

\$~R-66

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

Judgment reserved on: 11th February, 2020

Judgment pronounced on: 27th February, 2020

+ CRL.A. No. 993/2018

TEJ SINGH

..... Appellant

Through: Mr. S. Sethi and Ms. D. Sharma, Advocates

versus

STATE

..... Respondent

Through: Ms. Neelam Sharma, APP for the State
with W/SI Kamlesh Meena, P.S: Sangam
Vihar.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeal is directed against judgment dated 21.04.2018 and order of sentence dated 25.04.2018 passed by the learned Additional Sessions Judge, Fast Track Court, South District, Saket Courts, New Delhi in Sessions case No. 90/2017 arising out of FIR No. 650/2017, under Sections 376(2)(f)/354/506 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') registered at Police Station Mehrauli, Delhi whereby the learned Sessions Judge found the appellant-accused guilty and sentenced him as follows:

“The convict ‘t’ is accordingly sentenced as follows:

(i) U/s 376(2)(f) IPC of payment	Imprisonment for life and fine Rs.5000/- in default of of fine RI for one month
(ii) U/s 354 IPC Rs.	RI for five years and fine of 5000/- in default of payment of fine RI for one month
(iii) U/s 506 IPC Rs.	RI for two years and fine of 2000/- in default of payment of fine RI for one month

All the sentences shall run concurrently. He be also given benefit of Section 428 Cr.P.C.”

2. The facts, as elaborated by the trial court are extracted in extenso, as follows:

“The accused herein is facing trial for commission of the offences punishable under Sections 354, 376(2)(f) and 506 IPC. The crux of allegations against the accused is that on 27.08.2017 accused assaulted and/or used criminal force upon the prosecutrix, his daughter, by sucking her breasts with intent to outrage her modesty. It is further alleged that on 28.08.2017 at about 11:00 AM, accused committed forcible sexual intercourse with the prosecutrix, without her will and consent, at his residence in absence of his wife (mother of prosecutrix) and also threatened to kill her and her mother if she told the incident to her mother (wife of the accused).

The present case was registered against the accused when the prosecutrix (daughter of the accused) managed to reach police station Mehrauli on 28.08.2017, after the incident which had taken place earlier that day, and gave a complaint Ex.PW-1/A wherein she stated to

the effect that “she was 18½ years old and was a student of 9th class. She stayed at home. Her mother used to do work of cooking. Her father (accused) was not doing any work. He stayed at home. Her father had been harassing her (ched-chad karte the) since she was aged about 12 years. In the year 2012 also he had done a wrong act with her regarding which she had filed a complaint at police station Mehrauli. The FIR number of said complaint was 138/12. Her father was in Jail since then and had been released from Jail about six months ago. He had been doing ched-chad with her again since then. Two days ago when her mother had gone for work of cooking, her father did wrong act with her at about 11:00 AM and told her that if she told about it to her mother then he would kill her mother. She informed about the incident to her mother on which her father gave severe beatings to her mother. She had come with her mother today for doing work of cooking and got opportunity and came to police station where she later called her mother also. She further stated that her father did not permit her to go out of the house and used to beat her. She prayed that action be taken against her father.

On the basis of abovementioned complaint, case FIR Ex.PW2/A bearing No.650/2017 u/s. 376/506 IPC was registered against the accused. The prosecutrix was sent to AIIMS Hospital with PW-6 W/Ct. Sudesh and was medically examined vide MLC Ex.PW-5/A. In the meantime, Investigating Officer PW-11 W/SI Kamlesh Meena (hereinafter referred to as IO) proceeded to the place of incident i.e. house of prosecutrix with PW-8 HC Shonis Kumar and Ct. Narender. The accused was found present in his house and was apprehended by the IO with the help of staff accompanying her and was brought to Police Station. The PW-6 W/Ct. Sudesh also returned back to Police Station after medical examination of the prosecutrix and handed over the prosecutrix as well as her MLC to PW-11 W/SI Kamlesh Meena. The PW-1/prosecutrix informed the IO that accused was her

father and he had committed rape upon her. Accordingly, the accused was arrested by the IO vide arrest memo Ex.PW-1/D and his personal search was also conducted by the IO vide personal search memo Ex.PW11/B. Thereafter the accused was sent to AIIMS Hospital for his medical examination and potency test and after his examination, his MLCs Ex.PX (colly) and potency test report Ex.PY were prepared.

The prosecutrix was produced before the learned MM on 29.08.2017 where her statement Ex.PW-1/C under Section 164 CrPC was recorded. The IO obtained copy of statement Ex.PW-1/C of the prosecutrix. She also prepared site plan Ex.PW11/C of the place of the incident at the pointing out of the prosecutrix. During the course of the investigations, the exhibits of the case were sent to RFSL Chanakyapuri. After completion of investigation, chargesheet was prepared and filed in the Court.”

On 10.11.2017 charge for the offence punishable under Section 376/506 IPC was framed against the accused/appellant, to which he pleaded not guilty and claimed trial. On the same date, in terms of Section 294 Cr.P.C., accused admitted his MLCs as Ex.PX (colly) and potency test report as Ex.PY and in view of the same, prosecution witnesses namely, Dr. Nishant Goswami and Ct. Hemant Kumar Kanwar were dropped from the list of witnesses. On 12.12.2017, supplementary chargesheet with RFSL result was filed by the IO before Ld. MM and the same was received by way of committal in this Court on 06.01.2018.

On 12.03.2018, the charge in the present case was amended pursuant to an application in this regard filed on behalf of learned Additional PP. A detailed order was passed while allowing the application filed by learned Additional PP wherein it was observed that in her statement u/s. 164 Cr.P.C. prosecutrix had made allegations against accused, her father, of sexual assault/use of criminal force on 27.08.2017 and of

commission of rape on 28.08.2017. These allegations were made further to allegations made by her against her father i.e. the accused in her complaint to the police. The prosecutrix had in fact reiterated the allegations, made by her in her statement Ex.PW1/C u/s 164 Cr.P.C., before the Court as PW-1. Accordingly, in view of the specific allegations made by the prosecutrix, the charge U/s 376/506 IPC, which had been framed against the accused on 10.11.2017 was amended and charge U/s 354 IPC and 376 (2)(f) r/w Section 506 IPC was framed against accused on 12.03.2018 to which he pleaded not guilty and claimed trial.”

3. In order to bring home the guilt of the accused, the prosecution examined 9 witnesses in all. The incriminating evidence and circumstances were put to the accused before recording his statement under Section 313 Cr.P.C., wherein he claimed to have been falsely implicated and examined one witness in his defence.
4. After appreciating and considering the rival contentions of the parties and scrutinizing the evidence, the learned Trial Court held the accused guilty and convicted him for the charged offences.
5. Aggrieved by the impugned judgment Mr. S. Sethi, learned counsel for the appellant, opened his arguments by submitting that the impugned judgment dated 21.04.2018 is based on conjectures and surmises and the same is against the facts and settled proposition of law and that the learned Trial Court has ignored and omitted the material evidence and has disregarded the cogent evidence in favour of the appellant.
6. Learned counsel for the appellant further contended that the learned Trial Court had erred in holding the appellant guilty for the charged

offences and the judgment rendered by the learned Trial Court is perverse; that the evidence which had surfaced during the course of the trial was not properly appreciated and a proper appreciation of the facts and circumstances would have definitely resulted in the acquittal of the appellant for the charged offences; that the testimony of the prosecutrix is totally unreliable as well as there are material contradictions and concealments in her testimony recorded under Section 164 Cr.P.C and in her deposition before court; that the sole testimony of the prosecutrix has to be evaluated more carefully with greater circumspection and the same can only be relied upon if there is no embellishment or improvement therein; that there are severe contradictions and inconsistencies in the testimonies of other material witnesses; that the case of the prosecution is neither supported by medical evidence nor by scientific evidence; that the solitary testimony of the victim in a case of rape is sufficient to convict the accused subject to the condition that the same inspires confidence of the Court, but in the instant case, the sole testimony of the victim fails to inspire confidence and is unworthy of acceptance.

7. Learned counsel for the appellant further contended that as per the MLC of the prosecutrix, there were no major external or internal injuries on body of the prosecutrix on the date of her medical examination, which would necessarily mean that she had not been sexually assaulted by the appellant because absence of injuries will inevitably discredit the version of the prosecutrix. Further, it was urged by the learned counsel for the appellant that the biological and DNA Test did not incriminate the appellant for the commission of the

sexual assault because as per the first report tendered by PW-9 Dr. Suminder Kaur, Senior Forensic/Chemical Examiner, it was opined that '*no opinion could be offered from this laboratory as partial profile could be generated from the source exhibit 8*'. In support of his arguments learned counsel for the appellant relied upon the case of ***Sunil @ Raghu vs. State*** reported in ***2018 SCC OnLine Del 7401***.

8. Learned counsel for the appellant further contended that it is the duty of the police to investigate the matter fairly and thoroughly and collect all the evidence whether they are for or against the suspect, however, in the present case, there are serious discrepancies in the investigation which go to the root of the matter and the learned Trial Court erred in ignoring the effect of the defective investigation.
9. Learned counsel for the appellant further contended that the Trial Court in its impugned order had erred in sentencing the appellant to the imprisonment for life. He further submitted that the sentence awarded to the appellant was inappropriate and should be reduced from life imprisonment to ten years as the appellant is in his old age (*56 years old*) and belongs to an extremely poor strata of society and has the responsibility of two unmarried sons who are totally dependent upon him.
10. Counsel for the Appellant lastly urged that the Trial Court had not properly appreciated the facts and circumstances of the case; hence, the impugned judgment is liable to be set aside.
11. On the contrary, Ms. Neelam Sharma, learned APP appearing on behalf of the State, invited our attention to the clear and unrebutted

testimony of the prosecutrix, read in conjunction with the corroborating testimony of other material prosecution witnesses, as well as, the FSL report, to urge that, there was no warrant or reason in the present case to interfere with the finding of guilt arrived by the trial court.

12. Learned APP for the State further submitted that the learned Trial Court has appreciated the testimony of the prosecutrix in its right perspective and relying on the well-settled proposition of law that the sole testimony of the victim of a sexual offence is sufficient to base conviction of the accused. She further submitted that the version of the victim recorded under Section 164 of the Cr.P.C and the testimony of the prosecutrix before court was consistent, and unimpeachable. She further submitted that in such cases of heinous crimes, normal discrepancies are bound to occur in the deposition of the prosecutrix, due to normal errors of observation, namely, error of memory, due to mental disposition at the time of the incident.
13. Learned APP for the State further added that the testimony of the victim is corroborated with the scientific evidence on record because the DNA profile generated from the source of Exhibit '8' (*One microslide having faint smear and one cotton wool swab on a stick mentioned as 'Vaginal smear + swab of prosecutrix Kajal'*) was similar to the DNA profile generated from the source of Exhibit '11' (*A piece of dirty gauze having brownish stains mentioned as 'blood in gauze of accused'*). She further submitted that the absence of major external injuries on body of the prosecutrix on the date of her medical examination would not necessarily mean that she had not

been sexually assaulted or she had not resisted during the time of assault.

14. She further submitted that there may be some defect in the investigation but the same will not affect the merit and prospectus of the case of the prosecution and an accused cannot be acquitted only on the basis of defective investigation as held by the Hon'ble Apex Court in a number of cases.
15. Learned APP for the State further contended that the sentence of life imprisonment awarded by the Trial Court to the appellant was appropriate and proportionate with the crime that he has committed and the same does not warrant interference.
16. Based on these submissions counsel for the State urged that this Court may not interfere with the well-reasoned order passed by the learned Trial Court convicting the Appellant for the alleged offence.
17. We have given our anxious consideration to the submissions advanced on behalf of counsel for the parties at considerable length and also perused the material available on record.
18. It is a settled principle of law that conviction can be based on the sole testimony of the victim of sexual assault without corroboration from any other evidence and where the testimony of a victim of sexual assault instills confidence in the Court the same can be relied upon for conviction of the accused. It is also a well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the victim is not a requirement of law but a guidance to prudence under the given circumstances. At the outset, there is no gainsaying the settled position of law that, in cases of sexual assault,

the sole deposition of the prosecutrix, if creditworthy and reliable, is legally sufficient by itself sustain a verdict of guilty. In *State of Himachal Pradesh Vs. Manga Singh* reported in 2018 (15) SCALE 895, the Apex Court has observed as under: -

"11. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.

12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court."

19. In view of the settled law, we shall now examine whether the evidence adduced by the prosecution, particularly the testimony of the victim, is trustworthy, credible and can be relied upon. In this regard, it would be necessary and profitable to extract and appreciate the testimony of the victim. English Translation of the initial

statement (Ex.PW1/A) made by the victim is reproduced herein below:-

“I have been residing at the address mentioned above along with my parents since my childhood. I have studied upto 9th standard and I remain in the house itself. My mother does the work of cooking. My father Teg Singh does not do any work and remains at the house itself. When I was aged 12 years, right from that time my father had been molesting me and in the year 2012, he had committed rape with me and I got lodged a report in the said regard at PS Mehrauli vide FIR No. 138/2012. My father was in jail right from that time and he was released from the jail about 6 months ago and since that period, he had been molesting me. My father committed rape with me for two days at about 11 AM when my mother had left for her job and he threatened me that in case I disclosed the matter to my mother, he would kill me and my mother. Today, when I disclosed the said incident to my mother, my father gave severe beatings to my mother. Today, when I left the house for cooking food on behalf of my mother, I got an opportunity and I arrived at the Police Station. Thereafter, I also called my mother at Police Station. My father did not allow me to go out from the house and in case of my going out from house, he used to beat me too much. The legal action may be initiated against my father. You have recorded my statement, the contents whereof have been read over to me and the same are correct.”

20. English Translation of the statement of victim recorded under Section 164 Cr.P.C(Ex.PW1/C) is reproduced herein below: -

“My father had committed rape with me five years ago when he was released from jail. Even thereafter, he used to molest me. Sometimes, he used to return in an intoxicated condition and he used to pull me towards him by way of holding my hand. After his confinement in the

jail, it has been six months since he has been released from custody. On 27.08.2017 and 28.08.2017, he indulged in a gross misconduct with me. On 27.08.2017, my father took out my boobs from my clothes and started sucking those while pressing the same. Nobody was present in the house at that time and I was alone. He started raping me. He threatened me that he would kill me in case I disclose the same to anybody. On 28.08.2017 at about 11 AM, I was cooking food in the house and my father came over there. He forcibly committed sex with me in a standing position. My mother leaves for her work early at 7 AM and my father got out my brothers from the house. His brother Kamal Singh and his nephew (Bhanja) namely Ahin (-sic-) put a pressure on us to get him released. Last time Kamal Singh and Ahin asked me to depose falsely for getting him released and they told me that in case if he was not released at that time, he will come back after 5 years and would cause beatings to me as and when he would come out (from jail) and it would not be good for me. Hence, I made a false statement in the said case. He gives beatings to my mother. They also check the clothes of my mother and of myself in order to see as to whether we have committed sex with anybody. He doubts the integrity of everybody. He also breaks all of our phones. He also does not allow us to sit in the street and says that all of the persons are our paramours.”

21. The victim during her examination-in-chief stepped into witness box as PW-1 and deposed that :-

“On 27.08.2017 and 28.08.2017, my father committed wrong act with me. On 27.08.2017, I was at home and was cooking food at about 11:00 AM. My mother had gone for work. She is doing work of cooking. My father came home. He had consumed liquor at that time. My father told me to open my salwar. He also asked me why

I had told my mother that he was doing chedchad with me and gave me beatings. He did chedchad with me.

Court Quest.: What do you mean by chedchad?

Ans.: He was sucking my boobs (breasts).

I was feeling scared. He caught hold of my hand and was pressing it. At about 1:00 PM, my mother returned back.

On 28.08.2017 at about 11:00 AM, my father did zabardasti with me.

Court Quest.: What do you mean by Zabardasti?

Ans.: He asked me to remove my salwar. He told me “ketu ab de, apni mummy se mat bolna”.

Court Ques.: What do you mean by words ‘ketu ab de’?

Ans.: He was asking me to do sex with him.

*When I refused, he took out a blade and threatened to kill me and my mother “Dono maa beti ko maar dunga”. **Accused opened my salwar. He was licking and sucking my private parts, the place from where I urinate. He opened his male part and committed sex with me. He ejaculated outside saying that otherwise I may become pregnant “apna maal bahar feka ketu pregnant ho jayegi”.** He took bath saying that now nothing would come in report. My mother had not returned back from work. My mother returned back at 1:00PM. In the evening my mother sent me to work in her place. My father had stopped my studies and had also stopped me from working since the time he had returned back from Jail. My father was quarreling with my mother as to why she was sending me for work. My father had told that he would have sex with me again in the evening when my mother was away for work. I went to PS instead of going for work. I filed my complaint and thereafter I was sent for medical examination at AIIMS Hospital.*

*At this stage, the judicial file is sent to the deposition room with lady staff and the witness is shown her complaint and MLC. **The witness identifies her signatures at point ‘A’ on her complaint. The complaint is Ex.PW-1/A. She also identifies her signatures at***

point 'A' on the consent form of medico-legal form for sexual assault victims. The sexual assault report is Ex.PW-1/B. I had told about the incidents that had taken place with me to the examining doctor.

At this stage, one sealed envelope bearing seal of 'AM' is taken out from the judicial file and the proceedings under Section 164 CrPC are taken out. The same are sent to the deposition room with lady staff and shown to the witness. The witness identifies her signatures at point 'A' on all four pages. The statement of prosecutrix u/s 164 CrPC is Ex.PW-1/C.

My father/accused was arrested from home in my presence. At that time a document was prepared.

At this stage, witness is shown arrest memo of accused from the judicial file. The same is sent to the deposition room with lady staff and shown to the witness. The witness identifies her signatures at point 'A' thereupon. The arrest memo of accused is Ex.PW-1/D.

At this stage, witness has identified accused, who is sitting in the Court Room behind the screen, through video link.”

22. Further during her cross examination she deposed that:-

“When my father/accused came from Jail at that time I had filled form for 10th class from open school. I never went to attend classes. I was appearing in exams when my father came from Jail. I had appeared in one paper and thereafter he did not permit me to study.

My father/accused did not do anything with me for one month after he returned back from Jail. Thereafter he started doing chedchad. Vol. My father/accused told me that he would not do anything for six months and then he would do everything with me.

During the period when my father was home i.e. after he returned from Jail till 28.08.2017 when I filed the present complaint, I did not inform anyone about his acts of chedchad. I did not tell my friends or teachers at the examination center, my mother, my brothers or

neighbours about the acts of my father. I also did not go to file complaint regarding the said acts.

I did not raise alarm on 27.08.2017 when my father/accused did chedchad with me. Vol. My father had threatened me. I also did not inform my brothers and mother about it.

I did not raise alarm on 28.08.2017 also. Vol. There was no one at home.

It is wrong to suggest that I did not raise alarm as no incidents as stated by me in my examination in chief had happened on 27.08.2017 or 28.08.2017.

xxxx

xxxx

xxxx

xxxx

It is wrong to suggest that no incidents as stated by me had taken place on 27.08.2017 and 28.08.2017. It is wrong to suggest that accused never did any wrong act or chedchad with me at any point of time or that I am deposing falsely against the accused.”

23. From the perusal of the record, it transpires that the prosecutrix had deposed on the same lines and there are no material contradictions in her testimonies. The prosecutrix in her initial statement (Ex.PW1/A) recorded on 28.08.2017 deposed “My father committed rape with me for two days at about 11 AM when my mother had left for her job and he threatened me that in case I disclosed the matter to my mother, he would kill me and my mother. Today, when I disclosed the said incident to my mother, my father gave severe beatings to my mother.” Further during her statement recorded under Section 164 Cr.P.C (Ex.PW1/C) she deposed “On 27.08.2017 and 28.08.2017, he indulged in a gross misconduct with me. On 27.08.2017, my father took out my boobs from my clothes and started sucking those while pressing the same. Nobody was present in the house at that time and I was alone. He started raping me. He threatened me that he would

kill me in case I disclose the same to anybody. On 28.08.2017 at about 11 AM, I was cooking food in the house and my father came over there. He forcibly committed sex with me in a standing position. My mother leaves for her work early at 7 AM and my father got out my brothers from the house.”

24. Corroborating the aforesaid version the prosecutrix in her examination in chief deposed “Accused opened my salwar. He was licking and sucking my private parts, the place from where I urinate. He opened his male part and committed sex with me. He ejaculated outside saying that otherwise I may become pregnant “apna maal bahar feka ke tu pregnant ho jayegi.” and further during her examination in chief, she added “In the evening my mother sent me to work in her place. My father had stopped my studies and had also stopped me from working since the time he had returned back from Jail. My father was quarreling with my mother as to why she was sending me for work. My father had told that he would have sex with me again in the evening when my mother was away for work. I went to PS instead of going for work. I filed my complaint and thereafter I was sent for medical examination at AIIMS Hospital.”

25. Further as far as the contention of the appellant is concerned that the prosecutrix was in a habit of making false allegations as she had filed a false case against the appellant due to which the appellant had remained in custody for 5-6 years and the prosecution has failed to explain as to why the prosecutrix had turned hostile in the earlier matter (FIR No. 138/2012 dated 23.03.2012 registered at PS Mehrauli U/s 376/506 IPC) is without any force. As the prosecutrix

in her statement recorded under Section 164 Cr.P.C had deposed that “His brother Kamal Singh and his nephew (Bhanja) namely Ahin (-sic-) put a pressure on us to get him released. Last time Kamal Singh and Ahin asked me to depose falsely for getting him released and they told me that in case if he was not released at that time, he will come back after 5 years and would cause beatings to me as and when he would come out (from jail) and it would not be good for me. Hence, I made a false statement in the said case”.

26. Perusal of the aforesaid testimony reveals the fact that the prosecution had incurred the condition under which the prosecutrix turned hostile in the above-mentioned case because she was threatened with dire consequences by the brother and nephew of the appellant, due to which she was under the vulnerability to depose falsely in FIR No. 138/2012 registered at PS Mehrauli U/s 376/506 IPC. At this stage, we have no hesitation to hold that abovementioned case is based on separate circumstances and the same does not draw any inference.
27. Consequently, coming back to the testimony of the prosecutrix in the present case, this court is of the view that the prosecutrix has been consistent in her version throughout that the alleged act was committed against her wishes, as she had been threatened and thereafter, she had been subjected to sexual assault by her own father.
28. It is a well settled law that conviction can be based on the sole testimony of the prosecutrix and no corroboration would be required and in all criminal cases, normal discrepancies are bound to occur in the depositions of the witnesses due to normal errors of observation,

namely, error of memory due to lapse of time or due to mental disposition such as shock and horror at the time of the incident. In case of *State of U.P. v. Naresh* reported in (2011) 4 SCC 324 the Hon'ble Apex Court has held as under:-

“ 30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.” [Ed.: As observed in Bihari Nath Goswami v. Shiv Kumar Singh, (2004) 9 SCC 186, p. 192, para 9.]

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide State v. Saravanan

[(2008) 17 SCC 587 : (2010) 4 SCC (Cri) 580 : AIR 2009 SC 152] , Arumugam v. State [(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130 : AIR 2009 SC 331] , Mahendra Pratap Singh v. State of U.P. [(2009) 11 SCC 334 : (2009) 3 SCC (Cri) 1352] and Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra [(2010) 13 SCC 657 : JT (2010) 12 SC 287] .]”

29. The aforesaid principles were reiterated in the case of ***Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr.***, reported at **(2013) 12 SCC 796**, wherein the Hon’ble Apex Court observed that that minor contradictions or insignificant discrepancies in the statement of witnesses should not be a ground for not accepting an otherwise reliable prosecution case. Germane portion of the judgment is extracted below:-

*“28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defense can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See *Leela Ram vs. State of Haryana* and another, *Rammi alias Rameshwar v. State of M.P.* and *Shyamal Ghosh v. State of West Bengal*).*

(emphasis supplied)

30. Having discussed the testimony of the victim in detail, we deem it appropriate to examine whether the ocular evidence of the victim finds any support with the medical evidence adduced by the prosecution. Dr. Anshu Yadav (PW-5) Senior Resident, AIIMS Hospital had medically examined the victim on 29.08.2017 and proved the MLC as Ex.PW5/A. The relevant portion of his statement recorded is reproduced below:

“On 29.08.2017, I was posted at AIIMS Hospital as above. On that day prosecutrix was brought to hospital at about 1:52 AM by W/Ct. Sudesh from PS Mehrauli. The prosecutrix was examined by me vide MLC No. 7651/2017 already Ex.PW-1/B which bears my signatures at point ‘B’. The prosecutrix told history of sexual assault twice by her father on 28.08.2017 at about 11:00AM and also on 27.08.2017 at her home when she was alone and her mother was not at home. UPT was negative. Samples as detailed on page 7 were taken, sealed and handed over to the accompanying police official. I have also prepared casualty medical prescription slip of the prosecutrix. Same is Ex.PW-5/A which bears my signatures at point “A”.”

31. Relevant portion of the MLC No. 7651/2017 is reproduced herein below:-

*“P/A- soft
P/S- No active bleeding
Slight Congestion”*

32. After examining the above-mentioned medical record it is observed that there was no active bleeding and there was no major external injury on the body of the prosecutrix. Further it is apparent that the

absence of major external injuries on body of the prosecutrix on the date of her medical examination would not necessarily mean that she had not been raped or that she had not resisted at the time of commission of the crime. Absence of injuries does not indicate her consent or the falsity of the allegations or does not discredit the version of the prosecutrix. The Hon'ble Apex Court in ***Rafiq v. State*** reported in **(1980) 4 SCC 262** has cited their observations on absence of injuries on the victim, as well as, importance of corroborative evidence in rape cases. Germane portion of the judgment is extracted below:

*“5..... Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. **The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggrieved.***

*6.When rapists are revelling in their promiscuous pursuits and half of humankind — womankind — is protesting against its hapless lot, **when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable.....***”

33. The aforesaid principles were reiterated in the case of ***State Of U.P vs Chhotey Lal*** reported in (2011) 2 SCC 550. Germane portion of the judgment is extracted below:-

*“Although the lady doctor - PW-5 did not find any injury on the external or internal part of body of the prosecutrix and opined that the prosecutrix was habitual to sexual intercourse, we are afraid that does not make the testimony of the prosecutrix unreliable. The fact of the matter is that the prosecutrix was recovered almost after three weeks. Obviously the sign of forcible intercourse would not persist for that long period. **It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal part of the victim.** The prosecutrix has clearly deposed that she was not in a position to put up any struggle as she was taken away from her village by two adult males. **The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence;** she was a helpless victim. She did not and could not inform the neighbours where she was kept due to fear.”*

34. Further, as per the case of prosecution thirteen sealed parcels were forwarded for scientific examination and PW-9 Dr. Suminder Kaur, Senior Forensic/Chemical Examiner (BIO/DNA), RFSL prepared the DNA Examination report and proved the same as Ex.PW-9/A. The relevant portion of her statement recorded on 03.02.2018 is reproduced below:

“On 08.12.2017, I was posted as above. I had examined the exhibits of the present case which were received for examination from SHO PS Mehrauli. I checked the seals on the parcels and found them to be intact. Thereafter I proceeded to examine the exhibits and gave DNA

Examination Report Ex.PW-9/A which bears my signatures at point 'A' on all the three pages.

I also prepared a Genotypic data report based on the examination and the same is Ex.PW-9/B which bears my signatures at point 'A'.

On basis of my examination, I concluded that no opinion could be offered from the laboratory as partial profile could be generated from the source of exhibit 'a' (cotton wool swab and MS). The DNA Profile for the source of Ex. "11" (blood in gauze of accused) was preserved for future reference if any.

Court Quest.: You have stated that because of generation of partial profile, you could not give any opinion regarding matching of genotype. Is there any means by which you can give further report considering that the source of male DNA is father of the victim?

Ans.: Yes we can give for which we have to do Y STR typing.

Court Ques.: Is it possible to do so in the present case?

Ans.: Yes, since the DNA genotype has been preserved in the laboratory.

35. Further relevant portion of FSL Report No. 2017/B-1023 (Ex.PW9/A), dated 08/12/2017 is reproduced below:-

***“REGIONAL FORENSIC SCIENCE LABORATORY
HOME DEPT. GOVT. OF NCT OF DELHI
7TH FLOOR, YASHWANT PLACE, CHANAKYAPURI,
NEW DELHI-110021***

***REPORT NO.RFSL (Ch.P) 2017/B-1023 Bio No.
363/17 Dated. 08.12.2017***

***Please quote the Report (Opinion) No. & Date in future
correspondence & Summons.***

To,

*The SHO,
P.S.: Mehrauli,
Delhi.*

Your letter No. 1910/SHO/Mehrauli, Dated: 05.09.17 regarding 13 (Thirteen) parcels in connection with the case FIR No.650/17 Dated 28.08.17 U/S 376/506 IPC P.S. Mehrauli duly received in the office on 05.09.17 through Ct. Naveen Kr. No.874/SD.

DESCRIPTION OF PARCELS & CONDITION OF SEALS

SEAL INTACT AS PER F.A.'s LETTER

Sealed paper envelope	:	11
Sealed plastic dibbi	:	02
Total		13 (Thirteen)

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

- Parcel '1' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" returned unexamined.
- Parcel '2' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" containing exhibit '2'.
- Exhibit '2' : One microslide having faint smear kept in a polythene mentioned as 'Oral swab of prosecutrix Kajal'.
- Parcel '3' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" containing exhibit '3'.
- Exhibit '3' : One microslide having faint smear and one cotton wool swab on a stick mentioned as 'Anal swab + smear of prosecutrix Kajal'.

Parcel '4' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" returned unexamined.

Parcel '5' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" containing exhibit '5'.

Exhibit '5' : One microslide having faint smear kept in a polythene mentioned as 'Breast swab (RT) of prosecutrix Kajal'.

Parcel '6' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" containing exhibit '6'.

Exhibit '6' : One microslide having faint smear kept in a polythene mentioned as 'Breast swab (LT) of prosecutrix Kajal'.

Parcel '7' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" returned unexamined.

Parcel '8' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" containing exhibit '8'.

Exhibit '8' : One microslide having faint smear and one cotton wool swab on a stick mentioned as 'Vaginal smear + swab of prosecutrix Kajal'.

Parcel '9' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" containing exhibits '9a' & '9b' mentioned as 'undergarment bra (Blue color) and panty of prosecutrix Kajal'.

Exhibit '9a' : One foul smelling underwear.

Exhibit '9b' : One brassier.

Parcel '10' : One sealed paper envelope sealed with the seal of "AIIMS HOPT N.D CMO" containing exhibit '10'.

Exhibit '10' : One underwear torn at few places having no stains mentioned as 'Underwear (Blue color) of accused Teg Sing'.

Parcel '11' : One sealed paper envelope sealed with the seal of "DEPARTMENT OF FORENSIC MEDICINE AIIMS, NEW DELHI" containing exhibit '11'.

Exhibit '11' : a piece of dirty gauze having brownish stains mentioned as 'blood in gauze of accused'.

Parcel '12' : One sealed plastic dibbi sealed with the seal of "DEPARTMENT OF FORENSIC MEDICINE AIIMS, NEW DELHI" returned unexamined.

Parcel '13' : One sealed plastic dibbi sealed with the seal of "DEPARTMENT OF FORENSIC MEDICINE AIIMS, NEW DELHI" returned unexamined.

RESULTS OF ANALYSIS

- 1. Blood was detected on exhibit '11'.*
- 2. Exhibits '2', '3', '5', '6', '8', '9a', '9b' & '10' were directly processed for DNA Examination.*

DNA EXAMINATION:

The source of exhibits '2', '3', '5', '6', '8', '9a', '9b', '10' & '11' were subjected to DNA isolation. DNA could not be isolated from the source of exhibits '2', '3', '5', '6', '8', '9a', '9b' & '10'. DNA was isolated from the source of exhibits '8' & '11'. The DNA profile for the exhibits was prepared by using Amp F1 STR Identifiler PCR Amplification kit. STR analysis was used for the sample. Data was analyzed by using Gene Mapper ID-X software.

RESULT OF EXAMINATION

Partial DNA profile of male origin could be generated from the source of exhibit '8'(Cotton Wool Swab & MS). The alleles from the from the source of Exhibit '11'(Blood

*in gauze of accused) are **accounted** in the partial alleles from the source of exhibit '8'(Cotton Wool Swab & MS)."*

36. Joint perusal of the above-mentioned testimony and the FSL report reveals the fact that a partial DNA profile of male origin was generated from the Source of Exhibit '8'(One microslide having faint smear and one cotton wool swab on a stick mentioned as 'Vaginal smear + swab of prosecutrix Kajal'), as the alleles from the source of Exhibit '11'(A piece of dirty gauze having brownish stains mentioned as 'blood in gauze of accused') were accounted to be in partial alleles with the vaginal smear of the prosecutrix'.
37. Further it is relevant to highlight that in compliance of the order dated 03.02.2018, (PW-9) Dr. Suminder Kaur conducted the Y STR profiling of the abovementioned DNA genotype and proved the report as Ex.PW9/C. The relevant portion of her statement recorded on 09.03.2018 is reproduced below:

"In compliance of directions given to me on 03.02.2018 I have conducted Y STR profiling and brought its report along with electrophorogram.

At this stage, the witness has produced original report along with genotypic data report of examination of Y STR and electrophorogram. The report is Ex.PW9/C, the genotypic data profiling of Y STR is Ex.PW9/D and the electrophorogram (two pages) is Ex.PW9/E. The witness has identified her signatures on Ex.PW9/C to Ex.PW9/E at point A.

*Based on my DNA examination report Ex.PW9/A, genotypic data report Ex.PW9/B, submitted earlier and my reports Ex.PW9/C to Ex.PW9/E, **I concluded that the DNA profile generated from the source of exhibit '8' (cotton wool swabs and micro slides) is similar with***

the DNA profile generated from the source of exhibit '11' (blood in gauze of accused)."

38. During the course of argument learned counsel for the appellant had contended that as to why the Y STR profiling of the abovementioned DNA genotype was not done in the first place. It was further submitted that the second report tendered by the Senior Forensic/Chemical Examiner was manufactured at the instance of the investigating officer and the court was not empowered to direct the Senior Forensic/Chemical Examiner for conducting the Y STR profiling of the abovementioned DNA genotype.
39. The Learned Trial Court in the impugned judgment while relying on the second FSL Report (Ex.PW9/C), dated 16/02/2018 exhibited by (PW-9) Dr. Suminder Kaur gave its reasoning, which is reproduced herein below: -

*"97. Although learned Amicus Curiae has contended that the reports Ex.PW-9/C to Ex.PW-9/D are manipulated since they were produced later on and not at the very first instance, it is apparent from the record that PW-9 Ms. Suminder Kaur suggested Y-STR examination in response to query by the court. **She also stated in her subsequent examination that normally Y-STR Profiling is done only in gang rape case or cases of murder where two or more accused are involved. In the present case since the accused is the biological father of the prosecutrix, the Y-STR profiling was suggested after the initial DNA examination did not yield an conclusive finding.** It is noteworthy that PW-9 is a Senior Forensic/Chemical Examiner (Bio/DNA Division) of RFSL **and being an independent witness she would not have gained anything by deposing in favour of the prosecution.**"*

40. Consequently, this Court is in agreement with the finding of the Trial Court, as the perusal of the above extracted findings clearly and unequivocally lead to one inescapable conclusion that the version of (PW-9) Dr. Suminder Kaur being an independent witness can be relied upon as trustworthy and credible.
41. In the context of argument raised by counsel for the appellant in relation to conducting Y STR profiling, we see it profitable to refer to the case of *Mina Lalita Baruwa v. State of Orissa* reported in (2013) 16 SCC 173, wherein the Hon'ble Apex Court had observed that the court cannot be a silent spectator and has to play an active role during the course of trial. Germane portion of the judgment is extracted below:-

“23. In the famous Best Bakery case in Zahira Habibulla H. Sheikh v. State of Gujarat [Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158 : 2004 SCC (Cri) 999] , this Court has reminded the conscientious role to be played by the criminal courts in order to ensure that the court is alive to the realities, realising its width of power available under Section 311 CrPC read along with Section 165 of the Evidence Act. The relevant part of the said decision can be culled out from paras 43, 44, 46 and 56, which are as under: (SCC pp. 188-90 & 192-93)

“43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in

the evidence-collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e.: (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution. In *Mohanlal Shamji Soni v. Union of India* [Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271 : 1991 SCC (Cri) 595] this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, 'any court', 'at any stage', or 'any enquiry or trial or other proceedings', 'any person' and 'any such person' clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of

the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. ...

46. ... Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. **This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice.** Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case.

56. As pithily stated in *Jennison v. Baker* [(1972) 2 QB 52 : (1972) 2 WLR 429 : (1972) 1 All ER 997 (CA)] : (QB p. 66 H: All ER p. 1006d)

‘...“The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.”’

Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to

deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918] .)”
(emphasis supplied)

24. The said decision was also subsequently followed in a recent decision of this Court in **Manu Sharma [Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385]** , wherein one sentence in para 188 is relevant for our purpose, which reads as under: (SCC pp. 74-75)

“188. It is also important to note the active role which is to be played by a court in a criminal trial. The court must ensure that the Prosecutor is doing his duties to the utmost level of efficiency and fair play. This Court, in Zahira Habibulla H. Sheikh v. State of Gujarat [Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158 : 2004 SCC (Cri) 999] , has noted the daunting task of a court in a criminal trial while noting the most pertinent provisions of the law.”

(emphasis supplied)

42. Further the Hon’ble Apex Court in the case of **State of Haryana v. Ram Mehar** reported in **(2016) 8 SCC 762** has held as under:-

23. In Bablu Kumar v. State of Bihar [Bablu Kumar v. State of Bihar, (2015) 8 SCC 787 : (2015) 3 SCC (Cri) 862] the Court referred to the authorities in Manu Sharma v. State (NCT of Delhi) [Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] , Rattiram [Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] , J.

Jayalalithaa [J. Jayalalithaa v. State of Karnataka, (2014) 2 SCC 401 : (2014) 1 SCC (Cri) 824] , State of Karnataka v. K. Yarappa Reddy [State of Karnataka v. K. Yarappa Reddy, (1999) 8 SCC 715 : 2000 SCC (Cri) 61] and other decisions and came to hold that: (Bablu Kumar case [Bablu Kumar v. State of Bihar, (2015) 8 SCC 787 : (2015) 3 SCC (Cri) 862] , SCC p. 798, para 22)

*“22. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, **it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding.** They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one.”*

43. Keeping in view the facts of the present case and applying the principles laid down by the Apex Court, we are of the view that it is the duty and the responsibility of the court to be vigilant during the evidence-collecting process and to bring all the material facts & evidences on record, in order to serve the interest of justice. Hence the argument raised by learned counsel for the appellant the court was not empowered to direct the Senior Forensic/Chemical Examiner for conducting the Y-STR profiling of the abovementioned DNA genotype is without any force.

44. Further, coming back to the scientific evidence on record, the relevant portion of the FSL Report No. 2017/B-1023 (Ex.PW9/C), dated 16/02/2018 is reproduced below:

“In continuation to my earlier report RFSL (Ch.P) 2017/B-1023 issued on 08.12.17 regarding DNA examination of 13 (Thirteen) parcels in connection with the case FIR No.650/17 Dated 28.08.17 U/S 376/506 IPC P.S.: Mehrauli which was submitted to the Hon’ble court of Ms. Illa Rawat, ASJ, Saket Court.

On 03.02.18, while deposing before the Hon’ble court in the aforesaid case, the Hon’ble court has directed me to perform Y-STR Profiling to conclude the results of the case and to bring its report along with electrophorogram on the next date of hearing i.e. 19.02.18 (Y-STR Examination of exhibits ‘8’ & ‘11’ has been performed on the basis of available isolated DNA stocked in vials bearing RFSL No. 2017/B-1023).

DNA EXAMINATION

The DNA profile for the exhibit ‘8’ & ‘11’ was prepared by using Yfiler Plus PCR Amplification kit. Y-STR analysis was used for the sample. Data was analyzed by using Gene Mapper ID-X software.”

RESULT OF EXAMINATION

*The alleles from the source of exhibit ‘11’ (Blood in gauze of accused) are **accounted** in the alleles from the source of exhibit ‘8’ (Cotton Wool Swab & Microslides). ”*

CONCLUSION

The DNA profiling (Y-STR analysis) performed on exhibits is sufficient to conclude that the DNA profile generated from the source of exhibit ‘8’ (Cotton Wool Swab & MS) is

similar with DNA profile generated from the source of exhibit '11' (Blood in gauze of accused).”

45. Perusal of the aforesaid FSL Report No. 2017/B-1023, dated 16/02/2018 evidently establishes the fact that DNA Profile generated from the source of Exhibit '8' (*One microslide having faint smear and one cotton wool swab on a stick mentioned as 'Vaginal smear + swab of prosecutrix Kajal'*) **was similar with the DNA profile generated from the source of Exhibit '11'** (*A piece of dirty gauze having brownish stains mentioned as 'blood in gauze of accused'*).
46. Thus, a joint reading of the medical evidence on record connects the Appellant-accused and corroborates the version of the prosecution.
47. Another argument raised by learned counsel for the appellants is that the investigating agency failed to conduct a fair and transparent investigation, as prescribed under the Code of Criminal Procedure. Learned counsel has pointed out following discrepancies in the investigation:
 - a) That the blade with which PW-1 (*Prosecutrix*) was threatened by the appellant prior to committing the alleged assault and similarly the hammer with which PW-4 (*mother of the prosecutrix*) was claimed to have been injured was not seized and no perceptible efforts were made by the investigating officer to recover the same.
 - b) That the prosecution has failed to examine the material prosecution witnesses (*Brothers & neighbor of the prosecutrix*) and the house where the alleged offence was committed was not properly inspected by the investigating agency.

c) Hence the very foundational facts of the present case have not been established by the prosecution and the abovementioned failure reflects the laxity in the investigation, consequently an adverse inference should be drawn against the prosecution.

48. Very recently, this bench in the case of **Anil Kumar Sharma @ Pandit Vs. State [CRL.A. NO. 702/2018, decided on 31st January, 2020]** had an occasion to discuss the law on defective investigation. The relevant portion of the said judgment is reproduced herein below:

“77. In this context, the Hon’ble Supreme Court in Hema v. State reported in (2013) 10 SCC 192, held that fair investigation is a part of the Constitutional Rights guaranteed under Articles 20 and 21 of the Constitution of India and it is the immediate requirement of the rule of law that investigation must be fair, transparent and judicious and observed as follows:

“14. It is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decisions. In C. Muniappan v. State of T.N. [(2010) 9 SCC 567 : (2010) 3 SCC (Cri) 1402], the following discussion and conclusions are relevant which are as follows: (SCC p. 589, para 55)

“55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded.

Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.”

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

18. It is clear that merely because of some defect in the investigation, lapse on the part of the investigating officer, it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions, etc. it is the obligation on the part of the court to scrutinise the prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. ”

(Emphasis supplied)

78. In *Kailash Gour and others v. State of Assam* reported in (2012) 2 SCC 34, the Hon’ble Supreme Court observed as follows:

“43. At any rate, the legal proposition formulated by Bedi, J. based on the past failures does not appear to us to be the solution to the problem. We say with utmost respect to the erudition of our Brother that we do not share his view that the reports of the Commissions of Inquiry set up in the past can justify a departure from the rules of evidence or the fundamental tenets of the criminal justice system. That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a

*principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police. **The benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-à-vis cases in which it is not. The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice.***

(Emphasis supplied)

79. The Hon'ble Supreme Court in *Manu Sharma vs State (NCT of Delhi)* reported in (2010) 6 SCC 1 held as follows:

*“197. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. The criminal justice administration system in India places human rights and dignity for human life at a much higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the **alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.***

xxx xxx xxx

199. It is not only the responsibility of the investigating agency but as well as that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society

xxx xxx xxx

201. Historically but consistently the view of this Court has been that an investigation must be fair and effective, must proceed in proper direction in consonance with the ingredients of the offence and not in haphazard manner. In some cases besides investigation being effective the accused may have to prove miscarriage of justice but once it is shown the accused would be entitled to definite benefit in accordance with law. The investigation should be conducted in a manner so as to draw a just balance between citizen's right under Articles 19 and 21 and expansive power of the police to make investigation. These well-established principles have been stated by this Court in Sasi Thomas v. State [(2006) 12 SCC 421 : (2007) 2 SCC (Cri) 72] , State (Inspector of Police) v. Surya Sankaram Karri [(2006) 7 SCC 172 : (2006) 3 SCC (Cri) 225] and T.T. Antony v. State of Kerala [(2001) 6 SCC 181 : 2001 SCC (Cri) 1048] . 202. In Nirmal Singh Kahlon v. State of Punjab [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] 202. In Nirmal Singh Kahlon v. State of Punjab [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] this Court specifically stated that a concept of fair investigation and fair trial are concomitant to preservation of the fundamental right of the accused

under Article 21 of the Constitution of India. We have referred to this concept of judicious and fair investigation as the right of the accused to fair defence emerges from this concept itself. The accused is not subjected to harassment, his right to defence is not unduly hampered and what he is entitled to receive in accordance with law is not denied to him contrary to law.”

(emphasis supplied)

80. Further, it is a settled law that the defective investigation by itself cannot be a ground for acquittal as laid down by the Apex Court in the case of **Ram Bali v. State of Uttar Pradesh** reported in (2004) 10 SCC 598. Germane portion of the judgment is extracted below:-

“in case of defective investigation the Court has to be circumspect while evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective”

(emphasis supplied)

81. The legal principles that emerge from a careful consideration of the aforesaid decisions are summarized herein below:

- (i) Some defects in the investigation, lapse on the part of the investigating officer, would not entitle the acquittal of the accused.
- (ii) If the evidence on record bears out that the case of the prosecution and the evidence is of a sterling quality and is reliable then the lapses or irregularities in the investigation will not attribute benefit to the accused.
- (iii) However, to set aside the conviction of the

accused, there must be a sufficient nexus between the conviction and the irregularity in the investigation. If the prosecution evidence on which the accused has been convicted is held to be reliable and of sterling quality, the conviction cannot be set aside solely on the basis of some irregularity or illegality.

82. In view of the aforesaid dictum, if any defect is found in the investigation, benefit of the same should not be extended to the appellant. We are of the opinion that in the case of defective investigation, the court has to be circumspect in evaluating the evidence, but it can be stated that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the appellant. If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful. Hence, the plea of the counsel for the appellant is bereft of any merit and holds no ground.”

49. Consequently, it is a settled legal proposition that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused. If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful. If direct evidence is credible then failure, defect or negligence in the investigation cannot adversely affect the prosecution case, though the Court should be circumspect while evaluating the evidence. Hence, the plea of the counsel for the Appellant seeking benefit of doubt to the appellant on

facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.”

(emphasis supplied)

52. Further, rape is such a dark reality of the Indian Society that devastates a women's soul, shatters her self-respect and for a few, purges their hope to live. It shakes the insight of a woman who once was a ‘happy person’ and had no clue of being a victim of the said horrifying and terrifying encounter where the daughter had been raped by none else but her own father. At this stage, we have no hesitation to say the offences against the woman more particularly sexual assault are increasing and it is necessary for the courts to imbibe the legislative wisdom and to respect it because rape or an attempt to rape is a crime not against an individual but a crime, which destroys the basic equilibrium of the social atmosphere, as it not only lowers the dignity of a woman but also mars her reputation. The torment on the victim has the potentiality to corrode the poise and equanimity of any civilized society. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female. In ***Lillu @ Rajesh &Ors. Vs. State of Haryana*** reported in ***(2013) 14 SCC 643***, the

Hon'ble Apex Court reiterated the aforesaid principles and observed that :

“12. In State of Punjab v. Ramdev Singh [(2004) 1 SCC 421 : 2004 SCC (Cri) 307 : AIR 2004 SC 1290] this court dealt with the issue and held that rape is violative of the victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanising act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution.”

53. In *State of M.P. v. Munna Choubey* reported in (2005) 2 SCC 710 the Apex Court observed as under:

“15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social

order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

16. In Dhananjoy Chatterjee v. State of W.B. [(1994) 2 SCC 220 : 1994 SCC (Cri) 358] this Court has observed that a shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

17. Similar view has also been expressed in Ravji v. State of Rajasthan [(1996) 2 SCC 175 : 1996 SCC (Cri) 225] . It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must

not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society's cry for justice against the criminal”. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.”

54. In *State of Madhya Pradesh v. Bala @ Balaram* reported in (2005) 8 SCC 1, the Apex Court observed as under:-

"11. The crime here is rape. It is a particularly heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 I.P.C. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The provisos to Section 376(1) and 376(2) I.P.C. give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim

are not relevant reasons. Nor is the age of the offender by itself an adequate reason.

xxx xxx xxx

13. The rationale for advocating the award of a punishment commensurate with the gravity of the offence and its impact on society, is to ensure that a civilized society does not revert to the days of 'an eye for an eye and a tooth for a tooth'. Not awarding a just punishment might provoke the victim or its relatives to retaliate in kind and that is what exactly is sought to be prevented by the criminal justice system we have adopted.

14. Even in the time of Kautilya, the need for awarding just punishment was recognized. According to Kautilya, "whoever imposes severe punishment becomes repulsive to people, while he who awards mild punishment becomes contemptible. The ruler just with the rod is honoured. When deserved punishment is given, it endows the subjects with spiritual good, material well being and pleasures of the senses." (See Kautilyan Jurisprudence by V.K. Gupta under the head 'Nature and Scope of punishment'). This philosophy is woven into our statute and our jurisprudence and it is the duty of those who administer the law to bear this in mind."

55. The Hon'ble Apex Court in the case of ***Shimbu V. State Of Haryana*** reported in (2014) 13 SCC 318 had observed that the economic or social status of the accused cannot be construed as a special factor for reducing the sentence and mercy in such case of heinous crimes would result in a mockery of justice. Germane portion of the judgment is extracted below:-

"17. In State of Karnataka v. Krishnappa [(2000) 4 SCC 75 : 2000 SCC (Cri) 755] , a three-Judge

Bench of this Court held that the socio-economic status, religion, race, caste or creed of the accused are irrelevant considerations in the sentencing policy. It was further held: (SCC pp. 83-84, para 18)

“18. The High Court, however, differed with the reasoning of the trial court in the matter of sentence and, as already noticed, the reasons given by the High Court are wholly unsatisfactory and even irrelevant. We are at a loss to understand how the High Court considered that the ‘discretion had not been properly exercised by the trial court’. There is no warrant for such an observation. The High Court justified the reduction of sentence on the ground that the accused-respondent was ‘unsophisticated and illiterate citizen belonging to a weaker section of the society’; that he was ‘a chronic addict to drinking’ and had committed rape on the girl while in a state of ‘intoxication’ and that his family comprising of ‘an old mother, wife and children’ were dependent upon him. These factors, in our opinion, did not justify recourse to the proviso to Section 376(2) IPC to impose a sentence less than the prescribed minimum. These reasons are neither special nor adequate. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in

sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. **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, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court.** There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. **To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.** The High Court, in the facts and circumstances of the case, was not justified in interfering with the discretion exercised by the trial court and our answer to the question posed in the earlier part of the judgment is an emphatic — No.”
(emphasis in original)

Similar view-point was largely adopted in various cases, like in *Bhupinder Sharma v. State of H.P.* [(2003) 8 SCC 551 : 2004 SCC (Cri) 31] , *State of M.P. v. Balu* [(2005) 1 SCC 108 : 2005 SCC (Cri) 270] , *State of M.P. v. Bablu Natt* [(2009) 2 SCC 272 : (2009) 1 SCC (Cri) 713] and *State of Rajasthan v. Vinod*

Kumar [(2012) 6 SCC 770 : (2012) 3 SCC (Cri) 299] .

xxx xxx xxx

19. Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or the victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute. The power under the proviso should not be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.”

56. In view of the ratio of the judgments cited above, this court is of the view that the question of sentence is normally a matter of judicial discretion of the trial court and the superior Court does not as a rule interfere with the exercise of such discretion. Accordingly, interference of a sentence by an appellate Court is justified in cases only where there is a particular and cogent ground warranting interference. In broad terms, the appellate Court will interfere when:-
- a) The sentence is not justified by law, in which case it will interfere not as a matter of discretion, but of law;
 - b) Where sentence has been passed on a wrong factual basis;
 - c) Where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or
 - d) Where the sentence was wrong in principle or manifestly

excessive/inadequate.

57. Further, let it not be forgotten that this is a case of rape on a girl child, by her own father. The father is considered to be the protector and refuge of his own daughter and is looked upon by his daughter for protection from any kind of onslaughts taking place in the outside world. No doubt that the offence of rape is grave by its very nature but it is more horrendous and despicable when the perpetrator of the crime is one's own father.
58. A daughter always looks up to her father as a shield of her dignity and honor which is an intrinsic facet of a family, especially of a father-daughter relationship. It shocks human conscience when the sanctity of father and daughter relationship is ravaged in such a sordid manner and the protector becomes the violator. In such a case the offence assumes a greater degree of vulnerability which shall not go unpunished. There can never be a graver heinous crime than the father being charged with raping his daughter. It is the gravest sin, where the most pure relationship is shattered by an extreme pervert and shameful act.
59. Hence, we have no hesitation in saying that we are not inclined towards reducing the punishment of the appellant/Tej Singh and we also find no reasons to take a different view than the view taken by the learned trial court. Hence the argument raised by learned counsel for the appellant that the sentence awarded to the appellant was inappropriate and should be reduced, holds no ground.
60. In view of the foregoing and having regard to the facts and circumstances of the case and the principles laid down by the

Hon'ble Supreme Court, in the judgment extracted hereinabove, we find no compelling or substantial reasons to differ with the cogent findings arrived at, by the learned trial court, based upon just appreciation of the material evidence available on record in this case.

61. The trial court has correctly arrived at the conclusion of the guilt of the appellant, after carefully considering and analyzing the evidence on record including the testimony of the prosecutrix. In view of the above, we are of the considered opinion that the contradictions pointed out by the counsel on behalf of the appellant are minor in nature and do not render the evidence unbelievable, as the testimony of the prosecutrix is duly corroborated with the medical evidence on record.
62. The appeal is resultantly devoid of merit and is dismissed.
63. Copy of the order be communicated to the Trial Court as well as to the Jail Superintendent, Tihar Jail.
64. Trial Court record be sent back forthwith along with a copy of this order.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

FEBRUARY 27, 2020
SU