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

Judgment Reserved on: 08th January, 2020
Judgment Pronounced on: 24th January, 2020

+ CRL.A. NO. 1065/2018

LAL MOHAMMED

..... Appellant

Through: Mr. Krishan Kumar, Adv, Amicus Curiae
with Mr. S.P Nangia and Mr. R.C.S.
Bhadona, Advocates.

versus

THE STATE(NCT OF DELHI)

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State with
Inspector Vikram Singh, PS 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 arise out of judgment dated 27.07.2018 and order of sentence dated 30.07.2018 passed by the Learned Additional Sessions Judge-01, Special Court (POCSO), South District, Saket Courts in Sessions Case No. 6913/2016, in FIR No. 528/2012, registered under Sections 376/506 of the Indian Penal Code (hereinafter referred to as 'IPC') read with Sections 4/5(l)(m)(n)/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO') at Police Station Sangam Vihar,

whereby the learned Sessions Judge found the appellant-accused guilty and sentenced him as follows:

*“Hence, in my considered opinion, the convict does not deserve any leniency and interest of justice would be met **if the convict is sentenced to undergo rigorous imprisonment as under:-***

(1). Rigorous imprisonment for “Life” for the commission of the offence punishable under section 6 of the Protection of Children from Sexual Offences POCSO Act, 2012 (Act 32 of 2012), and to pay fine in the sum of Rs. 25,000/-(rupees twenty five thousand only).

(2). Rigorous imprisonment for a period of seven (07) years for the commission of the offence punishable under section 506 Part-II of the Indian Penal Code.

[7] Since, the convict is awarded sentence under section 6 r/w section 5(l) & (n) of the Protection of Children from Sexual Offences Act, 2012, hence no separate sentence is awarded to him for offence punishable under Section 376 of the Indian Penal Code

[8] Ordered accordingly. All the sentences shall run concurrently.”

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

“[2] The brief facts of the case are that on 22.12.2012, when Investigating Officer (IO)/Insp. Kamini Gupta was posted as a Sub-Inspector at PS-Ambekar Nagar, on that day, on the directions of senior officers, she reached the PS-Sangam Vihar, where the victim, namely, ‘T’ (PW1, whose full particulars are withheld in order to conceal the identity) was found present alongwith her Mausi, and

she made a complaint against her father Lal Mohammed that he has been committing rape upon her under the threat to kill her. The Investigating Officer got counseled the victim girl from the 'Prayatn NGO'. The victim 'T' gave her statement to the Investigating Officer that "[She resides at the given address (withheld in order to conceal her identity) of her maternal grandmother along with her father Lal Mohammed (the accused) and her Mausies (sisters of her mother). She stated that when she was a child, her mother had expired and thereafter, her father married to her Mausi, namely, 'SP' (the sister of her mother). She has one elder brother who is studying in 11th class and she is studying in 8th class. She further stated that in the year 2009, when she was in 5th class, at that time, her father Lal Mohammed came near to her and called her towards him. She went to him, he sat on the bed and touched and kissed on her breasts. Thereafter, he used to do such acts with her as and when he would get time. She further stated that in the year 2010, she does not remember the date, but in the evening time when she was studying, her father Lal Mohammed came into the room and asked her to lie down as he has to tell her something. Subsequently, her father Lal Mohammed started removing her wearing salwar and when she resisted to his such acts, he slapped her two-three times, and when she tried to scream, he gagged her mouth and committed rape upon her. After committing rape upon her, Lal Mohammed threatened her to kill her and to send her back to her native place where 10-10 people will commit sexual intercourse with her, if she will disclose about the incident to anyone. Thereafter, accused Lal Mohammed started committing rape upon her 2-3 times in a week. On 15.08.2010 also, when her father again attempted to commit rape upon her, she told him that she will disclose about his such wrong acts to her mother, and then he pressed her neck. He used to commit rape upon

her several times around 8-10 times in a month, when her mother used to be outside the house or in the bathroom. On 15.12.2012, in the morning, when her father came to her for committing sexual intercourse with her, she told him that her menstruation cycle was due on 05th December, but she could not have the same. Then, her father (the accused) told her to give him her urine sample and he will get it checked. She gave her urine sample to the accused and after some time the accused returned home and handed over a paper slip to the victim telling that nothing has come in the urine test. She hid the said paper slip with her. She used to remain sick and thereafter on 15.12.2012, her mother took her to the doctor and the victim showed the said paper slip to the doctor, on seeing which, the doctor told that there was nothing in the said slip. On asking by the doctor, she narrated about the incident to the doctor and subsequently, the doctor had disclosed about the incident so narrated by the victim, to the mother of the victim. Her mother took her to the police station and lodged the complaint with the police].

The victim was got medically examined from the AIIMS hospital. The accused was arrested in this case and his potency test was got conducted, wherein it was opined by the doctor that the accused was capable of performing sexual intercourse. The exhibits were seized by the police and sent to the FSL, Rohini for analysis. The statements of the witnesses were recorded, and after completion of the investigation, the charge-sheet was prepared against the accused for the commission of the offences punishable under sections 376/506 of the Indian Penal Code and sections 4/5(l), (m), (n)/6 of the Protection of Children from Sexual Offences Act, 2012, and put up before the Court.

Charge for the commission of the offences punishable under Sections 376/506 of the Indian Penal Code and sections 4/5(l), (m), (n)/6 of the Protection of Children from Sexual Offences Act, 2012, was framed against

the accused, to which the accused pleaded not guilty and claimed trial, and the case was proceeded for prosecution evidence.”

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 chose not to lead any evidence 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.

Arguments addressed on behalf of Appellant

5. Mr. Krishan Kumar, learned counsel for the appellant, opened his arguments by submitting that the impugned judgment dated 27.07.2018 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 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 evidence of a child witness has to be evaluated more carefully with greater circumspection and the same can only be relied upon if there are 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 condition that the same inspires confidence of the Court, but in 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 the learned Trial Court erred in convicting the appellant-accused under the POCSO Act, as the Act came into existence on 14.11.2012 and during the alleged period when the offence was committed, the POCSO Act was not even enforced. He further added that the offence was committed during a continuous period from 2010 to 2012, wherein the prosecutrix had not disclosed the exact date & time with regard to the sexual assault committed on her in the month of November/December 2012. It was further submitted that in view of the aforesaid circumstances the conviction of the appellant-accused under the POCSO Act was not sustainable in law and the punishment imposed on the appellant-accused needs to be reduced from life imprisonment to ten years.

8. 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 was liable to be set aside

Arguments addressed on behalf of State

9. Ms. Aasha Tiwari, learned APP for State, on the other hand, strongly refuted the submissions made by the counsel for the Appellant and submitted that the learned Trial Court after proper appreciation of the evidence adduced by the prosecution, has rightly convicted the appellant for the charged offences and the appeal filed by the appellant-accused is liable to be dismissed.
10. 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 a child witness, due to normal errors of observation, namely, error of memory, due to mental disposition at the time of the incident. To substantiate her arguments learned APP for State relied upon the case of *State of Punjab v Gurmit Singh and Others* reported in (1996) 2 SCC 384; *State (Govt. of NCT of Delhi) v. Pankaj Chaudhary* reported in AIR 2018 SC 5412.

11. Learned APP for the State further added that the testimony of the victim is corroborated with the medical evidence (*i.e. MLC of the prosecutrix*), as hymen of the victim was not intact, which is sufficient to credit the version of the prosecutrix that she was sexually assaulted. 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.
12. 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.
13. We have heard the learned counsel for the parties and carefully examined the impugned judgment and the material available on record as well.

Settled Principle of Law

14. It is a settled principle of law that in cases involving sexual assault/rape, it is generally difficult to find any corroborative witnesses, except the victim herself and therefore, the evidence of the victim is sufficient for conviction unless there exist compelling reasons for seeking corroboration. Thus, a conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The Apex Court has time and again held that the sole testimony of the prosecutrix is sufficient to hold the accused guilty if it inspires confidence and the same principles have been reiterated in ***Vijay v. State of Madhya Pradesh*** reported in **(2010) 8 SCC 191**. Relevant paragraph of the judgment reads as under:

“14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.”

15. In ***Gagan Bihari Samal v. State of Orissa*** reported as **(1991) 3 SCC 562**, The Hon'ble Supreme Court of India whilst observing that corroboration is not the sine qua non for conviction in a rape case, held as follows :

*“6. In cases of rape, generally it is difficult to find any corroborative witnesses except the victim of the rape. It has been observed by this Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* [(1983) 3 SCC 217 : 1983 SCC (Cri) 728 : AIR 1983 SC 753] as follows: (AIR headnote)*

“Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face

the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors, the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.”

The above observation has been made by this Court relying on the earlier observations made by this Court in Rameshwar v. State of Rajasthan [1952 SCR 377, 386 : AIR 1952 SC 54 : 1952 Cri LJ 547] with regard to corroboration of girl's testimony and version. Vivian Bose, J., who spoke for the Court observed as follows: (SCR p. 386)

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.”

16. Further, it is also a well settled principle of law that the testimony of child witness can be relied upon along with other circumstances and corroborative evidence to convict the accused. Undoubtedly, the

settled proposition of law that the evidence of child witness is required to be scrutinised and appreciated with great caution. In this regard, reference can be made to the dicta of the Apex Court in the case of *Yogesh Singh Vs. Mahabeer Singh and others* reported in *AIR 2016 SC 5160*, wherein the Apex Court has held that:

“22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853] , Baby Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] , Raja Ram Yadav v. State of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] , Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and Suryanarayana v. State of Karnataka [Suryanarayana v. State of Karnataka, (2001) 9 SCC 129 : 2002 SCC (Cri) 413] .)

23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. (Vide Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561])”

Appreciation of testimony of the Victim 'T'

17. 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*. From the perusal of the record, it transpires that the prosecutrix has deposed on same lines and there are no material contradictions in her testimonies. English Translation of the initial statement (Ex.PW1/A) made by the victim is reproduced herein below:-

“ I reside at the address mentioned above in the house of my maternal grandmother along with my father Lal Mohammad and maternal aunts. My mother had died during the days of my childhood. My father married with my maternal aunt Shama Parveen who is my mother presently. I have got one elder brother also who is a student of 11th standard. I study in 8th standard. In the month of November, 2009, I cannot recollect the exact date, when I was in 5th standard, I was studying in the evening, my father Lal Mohammad came to me and asked me to come before him. Whereupon, I went to him and he sat on the bed. My father touched my breast and kissed on (both the breast). This activity was repeated by my father intermittently as and when he found the opportunity. In the month of April 2010, I cannot recollect the date, I was studying in the evening time when my father Lal Mohammad came into my room and took the book from my hand and kept that aside. He asked me to lie down as he had to tell something to me. When I lay down he started removing my lower (‘salwar’). I asked my father as to what he was doing and he slapped me twice-thrice. When I tried to raise an alarm, my father clamped my mouth with his hand and removed his pants and underwear. He applied

something on his private part and inserted the same into my genital. I was feeling much pain and I made much movement with my hand and feet for coming out of his hold but in vain. Thereafter, my father threatened to kill me or to send me to the village where I would be subject to the same treatment by as many as ten persons, in case I revealed that incident to anyone. Thereafter, he used to repeat the said activity twice or thrice in a week. When my father tried to do that ill act on 15th August, 2010 I told him that I would tell the same to my mother whereupon my father kept on pressing my throat till I told him not to reveal the same before anyone. My father used to do that act 8-10 times in a month when my mother was either out of the home or taking bath. Sometimes he used to do that act by way of applying something on his private part and sometimes without that. In the morning of 15.12.12, when my father came to me to do the said act I told him that my date of menstruation was due on 5th but the same didn't. He asked me to give him urine sample and he will get the same checked. I gave the same to him. My father came at the noon time and after handing over a piece of paper to me told that nothing had come in the same. I concealed that paper with me. I remained much ill. On the same day i.e. 15.12.12, my mother took me to the doctor and I also took along with me that paper which I had concealed earlier with me. I showed the said paper to the doctor and he replied that there was nothing in that. Whereupon he asked as to whom that paper belonged and I told him that it belongs to me. The doctor asked me the entire story and I told him the act of my father Lal Mohammad. The doctor narrated the entire incident to my mother. My mother brought me to the Police Station today. You have recorded my statement which was read over to me. Stern action may be initiated against my father Lal Mohammad."

18. English Translation of the statement of victim recorded under Section 164 Cr.P.C is reproduced herein below: -

*“ I reside along with my mother and father at the house of my maternal grandmother. **My father has been committing rape upon me for the last three years. On being asked not to do so, he presses my throat and threatens me to do away with me. I know the meaning of rape (show hesitation) in stating the meaning in detail. My father has been committing rape upon me right from the time when I was in the 5th standard. When my MC (period) had stopped, I went along with my mother to the doctor on 05.12.12. I had complained my mother about headache. The doctor sent my mother outside to take the medicines and after seeing my urine report he enquired from me. The name of the doctor is Bhim Singh to whom I told everything. The doctor told to my mother in the said regard. My mother took me to the Police Station and got registered a case over there after getting recorded my statement. My medical examination was conducted at Medical (AIIMS). The Lady Police sent me to the ‘Prayas’ yesterday. She has brought me from there today. I want to go along with my mother.**”*

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

“That when I was studying in 5th Standard, about five years ago, in the year 2009 my father accused Lal Mohammad, who is present in the court today, touched my breasts and when I objected and told him that I will tell about the same to my mother, he warned me against that by stating that he would give me beatings. Thereafter, he kept on physically assaulting me.

In April, 2010 I was studying when my father approached me and asked me to lie down. Thereafter, he scolded me when I refused. He removed my salwar and committed wrong act with me. By wrong act I mean that he forcibly committed rape upon me by inserting his private part into

mine. I felt pains. Thereafter, on the occasion of 15.08.10 my father again committed the same act and pressed my neck also. Thereafter, my father started committed rapes upon me two-three times every week.

In December, 2012 I did not have my menstrual cycle about which I told to my father. Upon this my father asked for my urine, which I gave to him. My father returned and told me that there was nothing and handed me over some paper slip. However, I started remaining sick.

On 15.12.2012, I alongwith my mother visited the doctor and showed the same slip to him. Upon inquiries by the doctor, I told him about the wrong acts done by my father. I also told about the same to my mother. My mother called the police. Police recorded my statement which is on Ex.PW1/A bearing my signatures at point A. I was also medically examined. The copy of my statement recorded in the court earlier is on Ex.PW1/B bearing my signatures at point A in which I told the same facts. Accused Lal Mohammad is present in the court today.”

20. Further during her cross examination she stated that :-

“It is correct that what I have stated in court was read over by me. It is wrong to suggest that I have lodged the complaint against my father/accused at the instance of my stepmother. It is wrong to suggest that my father had not committed rape with me as stated by me in November, 2009, April, 2010 and August, 2010. It is further wrong to suggest that that my father did not commit rape upon me on any date. It is wrong to suggest that my father has not taken my urine for conducting the test. It is wrong to suggest that my father had not touched my breast. It is further wrong to suggest that due to quarrel between my father/accused and Dr. Bhim, false report Ex.PW1/A was got recorded. It is further wrong to suggest that due to quarrel between my stepmother and accused/father I have been forced by my stepmother to lodge this false report Ex.PW1/A. I have given my statement before Ld. MM. I do

*not remember if I had stated before Ld. MM that I had given a written complaint to police against my father/accused. I had not told this fact regarding rape committed by my father to my mother prior to disclosing of this fact to Dr. Bhim. I do not remember in which year I had told about the incident to Dr. Bhim. I had told about the incident to Dr. Bhim when I was taken to him by my mother for my treatment when I was sick and my mother came to know about the incident that day thereafter when she asked me. **It is wrong to suggest that I am deposing falsely in the court as well as in P.S.**"*

21. Perusal of the aforesaid testimony reveals that PW-1 (prosecutrix) has been consistent in her statement throughout that the intercourse was against her wishes and that there was no consent from her side, as she had been threatened and thereafter, she had been subjected to penetrative sexual assault by her own father (appellant-accused/Lal Mohammed). Further the prosecutrix has described in clear and unambiguous words and her testimony has remained consistent during her cross examination that her father (appellant-accused/Lal Mohammed) had committed rape upon her and thereafter threatened her with dire consequences, if she told anyone about the incident.

Other material witnesses

22. Although the sole testimony of the prosecutrix, as abovementioned, is sufficient by itself to sustain the conviction of the appellant, unless there are compelling reasons for seeking corroboration, as the same is a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. Consequently, it is relevant to highlight that the case of prosecutrix when appreciated in conjunction with the deposition of

PW-2 Shama, PW-5 Nasim Bano, PW-8 Dr. Bhim Singh, is further substantiated and corroborated. Relevant portion from the testimony of PW-2 Shama is reproduced herein below:-

*“Victim 'T' is my daughter and accused Lal Mohammad is my husband. Victim 'T' is aged about 15 years old. As my daughter Victim 'T' was not feeling well regularly therefore, I took her to doctor. She was also suffering from fits. However, it was revealed at the doctor's place by my daughter that she was being continuously raped by my husband for the last many years. **I came to know about this fact from the doctor also, whom Victim 'T' told about the rapes committed by the accused. Initially, I was shocked but then, I approached a Mahila Mandal Ayog and then police was called. My daughter gave statement to the police. She was also medically examined. Accused Lal Mohammad is present in the Court today.**”*

23. Relevant portion from the testimony of PW-5 Nasim Bano is reproduced herein below:-

*“Since I was not having cordial relations with my husband, therefore, at the time of the incident I was living with my mother and my sister, namely, Shama Praveen. On 15.12.2012, my victim daughter, namely, T had fallen ill. My sister Shama Praveen took my victim daughter to doctor Bhim Singh. After taking the medicines, my sister brought the victim girl back to the house. **On the same day, after their returning to the home, my sister Sham Praveen had received a telephonic call from Dr. Bhim Singh, who asked my sister Shama Praveen to come to his clinic as he had to make her understand about the disease, the victim was suffering from and the medicines provided to her. Pursuant to this call, my sister Shama Praveen went to***

the clinic of Dr. Bhim Singh. After the meeting with Dr. Bhim Singh my sister returned to the house and she told me that Dr. Bhim Singh had told her that the victim girl had informed him (Dr. Bhim Singh) that Lal Mohammad, the father of the victim girl had had sexual intercourse with her several times for a long time. On this I called the victim girl and in the presence of Shama Praveen asked her about the facts told by the doctor. The victim girl had told me that Lal Mohammad was committing the sexual intercourse with her for last three years and she could not disclose this fact on account of the threat given by accused Lal Mohammad. (At this stage the witness further states)

The victim girl, namely, T is the real daughter of my elder sister Yasmeen Bano, who has already passed away. The victim girl has been brought up at the house of my mother. Accused Lal Mohammad is the husband of my sister Shama Praveen.

After knowing the facts of sexual harassment with the victim girl by the accused we remained shocking and in a dilemma. After about two-three days the matter was reported to the police. The complaint was made on 22.12.2012. Police recorded my statement in this case. I identify accused Lal Mohammad, who is present in the court today.

24. Relevant portion from the testimony of PW-8 Dr. Bhim Singh is reproduced herein below:-

“On inquiry, victim ‘T’ had told me that her father had given the said prescription/parchi to her. Thereafter, victim started weeping. After consoling the victim, she told me that her father had been making physical relations with her for the last three years. She had also told me that her father had threatened her. She also informed me that her father used to press her neck and used to threaten to kill her. The victim had requested me

not to disclose the said fact to anyone. On hearing this, I was very surprised and shocked. Thereafter, her mother came there and they went away. In the evening, I made a call to the mother of victim and called her. I had narrated whole information to the mother of victim, which was told to me by the victim. The mother of the victim was surprised to hear this and was feeling giddiness. When she regained consciousness, she questioned me what she could do. I advised her to give a complaint to the police. Thereafter, she left my clinic. After 10-12 days, police came to my clinic and recorded my statement. It was on 30.12.2012 when police had recorded my statement. The father of the victim, namely Lal Mohammad, used to visit my clinic, who is now present in the court today (correctly identified by the witness).”

25. Joint perusal of the aforesaid testimonies reveal that the victim for the first time had told about the alleged incident to Dr. Bhim Singh, subsequent to which mother of the prosecutrix was informed and consequently the matter was reported to Police Station Sangam Vihar. It is also a well established proposition of law that minor contradictions or insignificant discrepancies in the statement of the prosecution witnesses should not be a ground for not accepting an otherwise reliable prosecution case. The Hon’ble Supreme Court of India in the case of ***State of U.P. v. Naresh*** reported in (2011) 4 SCC 324, , 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] .]”

26. Keeping in view the facts of the present case and applying the principles laid down by the Hon'ble Apex Court, the prosecutrix has clearly and unequivocally stated that she was raped by her father Lal Mohammed/Appellant-accused, in her statement recorded U/s 164 Cr.P.C and in her deposition before the court. In view of the above, we are of the considered opinion that the contradictions pointed out by the counsel on behalf of the appellant-accused are minor in nature and do not render the evidence of the prosecutrix as unbelievable.
27. Further, as per the version of the prosecution the initial statement (Ex.PW-1/A) of the victim was recorded by PW-9 Insp. Kamini Gupta. Relevant portion from the testimony of PW-9 Insp. Kamini Gupta is reproduced herein below:-

*“On 22.02.2012, I was posted at PS Ambedkar Nagar as Sub Inspector. On that day, I was present at police station and on the directions of Senior officers, I reached at PS Sangam Vihar where the victim, namely, ‘T’ (name told as mentioned at Serial No. 01 in the list of witnesses attached with the charge-sheet) along with her Mausi was present. **I recorded the statement of victim ‘T’ correctly as per her version which is already Ex.PW1/A. I attested the said statement which bears my signatures at point B. Thereafter, the victim was taken to AIIMS Hospital where she was medically examined vide MLC No.5421/2012 already Ex. PX and her OPD card is now Ex.PW9/A.** After medical examination, the doctor handed over MLC and the exhibits of the victim in sealed condition along with sample seal to me. **The said exhibits were seized vide seizure memo now Ex.PW9/B which bears my signatures at point A.** At that time, W/Ct. Pooja was also joined the investigation with me. Thereafter, we returned to PS where **I made endorsement on the statement of the victim vide Ex.PW9/C which bears my***

signatures at point A and at about 9.30 PM, rukka was handed over to the Duty Officer for registration of FIR. Thereafter, I along with the W/Ct. Pooja, Ct. Pawan, the victim and her Mausi reached at the place of occurrence (address told but withheld in order to conceal identity and full address is mentioned at Serial No. 01 in the list of witnesses attached with the charge-sheet), where accused was found present. He was caught hold with the help of Ct. Pawan. I also called Ct. Chhattar Singh at the spot. I prepared site plan at the instance of the victim which is now Ex.PW9/D which bears my signatures at point A. Thereafter we returned to PS.”

28. During her cross examination she deposed:-

“The complainant came to PS Sangam Vihar on 22.12.2012 and I recorded her statement on the same day and not on 22.02.2012. I received information about at about 5.00-6.00 PM and reached at PS Sangam Vihar immediately. I took 1-1½ hours for recording the statement of the victim. Thereafter, I along with the victim and her Mausi reached at AIIMS Hospital for medical examination of the victim. I do not remember about the other persons who accompanied us to the hospital. Exhibits were deposited in the Maalkhana. We returned the PS at about 9.00 PM. The accused was produced by Beat Constable at police station where he was arrested after inquiries. The accused accompanied us when we reached his house for preparing the site plan. All the documents i.e. arrest memo, personal search memo and disclosure statement of the accused were prepared at the police station. No document regarding treatment of the victim from Dr. Bheem was handed over to me by the mother of the victim. (Vol. it was a very small clinic and he used to prescribe the medicines only). It is wrong to suggest that I have not conducted the investigation in proper and fair manner or that I have prepared all the documents ante date and time or that all the documents were prepared while sitting at the

police station. It is wrong to suggest that I have not recorded the statement of Nani of the victim deliberately. It is wrong to suggest that I am deposing falsely.”

29. Perusal of the aforesaid testimony reveal that the OPD card (Ex.PW9/A) of the victim was prepared at AIIMS Hospital and she was medically examined vide MLC No.5421/2012(Ex. PX). Relevant portion of the MLC No.5421/2012(Ex. PX) is reproduced herein below:-

*“Hymen not intact
Finger easily inserted in vagina
No active bleeding/ tears/scars in the perineum
Findings S/o prev vaginal intercourse”*

30. Relevant portion of the OPD Card(Ex.PW9/A) is reproduced herein below:-

*“LE. Hymen not intact
PV- Hymen not intact
-1 finger easily inserted in vagina
No active bleedings/ no laceration or tear
Examination suggestive of prev vaginal intercourse”*

31. After examining the above-mentioned medical record it is observed that the hymen of the victim was not intact and on examination it was categorically suggested that the victim has a history of vaginal intercourse. 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 as (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.....”***

32. Further as per the version of the prosecution, the vaginal smear of the victim and the blood of the accused were forwarded to the Forensic Science Laboratory for examination. Relevant portion of FSL Report No. 2013/DNA-0004 (Ex.PX-2) is reproduced herein below:

“DESCRIPTION OF ARTICLES CONTAINED IN PARCEL
Parcel ‘1’ : One sealed adhesive tape sealed with the

seal of “CMO AIIMS HOPT ND” containing exhibit ‘1’.

Exhibit ‘1’ : One microslide described as vaginal smear.

Parcel ‘2’ : One sealed envelope sealed with the seal of “DEPARTMENT OF FORENSIC MEDICINE AIIMS NEW DELHI” containing exhibit ‘2’.

Exhibit ‘2’ : Gauze cloth piece described as blood in gauze of accused.

RESULT OF ANALYSIS

Semen could not be detected on exhibit ‘1’. Hence, DNA analysis could not be performed on exhibits ‘1’ and ‘2’.”

33. Consequently, from a perusal of the FSL Report, it is evident that Semen was not detected on Exhibit ‘1’ (*One micro slide described as vaginal smear*). The Hon’ble Apex Court in the case of **Wahid Khan v. State of M.P** reported in **(2010) 2 SCC 9** has held that the absence of semen cannot discard the version of the prosecution because penetration with or without emission of semen is sufficient to make out an offence of rape. Germane portion of the judgment is extracted below:

“19. It was also contended by learned counsel for the appellant that since hymen of the prosecutrix was found to be intact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as the offence of rape has been defined in Section 375 IPC. Explanation to Section 375 reads thus:

“Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

It has been a consistent view of this Court that even the slightest penetration is sufficient to make out an

offence of rape and depth of penetration is immaterial.

20. It is appropriate in this context to reproduce the opinion expressed by **Modi in Medical Jurisprudence and Toxicology (22nd Edn.)** at p. 495 which reads thus:

*“Thus, to constitute the offence of rape, it is not necessary that there **should be complete penetration of penis with emission of semen and rupture of hymen.** Partial penetration of the penis within the labia majora or the vulva or pudenda **with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law.** It is therefore **quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains.** In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. **Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis** to be made by the medical officer treating the victim. **The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.**”*

(emphasis supplied)

21. Similarly in **Parikh's Textbook of Medical Jurisprudence and Toxicology**, “sexual intercourse” has been defined as under:

“Sexual intercourse.—In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.”

22. If the aforesaid facts are kept in mind, it cannot be disputed that the act of the appellant would certainly constitute an offence of rape and leaves no amount of doubt in our mind.”

(emphasis supplied)

34. In view of the ratio of the judgments cited above, we are of the view that the medical evidence in the present case corroborates the version of the prosecutrix because as per the MLC of the victim her hymen was not intact and it was suggested that the victim had a history of vaginal intercourse. Subsequently we are of the view that since no semen was detected and no major external injury on the body of the prosecutrix was found, this in itself does not demolish the version of the prosecution as the same are countered by the ocular testimony which have a better standing than the medical evidence.

Whether POCSO applicable to the present case?

35. During the course of arguments an apprehension was expressed by the learned counsel for the appellant that learned trial court erred in convicting the appellant-accused under the POCSO Act, as the Act came into existence on 14.11.2012 and during the alleged period when the offence was committed, the POCSO Act was not in force. It was further contended that in view of the above the conviction of the appellant-accused under the POCSO Act was not sustainable in law and the same should be reduced from life imprisonment to ten years. The Learned Trial Court in the impugned judgment while dealing

with the aforesaid issue has given its reasoning, which is reproduced herein below:

“52. Ld. Defence counsel has also submitted that in this case, the POCSO Act is not attracted because it is not clear from the statement of the victim as to whether the accused also committed the alleged offence against the victim after 14.11.2012 when the POCSO Act 2012 came into effect. Again, this contention of the accused is without any merit for the following reasons. PW1 (the victim) at the time of her medical examination has categorically narrated her sexual assault history to the doctor in the MLC report including the other related papers Ex.PW9/A and Ex.PX that ‘last history of intercourse 01 month back’. The victim was medically examined on 22.12.2012 and on the same day, the said MLC report of the victim was prepared, and if one month back period from 22.12.2012 is calculated, it comes 22.11.2012 and by that time the POCSO Act 2012 was very much into effect because it has come into effect from 14.11.2012. Further, PW1 (the victim) has stated in her evidence that the accused Lal Mohammed started committing rape upon her 2-3 times in a week, and hence it was a continuing process of the offence, which continued till the time when she went to the clinic of Dr.Bhim Singh on 15.12.2012. The situation became worst in December 2012 when she did not have her menstruation cycle and she disclosed about this to her father (the accused). Pursuant to this, her father asked for her urine, which she gave to him, and her father returned and told her that there was nothing and handed over some paper slip to her. However, the victim started remaining sick, and then she approached to the doctor on 15.12.2012, and on the said day, she disclosed about the incident to Dr.Bhim Singh, and subsequently the matter was reported to the police. Therefore, if the statement of PW1 (the victim) is

critically evaluated, it is found that the accused was committing rape against the victim till December 2012. In view of the aforesaid discussions and as per the history of the last intercourse which was one month back, which was narrated to the doctor by the victim at the time of her medical examination on 22.12.2012, it comes 22.11.2012, and at that time, the POCSO Act 2012 was very much into effect, therefore, the contentions of the Ld. Defence counsel that the POCSO Act 2012 is not attracted in this case, if liable to be rejected.”

36. 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 argument raised by the learned counsel of the appellant-accused that the learned trial court erred in convicting the appellant-accused under the POCSO act is without any force and is liable to be rejected.

Whether sentence should be reduced?

37. Rape is a heinous crime not only against the individual but also against the society at large. The offences against the woman more particularly sexual assault are increasing and if such an offence is committed the same has to be dealt with stringently. 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 plight of a woman and the shock suffered by the victim can be well visualized, as the victim of rape grows with a traumatic experience and an unforgettable shame haunted*

by the memory of the disaster forcing her to a state of terrifying melancholia. 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 : (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.”

38. Further, it is worthwhile to notice the observations of a coordinate bench of this Court in *Khem Chand & Ors. v. State of Delhi* reported in *2008 SCC OnLine Del 1611* which while dealing with cases of statutory rape of minor, had summarized the principles and the factors which may be taken into consideration while assessing the appropriate sentence. The relevant portion is as under:

*“9. Before proceeding with the evaluation of the 12 appeals on merits, the principles and factors emerging from Judicial pronouncements, **which are relevant in the matter of choice of sentence or reprieve in the sentence awarded are enumerated below for facility of reference.** These are the factors which are, or may be taken into account by the Court while assessing as to what could be an appropriate sentence in a given case.*

*i. **Criminal and the crime** are both important for the purposes of sentence. *Bachan Singh Vs. State of Punjab* (1980) 2 SCC 684.*

*ii. **Manner of commission of the crime** being with meticulous planning or one on the spur of the moment;*

*iii. **Violence, If any, accompanying the crime** whether injuries suffered were serious and required extensive treatment or have caused any permanent damage to the child bearing capacity or otherwise*

*iv. **Whether the offender or accused was in a position of fiduciary trust or exploited a social or family relationship;***

*v. **State of the victim, impact of the crime on the victim,***

*vi. **The antecedents of the accused, his age, whether a first time offender or repeat offender, possibility of recidivism.***

*vii. **Social backwardness or offender being a***

poor, illiterate labourer not found to be adequate reason by Courts. (State of M.P Vs. Munna Choubey & anr. 2005(2) SCC 710 and State of M.P Vs. Babbu Barkare @ Dalap Singh (2005) 5 SCC 413.

viii. Passage of time since offence committed by itself considered inadequate reasons for reprieve. (Urmila (minor) Vs. Raju & Anr., (2005) 12 scc 366.

ix. Rape victim's marriage or rehabilitation may be considered as a mitigating factor.

x. The Supreme Court in a number of decisions Dinesh @ Buddha Vs. State of Rajasthan (2006) 3 SCC 771, State of Karnataka Vs. Krishnappa (2000) 4 SCC 75, Bantu @ Naresh Giri Vs. State of M.P (2001) 9 SCC 615 and State of M.P Vs. Santosh Kumar (2006) 6 SCC 1 where the victims were below the age of 12 years and rape had also been committed with some injuries, has chosen to uphold the award of minimum sentence.

10. One of us (Manmohan Sarin, J.) in Sheikh Falsar Vs. State (Crl.A.154/2005) reduced the sentence from life imprisonment to 10 years though the victim had suffered tear of the hymen, second degree perennial tear resulting in stitches being required for vagina, following the judgment of the Supreme Court in the State of Karnataka Vs. Krishnappa (supra) and considering that accused was a first time offender and this was a solitary offence, pleas of intoxication or the accused belonging to the weaker section of the society were not accepted. The Supreme Court in State of Karnataka Vs. Krishnappa (supra) also noted the rationale propounded by Kautilya of „just punishment“. Kautilya"s philosophy was "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.” 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.

11. Accordingly, while determining the sentence in appeals under consideration, we have considered the aspects as noted above and in particular whether the accused was a first time offender or a repeat offender, whether offence was accompanied or committed with violence, nature of injuries sustained, whether any permanent physical damage caused, did it involve betrayal of trust, possibility of recidivism i.e repeat offending or there was possibility of rehabilitation/ readjustment within the community, post conviction conduct of the accused displaying penitence or propensity to crime are few of the factors which have been considered. Cases where rape was committed more than once or over sustained periods or cases where there was no possibility of rehabilitation or amalgamation or adjustment in society, have not merited a reprieve in sentence.”

(emphasis supplied)

Conclusion

39. In view of the foregoing discussion, we are of the considered view that the testimony of the prosecutrix, which has remained unshattered and uncontroverted is creditworthy and reliable and has a ring of truth in it and although there is no gainsaying in the legal position that her testimony by itself is sufficient to establish the case of the prosecution, in the present case; the prosecutrix testimony is materially corroborated by the other evidence on record.

40. Further, let it not be forgotten that this is a case of rape on a girl child, by her own father. Nothing can be more heinous than a crime committed on a child by her own father, the one who is duty-bound to provide her unflinching protection from all harm. Hence, we have no hesitation in saying that we are not inclined towards reducing the punishment of the appellant-accused and we also find no reasons to take a different view than the view taken by the learned trial court.
41. In view of the aforesaid facts, we do not find any infirmity in the impugned judgment passed by learned trial court and the conviction of the appellant-accused/Lal Mohammed is upheld.
42. Accordingly, CRL.A No.1065/2018 being devoid of merit is dismissed.
43. Copy of the order be communicated to the Trial Court as well as to the Jail Superintendent, Tihar Jail.
44. Trial Court record be sent back forthwith along with a copy of this order.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

JANUARY 24, 2020
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