LEGAL HANDBOOK

ON

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012

A Guide to Handle Sexual Violence Cases of Children

Eliza Rumthao

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About Eliza Rumthao:

Eliza Rumthao received her LL. B degree from Faculty of Law, Delhi University and began practicing law since 2003 and had worked for survivors of human trafficking, women and children and other vulner able community assisting them through the process of criminal justice system. Had worked and managed 172 child sexual abuse cases in Delhi. Her experience on working for the children of abused survivors led to pen down this handbook.

Acknowledgment

This handbook is prepared in a simple language to empower and inform about the rights of children who have survived sexual violence. The idea of this handbook is to make every citizen aware of the nuances of the legal system and administrative process who may encounter criminal justice system.

The book covers the procedural law, substantive law and a compilation of guidelines and protocols laid down by Ministry of Health and Family Welfare, Appellate Courts, Bare Acts (Protection of Children from Sexual Offences Act, 2012), Case Laws and template applications. So, as to break the barrier of challenges in handling such crimes.

I am so grateful to Ishaan Mishra, National Law School, Delhi who helped me with the compilation of guidelines and protocols of Delhi High court and Ministries and putting the Case Laws together.

Thankful to Alfred Shimray and Shivam in helping with the format and cover design.

Hope this hand book may ease the fear and help to come forward courageously to protect children when we encounter traumatic abuse against children.

This handbook is dedicated to all the children below 12 years.

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Introduction

Protection of Children from Sexual Offence Act, 2012 (POCSO) is enacted to protect children below the age of 18 years defined under the law. India is a signatory to the UN Convention on the Rights of the child 1989 [1]that requires the government to take up preventive measures to protect child/children from any kinds of sexual exploitation or any other unlawful sexual activities towards children. This Act was legislated under [2]Article 15 (3), of the Fundamental Rights guaranteed under the Constitution of India. The Protection of Children from Sexual Offences Act 2012 was implemented on 14, November 2012. This Act aims to protect children from sexual offences and to have more child-friendly procedure for those children and parents, families etc who come through the process of criminal justice system because of the abused. [3]The National study on the child abuse by Ministry of Women and Child Development 2007 shows that 53.22 percent of children are abused which calls for serious attention to create or invoke a law pertaining to children specific laws. As per the study of [4]National Law School shows that children on the street, children at work and institution have the highest incidence of sexual assault as most of these children are outside the protection of law. The study also shows that 50 percent of the abuser or sex offenders are known to the children and in a position of trust or responsibility. 80 percent in the case, the accused were known to the victims.

Protection of Children from Sexual Offences Act, 2012 (POCSO) is a centralized law and applies to all the Indian states except Jammu and Kashmir. The act is a gender-neutral law. The penal law is limited only for women and girls in case of sexual offences. The Indian penal sections like 354 IPC (Outraging women's modesty and 376 (rape) IPC is confined only to women and girls. However,

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[1] The UN General Assembly adopted the Convention and opened it for signature on 20 November 1989 (the 30th anniversary of its Declaration of the Rights of the Child). It came into force on 2 September 1990, after it was ratified by the required number of nations. ... Two optional protocols were adopted on 25 May 2000.

[2] Article 15(3) in The Constitution Of India 1949

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[3] A National Study on Child Abuse, released by the Ministry of Women and Child Development in India with the support of UNICEF, Save the Children and Prayas. ... © Ministry of Women and Child Development, Government of India

[4] According to a study conducted by the National Law School of India University's Centre for Child and the Law in Delhi

this act protects male child/boys as they are abused and sodomised too and thus the Act takes cognizant of the equal vulnerability of young boys under sexual predators. Under this Act, the procedural law and substantive law takes an approach that is of victim friendly or child friendly, for example:

- When the victims come to report the case at the police station, the police must immediately register an FIR.
- Recording of complaints, investigation, medical examination, judicial procedure must be done in a child friendly proceeding.
- The identity of the child must be protected and must be kept confidential throughout the process.
- The child be accompanied by her parents, family member, guardian, a friend or a relative, in whom the child has trust during trial.
- The hospital need not required any prior requisition to conduct the medico legal examination.
- In case, of a girl child- the medical examination be done by a female doctor.
- The police to update the progress of the case to the victim' family or parents.
- Child be accompanied by a person whom she/he feels trusted.
- Supported person is provided under the law from the time the child comes to the police station until the adjudication of the case.
- The CWC must make an immediate assessment for the safety and protection of the child.
- Under this act, special court is set up wherein the child's statement must be recorded within 30 days from the date of cognizance and complete the case within a year.
- The child can be represented by a lawyer, in addition to the public prosecutor.
- Vulnerable child friendly witness court room is set up, so that the child does not have to encounter the sex offender at the time of trial.
- The special court may give the child frequent break during trial, if necessary
- The special court must ensure the child is not called repeatedly in the court to testify.
- During cross examinations, the questions is put up through the judge, the accused lawyer cannot directly ask the questions to the child.
- The defence lawyers are not permitted aggressive questioning or character assassination of the child to prevent re-traumatization and maintain dignity at all time during trial.

The Act laid down different categories of sexual offences thereby avoiding generalisation of crimes by sexual perpetrators in the hands of the authorities. The following are the different categories of sexual offences laid down in the Act:

- Penetrative sexual assault

- Aggravated penetrative sexual assault
- Sexual assault
- Aggravated Penetrative Sexual Assault
- Sexual harassment.
- Use of children for pornographic purpose
- Storage of pornographic material that involves children.

It is mandatory under POCSO, for every citizen to report a case of child abuse, in case of failure- there is a punishment of six months imprisonment. If a person is persecuted under POCSO, for allegedly committing, abetting or attempt to commit penetrative sexual assault, aggravated penetrative etc., then the court assumes that the person has committed the act. The onus is on the accused to prove that he didn't commit the act. This is a big departure from the general criminal procedure and evidence under which the burden is on the prosecution to established guilt beyond reasonable doubt.

The law maker recognized the social stigma and shame attached in sexual violence cases in our society. In a lot of ways, social stigma and lack of support from the community or extended families has been a barrier to justice. As a result, most of the cases of child sexual abuse goes unreported which only emboldens the perpetrators. To end all these social stigma, POCSO attempts to bring about a victim friendly process by providing psycho-social support through a support person to the victim's family, legal support and even financial assistance is provided for immediate medical needs. For law to implement well in spirit and letter, it requires all the agencies and stake holders who are involved in the process, to be sensitive with the issues and requires to be equipped with the law, so that it is applied effectively for the best interest of the child's justice. For the survivors to feel supported, it demands, all the agencies and stakeholders mentioned in the law to be highly sensitive, technically sound and emotionally matured and act in a collaborative manner. The process should help to heal the wounds of the survivors, protect children from further abuse and ensures to secure convictions rather than re-victimization and re-traumatization.

Child sexual abuse case is a dark subject to discuss or talk about in Indian society. So, it is very hidden in nature. [5]Child sexual abuse has a long term negative effect and study shows that childhood sexual abuse is also associated with higher levels of depression, guilt, shame, self-blame, eating disorders, somatic concerns, anxiety, dissociative patterns, repression, denial, sexual problems, and relationship problems. Depression has been found to be the most common long-term symptom among survivors. As per the study of Journal family, shows that [6]India has the highest number of child sexual abuse case. In spite, numerous initiatives and awareness campaign on the issues of child sexual abuse, it still requires a lot of courage, support and resilience to report about the abuse on the part of the victims and the families, as there is still a lot of shame, blame and humiliation attached to sexually exploited victims in the society. After the traumatic incident, fear, shame and stigma are the biggest struggle to report the case on time. A lot of times, it is because of uncertainty of how the case will move forward legally, apart from the social pressure or other unknown reasons that victims and their families are discouraged from going to through the legal justice system. In our country, criminal justice system is daunting and at times seem hostile towards people who do not have power, money and connections, and to secure timely justice and fair justice is an intimidating journey for many of us. The enactment of the Act certainly helps in ameliorating the burden of the prosecutors and law enforcers at the same time this Act help to some extent in alleviating the pain and trauma of the victims by introducing a more child-friendly system, although it yet to be implemented in spirit in many states and rural districts.

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[5] The Long-term effect of child sexual abuse: counselling implication. By Melissa Hall and Joshua Hall.

[6] ttps://www.ncbi.nlm.nih.gov › NCBI › Literature › PubMed Central (PMC)
by MM Singh - 2014 - Cited by 17 - Related articles
Jump to Indian Scenario of the Problem - A total of 33,098 cases of sexual abuse in children were reported in the nation during ... The first study on CSA in India was conducted by ... of Child Sex Abuse, an Indian NGO, conducted a study.

Definitions

What is child sexual abuse?

When any adult inappropriately touches any sexual part of the body of a child is called child sexual abuse. [7]World Health Organisation (WHO) defines child sexual abuse as "the involvement of a child in sexual activity that he or she does not fully comprehend and is unable to give informed consent to, or for which the child is not developmentally prepared, or else that violate the laws or social taboos of society. " The term child sexual abuse includes a range of activities like "intercourse, attempted intercourse, oral-genital contact, fondling of genitals directly or through clothing, exhibitionism or exposing children to adult sexual activity or pornography, and the use of the child for prostitution or pornography."

What are the different types of abuse to a child?

Physical Abuse - inflicting physical injury upon a child

Sexual Abuse - inappropriate sexual behaviour with a child

Emotional abuse, verbal abuse, mental abuse and psychological abuse

Neglect - Failure to provide for child's basic needs

Who is covered or protected under this Act?

All children under the age of 18 years are protected under the law. This Act is a gender neutral Act.

[7] WHO definition of child sexual abuse. The dynamics of child sexual abuse differ from those of adult sexual abuse.

What is the impact of child sexual abuse to a person?

Research has documented that child sexual abuse may hinder the following issues as they grow as:[8]

Self Esteem: As an adult you have • no rights • no control in your life • you're a bad person	*Emotions or Feelings:* As an adult, one may • have difficulty identifying or expressing feelings • not trust one's feelings • feel like one's emotions are out of control
Relationships: As an adult one may • avoid closeness to avoid betrayal • become involved with abusive people • cling to people for approval • put other people's needs first because one may feel one doesn't deserve to have one's needs considered	*Parenting:* As an adult one may: • find it hard to balance your needs with those of one's children • be over protective • find it hard to show affection appropriately
Sexuality: As an adult one may • go numb during sex • avoid sex • seek sex to meet other emotional needs • be vulnerable to sexual exploitation	*Your Body:* As an adult one may • be disconnected from bodily sensations • feel bad about one's body • inflict pain or injury on oneself • abuse alcohol, drugs or food

[8] *Judy Cashmore & Rita Shackel,* 'The long-term effects of child sexual abuse', CFCA PAPER NO. 11 2013, Australia Institute of Family Studies (2013)

Substantive law

As mentioned earlier, the 2007 Study highlighted that the existing laws did not specifically address the crimes that were being committed on children. Hence, this Act tried to link this gap and widened the definition of "rape" and also discuss other nature of sexual assault on young children. Following are the type of offences defined under the Act:

Penetrative Sexual Assault (Section 3): Penetrative Sexual Assault includes - Penetration of the penis; insertion of any object or other body part; manipulation of any parts of the body of the child or application of his mouth to the penis, vagina, anus, urethra or makes the child to do to such person.

Explanation:

If any person penetrates his/her private parts, inserts, manipulates in any parts of the body of the child will amounts to penetrative sexual assault or

If any person applies any object to any part of the body (private parts) in to part of the body of the child will amounts to penetrative sexual assault:

If any person makes the child do so with him or any other person would amount to penetrative sexual assault.

Punishment (Section 4): Imprisonment: 7 years to life; and Fine

Aggravated penetrative sexual assault (SECTION 5): Any penetrative sexual assault committed by the following persons would amount to Aggravated penetrative sexual assault:

- Person of authority
- Police Officer
- Armed Forces or Security Forces
- Public Servant
- Management or the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection institution.
- Management or staff of a hospital, whether Government or private.
- Person of trust
- Relatives of the child
- Foster care
- Domestic relationship with a parent of the child
- Living in the same shared household
- Owner, or management, or staff, of any institution providing services to the child
- Institution or home of the child or anywhere else

- Causing harm
- Using deadly weapon, fire, heated substance or corrosive substance
- Grievous hurt or causing bodily harm and injury to the sexual organ of the child
- Physically / mentally incapacitating the child
- Impregnating the child
- STD/HIV/Other---life-threatening disease or infection
- Mental or physical disability
- Miscellaneous
- Gang penetrative sexual assault
- More than once or repeatedly
- Child below twelve years
- Knowing the child is pregnant
- PSA on child and attempts to murder the child
- In course of communal or sectarian violence
- By a person previously convicted
- Penetrative sexual assault on a child and making the child to strip or parade in public

Punishment (Section 6): Rigorous imprisonment:10 years to life imprisonment; and Fine.

Sexual Assault (Section 7): When a person is said to have committed sexual assault on a child if he/she with sexual intent, touches a child or asks the child to touch him/her or any other person.

Explanation: If any person with *sexual intent* touches the private parts of the child or makes the child touch the body parts of such person or any other person will amount to sexual assault. or

If any person does any other act with *sexual intent*, which involves a physical contact without penetration will amount to sexual assault.

Punishment (Section 8): Imprisonment: 3 years to 5 years; and Fine.

Aggravated Sexual Assault (Section 5, 9): The statute lays down 20 different circumstances under which an offence of penetrative sexual assault and sexual assault can be deemed as aggravated.

Punishment (Section 10): Imprisonment: 5 years to 7 years and Fine.

Sexual Harassment (Section 11): If any person with sexual intent the following acts, will amount to sexual harassment:

- Utters any word or makes any sound, or makes any gesture or exhibits any object or part of body.
- Makes a child exhibit his body or any part of his body
- Shows any object to a child for pornographic purposes; or

- Repeatedly or constantly follows or watches or contacts a child; or Threatens to use the child or involvement of the child in a sexual act; or
- Entices a child for pornographic purposes or gives gratification.

Punishment (Section 12): Imprisonment: extend to three years and Fine

Child Pornography (Section 13): If a person uses a child in any form of media for personal use or for distribution, for the purpose of sexual gratification and if he/she - represents sexual organs of a child; uses a child in real or stimulated sexual acts (with or without penetration) or represents a child indecently it will be considered an offence of Child Pornography.

Punishment (Section 14):

- *First Offence*: Imprisonment to 5 years and fine.
- *Subsequent Conviction*: Imprisonment to seven years and fine.
- *Participating in PSA in the pornography*: Imprisonment 10 years to life, and fine.
- *Participating in Aggravated PSA in the pornography*: Rigorous Imprisonment for life and fine.
- *Participating in Sexual Assault in the pornography*: Imprisonment 6 years to 8 years, and fine.
- *Person participating in Aggravated Sexual Assault in the pornography:* Imprisonment 8 years to 10 years, and fine.

Storage of Child Pornography (Section 15): Under POCSO, a person who stores child pornography for commercial purpose is punishable under this law.

Punishment (Section 15): Imprisonment to three years; or Fine, or Both

Abetment of an offence (Section 16): Instigates, Engages with one or more other person or persons or Intentionally aids, by any act.

Punishment (Section 17): The same as provided for the offence abetted.

Attempt of an offence (Section 18): If a person attempts to commit any offence under this Act or cause such an offence to be committed and if such attempt, does any act towards the

commission of the offence is punishable with imprisonment that may extend to one half of the imprisonment for life or one-half of the longest term of imprisonment or with fine or with both.

Punishment: Extend to one half of the imprisonment for life or one half of the longest term of imprisonment provided for that offence or with fine or both

Penal Action under POCSO

Offences	Minimum	Maximum	Fine
Penetrative Sexual Assault: (S. 3, 4)	7 Years	Life Imprisonment	Yes
Aggregated Penetrative Sexual Assault: (S. 5, 6)	10 Years (Rigorous Imprisonment)	Life Imprisonment	Yes
Sexual Assault: (S. 7, 8)	3 Years	5 Years	Yes
Aggregated Sexual Assault: (S. 9, 10)	5 Years	7 Years	Yes
Sexual Harassment:		3 Years	Yes
Use of Child for Pornographic Purposes: (S. 13, 14)		5 Years	Yes
Second or Subsequent Conviction		7 Years	Yes
Penetrative Sexual Assault for Pornographic Purposes	10 Years (Rigorous Imprisonment)	Life Imprisonment	Yes
Aggravated Penetrative Sexual Assault for Pornographic Purposes	Life Imprisonment (Rigorous)		Yes
Sexual Assault for Pornographic Purposes	6 Years	8 Years	Yes
Aggravated Sexual Assault for Pornographic Purposes	8 Years	10 Years	Yes
Storage of pornographic substance		3 Years	And/or
Abetment of offence (Section 16)	If abetted offence is committed, same as the offence.		

Attempt to commit an offence (Section 17)	Half of imprisonment for life; Half of longest term of imprisonment for the offence; Fine; Fine/Imprisonment		
Punishment for failure to report or record a case (Section 21)		6 Months	and/or
Punishment for false complaint or false information (Section 22)		6 Months	And/or

Procedural Law

How to report the case

1. Report the Crime and provide the information to either Special Juvenile Police Unit or the local Police within the concern jurisdiction.
2. Take note of following details of I.O. and supervisor: name and designation, address and telephone number
3. Ensure that the information to either Special Juvenile Police Unit or the local Police is
    a. Ascribed an entry number
    b. Recorded in writing
    c. Read over to the informant
    d. Entered in a book kept by the Police Unit
4. If the informant is child
    a. Record in simple language
    b. Provide a translator or interpreter
5. Copy of the FIR to the complainant
6. Immediate arrangements to give care and protection in a shelter home or hospital within 24 hours of the report, if the Child is in need
7. The Police shall report the matter to the Child Welfare Committee and the Special Court within 24 hours of the report of the matter
8. Identity of the child: No disclosure
9. Police provides information to the child, his parents/guardians or support person about
    a. Developments in the case and
    b. The status of the investigation of the crime (to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation)
    c. Filing of charges against a suspected offender
    d. Schedule of court proceedings that the child is either required to attend or entitled to attend
    e. About applications filed by the accused for example bail application etc.

HOW TO RECORD THE STATEMENT OF THE CHILD

1. As spoken by the child
2. Presence of the parents of the child or any other person in whom the child trust
3. Translator or interpretation if required
4. Special educator if the child has disability
5. Audio video electronic means wherever possible
6. Copy of the final report to the child his parents or representative

HOW TO CONDUCT MEDICAL EXAMINATION

1. No legal magisterial requisition or other documentation as a pre-requisite
2. Special room
3. Medical examination of girl child will be conducted by a female doctor
4. Presence of the parents of the child or any other person in whom the child shall trust or in presence of a woman nominated by the head of the medical institution
5. Wherever necessary, a referral or consultation for mental or psychological health or other counselling
6. Medical practitioner should provide:
    a. Treatment for cuts, bruises, and other injuries including genital injuries, if any
    b. Treatment for exposure to sexually transmitted diseases (STDs) including prophylaxis for identified STDs
    c. Treatment for exposure to Human Immunodeficiency Virus (HIV), including prophylaxis for HIV after necessary consultation with infectious disease experts

Provisions related to Special Court

1. Presume the person who is prosecuted under the act has committed or abetted or attempted to commit the act.
2. Presume the existence of culpable mental state.
3. Special court can take cognizance of any offence upon receipt of a complaint or police report without the accused being committed to it for trial.

4. The Public Prosecutor/counsel for the accused shall communicate the questions during examination, cross-examination or re-examination via Special court.
5. Special Court shall not permit aggressive questioning or character assassination of the child.
6. Create a child friendly atmosphere by allowing a family member, guardian, friend or relative in whom the child has trust to be present in the court.
7. Record the statement of the child through video conferencing or by utilising single visibility mirrors or curtains or any other device.
8. In camera proceedings in presence of the parents of the child or any other person in whom the child has trust.
9. Examined at a place other than the court if the child needs.
10. May permit frequent breaks.
11. Child shall not be called repeatedly to testify in the court.
12. Dignity of the child is maintained at all time during the trial.
13. Not exposed to the accused at the time of recording of evidence.
14. Assistance of a legal counsel of their choice.
15. Immediate rehabilitation of the child in appropriate cases.
16. No person shall report or comment on any child in any form of media which may lower the reputation of the child or infringe the privacy of the child without complete authentic information.

Interim compensation

1. Interim Compensation released to victim within 30 days of order.
2. Evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence. In case of delay, Special Court shall record such reason.
3. Special Court shall complete the trial within a period of one year from the date of taking cognizance of the offence.

General Awareness in handling Child sexual abuse case

Who can report and how to report the case of child sexual abuse?

Any person who has information on the child being abused can report the case.[9]When a person reports a case in good faith, he/she shall not incur any liability of any nature – civil and criminal.[10] However, if the complaint is found to be false with the intent to humiliate, extort, threaten or defame the accused, the person (unless he is a child[11]) will be punished[12]. The Act also prescribes punishment for complaints against the child with the intent to victimise him.[13]It should also be noted that if any person, other than the child, fails to report the offence that he/she has information about, he/she will be punished.[14]

Whom to report?

The offence can be reported to the Special Juvenile Police Unite (SJPU) or the local police within the concern jurisdiction. [15]

Lodging the FIR

1. In cases where the child is the informant, the report should be recorded in a simple language so that the child understands the recorded content.[16]
2. Every report should be in writing.[17]
3. Every report will be ascribed a number.[18]
4. Every report should be read over to the informant.[19]
5. Report should be entered in a book to be kept by the Police Unit.[20]

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[9] Section 19(1) POCSO
[10] Section 19 (6)
[11] Section 22 (2)
[12] With imprisonment for a term which may extend to one year and with fine. [Section 22 (1)]
[13] Section 22 (3)
[14] Section 21 states that if one fails to report the case, he will be punished with imprisonment of either description which may extend to six months or with fine or with both.
[15] Section 19(1)
[16] Section 19(3)
[17] Section 19(2) (a)
[18] Section 19 (2) (a)
[19] Section 19(2)(b)
[20] Section 19(2) (c)

6. The Police can take the help of translators, interpreters and special educators if there arises any need.[21]
7. If the Police feel that the child is in need of care and protection, the police will record the same with reason and produce the child before CWC or hospital within 24 hours of the report.[22]
8. The Police shall inform the CWC and Special Court about the case including the need of the child for care and protection and steps taken for the same.[23]

[21] Section 19 (4)
[22] Section 19(5)
[23] Section 19 (6)

Stakeholder

The following stake holders play a crucial role, when any child comes forward with a report of sexual abuse. With healthy collaboration and compassionate attitude among all the stakeholders, a child can receive justice and healing throughout the process of criminal justice system without any fear of re-traumatization and intimidation.

The Role of police:

When a case of child sexual abuse is reported at the police station. The police must take cognizance of the case and immediately register an FIR under section 154 of CrPC. The investigating office must comply the following rules laid down in the POCSO Act:

Police officer discloses to the complainant his/her:

- Name
- Designation
- Address
- Contact number
- The name of his supervising officer
- Designation of the supervisor
- Contact details of the supervising officer
- Police must provide the copy of the FIR to the complainant. The local police shall produce the child before the concerned Child Welfare Committee ("CWC") within 24 hours of receipt of such report with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of section 19 of the Act and request for a detailed assessment by the CWC.

POSCO Rule 4(12) (vii)-Police (*investigating officer of the case*) provide information to the child, his parents/guardians or support person about the schedule of court proceedings that the child is either required to attend or entitled to attend. Police provides information to the child, his parents/guardians or support person about developments in the case and the status of the

investigation of the crime (to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation.

POSCO Rules (4) (11)-Police provide information to the child, his parents/guardians or support person about applications filed by any party pertaining to the case. *For example bail application filed by the accused should be informed to the child's parents or the support person.*

Note Police:

Statement should be recorded at home or wherever the child is comfortable by a woman police officer not below the rank of a sub inspector and she shouldn't be wearing her uniform at the time of recording the child's statement. With this, the accused person should not be anywhere close when the statement of the child is being recorded. Further, the child shall not be kept at the police station at night at any cost and the media shouldn't report such a case unless otherwise directed by the special courts in the best interest of the child.

The role of Magistrate

If the statement of the child is recorded under section 164 CrPC, then it should be recorded as it is, in the same manner as told/narrated by the child. The magistrate shall provide a copy of the document under section 207 CrPC to both the parents and the child upon final report being filled by section 173 CrPC.

Common provisions to be followed by both, the police and magistrate:

The statement of such a child must be recorded in the presence of their parents or person of confidence i.e. a person such a child trusts and feels comfortable around. Further, an interpreter or translator should be present while recording a child's statement whenever possible. If the child is physically disabled, then there should be a special educator present while recording the statement.

The role of Hospitals/Doctors:

- No hospital shall demand any legal magisterial requisition or other documentation as a pre-requisite for rendering care to the victim
- In case the victim is a girl child, the medical examination shall be conducted by a woman doctor[24]
- Special room in government hospitals shall be set up to conduct medical exam of victim in private
- For child victim, the medical exam shall be conducted
  - In the presence of the child's parent or any other person the child trusts or,
  - Such person is not available, then in the presence of a woman nominated by the hospital.

Medical practitioner protocol[25]:

- Treatment for cuts, bruises, and other injuries including genital injuries, if any
- Treatment for exposure to sexually transmitted diseases (STDs) including prophylaxis for identified STDs
- Treatment for exposure to Human Immunodeficiency Virus (HIV), including prophylaxis for HIV after necessary consultation with infectious disease experts
- Wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made

[24]Section.27(2) POCSO
[25]Guideline and Protocol (Medico-legal care for survival of sexual violence by Ministry of Health and Family Welfare)

Note for Medical examination: Medical examination of the children should be done according to section 164 CrPC and if it is a girl then there should be a female doctor who must conduct such a medical examination in front of the girl's parents or the person she trusts and is comfortable around. If no such people are present during the medical examination then a lady must be present as appointed by the medical institution.

The role of CWC

- CWC may immediately appoint support person after the child is produced by the police or investigating officer.
- CWC may order for immediate rehabilitation if needed.

The role of the Support person: Support person means

- A person assigned by a CWC to render assistance to the child through the process of investigation and trial, or
- Any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act.
- The support person shall maintain the confidentiality of all information pertaining to the child to which he/she has access.[26]
- Keep the child and his parent or guardian or other person in whom the child has trust and confidence, informed as to the proceedings of the case, including available assistance, judicial procedures, and potential outcomes.

'

[26]Rule 8 POCSO

The role of Court/Judges[27]

Special Courts

- [28]To ensure speedy trials of such cases, the state governments in consultations with the Chief Justice of the High Court are supposed to designate one such court in the district courts where such cases which fall under POCSO Act.
- Where a person is prosecuted under the section 3, 5, 7 and 9 and where a victim is below 18 years, the special court shall presume that such person has committed the offence, unless the contrary is proved.[29]
- The Magistrate shall provide the copy of the charge sheet filed by the police under section 173 of CrPC.
- This special court would have a special public prosecutor with at least seven years of experience as an advocate.

Powers/procedures-Special court

- The special court can start action *suo motto* without the accused being committed to an offence for trial on receiving a complaint of fact, either by complainant or police, which would constitute such an offence.
- The law further provides that the public prosecutor must furnish a copy of the list of questions which he seeks to ask from the child while recording the examination-in-chief, cross-examination or re-examination.
- The court ensures frequent breaks for children during the trial process. The special court is supposed to ensure child friendly environment/atmosphere by various means like allowing a family member, a guardian, a friend or a relative who the child is comfortable with.
- To avoid it playing on the child's psyche, the court provides that the child shouldn't be called to the court repeatedly to testify.

[27]Delhi High Court (Guidelines for recording evidence of vulnerable witnesses in criminal matters).
[28]Section 28
[29]Section 29(2)

- Special Court must ensure the dignity of the child by including provisions which express it explicitly that there should be no disclosure of identity of the child unless the court deems otherwise.
- The court can impose a fine/compensation with the punishment.

Other procedures:

- The Act provides that evidence of the child should be recorded within thirty days from the date of taking cognizance by the Special Court.
- The Special Court shall as far as possible complete the trial within one year from the date of cognizance of the offences.
- The Special Court should further make sure that the child does not at any point during the court proceedings/trial come in contact with the accused including the recording of evidence though the accused must hear what the child is saying.
- Therefore, POCSO trials are supposed to be conducted in camera with parents/guardian of the child.

POSCO Rule 7– [30]The Special Court passes an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation under section CrPC S.357A and POCSO S.33(8)

POSCO Rule 7 (5)-Interim Compensation released to victim within 30 days of order.

Section 35(2) Court shall complete trial, as far as possible, within 1 year from the date of framing of charge. The Criminal Law Amendment Act 2013, in Section 309 mentions,-When the inquiry or trial relates to an offence under section 376, section 376A, section 376B, section 376C or section 376D of the IPC, the trial shall be completed within a period of two months from the date of filing of the charge sheet.

[30]Delhi High Court (PIL) No. - 4579 of 2015

The role of Media[31].

The Act prohibits any person from making any report or comments on the child in any form of media without complete and authentic information which may have effect of lowering the reputation or infringing the privacy of the child.[32] It also prohibits publishing any information which will lead to disclosure of the identity of the child.[33]

Any person who works with the Media, Hotel, Lodge, Hospital, Club, Studio, Photographic facility should report the authorities as soon as they come across any material or object which is sexually exploitative of the child through the use of any medium. In case of failure to report the offence, the person will be punished.

The Role of Teachers:

- We must believe his/her story
- We must keep the information confidential at all time
- Do make her/him repeat the story
- Do not ask judgemental question
- Help the child cope in her/his study well
- Help the cope her emotional
- Encourage
- Be aware of your demeanour when you asking any question relating to the incident

Role of Parents:

- Believe the story of the child
- Get immediate medical check up
- Keep the information confidential
- Ensure safety of the child
- Help the child cope the trauma

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[31] Delhi High Court W.P.(C) 787/2012
[32] Section 23 (1)
[33] Section 23 (2). Section 23(3) and (4) mentions the punishment for violating the provision.

Role of shelter home of the care giver in case the child is put in a shelter home for safety:

- Believe the story of the child
- Ensure that the Identity of the child is protected
- Treat the child with respect, value and dignity
- Keep all the information relating to the incident confidential
- Ensure to provide psychological care and physical care
- Intentional care plan to help the child cope the trauma for healing

Notification of the Act

रजिस्ट्री सं० डी० एल०-33004/99

REGD. NO. D. L.-33004/99

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The Gazette of India

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महिला और बाल विकास मंत्रालय

अधिसूचना

नई दिल्ली, 9 नवम्बर, 2012

का.आ. 2705(अ).—केन्द्रीय सरकार, लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 (2012 का 32) की धारा 1 की उप-धारा (3) द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए, 14 नवम्बर, 2012 को उस तारीख के रूप में नियत करती है जिसको उक्त अधिनियम के उपबंध प्रवृत्त होंगे ।

[सं. 22-14/2012-सीडब्ल्यू-I]

डॉ. विवेक जोशी, संयुक्त सचिव

MINISTRY OF WOMEN AND CHILD DEVELOPMENT

NOTIFICATION

New Delhi, the 9th November, 2012

S.O. 2705(E).—In exercise of the powers conferred by sub-section (3) of Section (1) of the Protection of Children from Sexual Offences Act, 2012 (No. 32 of 2012), the Central Government hereby appoints the 14th November, 2012, as the date on which the provisions of the said Act shall come into force.

[No. 22-14/2012-CW-I]

Dr. VIVEK JOSHI, Jt. Secy.

4277 GI/2012

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Guideline for vulnerable witness (Delhi High Court)

Guidelines for recording of evidence of vulnerable witnesses in criminal matters[34]

Preamble

The purpose of this protocol is to present guidelines and mandatory recommendations, to improve the response of the justice dispensation system to vulnerable witnesses. This protocol prescribes guidelines while recording depositions of vulnerable witnesses in order to enable them to give their best evidence in criminal proceedings. Each witness is unique and is to be handled accordingly. Some of the most challenging cases handled by judges during the course of their careers are those involving vulnerable witnesses as, what happened to or was witnessed by them, impact significantly on their quality of deposition and potentially outcome of a trial. Vulnerable witnesses, find the criminal justice system intimidating, particularly the courtroom experience. Under these circumstances, a vulnerable witness may be a poor witness, providing weak testimony and contributing less information than should have been elicited. Further, the lengthy process of navigating the formal and adversarial criminal justice system can affect the vulnerable witnesses psychological development and disable this sensitivity in significant and long-lasting ways. To respond effectively to the needs of vulnerable witnesses the criminal justice system needs to respond proactively with sensitivity in an enabling and age appropriate manner, so that the trial process is less traumatic for them. Judges have to strike a balance between protecting the accused's right to a fair trial, and ensuring that witnesses who give evidence in the case are enabled to do so, to the best of their ability.

> **(*The UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime published by the UN Office on Drugs and Crime, Vienna, UN, New York 2009 has provided valuable insight and has been a major reference in formulating these guidelines and to enable compliance***

[34] Delhi High Court Guideline on Vulnerable Witness

OBJECTIVES OF THESE GUIDELINES

1. To elicit and secure complete, accurate and reliable evidence from vulnerable witnesses;

2. To minimize harm or secondary victimization of vulnerable witnesses in anticipation and as a result of participation in the criminal justice system;

3. To ensure that the accused's right to a fair trial is maintained.

Applicability

Unless otherwise provided, these guidelines shall govern the examination of vulnerable witnesses during criminal trial who are victims or witnesses to crime.

1. Short Title, extent and commencement: These guidelines shall be called, —Guidelines for recording evidence of vulnerable witnesses in criminal matters||. They shall apply to every criminal court in Delhi. Their application shall commence from the date notified by the Delhi High Court.

2. Construction of the guidelines. These guidelines shall be liberally construed to uphold the interests of vulnerable witnesses and to promote their maximum accommodation without prejudice to the right of the accused to a fair trial.

3. Definitions –

a. **Vulnerable Witness –** is a child who has not completed 18 years of age.

b. **Support Person** – Means and includes guardian *ad litem,* legal aid lawyer, facilitators, interpreters, translators and any other person appointed by court or any other person appointed by the court to provide support, accompany and assist the vulnerable witness to testify or attend judicial proceedings.

c. **Best Interests of the Child –** Means circumstances and conditions most congenial to security, protection of the child and most encouraging to his physical, psychological and emotional development and shall also include available alternatives for safeguarding the growth and development of the child.

d. Development Level – Development level refers to the specific growth phase in which most individual are expected to behave and function in relation to the advancement of their physical, socio economical, cognitive and moral abilities.

e. In-Camera Proceedings – means criminal matters or part thereof wherein the public and press are not allowed to participate, for good reason as adjudged by the court.

f. Concealment of Identity of witness – Means and includes any condition prohibiting publication of the name, address and other particulars which may lead to the identification of the witness.

g. Comfort Items – Comfort items mean any article which shall have a calming effect on a vulnerable witness at the time of deposition and may include stuffed toy, blanket or book.

h. Competence of a *vulnerable* Witness – Every vulnerable witness shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions due to tender years, disease, either of body or mind, or any other cause of the same kind.
Explanation: *A* mentally ill person may also be held competent unless he is prevented by his lunacy to understand questions.

i. Court House Tour – A pre-trial tour of court room to familiarize a vulnerable witness with the environment and the basic process of adjudication and roles of each court official.

j. *Descriptive* Aids – A human figure model, anatomically correct dolls or a picture or anatomical diagrams or any other aids deemed appropriate to help a vulnerable witness to explain an act or a fact.

k. Live Link – Live link' means and *includes* a live television link, audio-video electronic means or other arrangement whereby a witness, while absent from the courtroom6 is nevertheless present in the court room by remote communication using technology to give evidence and be cross-examined.

l. Special Measures – mean and include the use of any mode, method and instrument, etc, considered necessary for providing assistance in recording deposition of vulnerable witnesses.

m. **Testimonial Aids** – means and includes screens; live links, image and/or voice altering devices; or any other technical devices.

n. **Secondary Victimization** – means victimization that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.

o. **Revictimization –** means a situation in which a person suffers more than one criminal incident over a period of time.

p. **Waiting Room –** A safe place for vulnerable witnesses where they can wait. It shall have toys, books, TV, etc. which can help them lower their anxiety.

4. **Special Measures Direction -** The court shall direct as to which, special measure will be used to assist a particular eligible witness in providing the best evidence. Directions may be discharged or varied during the proceedings, but normally continue in effect until the proceedings are concluded, thus enabling the witness to know what assistance to expect.

5. **Applicability of guidelines to all vulnerable witnesses.** For the avoidance of doubt, it is made clear that these guidelines are to apply to any vulnerable witness including a child party, regardless of which party is seeking to examine the witness.

6. **No adverse inference to be drawn from special measures.** The fact that a witness has had the benefit of a special measure to assist them in deposition, shall not be regarded in any way whatsoever as being adverse to the position of the other side and this should be made clear by the judge at the time of passing order in terms of these guidelines to the parties when the vulnerable witness is examined and when the final judgment is pronounced.

7. **Identification of Stress causing factors of adversarial Criminal Justice System** Factors which cause stress on child witness, rendering them further vulnerable witnesses, and impeding complete disclosure by them shall, amongst others, include: (i) Multiple depositions and not using developmentally appropriate language. (ii) Delays and continuances. (iii) Testifying more than once. (iv) Prolonged/protracted court proceedings. (v) Lack of communication between professionals including police, doctors, lawyers, prosecutors, investigators, psychologists, etc. (vi) Fear of public exposure. (vii) Lack of understanding of

complex legal procedures.

(viii) Face-to-face contact with the accused. (ix) Practices are insensitive to developmental needs. (x) Inappropriate cross-examination. (xi) Lack of adequate support and victims services. (xii) Sequestration of witnesses who may be supportive to the child. (xiii) Placement that exposes the child to intimidation, pressure, or continued abuse. (xiv) Inadequate preparation for fearless and robust testifying. (xv) Worry about not being believed especially when there is no evidence other than the testimony of the vulnerable witness. (xvi) Formality of court proceedings and surroundings including formal dress of members of the judiciary and legal personnel.

8. Competency of vulnerable witness:- (i) Every vulnerable witness shall be presumed to be qualified as a witness unless prevented by the following- (a) age (b) physical or mental disability leading to recording a finding of doubt regarding the ability of such witness to perceive, remember, communicate, distinguish, truth from falsehood or appreciate the duty to tell the truth, and/or to express the same.

Explanation: The court shall conduct a competency examination before recording the testimony of such witness, or on an application of either prosecution or defence or *suo motu.*

9. Persons allowed at competence assessment — Only the following are allowed to attend the competence assessment: (i) the judge and such court personnel deemed necessary and specified by order of the judge concerned; (ii) the counsel for the parties; (iii) the guardian *ad litem*; (iv) one or more support persons for the child; and (v) the accused, unless the court determines that competence requires to be and can be fully evaluated in his absence. (vi) any other person, who in the opinion of the court can assist in the competence assessment.

10. Conduct of competence assessment. — The assessment of a child as to his competence as a witness shall be conducted only by the judge.

11. Developmentally appropriate questions. — The questions asked to assess the competency of the child shall be appropriate to the age and developmental level of the child; shall not be related to the issues at trial; and shall focus on the ability of the child to remember, communicate, distinguish between truth and falsehood and appreciate the duty to testify truthfully.

12. Continuing duty to assess competence – The court has the duty of continuously assessing the competence of the vulnerable witnesses throughout their testimony and to pass appropriate orders, as and when deemed necessary.

13. Pre-trial visit of Witnesses to the Court - Vulnerable witness shall be allowed a pre trial court visit along with the support person to enable such witnesses to familiarise themselves with the layout of the court, and may include visit to and explanation of the following: (i) the location of the accused in the dock; (ii) court officials (what their roles are and where they sit); (iii) who else might be in the court, for example those in the public gallery; (iv) the location of the witness box; (v) a run-through of basic court procedure; (vi) the facilities available in the court; (vii) discussion of any particular fears or concerns with the intermediaries, prosecutors and the judge to dispel the fear, trauma and anxiety in connection with the prospective deposition at court. (viii) demonstration of any special measures applied for and/or granted, for example practising on the live link and explaining who will be able to see them in the 8 courtroom, and showing the use of screens (where it is practical and convenient to do so).

14. Meeting the judge – The Judge may meet a vulnerable witness *suo motu* on reasons to be recorded or on an application of either party in the presence of the prosecution and defence lawyer or in their absence before they give evidence, for explaining the court process in order to help them in understanding the procedure and giving their best evidence.

15. Appointment of Guardian *ad litem* — The court may appoint any person as guardian *ad litem* as per law to a witness who is a victim of, or a witness to a crime having regard to his best interests after considering the background of the guardian *ad litem* and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian *ad litem* may be a member of bar / practicing advocate, except a person who is a witness in any proceeding involving the child.

16. Duties of guardian *ad litem*: It shall be the duty of the guardian ad litem so appointed by court to: (i) attend all depositions, hearings, and trial proceedings in which a vulnerable witness participates. (ii) make recommendations to the court concerning the welfare of the vulnerable witness keeping in view the needs of the child and observing the impact of the proceedings on

the child. (iii) explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which the child is involved; (iv) assist the vulnerable witness and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved; (v) remain with the vulnerable witness while the vulnerable witness waits to testify;

17. Legal assistance A vulnerable witness may be provided with legal assistance by the court, if the court considers the assignment of a lawyer to be in the best interests of the child, throughout the justice process in the following instances: (a) at the request of the support person, if one has been designated; (b) pursuant to an order of the court on its own motion.

18. Court to allow presence of support persons (a) A court shall allow *suo motu* or on request, verbal or written, to child testifying at a judicial proceeding to have the presence of one person of his own choice to provide him support who shall within the view and if the need arise may accompany the child to the witness stand, provided that such support person shall not completely obscure the child from the view of the opposing party or the judge. (b) The court may allow the support person to hold the hand of the vulnerable witness or take other appropriate steps to provide emotional support to the vulnerable witness in the course of the proceedings. (c) The court shall instruct the support persons not to prompt, sway, or influence the vulnerable witness during his testimony. The support person shall also be directed that he/she shall in no circumstances discuss the evidence to be given by the vulnerable witness. (d) Where no other suitable person is available only in very rare cases should another witness in the case be appointed as a support person. The court shall ordinarily appoint a neutral person, other than a parent, as a support person. It is only in exceptional circumstances keeping the condition of the vulnerable witness in mind, that the court should appoint a parent as a support person.

19. The testimony of support person to be recorded prior: A testimony of such support person if he also happens to be a witness shall be recorded, ahead of the testimony of the child.

20. Court to appoint facilitator (i) To assist the vulnerable witnesses in effectively communicating at various stages of trial and or to coordinate with the other stake holders such as police, medical officer, 10 prosecutors, psychologists, defence counsels and courts, the court shall allow use of facilitators. (ii) The court may, suo *motu* or upon an application presented by either party

or a support person of vulnerable witnesses appoint a facilitator if it determines that such witness is finding it difficult to understand or respond to questions asked. Explanation: (i) The facilitator may be *an interpreter, a translator*, child psychologist, psychiatrist, social worker, guidance counselor, teacher, parent, or relative of such witness who shall be under oath to pose questions according to meaning intended by the counsel. (ii) If the court appoints a facilitator, the respective counsels for the parties shall pose questions to the vulnerable witness only through the facilitator, either in the words used by counsel or, if the vulnerable witness is not likely to understand the same, in words or by such mode as is comprehensible to the vulnerable witness and which convey the meaning intended by counsel.

21. Right to be informed A vulnerable witness, his or her parents or guardian, his or her lawyer, the support person, if designated, or other appropriate person designated to provide assistance shall, from their first contact with the court process and throughout that process, be promptly informed by the Court about the stage of the process and, to the extent feasible and appropriate, about the following: (a) procedures of the criminal justice process including the role of vulnerable witnesses, the importance, timing and manner of testimony, and the ways in which proceedings will be conducted during the trial; (b) existing support mechanisms for a vulnerable witness when participating in proceedings, including making available appropriate person designated to provide assistance; (c) specific time and places of hearings and other relevant events; (d) availability of protective measures; (e) relevant rights of child victims and witnesses pursuant to applicable laws, the Convention on the Rights of the Child and other international legal instruments, including the Guidelines and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in its resolution 40/34 of 29 November 1985; (f) the progress and disposition of the specific case, including the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the 11 outcome of the case.

22. Language, interpreter and other special assistance measures (i) the court shall ensure that proceedings relevant to the testimony of a child victim or witness are conducted in language that is simple and comprehensible to a child. (ii) if a child needs the assistance of interpretation into a language or mode that the child understands, an interpreter shall be provided free of charge. (iii)

if, in view of the child's age, level of maturity or special individual needs, which may include but are not limited to disabilities if any, ethnicity, poverty or risk of revictimization, the child requires special assistance measures in order to testify or participate in the justice process, such measures shall be provided free of charge.

23. Waiting area for vulnerable witness The courts shall ensure that a waiting area for vulnerable witnesses with the support person, lawyer of the witness facilitation, if any, is separate from waiting areas used by other persons. The waiting area for vulnerable witnesses should be furnished so as to make a vulnerable witness comfortable.

24. Duty to provide comfortable environment It shall be the duty of the court to ensure comfortable environment for the vulnerable witness by issuing directions and also by supervising, the location, movement and deportment of all persons in the courtroom including the parties, their counsel, child witnesses, support persons, guardian *ad litem*, facilitator, and court personnel. The child may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the child testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the child even by a video link, during the testimony of the child. The witness chair or other place from which the child testifies may also be rearranged to allow the child to see the opposing party and his counsel, if he chooses to look at them, without turning his body or leaving the witness stand. While deciding to make available such environment, the judge may be dispensed with from wearing his judicial robes.

25. Testimony during appropriate hours The court may order that the testimony of the vulnerable witness should be taken during a time of day when the vulnerable witness is well-rested.

26. Recess during testimony The vulnerable witness may be allowed reasonable periods of relief while undergoing depositions as often as necessary depending on his developmental need.

27. Measures to protect the privacy and well-being of child victims and witnesses. (1) At the request of a child victim or witness, his or her parents or guardian, his or her lawyer, the support person, other appropriate person designated to provide assistance, or the court on its own motion, taking into account the best interests of the child, may order one or

more of the following measures to protect the privacy and physical and mental well-being of the vulnerable witness child and to prevent undue distress and secondary victimization: (a) expunging from the public record any names, addresses, workplaces, professions or any other information that could be used to identify the child; (b) forbidding the defence lawyer and persons present in court room from revealing the identity of the child or disclosing any material or information that would tend to identify the child; (c) ordering the non-disclosure of any records that identify the child, until such time as the court may find appropriate; (d) assigning a pseudonym or a number to a child, in which case the full name and date of birth of the child shall be revealed to the accused within a reasonable period for the preparation of his or her defence; (e) efforts to conceal the features or physical description of the child giving testimony or to prevent distress or harm to the child, including testifying: (i) behind screen; (ii) using image- or voice-altering devices; (iii) through examination in another place, transmitted simultaneously to the courtroom by means of video link; 13 (iv) through a qualified and suitable intermediary, such as, but not limited to, an interpreter for children with hearing, sight, speech or other disabilities; (f) holding closed sessions; (g) if the child refuses to give testimony in the presence of the accused or if circumstances show that the child may be inhibited from speaking the truth in that person‘s presence, the court shall give orders to temporarily remove the accused from the courtroom to an adjacent room with a video link or a one way mirror visibility into the court room. In such cases, the defence lawyer shall remain in the courtroom and question the child, and the accused‘s right of confrontation shall thus be guaranteed; (h) taking any other measure that the court may deem necessary, including, where applicable, anonymity, taking into account the best interests of the child and the rights of the accused. (2) Any information including name, parentage, age, address, etc. revealed by the child victim or witness which enables identification of the person of the child, shall be kept in a sealed cover on the record and shall not be made available for inspection to any party or person. Certified copies thereof shall also not be issued. The reference to the child victim or witness shall be only by the pseudonym assigned in the case.

28. Directions for Criminal Court Judges12 - (i) Vulnerable witnesses shall receive high priority and shall be handled as expeditiously as possible, minimizing unnecessary delays and continuances. (Whenever necessary and possible, the court schedule will be altered to ensure that the

testimony of the child victim or witness is recorded on sequential days, without delays.) (ii) judges and court administrators should ensure that the developmental needs of vulnerable witnesses are recognized and accommodated in the arrangement of the courtroom. (iii) separate and safe waiting areas and passage thereto should be provided for vulnerable witnesses. (iv) judges should ensure that the developmental stages and needs of vulnerable witnesses are identified recognized and addressed throughout the court process by requiring usage of appropriate language, by timing hearings and testimony to meet the attention span and physical needs of such vulnerable witnesses by allowing the use of testimonial aids as well as interpreters, translators, when necessary. (v) judges should be flexible in allowing the vulnerable witnesses to have a support person present while testifying and should guard against unnecessary sequestration of support persons. (vi) hearings involving a vulnerable witness may be scheduled on days/time when the witness is not in inconvenienced or is not disruptive to routine/ regular schedule of child.

29. Allowing proceedings to be conducted in camera (i) When a vulnerable witness testifies, the court may order the exclusion from the courtroom of all persons, who do not have a direct interest in the case including members of the press. Such an order may be made to protect the right to privacy of the vulnerable witness or if the court determines on the record that requiring the vulnerable witness to testify in open court would cause psychological harm to him, hinder the ascertainment of truth, or result in his inability to effectively communicate due to embarrassment, fear, or timidity. (ii) In making its order, the court shall consider the developmental level of the vulnerable witness, the nature of the crime, the nature of his testimony regarding the crime, his relationship to the accused and to persons attending the trial, his desires, and the interests of his parents or legal guardian. (iii) The court may, *motu proprio*, exclude the public from the courtroom if the evidence to be produced during trial is of such character as to be distressing, personal, offensive to decency or public morals.

30. Live-link television testimony in criminal cases where the vulnerable witness is involved - (a) The prosecutor, counsel or the guardian *ad litem* may apply for an order that the testimony of the child be taken in a room outside the courtroom and be televised 15 to the courtroom by live-link television13. (b) In order to take a decision of usage of a live-link the

judge may question the child in chambers, or in some comfortable place other than the courtroom, in the presence of the support person, guardian *ad litem*, prosecutor, and counsel for the parties. The questions of the judge shall not be related to the issues at trial but to the feelings of the child about testifying in the courtroom. (c) The court on its own motion, if deemed appropriate, may pass orders in terms of (a) or any other suitable directions for recording the evidence of a vulnerable witness.

31. **Provision of screens, one-way mirrors, and other devices to vulnerable witness from accused.** The court may *suo motu* or on an application made even by the prosecutor or the guardian *ad litem* may order that the chair of the vulnerable witness or that a screen or other device be placed in the courtroom in such a manner that the child cannot see the accused while testifying. The court shall issue an order stating the reasons and describing the approved courtroom arrangement.

32. **Factors to be considered while considering the application under Guidelines 31 & 32.** The court may order that the testimony of the vulnerable witness be taken by livelink television if there is a substantial likelihood that the vulnerable witness would not provide a full and candid account of the evidence if required to testify in the presence of the accused, his counsel or the prosecutor as the case may be. The order granting or denying the use of live-link television shall state the reasons therefore and shall consider the following: (i) the age and level of development of the vulnerable witness; (ii) his physical and mental health, including any mental or physical disability; (iii) any physical, emotional, or psychological harm related to the case on hand or trauma experienced by the child; (iv) the nature of the alleged offence and circumstances of its commission; (v) any threats against the vulnerable witness;
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Proviso to Section 275 of CrPC 16 (vi) his relationship with the accused or adverse party; (vii) his reaction to any prior encounters with the accused in court or elsewhere; (viii) his reaction prior to trial when the topic of testifying was discussed with him by parents or professionals; (ix) specific symptoms of stress exhibited by the vulnerable witness in the days prior to testifying; (x) testimony of expert or lay witnesses; (xi) the custodial situation of the child and the attitude of

the members of his family regarding the events about which he will testify; and (xii) other relevant factors, such as court atmosphere and formalities of court procedure.

33. Mode of questioning To facilitate the ascertainment of the truth the court shall exercise control over the questioning of vulnerable witness. (i) ensure that questions are stated in a form appropriate to the developmental level of the vulnerable witness; (ii) protect vulnerable witness from harassment or undue embarrassment; and (iii) avoid waste of time by declining questions which the court considers unacceptable due to their being improper, unfair, misleading, needless, repetitive or expressed in language that is too complicated for the witness to understand. (iv) the court may allow the child witness to testify in a narrative form. (v) questions shall be put to the witness only through the court.

34. Rules of deposition to be explained to the Witnesses The court shall explain to a vulnerable witness to listen carefully to the questions and to tell the whole truth, by speaking loudly and not to respond by shaking head in yes or no and also to specifically state that the witness does not remember where he has forgotten something and to clearly ask when the question is not understood.

A gesture by a child to explain what had happened shall be appropriately translated and recorded in the child‘s deposition.

35. Objections to questions Objections to questions should be couched in a manner so as not to mislead, confuse, frighten a vulnerable witness.

36. Allow questions in simple language The court to allow the questions to be put in simple language avoiding slang, esoteric jargon, proverbs, metaphors and acronyms. The court must not allow the question carrying words capable of two-three meanings, questions having use of both past and present in one sentence, or multiple questions which is likely to confuse a witness.

Where the witness seems confused instead of repetition of the same question, the court should direct for its re-phrasing.

Explanation: (i) The reaction of vulnerable witness shall be treated as sufficient clue that question was not clear so it shall be rephrased and put to the witness in a different way15. (ii) Given the witness developmental level, excessively long questions shall be required to be rephrased and

thereafter put to witness. (iii) Questions framed as compound or complex sentence structure; or two part questions or those containing double negatives shall be rephrased and thereafter put to witness.

37. Testimonial aids. The court shall permit a child to use testimonial aids as defined in the definition clause.

38. Protection of privacy and safety (a) Confidentiality of records — Any record regarding a vulnerable witness shall be confidential and kept under seal. Except upon written request and order of the court, the record shall only be made available to the following: (i) Members of the court staff for administrative use; (ii) The Public Prosecutor for inspection; (iii) Defence counsel for inspection; (iv) The guardian *ad litem* for inspection; (v) Other persons as determined by the court. (b) Protective order.— The depositions of the vulnerable witness recorded by video link shall be video recorded except under reasoned order requiring the special measures by the judge. However where any videotape or audiotape of a vulnerable witness is made, it shall be under a protective order that provides as follows: (i) A transcript of the testimony of the vulnerable witness shall be prepared and maintained on record of the case. Copies of such transcript shall be furnished to the parties of the case. (ii) Tapes may be viewed only by parties, their counsel, their expert witness, and the guardian *ad litem*. (iii) No person shall be granted access to the tape, or any part thereof unless he signs a written affirmation that he has received and read a copy of the protective order; that he submits to the jurisdiction of the court with respect to the protective order; and that in case of violation thereof, he will be subject to the contempt power of the court. (iv) Each of the tapes, if made available to the parties or their counsel, shall bear the following cautionary notice:
—This object or document and the contents thereof are subject to a protective order issued by the court in (case title), (case number). They shall not be examined, inspected, read, viewed, or copied by any person, or disclosed to any person, except as provided in the protective order. No additional copies of the tape or any of its portion shall be made, given, sold, or shown to any person without prior court order. Any person violating such protective order is subject to the contempt power of the court and other penalties prescribed by
law.|| (v) No tape shall be given, loaned, sold, or shown to any person except as ordered by the

court. 19 (vi) This protective order shall remain in full force and effect until further order of the court. (c) Personal details during evidence likely to cause threat to physical safety of vulnerable witness to be excluded — A vulnerable witness has a right at any court proceeding not to testify regarding personal identifying information, including his name, address, telephone number, school, and other information that could endanger his physical safety or his family. The court may, however, require the vulnerable witness to testify regarding personal identifying information in the interest of justice. (d) Destruction of videotapes and audiotapes — Any videotape or audiotape of a child produced under the provisions of these guidelines or otherwise made part of the court record shall be destroyed as per rules formed by the Delhi High Court.

39. Protective measures At any stage in the justice process where the safety of a child victim or witness is deemed to be at risk, the court shall arrange to have protective measures put in place for the child. Those measures may include the following: (a) avoiding direct or indirect contact between a child victim or witness and the accused at any point in the justice process; (b) restraint orders; (c) a pre-trial detention order for the accused or with restraint or —no contact|| bail conditions which may be continued during trial; (d) protection for a child victim or witness by the police or other relevant agencies and safeguarding the whereabouts of the child from disclosure; (e) any other protective measures that may be deemed appropriate.

Guideline for Medico legal by Ministry of Health and Family Welfare

[35]The Criminal Law Amendment Act 2013, in Section 357C CrPC says that both private and public health professionals are obligated to provide treatment. Denial of treatment of rape survivors is punishable under Section 166 B IPC with imprisonment for a term which may extend to one year or with fine or with both. Health professionals need to respond comprehensively to the needs of survivors. The components of a comprehensive response include:

• Providing necessary medical support to the survivor of sexual violence.

• Establishing a uniform method of examination and evidence collection by following the protocols. [in the Sexual Assault Forensic Evidence (SAFE) kit] [The contents of the kit are listed under Operational Issues (Page No.20)]

• Informed consent for examination, evidence collection and informing the police.

• First contact psychological support and validation.

• Maintaining a clear and fool-proof chain of custody of medical evidence collected. Referring to appropriate agencies for further assistance (eg. Legal support services, shelter services, etc).

It is important to establish a rapport with the survivor. The following guidelines are to help establish rapport:

• Never say or do anything to suggest disbelief regarding the incident.

• Do not pass judgmental remarks or comments that might appear unsympathetic.

• Appreciate the survivor's strength in coming to the hospital as it can serve to build a bond of trust.

Convey important messages such as: the survivor is not responsible for precipitating the act of rape by any of her actions or inactions.

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[35] Guideline and Protocol by Ministry of Health and Family Welfare (extracted from page 23 -24)

• Explain to the survivor that this is a crime/violence and not an act of lust or for sexual pleasure.

• Emphasize that this is not a loss of honour, modesty or chastity but a violation of his/her rights and it is the perpetrator who should be ashamed.

• Take help of a counsellor, if required.

Facilitating procedures:

• The health worker should explain to the survivor in simple and understandable language the rationale for various procedures and details of how they will be performed.

• Specific steps when dealing with a survivor from marginalized groups such as children, persons with disability, LGBTI persons, sex workers or persons from minority 9 community, may be required as recommended in Chapter 3.

• Ensure confidentiality and explain to the survivor that she/he must reveal the entire history to health professional without fear. The survivor may be persuaded not to hide anything

• The fact that genital examination may be uncomfortable but is necessary for legal purposes should be explained to the survivor. The survivor should be informed about the need to carry out additional procedures such as x-rays, etc which may require him/her to visit to others departments. While performing the examination, the purpose of forensic medical examination is to form an opinion on the following:

• Whether a sexual act has been attempted or completed. Sexual acts include genital, anal or oral penetration by the penis, fingers or other objects as well as any form of non-consensual sexual touching. A sexual act may not only be penetration by the penis but also slightest penetration of the vulva by the penis, such as minimal passage of the glands between the labia with or without emission of semen or rupture of the hymen.

• Whether such a sexual act is recent, and whether any harm has been caused to the survivor's body. This could include injuries inflicted on the survivor by the accused and by the survivor on the accused. However, the absence of signs of struggle does not imply consent.

• The age of the survivor needs to be verified in the case of adolescent girls/boys. Whether alcohol or drugs have been administered to the survivor needs to be ascertained.

Guideline for media

As established in *A. K. Asthana vs Union of India and Anr.* by the Delhi High Court,

Media coverage on matters relating to children may have long term consequences on their overall development (physical, mental, psychological, emotional, moral, social, economic etc.), life and dignity and lack of care by Media in this regard may entail real risk of children facing harm, stigma, disqualification, retribution etc. The privacy, dignity, physical and emotional development of children is of the utmost importance, which are to be preserved and protected at all times, while reporting/broadcasting/publication of news/programs/ documentaries etc. on and for children.

The guidelines are in the backdrop of the existing legal framework, as detailed in SCHEDULE hereto, to secure and protect the rights of children and to set-out the minimum parameters of responsibility to be borne by print and electronic media (hereinafter referred to as Media) in relation to reporting/broadcasting/ publication of news/programs/documentaries etc. on and for children.

1. Meaning of terms used:

1.1 Child or children shall mean a person(s) who has/have not completed 18 years of age.

1.2 Media shall include, but not be limited to, any newspaper, magazine, news-sheet or electronic media.

2. PRINCIPLES:

2.1 Involvement of children in news/programs/documentaries etc. must evidently be editorially justified including from a child rights perspective.

2.2 Media shall ensure that child victims of rape, other sexual offences, trafficking, drug/substance abuse, elopement, organized crimes, children used in armed conflicts, children in conflict with law and child witnesses etc. are automatically guaranteed anonymity for life.

2.3 Media must ensure that due consideration is given to a child s right to privacy and to prevent the child from being exposed to anxiety, distress, trauma, social stigma, risk to life and safety and further suffering in relation to reporting/broadcasting/publication of news/programs/ documentaries etc. on and for children.

2.4 Media shall ensure that a child s identity is not revealed in any manner, including but not limited to, disclosure of personal information, photograph, school/institution/locality and information of the family including their residential/official address.

2.5 Media shall not sensationalize issues or stories, especially those relating to children, and should be conscious of the pernicious consequences of disclosing/highlighting information in a sensational form and the harm it may cause to children.

2.6 INTERVIEWING A CHILD BY THE MEDIA:

This shall be governed by the following principles:

a) That the interview is in the child s best interest.

b) That the interview does not aggravate the child s situation further.

c) That the manner and content of the interview does not affect/interfere with the child's right to privacy.

d) That if the interview is in the child s best interest, the same shall be done under supervision and consent of the child s parent(s) or legal guardian, or in the alternative, the competent authorities for the child.

e) That while interviewing a child, his/her consent may be obtained, depending upon his/her age and maturity.

f) Frequent interviewing of a child must be avoided.

g) The child's refusal to be interviewed must be honoured.

h) Before interviewing the child he/she must be duly informed about the purpose and manner of the interview.

i) The child and/or his/her parents/guardian or any person having control over him/her shall not be coerced or enticed in any manner including financial or other inducement to secure consent for the interview.

2.7 Media must verify the credentials and authority of individuals/organizations whose consent is sought on behalf of the child.

2.8 Media shall not give any financial or other inducement to the child or parent / guardian or others in relation to reporting / broadcasting / publication of news / programs / documentaries etc. on and for children.

2.9 Media must balance its responsibility to protect children from unsuitable content with the right to freedom of expression and the right to know.

2.10 To protect the identity of the child media shall ensure that any visual showing the face of the child must be completely morphed in cases where privacy /anonymity is required as illustrated in Principle 2.2. above.

2.11 Media shall orient/sensitize its editorial personnels, including editors/ editorial team / reporters / correspondents / producers / photographers etc. about laws, rules, regulations and guidelines related to reporting/broadcasting/publication of news/programs/documentaries etc. on and for children.

2.12 The media shall proactively promote the children s right to information and freedom of expression.

2.13 PUBLICITY:

The Department of Information and Public Relations of all State Governments and U.T. Administrations, the Directorate of Field Publicity, Directorate of Advertising and Visual Publicity (DAVP) of Ministry of Information and Broadcasting, Prasar Bharati (AIR and DD), Self Regulatory Bodies etc. shall give due publicity at appropriate intervals to the laws, rules, regulations and guidelines (including the Guidelines) related to reporting/broadcasting/publication of news/programs/documentaries etc. on and for children.

2.14 MONITORING:

The compliance with the applicable laws, rules, regulations and Guidelines (including these ones) related to reporting/broadcasting/publication of news/programs/ documentaries etc. on and for children shall be monitored by the following:

(a) the self-regulatory bodies.

(b) the regulatory mechanisms of Ministry of Information and Broadcasting, such as, Electronic Media Monitoring Center (EMMC) and Inter-Ministerial Committee (IMC).

(c) Press Council of India through their respective procedures.

2.15 STATUS REPORT:

NCPCR / SCPCRs shall file a report in this Court on yearly basis regarding the compliance level of the applicable laws, rules, regulations and Guidelines (including these ones) by all concerned.

The foregoing are only broad Guidelines and are not meant to be exhaustive.

CASE LAW

On Sole Testimony of the victim

1. Vishnu v State of Maharashtra (2006) 1 SCC 283: The offence occurred when victim taken to a hotel by the accused under the pretext of it being a hospital– only witness was the victim herself – The court held that "It is now a well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence."

2. State of TN v Ravi alias Nehru (2006) 10 SCC 534: Both the case assert the importance of a victim's testimony, and affirm that conviction can be made on the sole basis of it; additionally holding that there must be compelling reasons which necessitate looking for corroboration of her statement.

Similar position held in: *State of Punjab vs Gurmit Singh and Others (1996) 2 SCC 384* and

Other cases supporting this position Motilal vs State of Madhya Pradesh (2008) 11 SCC 20 (where the offence occurred when the victim and the accused were alone in a hut which was in the middle of the field.)

On applicability of Rule 12 of JJ Rules, for determination of age of victim

3. Jarnail Singh vs State of Haryana (2013) 7 SCC 263: Court while dealing with the question of the age of the victim of rape, opined that the statutory provision of Rule 12 should be the basis for determining age, even for a child who is a victim of a crime. *A*lthough the court then went on to determine the age of the victim only as per Rule 12(3), the benefits available to a juvenile under Rule 12 should be available to a Minor Victim as per this judgement.

Specifically, Rule 12(3) of JJ rules was applied by the Supreme Court to determine the age of the Victim in:

Mahadeo vs State of Maharashtra (2014) 4 SCC(Cri) 306 & State of Madhya Pradesh vs Anoop Singh

On discrepancies in victim testimony

4. State of UP vs Krishna Master (2010) 12 SCC 324: Criteria for appreciation of oral evidence – approach must be whether the evidence by the witness as a whole appears to have a ring of truth. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach of taking sentences torn out of context would not ordinarily permit rejection of evidence as a whole.

Similar position held in State of Rajasthan vs Smt. Kalki and Anr. (AIR 1981 SC 1390): Discrepancies in witness testimony regarding the details in which the crime was committed held normal and immaterial.

On recalling of Victim as witnesses again and again

5. AG vs Shiv Kumar Yadav and Ors. (2016) 2 SCC 402: The judgement talks about re calling of witnesses, especially the victim in a rape case, and lays down detailed guidelines of when it should be allowed. I have highlighted relevant parts, but the judgement as a whole is important, with the various cases referred in it. Excerpt:

"Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination."

On general guidelines and treatment of victims

6. Delhi Domestic Working Women's Forum (1995) 1 SCC 14: Judgement generally talks about the treatment of victims and lays down guideline for their treatment. One important paragraph, which alone refers to expedient trial, refers to importance of Article 14 and 21 when it comes to speedy trials. Although this observation is general, the case concerns the crime of rape.

On conviction even when lack of injuries on the victim

7. Dastagir Sab vs State of Karnataka (2004) 2 SCC 106: The convicts contended that the lack of injuries on the victim was a basis to hold their conviction as wrong; court observed that the surface on which the offence occurred though made up of rocks, was covered by *Jower stocks* (crops) which could provide enough cushion to avoid injuries. It also held:

"Injury on the body of the person of the victim is not a sine qua non to prove a charge of rape. Absence of injury having regard to overwhelming ocular evidence, cannot, thus be the sole criterion for coming to conclusion that no such offence had taken place." *Para 26*

8. Rakesh vs Govt. of NCT 2006 SCC OnLine Del 39 : This case resulted in conviction eve in lack of injuries, as the circumstances under which the offences occurred explained such lack of injuries.

"The prosecutrix, an unmarried girl, was facing two youths, one of them was armed with a screw driver, holding out threat to life. In these circumstances, there could hardly be any struggle, which would result in injury on her person or her genitals." *Para 9*

9. Ranjit Hazarika vs State of Assam (1998) 8 SCC 635: Case resulted in conviction even though there were no injuries on the person of the victim and the hymen was intact. It further reiterated that even the slightest of penetration, not resulting in a torn hymen, would constitute rape. The lack of injuries were explained in the situation when the offence was committed and therefore held as irrelevant.

Full Cases

1. Vishnu vs State of Maharashtra

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 1112-1113 of 1999

Decided On: 24.11.2005

Appellants: **Vishnu @ Undrya**
Vs.
Respondent: **State of Maharashtra**

Hon'ble Judges/Coram:
H.K. Sema and Tarun Chatterjee, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: U.U. Lalit.,

Sr. Adv.,Prashant Kumar, Nitin Sahara and

Prasenjit Keswani, Advs

For Respondents/Defendant: Sushil Karanjkar and Ravindra Keshavrao Adsure, Advs.

Subject: Criminal

Catch Words

Mentioned IN

Acts/Rules/Orders:
Indian Penal Code (IPC) - Section 366, Indian Penal Code (IPC) - Section 375, Indian Penal Code (IPC) - Section 376;Bombay Children Act - Section 57; Code of Criminal Procedure (CrPC) - Section 313

Cases Referred:
Bharwada Bhoginbhai Hirjibhai vs State of Gujarat,MANU/SC/0090/1983; Madan Gopal Kakkad vs Naval Dubey and Anr., MANU/SC/0509/1992

Prior History:
From the Judgment and Order dated 4.5.98 of the Bombay High Court in Crl.A. Nos. 147 and 356 of 1984 (MANU/MH/0686/1998)

Disposition:
Appeal Dismissed

H.K. Sema, J.

1. I The sole appellant was put to trial under Section376/366 IPC. He was convicted by the Trial Court and sentenced to two years R.I. on each count. He was also directed to pay a fine of Rs. 1000/- and in default further sentence of 3 months R.I. Aggrieved thereby, two appeals were preferred before the High Court. Appeal No. 147/84 was preferred by the accused against his conviction. Appeal No. 356/84 was preferred by the State for enhancement of the sentence. The High Court, by a common order, dismissed the appeal filed by the accused and allowed the appeal filed by the State. The sentence of the appellant was enhanced to 5 years R.I. and a fine of Rs. 1000/- and in default further R.I. for 3 months. Aggrieved thereby, the present appeals have been filed by special leave.

2. The factual matrix may be noted briefly:

The prosecutrix - Kumari Pushpa at the relevant time was residing with her parents Pandurang - PW-1 and Vimal - PW-13 at Khar Danda, Mumbai. The accused was known to the prosecutrix as they were residing in the same locality. The accused was also a friend of the maternal uncle of the prosecutrix. She used to visit her maternal uncle's house where she used to meet the accused. Pandurang, father of the prosecutrix was admitted at K.E.M. Hospital for treatment of his eyes. The prosecutrix used to take food and tea to the hospital for her father.

On 10th July, 1980, the prosecutrix had gone to the hospital at about 11.00 A.M. carrying food and tea for her father. She left the hospital at about 3.30 P.M. While she was coming out of the gate of the K.E.M. hospital, the accused who was a taxi driver met her at the gate and inquired as to where she was going. The prosecutrix told the accused that she was on her way to her residence. The accused told her that he had his own taxi and he would drop her at her residence at Danda. Upon such offer, the prosecutrix got into the taxi. When the taxi came to the Linking Road Junction, the accused told her that his wife was admitted in Nanawati Hospital and he would go and see his wife in the hospital and thereafter he would drop her at

her residence. The accused then took the taxi to a small hotel representing that it was Nanawati Hospital. The accused took her inside the room of the hotel, bolted the room from inside and committed rape on her by threatening that in case of her shouting, she would be finished. Both of them came out of the hotel room and the accused dropped her home at 5.45 P.M. in his own taxi.

The prosecutrix reached home bleeding profusely from her private parts. After half an hour, she became unconscious. Her mother Vimal -PW-13 and her brother Eknath took her in a taxi to Bhabha Hospital. She was examined by Dr. Dilip Chaniary - PW-12 of Bhabha Hospital. After she regained consciousness at about 10.00 P.M. she narrated the incident to her mother that she was raped at about 5 P.M. and told that she was bleeding from her vagina since 5.30 P.M.

3. PW-15, S.I. Bagal, who was attached to Bandra Police Station was intimated about the incident on telephone. PW-15, along with a Police Constable, reached Bhabha Hospital for inquiry. He contacted the prosecutrix in the ward. He also questioned her about the incident and recorded her statement. He also recorded the statements of her mother Vimal and brother Eknath. He further made inquiry about the age of the girl from the brother and mother of the prosecutrix. Thereafter, he went to the school where she studied last and collected the school leaving certificate from Khar Upper Municipal School on 11th July, 1980. PW-15 did not register any case presumably thinking that the age recorded in the school leaving certificate was more than 16 years and she was a consenting party to sex. He was of the view that there was not enough material to register a case. He also stated that he called the accused for further inquiry on 3-4 occasions but did not think it necessary to register the offence or to carry further investigations. The conduct of PW-15, S.I. Bagal has been commented upon and deprecated by both the Trial Court and the High Court, which we may refer at an appropriate stage, if need be.

4. May be for any reason, best known to him, PW-15, S.I. Bagal did not register the offence, but we are shocked to note that in a grievous offence like rape being reported to the police, the concerned police officer did not register the case despite the fact that the prosecutrix had categorically stated that the accused had forcible sexual intercourse with her which no doubt would lead to the losing of confidence of the public in the police establishment.

5. When the matter stood thus, an unexpected development had taken place. PW-5, Kashinath, a friend of the father of the prosecutrix informed Pandurang (PW-1) in the K.E.M. Hospital about the incident. He was shocked to hear the same and after confirming the same from his wife Vimal and daughter Pushpa, against the medical advice, he got himself discharged from the hospital on 9 September, 1980 and made an application dated 23rd September, 1980 to the Commissioner of Police, copies of which were also sent to the

Prime Minister of India and the Chief Minister of the State. After receiving the application dated 23rd September, 1980, the Commissioner of Police forwarded the papers to A.C.P. Rodriques who took away the investigations from S.I. Bagal and directed PW-14, S.I. Parab to re-investigate the matter.

6. During the course of investigation, S.I. Parab recorded the statements of the witnesses including the prosecutrix and her parents and collected relevant documents. It is revealed from the documents collected by him that Pushpa's (prosecutrix) date of birth was 29th November, 1964 and she was below 16 years of age at the time of commission of offence on 10.7.1980. The accused was arrested on 3rd November, 1980 and during interrogation, the accused took them to the Marwadi hotel at Juhu where the prosecutrix was taken by him. The panchanama was drawn vide Exh. 7. After close of the investigation, a prima facie case was established and a chargesheet against the accused under Sections 366/376 IPC and Section 57 of the Bombay Children Act was filed before the Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Bombay. Thereafter, the case was committed to Sessions. Before the Sessions Court, the prosecution examined as many as 14 witnesses and led documentary evidence with regard to the establishment of the age of the prosecutrix and after the conclusion of the trial, the accused was convicted and sentenced as stated above.

We have heard Mr. U. U. Lalit, learned senior counsel for the appellant and Mr. Sushil Karanjkar, learned counsel for the respondent at length.

7. Before us the learned Senior counsel for the appellant strenuously urged that there are two date of births of the prosecutrix, one - 29.11.1964 (recorded in the date of birth register of the Bombay Greater Municipal Corporation and register of Kashibai Hospital, Santa Cruz, Bombay, where Pushpa was born); and second - 29.6.1963 (the date of birth recorded in the school leaving certificate of Khar Upper Municipal School) which have created a doubt and are capable of two opinions - one in favour of the accused and the other against the accused; the one in favour of the accused should be accepted and the accused be acquitted by giving him the benefit of doubt. He further contended that since the sexual intercourse is consensual, therefore, unless it is established that the prosecutrix is below the age of 16 years, the accused is not liable to be punished in view of the definition of 'rape' under Section 375 of IPC namely, clause sixthly. This submission deserves outright rejection.

8. The question whether the date of birth of the prosecutrix is 29th November, 1964 or 29th June, 1963 is no more in controversy.

The date of birth of the prosecutrix, as of 29.11.1964, has been recorded concurrently by both the Trial Court and the High Court on consideration of the evidence of PW-1, Pandurang, father of the prosecutrix and PW-13, Vimal, mother of the prosecutrix, corroborated by the

age of the prosecutrix recorded in the date of birth register of Greater Bombay Municipal Corporation and the register of Kashibai Hospital, Santa Cruz, where the prosecutrix was born. The evidence of PW-1 and PW43, father and mother of the prosecutrix supported by contemporaneous documents/registers produced by the prosecution like date of birth register in Bombay Municipal and the date of birth register in the hospital where the prosecutrix was born and the evidence of the doctor clearly establish that the prosecutrix was born on 29.11.1964. Therefore, this question need not detain us any longer in view of the observations of this Court in the case of ***Bharwada Bhoginbhai Hirjibhai vs State of Gujarat***MANU/SC/0090/1983 , this Court held at para 5 page SC- 755:

"A concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established: (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its lace value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded."

9. The present is not a case of such a nature which would warrant our interference. That apart, what was recorded by the High Court is worthy to be noted. In paragraph 13, the High Court has noted as under:

"At the outset, it is required to be noted that the finding " recorded by the trial court that Pushpa was less than 16 years of age on the date of the commission of the offence is not at all challenged by Mr. Samant."

Noticing the aforesaid observation of the High Court, this Court while issuing notice on 19.7.99, noted as under:

"Learned counsel for the petitioner contends that even though the counsel for the petitioner in the High Court did not challenge the age shown in the Birth Register, there are materials for indicating that the said date cannot be accepted as a correct one. He invited our attention to the date of birth shown in the School Leaving Certificate. According to the counsel if that is to be given credence the prosecutrix would be far above the age of 16 years on the date of occurrence. Question of consent will very much depend upon the exact date of birth of the prosecutrix. In the light of this we feel it necessary to examine the record."

(emphasis supplied)

It is because of that observation we allowed the learned counsel for the appellant to make submissions on the question of date of birth.

10. We have also perused the entire records.

The school certificate which has been relied upon by the accused is marked Exh. 37, the translated copy of which reads:

"Khar Danda Higher Secondary Marathi School Birth date of ex-student of said school - Pushpala Pandurang Satrange, as per school Register is twenty ninth June, Nineteen Sixty-three - 29.6.1963.

Submitted Dt. 11.7.80.

Sd/-
For Principal
Khar Danda Higher Secondary Marathi School."

On a bare perusal of the certificate, it is noticed that it is not an authenticated copy and no one has been examined to prove the age of the prosecutrix recorded in the school certificate.

11. PW-1, Pandurang is the father of the prosecutrix. He has stated that his daughter Pushpa (prosecutrix) was born on 29.11.1964. He has also stated that Pushpa was born at Kashibai Hospital, Santa Cruz, Bombay. This witness was subjected to lengthy cross-examination but his statement that the prosecutrix was born on 29.11.1964 remained unimpeached. In fact, in the cross-examination, this witness clarified that the date of birth given in the school was incorrect and he further clarified that the correct date of birth of Pushpa is 29.11.1964. It is a common knowledge that very often parents furnish incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. Therefore, we do not see any infirmity in the statement of the witness, who is the father of the prosecutrix, stating that the prosecutrix was born on 29.11.1964.

12. PW-13, Vimal is the mother of the prosecutrix. She has also stated that her daughter, Pushpa (prosecutrix) was born in Kashibai Hospital, Santa Cruz, Bombay on 29.11.1964. To prove this, the prosecution has examined Dr. Shashikant Awasare, who is one of the proprietors of Dr. Kashibai Nursing Home, Santacruz (West), Mumbai. He has produced the registers for the year 1964. He has also produced the entry at Sr. No. 293, Exh. 18. The entry shows that Vimal - PW.13 gave birth to a female child on 29th November, 1964. The prosecution has also produced a Certificate of Birth Registry of Municipal Corporation of Greater Bombay which shows the registration of a female child of Pandurang - PW.1 and Vimal

- PW-13 and the date of birth is shown as 29.11.1964. To prove this the prosecution has produced on record the birth register Book No. 24 of Municipal Corporation of Greater Bombay showing entries from 4th November, 1964 to 5th February, 1965. The entry at Sr. No. 542 dated 16th January, 1965 is in respect of the birth of the female child to Vimal and the birth date is shown as 29th November, 1964. These two unimpeachable documents clearly corroborate the statements of PW. 1 and PW. 13 in all material particulars that the prosecutrix was born on 29th November, 1964. Men may lie but the documents do not. These two unimpeachable documents clearly establish the fact that PW.4, Pushpa was born on 29th November, 1964. Therefore, she was below 16 years of age on 10.7.1980 and her consent, if any, is immaterial under clause sixthly of the definition of 'rape' under Section 375 IPC.

13. Mr. Lalit referred us to the evidence of Dr. Bhimrao - PW-10. Dr. Bhimrao was the medical officer, Police Hospital Nagpada, before whom the prosecutrix was produced on 3.11.80 for medical examination. According to him, she had fourteen teeth (7/7) in upper jaw and thirteen teeth in lower jaw. The doctor opined, among others, that her hymen showed old healed tears at 3-9 O'clock position. For the determination of the age of the prosecutrix, PW-10. - Dr. Bhimrao has stated as under:

"1 x-rayed for ossification test. 1 took her x-rays of wrist, elbows and shoulder joint. Elbow joint is united which unite at the age of 13/14 years. The wrist joint is united which unites at the age of 16/17 yrs. The shoulder joint is united which unites at the age of 18 years. From physical findings and ossification test and secondary sex characteristics I am of the opinion that the age of the girl Pushpa was 18-19 years with error of margin 6 months on either side. From the finding of internal examination of external genitals I am of the opinion that the said girl was subjected to sexual intercourse. Notes of examination prepared by me. It bears my signature and also of Dr. Gawane."

It is urged before us by Mr. Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the medical officer is to assist the court as he is not a witness of fact and the evidence given by the medical officer is really of an advisory character and not binding on the witness of fact.

14. In the case of *Madan Gopal Kakkad vs Naval Dubey and Anr.MANU/SC/0509/1992 :*

[1992]2SCR921 this Court has considered a similar question and pointed out in paragraph 34 at page SCC 221 as under:

"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."

15. We are of the opinion that this contention of the counsel for the appellant will be of no assistance in the face of evidence of fact from the mouth of PW-1 father and PW-13 mother, well corroborated by the register of the date of birth of Bombay Greater Municipal Corporation and the evidence of Dr. Shashikant Awasare, who is one of the proprietors of Dr. Kashibai Nursing Home, Santa Cruz (West), Mumbai, produced by him which shows that PW-4 Pushpa was born on 29.11.64.

16. In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother - PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.64, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness effects tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In the present case, as already noted, the parents had admitted to have given an incorrect date of birth of their daughter, presumably with a view to make up the age to secure admission in the school. Apart from this, as noticed earlier, the school certificate collected by PW-15 S.I. Bagal was not an authenticated document. Nobody was produced to prove the date of birth recorded in the school certificate. The date of birth recorded in the school certificate as 29.6.63 is, therefore, belied by the unimpeachable evidence of PWs.- 1 & 13 and contemporaneous documents like date of birth register of Greater Bombay Municipal Corporation and the register of the Nursing Home where the prosecutrix was born and proved by Dr. Shashikant Awasare, as noted above.

17. Besides aforesaid, looking into the statement of PW-4 Pushpa (prosecutrix), we are clearly of the view that the prosecutrix had been ravished sexually by force and against her wishes. This is what the prosecutrix stated before the Court:

"I know accused Vishnu who is sitting in the dock. Accused is residing in our locality. Accused used to visit my maternal uncle's place. P.W.3 Tulsidas is my maternal uncle. Two or three months prior to the incident my father was admitted in K.E.M. Hospital for the treatment of his eyes. I used to go to see my father at K.E.M. Hospital. I used to go to serve food and tea to my father at hospital. On 10/7/80 I reached the hospital at about 11 a.m. I served my father food and tea and I left hospital at about 3.30 p.m. Then I came to the gate of K.E.M. Hospital. Accused met me at gate. Accused asked me to where I was going. I told him I was going home. Then accused represented to me that he had got his own taxi and he also further represented that he would leave me at my residence at Danda. Then I sat with him in his taxi. We both were alone in the taxi. Accused was driving the taxi. We came to Linking Road Junction that time he was taking the taxi towards other side of Danda. I told him I was getting late then he represented to me that as his wife (my aunty) was in Nanawati Hospital, he would see her and drop me at my residence. I do not know the name of the wife of the accused. I refused to accompany him in the hospital, he told me that within 5 minutes he would leave me at my residence. I requested him to first drop me at Khar Danda. Accused drove taxi towards Juhu side.

Accused stopped the taxi near on chawl and represented to me that it was Nanawati Hospital. I also felt that it was hospital so I got down. Then he took me in one room. He closed the door of that room. He threatened me to finish if I shout. Then he made me lie down on the cot. He removed my skirt and underwear and had forcible sexual intercourse with me. He put his private part in my private part forcibly. He had a sexual intercourse with me against my consent. Then we came out of that hotel from that room. Then he dropped me at my residence at about 5.45 p.m. in his taxi."

This witness was subjected to lengthy cross-examination. The trend of the entire cross-examination is on the line of consensual sex, which has been denied by the prosecutrix.

18. The accused in Section 313 CrPC. statement has completely denied that he had any sexual intercourse with the prosecutrix. Question No. 19 (page 154 of original record) was put to him about the statement of the prosecutrix regarding forcible intercourse with her on the fateful day, to which he replied, "This is false". Question No. 64 (page 167 of original record) was put to him as to whether he wished to say anything more in his defence, to which he replied, "I am

innocent and falsely involved in this case." How he was falsely implicated has not been explained.

19. The statement of the prosecutrix, in our view, is quite natural, inspires confidence and merits acceptance. In the traditional non-permissive bounds of society of India, no girl or woman of self respect and dignity would depose falsely implicating somebody of ravishing her chastity by sacrificing and jeopardizing her future prospect of getting married with suitable match. Not only she would be sacrificing her future prospect of getting married and having family life, but also would invite the wrath of being ostracized and outcast from the society she belongs to and also from her family circle. From the statement of the prosecutrix, it is revealed that the accused induced her to a hotel by creating an impression that his wife was admitted in the hospital and that he would see her first and then drop the prosecutrix at her residence whereas, intact, she was not admitted in the hospital. On the pretext of going to Nanawati hospital, he took her to a hotel, took her inside a room, closed the door of the room, threatened her to finish her if she shouted and then forcibly ravished her sexually. In our view, a clear case of rape, as defined under Section375 clause thirdly of IPC has been established against the accused. It is now a well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence.

20. We now say something about PW-15, S.I. Bagal, who refused to register an offence and on whom both the Trial Court and the High Court have commented, and in our view correctly. The Trial Court in paragraph 34 of the Judgment observed as under:

"It is a pathetic situation, when the citizen is confronted with the dishonest police officer. I am constrained to observe that the investigation done by S.I. Bagal P.W.15, is not only suspicious but also dishonest and out and out in favour of the accused. I am making this observation with responsibility. I have scrutinized carefully the 3 statements recorded by S.I. Bagal they are very cryptic and favourable to the accused. He did not care to ascertain the correct age of the victim girl, in a kidnapping and rape case. He did not register an offence against the accused. I fail to understand as to what interrogation of the accused he has done. He has obtained the signature on the statement of P.W.4 Pushpa and Eknath and right hand thumb impression on the statement of Smt. Vimal for what reason, I do not understand, on three statements. At least he could have registered the offence for kidnapping after taking extract of birth from the school. If he wanted to ascertain the correct date from her father Pandurang and he was aware that P.W.1 Pandurang was in K.E.M. Hospital and he wanted to obtain Hospital record, but he never cared to visit K.E.M. Hospital and to record the statement of Pandurang. He was trying to shift the burden on the Senior P.I. Sharma. Merely, he had produced these three statements in a routine manner before P.I. Sharma, on the next day. There is no guarantee that he had faithfully recorded statements of all these three witnesses. The reading of the three statements clearly

indicates that those are completely in favour of the accused. The entire conduct of S.I. Bagal in the investigation has a smell of suspicion and dishonesty."

The High Court also observed about the conduct of PW-15, S.I. Bagal as under:

"In the present case, the investigation conducted by S.I. Bagal was completely defective and casual. He has not even registered the offence. The learned trial Judge has observed that the attitude of S.I. Bagal was completely dishonest and partial to the accused. On closer scrutiny of the record, we are inclined to agree with the observations of the learned Judge. We have reason to believe that S.I. Bagal deliberately refused to register the offence in order to help the accused at the costs of the prosecutrix. But despite this deficiency, the prosecution has successfully proved the offence of rape. We have, therefore, no hesitation in confirming the conviction recorded by the trial court under Section 376 of the IPC."

21. In the facts and circumstances of this case, the comments made by the Trial Court and the High Court about the manner in which S.I. Bagal conducted the first investigation are well justified.

22. In the premises aforestated, we see no infirmity in the well-merited concurrent findings recorded by two courts below. The appeals are dismissed. The appellant is on bail. His bail bonds and surety stand cancelled. He is directed to be taken into custody forthwith to serve out the remaining part of sentence. Compliance report should be sent to this Court within one month.

2. State of TN vs Ravu @ Nehru

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 582 of 2000

Decided On: 04.07.2006

Appellants: State of Tamil Nadu
Vs.
Respondent: Ravi @ Nehru

Hon'ble Judges/Coram:
H.K. Sema and A.K. Mathur, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Subramonium Prasad,Abhay Kumar, Jai Kumar and R. Gopal Krishna, Advs

For Respondents/Defendant: Arvind and V. Balachandran, Advs.

Acts/Rules/Orders:
Indian Penal Code (IPC) - Section 376

Cases Referred:
Madan Gopal Kakkad vs Naval Dubey MANU/SC/0509/1992; State of Punjab vs Gurmit Singh MANU/SC/0366/1996 ;Ranjit Hazarika vs State of Assam MANU/SC/1319/1998;Bharwada Bhoginbhai Hirjibhai vs State of GujaratMANU/SC/0090/1983

Authorities Referred:
Encyclopedia of Crime and Justice (Vol.4) at page 1356; Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369; Parikh's Textbook of Medical Jurisprudence and Toxicology

Prior History:
From the Judgment and Order dated 8.7.1999 of the High Court of Judicature at Madras in Crl. Appeal No. 768 of 1992

Disposition:
Appeal Allowed

Subject Category :
CRIMINAL MATTERS - MATTERS RELATING TO SEXUAL HARASSMENT, KIDNAPPING AND ABDUCTION

JUDGMENT

H.K. Sema, J.

1. This appeal is preferred by the State of Tamil Nadu against the judgment and order dated 8.7.1999 passed by the High Court. The respondent-accused Ravi @ Nehru was convicted by the Trial Court for an offence under Section376 IPC and sentenced to seven years rigorous imprisonment and a fine of Rs. 2,500/- and in default to undergo rigorous imprisonment of 2 years. Aggrieved thereby he preferred Criminal Appeal No. 768 of 1992 before the High Court.

The High Court by the impugned judgment and order has set aside the order of conviction and acquitted the accused. Hence this appeal by special leave.

2. Briefly stated the prosecution's case is as follows:

On 23.10.1989 at about 3.30 p.m. PW-2 Arthi (victim girl) aged about five years was going to her aunt's house along with other children. At about 4.00 p.m. she came running to her house and informed her mother PW-1 that the accused took her to the bed room of his house and after removing her underwear and his pant placed her on his lap and pressed his male organ on her female organ. She cried in pain. On hearing her cry, two persons who were watching television in the front room of the house came there and scolded the accused. PW-1 the mother of the victim girl removed all the clothes of PW-2, which according to her contained blood stains. She also washed her clothes and gave a bath to her daughter with the help of PWs 8 and 9 Thereafter, she took PW-2 along with PWs 8 and 9 to H.P.F. Hospital where PW-7 Dr. Gavaramma was working. PW-7 then advised them to take the victim girl to a nearby government hospital. After the arrival of the father of the victim girl at the house PW-2 was taken to the government Hospital, Udhagamandalam at about 10.30 p.m. She was then referred to children's hospital. PW-6 Dr. Radhabhai who was in charge of the government hospital examined PW-2 at about 11.00 P.M. PW-6 stated that at the time of examination, the victim girl was in a conscious state of mind, there were no external injuries, there were no blood stains on her dress, there was no injuries on her female organ but hymen was ruptured and there were no fresh bleedings from the female organ.

3. PW-5 Dr. Lakshmanan examined the accused on 24.10.1989 at about 12.30 p.m. and found the following injuries on him:

1. There were bloodstains both on the top portion and in the middle portion of the brief of the accused.

2. His penis was 3 inches in length and his urinary opening was normal and there were no external injuries.

3. There was cut wound at the bottom portion of his penis. When pressed at the place of this cut wound, bloodstain was there. There was no sign of fresh semen. Except this cut wound on the penis, there is no injury anywhere around the penis. There were not bloodstains on the pubic hair, which were = inch long. Scrotum was normal. When the frontal portion was pressed, there was no oozing of blood. His penis was well-developed and he possesses virility. The certificate which I gave was the 4th documents. There is possibility for a cut wound of the above sort to cause when the penis is forced into the vagina. This cut wound might have caused before 12 hours of

and within 24 hours of the medical test performed by me. The certificate which I gave this effect was document 5. As the blood sample of the accused has to be tested, I directed for the same. Test results showed that his blood group is PRH - Positive.

In re-examination he stated:

Chances for causing such type of cut wounds are possible usually when the penis is in erect condition.

4. In the course of the Trial the prosecution examined as many as 14 witnesses. Exhibits P-1 to P-19 were marked and M.Os. 1 to 6 were also produced before the Court. No defence witness was examined on behalf of the accused. The plea of the accused was total denial. The Trial Court on appreciation of the evidence and documents on record found him guilty and sentenced him as aforestated.

5. PW-2, the prosecutrix has stated in examination in chief that she was studying in UKG and on the fateful day after the school was over she went to her aunt's house (father's sister's house) at about 2 p.m. On the way the accused accosted her and took her stating that they would watch TV. She further stated that there were two other persons watching TV and the accused took her to another room and made her sit on his lap. The accused then removed his pant and brief and also removed the prosecutrix's brief. The accused pressed his sexual organ on her sexual organ. Then she started weeping and the other two brothers scolded the accused. The accused then ran away by putting his pant and shirt. Thereafter, the prosecutrix after putting her brief went to the house sobbing. She narrated the story to her mother. She also stated that on seeing her coming sobbing her mother fainted and fell down and then PW-8 Kamalam and PW-9 Rani received her clothes and drenched them in water. She further stated that PWs 8 and 9 also washed her sexual organ. Her statement was well corroborated by PWs 1, 3, 6, 7, 8 and 9.

6. At this stage, we may notice the evidence of PW-7 Dr. Gavaramma before whom she was first taken by PW-1 and PW-8 Kamalam. PW-7 stated that when the prosecutrix was brought by PW-1 and one lady name Kamalam, her mother was weeping and the prosecutrix was also weeping. PW-7 advised them to go to Government Hospital. PW-7 further stated that the small girl was crying due to pain. PW-7 further stated that the prosecutrix's vagina was reddened.

7. PW-6 Dr. Radhabhai was functioning as Asst. Civil Surgeon in the government maternity hospital. She examined the prosecutrix on 23.10.1989 at about 11.00 p.m. PW-6 found that there were no external injuries; there were no stains in her dresses. The skin-like tissue called hymen in her vagina was torn. There was no fresh oozing of blood. There was no oozing of

blood around her vagina. PW-6 further stated that she did not know as to when the hymen was torn. She further stated that no external injury would be caused during the sexual intercourse. The doctor further opined that the penis would not have gone inside the girl's vagina. It will clearly appear from the testimony of PW-6 that the hymen of the prosecutrix was torn. PW-6, however, opined that the penis would not have gone inside the girl's vagina. We are totally at a loss as to how this opinion would have been recorded when the doctor categorically stated that hymen in the vagina of the prosecutrix was found torn.

8. It will be noticed that the statement of the prosecutrix was also well corroborated by PW-3 who was at the place of incident. PW-3 is Sundaram. He has stated that he along with the accused and another person Anand went to the house of the sister of accused to watch cricket match. At about 3.30 p.m. the accused went outside and came back with PW-2 (the prosecutrix). The accused took PW-2 to a room inside. On being questioned he told the girl's name was Arthi. After five minutes they heard crying sound from inside the room. He and Anand went inside the room and saw the accused without pant and underwear and the prosecutrix's underwear was also removed. The accused had made the prosecutrix to sit on his lap and on seeing their entry the accused released her. The High Court unfortunately disbelieves the creditworthy testimony of this witness as artificial and unnatural.

9. The High Court disbelieves the testimony of PW-2 the prosecutrix on the ground that her statement has not been corroborated by PW-6 Asst. Civil Surgeon who examined the prosecutrix in Govt. Maternity Hospital on 23.10.1989. According to the High Court, the statement of the prosecutrix is not corroborated by the evidence of PW-6 as there were no external injuries, there were no blood stains on her dress, there was no injury on her female organ, hymen was ruptured and there was no fresh bleeding from the private parts. The doctor admitted that she was not in a position to state as to how the hymen of the girl was torn. She further stated that the male organ would not have penetrated in a young girl's vagina. The doctor further opined that there was no sign of rape. In our view, the finding of the High Court is absolutely perverse and inconsistent with the evidence on record. First of all no opinion could be given by this doctor that there was no sign of rape. Regarding non presence of blood stains on her vaginal part and on her wearing apparel it is the categorical testimony of PWs 1, 8 and 9 that the prosecutrix was given bath, her vagina was washed and her wearing apparel was washed before taking her to doctor. PW-6 having recorded that hymen of the vagina was torn was not justified in giving an opinion that the male organ would not have penetrated into the young girl's vagina.

10. That apart, the High Court has completely overlooked the testimony of PW-5 Dr. Lakshmanan, Asstt. Medical Officer who conducted the medical test on the accused Ravi on 24.10.1989. On examination PW-5 found a cut wound at the bottom portion of his penis.

When pressed at the place of this cut wound, bloodstain was present. The doctor further opined that his penis was well developed and he possessed virility. The doctor further opined that there was a possibility for cut wound of the above sort to have been caused when the penis is forced into the vagina. Doctor further opined that this cut wound might have been caused before 12 hours of and within 24 hours of the medical test. In re- examination doctor clarified that chances for causing such type of cut wounds are possible usually when the penis is in erect position.

11. Facts on record established that the accused was 22 years old and the prosecutrix was about 4 to 5 years old. It is well-established principle that when a fully developed man has committed sexual assault with a minor girl aged about 4 or 5 years there is likelihood of an injury being caused on the penis. PW-5 found that there was cut wound at the bottom of penis of the accused. He further stated that when the cut wound was pressed bloodstain was there. He further stated that the penis of the accused was fully developed and he possessed virility. Doctor further opined that there was a possibility of cut wound of the kind of accused when the penis is forced into the vagina. It is unfortunate that this stark testimony of PW-5 against the accused for which he has no explanation, has escaped the notice of the High Court. In the case of **Madan Gopal Kakkad vs Naval Dubey** MANU/SC/0509/1992 : [1992]2SCR921 , the accused was charged with the rape of minor girl of eight years. This Court held that even slightest penetration of penis into vagina without rupturing the hymen would constitute rape.

12. We may also notice the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 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 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 that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

13. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

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.

14. In Encyclopedia of Crime and Justice (Vol.4) at page 1356, it is stated:

...even slight penetration is sufficient and emission is unnecessary.

15. It is now well-accepted principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is also well accepted principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence. The woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. [See **State of Punjab vs Gurmit Singh** MANU/SC/0366/1996: 1996CriLJ1728] So also in the case of **Ranjit Hazarika**v. **State of Assam** MANU/SC/1319/1998 : (1998)8SCC635 , this Court observed that non-rupture of hymen or absence of injury on victim's private parts does not belie the testimony of the prosecutrix. The evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offender is entitled to great weight, absence of corroboration notwithstanding. [See **Bharwada Bhoginbhai Hirjibhai vs State of Gujarat**MANU/SC/0090/1983 : 1983CriLJ1096]

16. Reverting back to the facts of the present case the evidence of PW-2 the prosecutrix remains unimpeached. There is no iota of evidence or even a suggestion that the accused has been falsely implicated because of animosity. Similarly, the evidence of PW-2 has been corroborated by the evidence of PWs-1, 3, 5, 6, 7, 8 and 9. In the present case, the ocular evidence of PWs is well corroborated with the medical evidence.

17. Thus, the High Court committed grave miscarriage of justice in recording acquittal by reversing the conviction recorded by the Trial Court. The impugned order of the High Court dated 8.7.1999 is accordingly set aside. The conviction recorded by the Trial Court is restored. This appeal is accordingly allowed. The respondent Ravi @ Nehru shall be taken back into custody forthwith to serve out the remaining part of the sentence. Compliance report within one month.

3. Jarinail Singh vs State of Haryana

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1209 of 2010

Decided On: 01.07.2013

Appellants: **Jarnail Singh**
Vs.
Respondent: **State of Haryana**

Hon'ble Judges/Coram:
P. Sathasivam and J.S. Khehar, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: H.P.S. Ishar and Kailash Chand, Advs.

For Respondents/Defendant: Meera Bhatia and Kamal Mohan Gupta, Advs.

Subject: Criminal

Catch Words

Mentioned IN

Acts/Rules/Orders:
Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 7A, Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 64, Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 68(1); Code of Criminal Procedure (CrPC) - Section 161, Code of Criminal Procedure (CrPC) - Section 164, Code of Criminal Procedure (CrPC) - Section 313; Indian Penal Code (IPC) - Section 120, Indian Penal Code (IPC) - Section 120B, Indian Penal Code (IPC) - Section 366, Indian Penal Code (IPC) - Section 376;Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 12, Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 12(3), Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 19, Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 19(3)

Cases Referred:
Sunil vs State of Haryana MANU/SC/1864/2009 : AIR 2010 SC 392

Prior History:
From the Judgment and Order dated 04.11.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 247-SB of 1995 (MANU/PH/1989/2008)

Disposition:
Appeal Dismissed

Case Note:

Subject Category :
CRIMINAL MATTERS - MATTERS RELATING TO SEXUAL HARASSMENT, KIDNAPPING AND ABDUCTION

JUDGMENT

J.S. Khehar, J.

1. The factual position on which the prosecution version is founded, commences with the passing of information by Savitri Devi (the mother of the prosecutrix VW-PW6), to her husband Jagdish Chander-PW8, on 26.3.1993, at about 6 am. She informed her husband, that the prosecutrix VW-PW6 was missing from their residence. In this behalf it would be pertinent to mention, that on 25.3.1993 at about 10 pm, Jagdish Chander went to sleep in the "baithak" (drawing room) of their residence. Savitri Devi, the mother of the prosecutrix VW-PW6, along with the prosecutrix VW-PW6, and the other children (comprising of three sons, the prosecutrix VW-PW6 and one other daughter), went to sleep in the other rooms of the house. Savitri Devi, told her husband, that she suspected the Accused-Appellant Jarnail Singh, may be responsible for having taken away their daughter.

2. Jagdish Chander-PW8, commenced to search for his daughter. During the course of the aforesaid search, the Accused-Appellant Jarnail Singh, who had his residence in the neighbourhood (of Jagdish Chander-PW8), was also found missing from his residence. The search for the prosecutrix VW-PW6 by her father, proved futile. It is therefore, that Jagdish Chander-PW8, made a complaint Exhibit PO on 27.3.1993 to the Sub-Inspector Incharge,

Police Post, Jathlana. In his complaint, he described VW-PW6, as the elder of his two daughters. He gave out her age as about 16 years. He also alleged, that his daughter VW-PW6 had gone missing from their residence in the night intervening 25th and 26th March, 1993. He also alleged, that an amount of Rs. 3,000/- was missing from his house, which he assumed may have been taken away by his daughter VW-PW6, while leaving the house. In the complaint Exhibit PO, the needle of suspicion was pointed at the Accused-Appellant Jarnail Singh.

3. After the registration of the complaint of Jagdish Chander-PW8, the prosecutrix VW-PW6 was recovered on 29.3.1983, from the custody of the Accused-Appellant Jarnail Singh, from the house of Shashi Bhan at Raipur in district Haridwar. The Accused-Appellant simultaneously came to be arrested, on 29.3.1993.

4. The statement of the prosecutrix VW-PW6 was got recorded under Section 164 of the Code of Criminal Procedure before O.P. Verma, Judicial Magistrate First Class, Jagadhri on 6.4.1993. It is necessary in the facts and circumstances of this case to extract herein her short statement recorded under Section 164 of the Code of Criminal Procedure, which is being reproduced hereunder:

Stated that on the night of 25.3.1993 at around 11 pm, I went to a street near my house to answer nature's call. Accused Jarnail Singh and his three accomplices were hiding there. When I got up after answering nature's call, then they caught hold of me and inhaled me something by cloth, due to which, I got unconscious. They took me to some unknown place in U.P. By putting me in some vehicle. There they took me to a room.

Jarnail Singh, forcibly committed wrong (intercourse) with me. I slapped on his face, then he put cloth in my mouth. Therefore, I could not raise noise. Thereafter, everyone committed forcible intercourse with me, turn by turn. Huge blood came out of my vagina, and I felt a lot of pain. Thereafter, police caught us and handed over me to my parents.

5. On completion of investigation, a challan was presented under Sections 366, 376 and 120 of the Indian Penal Code. The matter was committed to the Court of Sessions, Jagadhri, whereupon, it was marked to the Additional Sessions Judge, Jagadhri. The Additional Sessions Judge, Jagadhri framed charges on 20.12.1993. The Accused-Appellant pleaded not guilty, and claimed trial.

6. In order to bring home the charges levelled against the Accused-Appellant, the prosecution examined 9 witnesses. Thereafter, the prosecution evidence was closed. The statement of the Accused-Appellant Jarnail Singh, was then recorded under Section 313 of the Code of Criminal Procedure. He denied the allegations levelled against him, and pleaded false implication.

Despite opportunity having been afforded to him, the Accused-Appellant did not lead any evidence, in his defence.

7. It is necessary to record, that on the culmination of the trial, the Additional Sessions Judge, Jagadhri arrived at the conclusion, that the prosecution had been able to bring home the guilt of the Accused-Appellant beyond any shadow of reasonable doubt, under Sections 366, 376(g) and 120B of the Indian Penal Code. The Accused-Appellant Jarnail Singh was accordingly held guilty of the charges levelled against him. The Additional Sessions Judge, Jagadhri gave an opportunity of hearing to the Accused-Appellant Jarnail Singh on the question of sentence. Thereupon, for the offence under Section 376(g) of the Indian Penal Code the Accused-Appellant was awarded rigorous imprisonment for 10 years, he was also required to pay a fine of Rs. 200/- (in case of default in payment of fine, the Accused-Appellant was to undergo further rigorous imprisonment for 3 months). For the offence under Section 366 of the Indian Penal Code, the Accused-Appellant was awarded rigorous imprisonment for 7 years, and was required to pay a fine of Rs. 150/- (in case of default in payment of fine, the Accused-Appellant was to undergo further rigorous imprisonment for 3 months). And for the offence under Section 120B of the Indian Penal Code, the Accused-Appellant was awarded rigorous imprisonment for 7 years, and was required to pay a fine of Rs. 150/- (in case of default in payment of fine, the Accused-Appellant was to undergo further rigorous imprisonment for 3 months). The aforesaid sentences were ordered to run concurrently.

8. Dissatisfied with the judgment dated 14.3.1995, rendered by the trial Court, the Accused-Appellant Jarnail Singh preferred Criminal Appeal No. 247-SB of 1995 before the Punjab & Haryana High Court at Chandigarh (hereinafter referred to as, the High Court). The High Court dismissed the appeal preferred by the Accused-Appellant on 4.11.2008. The judgment of conviction dated 14.3.1995 and the order of sentence dated 15.3.1995 (rendered by the trial Court i.e., the Additional Sessions Judge, Jagadhri) were upheld.

9. Dissatisfied with the judgment of the trial Court dated 14.3.1995 and that of the appellate Court dated 4.11.2008, the Accused-Appellant Jarnail Singh approached this Court. On 7.7.2010, this Court granted leave, in the Petition for Special Leave to Appeal (Crl.) No. 7836 of 2009, filed by the Accused-Appellant. Having traversed the aforesaid course, the instant criminal appeal has finally been placed before us, for adjudication.

10. Before dealing with the issues canvassed at the hands of the learned Counsel for the Accused-Appellant Jarnail Singh, it is considered expedient to have a bird's eye view of the relevant prosecution witnesses. It is, therefore, that we shall endeavour to deal with the testimony of some of the prosecution witnesses hereunder:

(i) Dr. Kanta Dhankar was produced by the prosecution as PW1. She had medico-legally examined the prosecutrix VW-PW6 on 29.3.1993 at 3 pm. According to her testimony, no blood or seminal stain was visible to the naked eye, during the course of examination of the prosecutrix VW-PW6. Pubic hairs were present. There was no visible injury on the external genitalia or vagina. The hymen of the prosecutrix VW-PW6 was found ruptured. Her vagina admitted 2/3 fingers easily. The clothes of the prosecutrix VW-PW6, a swab taken from her vagina and her pubic hair, were sent to the forensic science laboratory for examination, so as to determine whether there was any semen or blood thereon. Along with the testimony of Dr. Kanta Dhankar-PW1, it is necessary to record, that as per the report of the forensic science laboratory (Exhibit PL), human semen was detected on the prosecutrix's "salwar" (female trouser), her underwear, as also, on her pubic hair. The report of the serologist (Exhibit PL/1) further revealed medium and small sized blood stains on the "salwar". The report of the serologist also disclosed, that the stains on the "salwar" were of human blood.

(ii) Dr. Satnam Singh-PW2, was the second witness to be examined by the prosecution. He had medico-legally examined the Accused-Appellant Jarnail Singh. Dr. Satnam Singh-PW2, while deposing before the trial Court affirmed, that the Accused-Appellant was capable of sexual intercourse.

(iii) The prosecution then examined Moti Ram as PW3. Moti Ram testified, that he was present when the prosecutrix VW-PW6, was recovered whilst in custody of the Accused-Appellant, from the house of Shashi Bhan at Raipur, in district Haridwar. Moti Ram also affirmed the presence of Om Prakash, Jagmal and Sumer Chand, along with the police party, at the time of recovery of the prosecutrix VW-PW6, on 29.3.1993. Moti Ram had identified the prosecutrix VW-PW6, at the time of her said recovery.

(iv) Satpal was produced by the prosecution as its fourth witness. Satpal-PW4 was the Headmaster of the Government High School, Jathlana, i.e. The school which the prosecutrix VW-PW6, had first attended. Satpal-PW4 proved the certificate Exhibit PG, as having been prepared on the basis of the school records. As per the certificate, Exhibit P4, the prosecutrix VW-PW6 was born on 15.5.1977.

(v) The prosecutrix appeared as PW6 before the trial Court. She affirmed the factual position expressed by her father Jagdish Chander-PW8 in his complaint dated 27.3.1993 (Exhibit PO). She also reiterated the factual position expressed by her, in her statement, recorded under Section 164 of the Code of Criminal Procedure, on 6.4.1993. In sum and substance she asserted, that she had studied upto class 3 at the Government High School, Jathlana, whereafter, she started to do household work at home. On 25.3.1993 at about 11 pm, she had gone out of her house to urinate in the street. The Accused-Appellant Jarnail Singh and three

other persons had caught hold of her, and had taken her in a tanker towards Raipur side in Uttar Pradesh. The Accused-Appellant Jarnail Singh and his three accomplices, had then raped her in a small room. She also testified, that she had been recovered by the police from Raipur, and at the time of her recovery, Moti Ram-PW3 and her uncle Omilal (Om Prakash) and Jagmal were present with the police party. Thereafter, she claims to have been brought to police post Jathlana, and was got medico-legally examined by a lady doctor at Civil Hospital, Radaur. Since the prosecutrix VW-PW6, was not disclosing the entire factual position, and seemed to be changing the version of her statement recorded under Section 164 of the Code of Criminal Procedure, the Public Prosecutor sought permission to cross-examine her. Consequent upon being permitted to cross-examine the prosecutrix VW-PW6, she affirmed, that the Accused-Appellant had been alluring her for marriage, with the promise of giving her ornaments and clothes, and a further commitment to move her to the city, after their marriage. During these allurements, the Accused-Appellant Jarnail Singh used to also impress upon her, that her parents were poor and would marry her to some poor person, who would never be able to provide her such facilities. During her cross-examination, she expressly denied the suggestion, that she herself had allured the Accused-Appellant Jarnail Singh, to take her away, in order to marry him.

(vi) O.P. Verma, Judicial Magistrate First Class, Jagadhri, appeared as PW7. He proved the statement, recorded before him under Section 164of the Code of Criminal Procedure, by the prosecutrix VW-PW6, on 6.4.1993.

(vii) Jagdish Chander-PW8, the father of the prosecutrix VW-PW6 during the course of his deposition, affirmed the factual position depicted in his complaint dated 27.3.1993 (Exhibit PO). He also corroborated the testimony of his daughter (i.e., the prosecutrix VW-PW6) in all material particulars.

The conviction of the Accused-Appellant at the hands of the trial Court (on 14.3.1995) and by the High Court (on 4.11.2008) was primarily based on the statements of the prosecution witnesses summarised above.

11. We shall now endeavour to deal with the submissions advanced at the hands of the learned Counsel for the Accused-Appellant.

12. The first and foremost contention advanced at the hands of the learned Counsel for the Accused-Appellant was, that the prosecutrix VW-PW6, had voluntarily and with her free consent, accompanied the Accused-Appellant Jarnail Singh. It was contended, that in actuality, it was the prosecutrix VW-PW6 who had allured the Accused-Appellant to marry her, and had persuaded him to take her away during the night intervening 25th and 26thMarch, 1993. In order to substantiate the instant submission, it was pointed out that the prosecutrix VW-PW6

has remained with the accused Jarnail Singh for four days without any protestation. During the course of the aforesaid four days in the company of the Accused-Appellant Jarnail Singh, they had travelled from one place to another, and had finally reached the house of Shashi Bhan at Raipur (from where the police recovered her on 29.3.1993). It was submitted, that there was ample opportunity with her, to raise an alarm during the aforestated four days. The fact that she did not raise any alarm shows, that she had voluntarily remained with the Accused-Appellant Jarnail Singh. Therefore, sexual intercourse with the Accused-Appellant Jarnail Singh, according to learned Counsel, was also consensual. Thus viewed, it was asserted, that the Accused-Appellant Jarnail Singh could not be Accused of either having kidnapped her, and/or having committed rape on her.

13. On the same issue, learned Counsel for the Accused-Appellant also invited our attention to the fact, that in the complaint lodged by Jagdish Chandra (PW8), dated 27.3.1993, he had expressly mentioned that the prosecutrix had taken away a sum of Rs. 3,000/-. In this behalf it was submitted that the instant act of the prosecutrix exhibits that she had taken money from her father's house to make good her escape in the company of the Accused-Appellant Jarnail Singh. It is sought to be inferred from the above, that the prosecutrix VW-PW6 had gone with the Accused-Appellant Jarnail Singh, of her own free will. And, that she had sexual intercourse with him consensually. For the reasons indicated hereinabove, it was the vehement contention of the learned Counsel for the Accused-Appellant Jarnail Singh, that the courts below had seriously erred in recording the Appellant's conviction under Sections366, 376 and 120B of the Indian Penal Code.

14. We have given our thoughtful consideration to the first contention advanced at the hands of the learned Counsel for the Accused-Appellant. We shall venture to determine the factual aspects taken into consideration by the learned Counsel for the Appellant, to substantiate the alleged free will and consent of the prosecutrix VW-PW6 individually, so as to effectively determine the veracity of the submissions noticed above.

15. In so far as the issue of having gone with the Accused-Appellant Jarnail Singh of her own free will, and of having had sexual intercourse with him consensually, it is necessary only to examine the uncontested deposition of the prosecutrix VW-PW6. In this behalf, it may be pointed out, that in her statement recorded under Section 164 of the Code of Criminal Procedure before the Judicial Magistrate, First Class, Jagadhari on 6.4.1993, the prosecutrix VW-PW6 had expressly asserted, that she was forcibly taken away on 25.3.1993, when she had gone out of her house to urinate in the street, by Jarnail Singh and his three accomplices. She had clearly and categorically testified, that all the four had caught hold of her. They had made her inhale something, which rendered her unconscious. She had further stated, that the Accused-Appellant Jarnail Singh and his accomplices, had then taken her to some unknown

place in Uttar Pradesh in a vehicle where Jarnail Singh forcibly attempted to commit intercourse with her. At that juncture, she had slapped Jarnail Singh on his face, but in order to subjugate her, he had put a cloth in her mouth to prevent her from raising an alarm. Thereafter, the Accused-Appellant Jarnail Singh and his accomplices had committed forcible intercourse with her, one after the other. In her statement before the Trial Court, where she appeared as PW6, she had reiterated clearly the position of having been taken away by the Accused-Appellant Jarnail Singh, and his three accomplices. She affirmed, that she was taken away in a tanker to Uttar Pradesh and then all the Accused had committed rape on her in a small room. On the aforestated aspect of the matter, she was not subjected to cross-examination at the behest of the Accused. Only a suggestion was put to her, that she had persuaded the Accused-Appellant Jarnail Singh to take her away, in order to perform marriage with her, and for the said purpose had taken away cash, clothes and jewellery from her own residence. The aforestated suggestion was denied by the prosecutrix VW-PW6. Keeping in view the statement of the prosecutrix VW-PW6 under Section 164 of the code of Criminal procedure before the Judicial Magistrate, First Class, Jagadhri, as also, the statement made by her while appearing before the trial court, and the manner in which she was subjected to cross-examination, there is no room for any doubt, that the prosecutrix was forcefully taken away, and that, she was subjected to rape at the hands of the Accused-Appellant Jarnail Singh and his three accomplices. It may still have been understandable, if the case had been, that she had consensual sex with the Accused-Appellant alone. But consensual sex with four boys at the same time, is just not comprehensible. Since the fact, that the Accused-Appellate Jarnail Singh and the prosecutrix VW-PW6 had eloped together is not disputed. And furthermore, since the Accused-Appellant having had sexual intercourse with the prosecutrix is also the disputed. It is just not possible to accept the proposition canvassed on behalf of the Accused-Appellant. We, therefore, find no merit in the instant submission.

16. The contention advanced at the hands of the learned Counsel for the Accused-Appellant Jarnail Singh, that while leaving her house on 25.3.1993, the prosecutrix VW-PW6, had taken away a sum of Rs. 3,000/-, needs a holistic examination. Whilst it is true that in the complaint, Jagdish Chandra (PW8), the father of the prosecutrix VW-PW6, had categorically mentioned that a sum of Rs. 3,000/- was missing from his residence, and the said fact was duly mentioned in his complaint to the police dated 27.3.1993, yet he had not accuse the prosecutrix VW-PW6 for having taken it away. The instant aspect, in our considered view pales into insignificance, on account of the statement made by Jagdish Chandra (PW8) before the Trial Court. During the course of his deposition before the Trial Court, he had asserted, that he had mentioned that a sum of Rs. 3,000/- was missing from his residence, but his wife Savitri Devi had found the aforesaid money from the residence itself, a few days later. Accordingly, the assertion made by the learned Counsel representing the Accused-Appellant to the effect that the prosecutrix VW-PW6 had taken away a sum of Rs. 3,000/-, when she left the house of her

father on 25.3.1993, cannot be stated to have been duly proved. Besides the aforesaid, it is apparent from the cross-examination of the prosecutrix VW-PW6, that a suggestion was put to her that besides cash, she had taken away clothes and jewellery at the time of leaving her father's house on 25.3.1993. The prosecutrix VW-PW6 expressly denied the suggestion. There is no material on the record of the case to substantiate the said allegation. Therefore, it is not possible for us to accept the accusation levelled by the Accused-Appellant Jarnail Singh against the prosecutrix VW-PW6, either on the issue of having taken away a sum of Rs. 3,000/- while leaving her house, or that she left her house on 25.3.1993 along with clothes and jewellery. Accordingly, the inference drawn by assuming the said factual position as true, simply does not arise.

17. The first contention advanced at the hands of the learned Counsel for the Appellant can be conveniently determined from another perspective. The High Court in the impugned order arrived at the conclusion that the prosecutrix VW-PW6 was a minor at the time of occurrence on 25.3.1993, and had concluded, that even if she had accompanied the Accused-Appellant Jarnail Singh on 25.3.1993 of her own free consent, and even if she had had sexual intercourse with the Accused consensually, the same would be immaterial. For, consent of a minor is inconsequential.

18. During the course of hearing of the present appeal, learned Counsel for the Appellant vehemently contested the determination of the High Court in the impugned judgment, wherein it had concluded, that the prosecutrix VW-PW6 was a minor. Insofar as the instant aspect of the matter is concerned, it was pointed out, that the sexual organs of the prosecutrix VW-PW6 were found to be fully developed by Dr. Kanta Dhankar-PW1. Her hymen was found to be ruptured. It was also seen during the medico-legal examination of the prosecutrix VW-PW6, that the vagina admitted two/three fingers easily. Learned Counsel for the Appellant-Accused Jarnail Singh, also invited our attention to the cross-examination of Dr. Kanta Dhankar-(PW1), wherein she acknowledged having mentioned the age of the prosecutrix VW-PW6 as 15 years, on the basis of the statement made by the prosecutrix to her. Dr. Kanta Dhankar-PW1 had also acknowledged, that she had not got the ossification test conducted on the prosecutrix VW-PW6 to scientifically determine the age of the prosecutrix. Based on the aforesaid, it was averred that there was no concrete material on the record of the case, on the basis of which it could have been concluded by the High Court, that the prosecutrix was a minor on the date of occurrence.

19. In order to support his contention, that the prosecutrix was not a minor at the time of occurrence, learned Counsel for the Appellant placed reliance on the judgment rendered in Sunil v. State of Haryana MANU/SC/1864/2009 : AIR 2010 SC 392. Ordinarily, we would have

extracted the observations on which reliance was placed, but for reasons that would emerge from our conclusion, we consider it inappropriate to do so.

20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforestated 2007 Rules have been framed under Section68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

12. Procedure to be followed in determination of Age.--(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of Clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his

age and either of the evidence specified in any of the Clauses (a) (i), (ii), (iii) or in the absence whereof, Clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in Sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in Sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in Sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in Sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates

reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

21. Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW-PW6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied upto class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW-PW6, on the next available basis, in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW4), to prove the age of the prosecutrix VW-PW6. Satpal (PW4) was the Head Master of the Government High School, Jathlana, where the prosecutrix VW-PW6 had studied upto class 3. Satpal (PW4) had proved the certificate Exhibit-PG, as having been made on the basis of the school records indicating, that the prosecutrix VW-PW6, was born on 15.5.1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view, that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW-PW6. It would also be relevant to mention, that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW-PW6. The deposition of Satpal-PW4 has not been contested. Therefore, the date of birth of the prosecutrix VW-PW6 (indicated in Exhibit P.G., as 15.7.1977) assumes finality. Accordingly it is clear, that the prosecutrix VW-PW6, was less than 15 years old on the date of occurrence, i.e., on 25.3.1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW-PW6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW-PW6 had accompanied the Accused-Appellant Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.

22. Since the judgment relied upon by the learned Counsel for the Appellant is distinguishable on facts. And since the judgment relied upon, had not made any reference to the 2007 Rules, we are of the view that the same would not be relevant for the purposes of determining the age of the prosecutrix VW-PW6, specially in the background of the evidence led by the prosecution through Satpal (PW4) to establish.

23. The next contention advanced at the hands of the learned Counsel for the Accused-Appellant Jarnail Singh was, that the oral testimony of the prosecutrix VW-PW6 ought not to be accepted as sufficient to return a finding of guilt against the Accused-Appellant Jarnail Singh. Insofar as the testimony of the prosecutrix VW-PW6 is concerned, it is pointed that there were a number of discrepancies and contradictions therein. It was submitted, that such discrepancies can be seen on a comparison of her deposition before the trial Court, with the statement of the prosecutrix recorded under Section 164 of the Code of Criminal Procedure on 6.4.1993, as also, the statement of the prosecutrix recorded by the Investigating Officer under Section 161 of the Code of Criminal Procedure on 29.3.1993.

24. We have given our thoughtful consideration to the above noted submission, advanced at the hands of the learned Counsel for the Appellant. We, however, find no merit therein. It is not as if the prosecution version is entirely based on the statement of the prosecutrix VW-PW6. It would be relevant to mention, that her recovery from the custody of the Accused-Appellant Jarnail Singh from the house of Shashi Bhan, at Raipur, is sought to be established from the statement of Moti Ram-PW3. There can therefore be no room for any doubt, that after she was found missing from her father's residence on 25.3.1993, and after her father Jagdish Chandra-PW8 had made a complaint to the police on 27.3.1993, she was recovered from the custody of the Accused-Appellant Jarnail Singh. Thereafter, the prosecutrix VW-PW6 was subjected to medico-legal examination by Dr. Kanta Dhankar-PW1 on 29.3.1993 itself at 3.00 p.m. Dr. Kanta Dhankar-PW1, in her independent testimony, affirmed that she had been subjected to sexual intercourse, inasmuch as her hymen was found ruptured. Even though the visual examination of the prosecutrix VW-PW6, during the course of her medico-legal examination did not reveal the presence of semen or blood, yet the report of the forensic science laboratory (Exhibit PL) and of the Serologist (Exhibit PL/1) clearly establish the presence of semen on her salwar, underwear and pubic hair. The serologist's report also disclose, medium and small blood stains on her "salwar". In her own deposition, she had mentioned that, when she was raped by the Accused-Appellant Jarnail Singh and his accomplices, bleeding had taken place and she had felt pain, and her clothes were stained with blood. Her deposition stands scientifically substantiated by Exhibits PL and PL/1. The suggestion put to the prosecutrix VW-PW6 at the behest of the Accused-Appellant Jarnail Singh, during the course of her cross-examination, that she had accompanied the Accused-Appellant Jarnail Singh, of her own free will and had had sexual intercourse with him consensually, leaves no room for any doubt, that she was in his company, and that, he had had sexual intercourse with her. The assertion that the prosecutrix VW-PW6 had accompanied the Accused-Appellant Jarnail Singh, and had had sexual intercourse with him consensually is completely ruled out, because as per the substantiated prosecution version, the prosecutrix VW-PW6 was not taken away by the Accused-Appellant Jarnail Singh alone, but also, by his three accomplices. All the four of them had similarly violated her person. Additionally, in her

statement under Section 164 of the Code of Criminal procedure, the prosecutrix VW-PW6 had asserted, that in the first instance, after having caught hold of her, the Accused had made her inhale something from a cloth which had made her unconscious. Thereafter, when the Accused-Appellant Jarnail Singh attempted to commit intercourse with her, she had slapped him. He had then put a cloth in her mouth, to stop her from raising an alarm. Thereafter, each one of the accomplices had committed forcible intercourse with her in turns. The factum of commission of forcible intercourse by the Accused-Appellant, as also, his accomplices was reiterated by her during her testimony before the Trial Court as PW6. Besides the aforesaid, there is a statement of her own father, Jagdish Chandra (PW8) who also in material particulars had corroborated the testimony of the prosecutrix VW-PW6. The prosecutrix VW-PW6, was not subjected to cross-examination on any of these issues. Nor was the prosecutrix confronted with either the statements made by her under Section 161 or Section 164 of the Code of Criminal Prosecution, so as to enable her to explain discrepancies, if any. Therefore, we find no merit at all, in the submission advanced by the learned Counsel. In the above view of the matter, we are satisfied that there was substantial material corroborating the statement of the prosecutrix VW-PW6, for an unequivocal determination of the guilt of the Accused-Appellant Jarnail Singh.

25. No other submission besides those dealt with hereinabove, was advanced at the hands of the learned Counsel for the Appellant. For the reasons recorded above, we find no merit in the instant appeal and the same is accordingly dismissed.

4. State of U.P V Krishna Master and Ors.

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1180 of 2004

Decided On: 03.08.2010

Appellants: **State of U.P.**
Vs.
Respondent: **Krishna Master and Ors.**

Hon'ble Judges/Coram:
H.S. Bedi and J.M. Panchal, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Ratnakar Dass, Sr. Adv., Shekhar Raj Sharma and Chandra Prakash Pandey, Advs.

For Respondents/Defendant: Imtiaz Ahmed and Naghma Imtiaz, Advs. for Equity Lex Associates

Subject: Criminal

Subject: Law of Evidence

Catch Words

Mentioned IN

Acts/Rules/Orders:
Employee's Compensation Act; Indian Evidence Act - Section 134; Indian Penal Code, 1890 (IPC) - Section 34, Indian Penal Code, 1890 (IPC) - Section 302; Code of Criminal Procedure, 1973 (CrPC) - Section 161, Code of Criminal Procedure, 1973 (CrPC) - Section 313, Code of Criminal Procedure, 1973 (CrPC) - Section 357

Cases Referred:
State of U.P. v. Anil Singh MANU/SC/0503/1988 : AIR 1988 SC 1998; Superintendent of Police, CBI and Ors. v. Tapan Kumar Singh MANU/SC/0299/2003 : AIR 2003 SC 4140

Prior History:
From the Judgment and Order Dated 12.04.2002 of the High Court of Judicature at Allahabad in Criminal Appeal No. 574 of 2001 (MANU/UP/1364/2002)

Disposition:
Disposed off

Citing Reference:

JUDGMENT

J.M. Panchal, J.

1. The State of Uttar Pradesh has questioned legality of judgment dated April 12, 2002 rendered by Allahabad High Court in Criminal Appeal No. 574 of 2001 by which judgment dated February 20, 2001 passed by the learned Special Judge (EC Act)/Additional District Judge, Farrukhabad in Sessions Trial No. 17 of 1992 convicting the three respondents herein under Section 302 IPC and sentencing each of them to death with fine of Rs. 10,000/- in default RI for two years for commission of murder of six persons is reversed and they are acquitted.

2. The facts emerging from the record of the case are as under:

> The incident in question took place on August 10/11, 1991. The first informant is one Jhabbulal. He, as well as the respondents, are residents of Village Lakhanpur, District, Farrukhabad, Uttar Pradesh. About one year before the date of incident, Sontara, daughter of the respondent No. 1 had eloped with Amar Singh, son of Jhabbulal. On one day, Amar Singh was spotted in the village and on learning that Amar Singh was back in village, the respondents had made an attempt to find him out to assault him and to take revenge. However, Ramwati, wife of Guljari, had learnt about the plans of respondents. She was neighbour of Jhabbulal. Therefore, she had given prior intimation to Amar Singh about the ill designs of respondents to assault him. Thereupon Amar Singh had left the village and this is how his life was saved. Later on, the respondents had learnt that because of the intimation given by Ramwati, Amar Singh had left the village and he could not be targeted. Since then, the respondents were bearing a grudge against Ramwati. It may be mentioned that after 3-4 days Sontara and Amar Singh had returned to the village. It is the prosecution case that at that time, Guljari Lal, husband of Ramwati had suggested the Respondent No. 1, in presence of first informant Jhabbulal to get his daughter married to the son of Jhabbulal. Thereupon, respondent No. 1 had taken exception and told Guljari Lal not to play with the honour of his family. Because of the suggestion made by Guljari Lal, the respondent No. 1 was highly agitated and had animus against Guljari Lal and first informant, Jhabbulal.
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> Some 10 to 15 days prior to the date of incident, Sontara had again eloped with Amar Singh. Due to this reason the respondents had become restive and uneasy with the family of Jhabbu Lal and his neighbour Gulzari Lal. The respondent No. 1, Sri Krishna Master had gone to meet Jhabbulal and told

Jhabbulal that Sontara must come back to him by Sunday failing which no one in the world would be able to save him and family of Guljari. Because of the threat given by respondent No. 1, Jhabbulal had gone to the residence of his relatives in search of his son and daughter of the respondent No. 1, but he was unable to trace the missing boy and the girl.

3. On August 10, 1991, Ram Sewak, announced while sitting on Chabutra of Ram Sewak that, at all costs, the girl Sontara should come back. Otherwise, no one would be kept alive even for the name sake. Sontara did not come back to the village. In the midnight of August 10/11, 1991, at about 12 hours, the respondent No. 1, i.e., Shrikrishna, the respondent No. 2 Ram Sewak and the respondent No. 3 Kishori carrying country made pistols in their hands entered the house of Guljarilal by jumping the southern wall of the house. After entering into the house of Guljari, the respondents started firing shots indiscriminately. Because of the gun shots, Guljari, Ramwati, wife of Guljari, Rakesh, Umesh and Dharmendra sons of Guljarilal, were injured. PW2 (Madan Lal) who was sleeping at the place of incident, got up after hearing gun shots and hid himself under the cot. He witnessed the whole incident from there. First Informant Jhabbulal and his wife Lilawati, on seeing this ghastly incident, left their house and while making hue and cry entered the house of Khemkaran. The respondents after killing Guljari and his family made search for the complainant and his family members but they did not find them present in the house. At that very time, Baburam, brother of the first informant, who had entered his shop out of fear, was also dragged out by the respondents from the shop and shot dead. After resorting to indiscriminate firing, the respondents left the village and went towards the south by making two fires in the air.

At the time of incident, the respondents were carrying firearms and, therefore, no one dared to go near them. In the incident, Umesh and Dharmendra who had received injuries were removed to hospital but later on they also succumbed to their injuries. The written report relating to the incident was got scribed by Jhabbulal through a person named Radhey Shyam and it was submitted at the police station at about 3.30 a.m. on 11.8.1991. The Investigating Officer, Mr. Gajraj Singh recorded statements of those who were found to be conversant with the facts of the case. During the course of investigation, he took into possession Ban (the thread by which cot is woven), bed sheets etc. and prepared a memo. He also picked up 315 bore bullet lying near the dead body of Rakesh. Similarly, bullets of 315 bore lying near the cot on which Dharmendra and Umesh slept were also seized. He inspected the place of incident and prepared the sketch. The incriminating articles seized were sent to forensic science laboratory for analysis. He held inquest on the dead bodies and made arrangements for sending the dead body of four persons to hospital for post mortem examination. On completion of investigation, the three respondents were charged sheeted in the court of learned Chief Judicial Magistrate, Farrukhabad for commission of offences punishable under

Section 302 read with 34 IPC. In due course, the case was committed to Sessions Court for trial.

The learned Additional Sessions Judge to whom the case was made over for trial framed charges against the respondents under Section 302 read with Section 34 of the Indian Penal Code 1860. The charge was read over and explained to them. However, the respondents denied the same and claimed to be tried. The prosecution, therefore, in all, examined nine witnesses including two eye-witnesses and produced documents to prove its case. After the recording of evidence of prosecution witnesses was over, the respondents were explained by the learned Additional Sessions Judge, the circumstances appearing against them in the evidence of the witnesses and recorded their statements under Section 313 of the Code of Criminal Procedure, 1973. In their further statements, case of each of the respondent was that he was falsely implicated in the case and, therefore, should be acquitted.

The learned Judge of the Trial Court discussed the evidence of the witnesses in great detail and found that the evidence of the two eye-witnesses was trustworthy, cogent, consistent and reliable. On the basis of testimony of the two eye-witnesses, the Trial Court by judgment dated February 20, 2001 convicted each of the respondents under Section 302 read with Section 34 IPC. The respondents were thereafter heard by the learned Judge regarding sentence to be imposed on them for commission of offences punishable under Section 302read with Section 34 IPC. After hearing the respondents, the learned Judge awarded capital punishment to each of the three respondents and fine of Rs. 10,000/- in default RI for two years. A direction was given not to execute capital punishment until the same was confirmed by the High Court. It was also directed that the amount of fine paid by the respondents, be given to Madan Lal who was PW2 and son of deceased Guljari as compensation. The learned Additional District Judge, Farrukhabad under a reference sent the documents to the High Court for confirmation of the capital punishment imposed on the respondents.

4. Feeling aggrieved, the respondents preferred Criminal Appeal No. 574 of 2001. The reference made by the trial court for confirmation of the death sentence awarded to the respondents, was heard along with the appeal filed by the respondents. The High Court by the impugned judgment has acquitted the respondents and rejected the reference made by the trial court, for confirmation of the death sentence, giving rise to the instant appeal.

5. This Court has heard the learned Counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the record.

6. The fact that each of the six deceased had died homicidal death is not disputed before this Court. The said fact was also not disputed by any of the respondents before the High Court or

the trial court. From the evidence of two eye-witnesses as well as that of Dr. S.K. Gupta, PW4, who had conducted autopsy on the dead body of six deceased persons and on perusal of their respective post-mortem notes, there is no manner of doubt that the six deceased persons had died homicidal death on account of firearm injuries. The said finding recorded by the trial court and confirmed by the High Court, being eminently just, is hereby upheld.

7. The time of occurrence is also not disputed by the learned Counsel of the respondents. It is admitted before this Court that all the murders were committed in the night of August 10, 1991. However, it was maintained by the learned Counsel for the respondents that none of the respondents were assailants and, therefore, acquittal of the respondents recorded by the High Court should not be lightly interfered with by this Court.

8. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the Police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a short-coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. In the deposition of witnesses, there are always normal discrepancies, howsoever, honest and truthful they may be. These discrepancies are due to normal errors of observation, normal

errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case albeit foolishly. Therefore, it is the duty of the Court to separate falsehood from the truth. In sifting the evidence, the Court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eye-witnesses examined in this case proves the prosecution case.

9. From the impugned judgment, it becomes evident that the High Court took into consideration the evidence tendered by PW1 Jhabbulal and PW2 Madan Lal. The High Court, at the very outset examined the evidence adduced by the prosecution with regard to five murders committed in the house of Guljari Lal and scanned the evidence of PW1, Jhabbulal. After noting that his house was undisputedly situated to the north of house of Guljari and that both the houses were separated by an intervening wall running East to West, the High Court analysed the evidence of PW1 Jhabbulal. The High Court took into consideration the claim of PW1 Jhabbulal that at the time of the incident, he was sleeping in the courtyard of his house and that he had woken up on hearing sounds of gun shots and was scared as a result of which he stood by the side of the wall of courtyard to save himself. On scrutiny of this witness, the High Court came to the conclusion that on his own showing, it was not possible for PW1, Jhabbulal to have witnessed the incident which occurred inside the house of Guljari, more particularly when the two houses were separated by a wall having height of more than that of a normal person. The High Court thereafter proceeded to examine the site plan Exhibit- Ka14 and concluded that when the investigating officer had made inspection of the scene of occurrence, PW1, Jhabbulal had claimed to have seen the incident through holes (mokhana) in the intervening wall, but in his substantive evidence tendered before the Court, Jhabbulal had not claimed to have seen the incident through the holes in the intervening walls. Thereafter, the High Court again took notice of the statement made by PW1, Jhabbulal that he was standing by the side of the wall of courtyard and finally concluded that it was highly doubtful that Jhabbulal who was present inside his own house had seen the incident which occurred inside the house of Guljari.

10. This Court finds that the abovestated reasons are the only reasons specified by the High Court to disbelieve the eye- witness account given by PW1, Jhabbulal. In order to find out whether the reasons assigned by the High Court to disbelieve the episode of five murders narrated by witness Jhabbulal, are sound, this Court has undertaken the exercise of going through the entire testimony of witness Jhabbulal recorded before the Trial Court. As far as the incident which had taken place in the house of Guljari is concerned, it was mentioned

therein that at about 12 O'clock, in the night, Master Shri Krishna holding ponia gun and Ram Sewak as well as Kishori holding country-made pistols tresspassed into the house of Guljari after jumping over southern side wall of the house of Gulzari and committed murder of Guljari, his wife Ramwati and son Rakesh by firing gun shots. He also mentioned in his testimony that because of the firing of gun-shots Umesh and Dharmendra who were sons of Gulzari were injured. According to him, on witnessing the said incident, he with his wife Leelawati left his home and went into the house of Khemkaran rasing hue and cry. It was further mentioned by the witness that the respondents had tried to trace his family and they had gone inside the shop of his brother Baburam and gunned him down after dragging him out of the shop. What was claimed by this witness was that the incident was also witnessed by Sarla Devi, daughter of Guljari, Rakesh and Madan Lal, sons of Guljari and his brothers Mohanlal, Rajaram and Kailash who were sons of Jiwan. It was asserted by him that he had witnessed the incident in the light of electric bulb. It was frankly admitted by him that no one had dared to go near to the respondents because they were carrying with fire arms.

It was further asserted by him that after the respondents had left the place opposite the shop of his brother, he had gone near his injured brother who was alive and had tried to learn from Baburam as to who had assaulted him and thereupon his brother had informed him that Shrikrishna (respondent No. 1), Ram Sewak (Respondent No. 2) and Kishori (Respondent No. 3) had assaulted him with fire arms. It is also mentioned by him that at his instance, FIR was reduced into writing by Radhey Shyam as dictated by him and that he had filed the same at the police station. The record of the case shows that this witness was cross-examined at great length. He was subjected to grueling cross-examination which runs into 31 pages. The first and firm impression which one gathers on reading the testimony of this witness is that he is a rustic witness. A rustic witness, who is subjected to fatiguing, taxing and tiring cross-examination for days together, is bound to get confused and make some inconsistent statements. Some discrepancies are bound to take place if a witness is cross-examined at length for days together. Therefore, the discrepancies noticed in the evidence of a rustic witness who is subjected to grueling cross-examination should not be blown out of proportion. To do so is to ignore hard realities of village life and give undeserved benefit to the accused who have perpetrated heinous crime. The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness. When the respondents were firing from their respective fire arms, the High Court should not have expected PW1 Jhabbulal to mention

description of the whole episode which had happened in a few minutes. The rustic witnesses cannot be expected to have an exact sense of time and so cannot be expected to lay down with precision the chain of events. In the instant case, this Court is of the firm opinion that the High Court gravely erred in not accepting evidence of PW1, Jhabbulal. Jhabbulal being a rustic witness is not expected to always have an alert mind and so have an idea of direction, area and distance with precision from which he had witnessed the incident. It is well to notice that in his examination in chief, Jhabbulal never claimed that he was standing by the side of the wall of courtyard nor it was claimed by him that he had witnessed the incident through mokhana, i.e. holes in the intervening walls. Though the witness was cross-examined for days together, he was never confronted with his statement recorded under Section 161 of the Code of Criminal Procedure wherein he had allegedly stated before the Police Officer that he had witnessed the incident through holes in the intervening wall. The witness having not been confronted with his earlier police statement wherein he had reportedly stated that he had seen the incident through the holes in the intervening wall, this Court fails to understand as to how the said statement allegedly made before the police during the investigation could have been pressed into service by the High Court to reject the substantive evidence of this witness tendered before the Court wherein it was specifically asserted that while in his house, he had witnessed the incident of killing of five members of Guljari's family by the respondents by firing gun shots. The prosecution has satisfactorily established that Baburam who was brother of Jhabbulal, PW1, had lost his life because of gun shots fired at him. The suggestion made by the defence to the witness that he was making a false claim that Baburam was alive and that on enquiry by him, Baburam had told him that the respondents had assaulted him with fire arms, as he was tutored by the police outside the court room was emphatically denied by him. It is interesting to note that to confuse this witness he was cross-examined for days together on the point as to where and in which direction houses of Kailash, Rajaram Subedar, Darbari etc. were situated. Such an attempt by defence lawyer can hardly be approved. On re-appreciation of evidence of Jhabbulal, this Court finds that he has not made major improvements in his testimony before the Court and the so-called discrepancies which are blown out of proportion by the High Court are minor in nature and do not relate to the substratum of the prosecution story. To say the least, this Court finds that the approach of the High Court in appreciating evidence of PW1 Jhabbulal who was a rustic witness is not only contrary to the well settled principles governing appreciation of evidence of a rustic witness but is perverse. At this stage, it would be well to recall to the memory the weighty observations made by this Court as early as in the year 1988 relating to appreciation of evidence and the duties expected of a Judge presiding over a criminal trial. In State of U.P. vs Anil Singh MANU/SC/0503/1988 : AIR 1988 SC 1998, it is observed as under:

In the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood stated or embroidery added by

witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.

11. There appears to be substance in the argument of the learned Counsel for the State that the feeble and insubstantial reasons have been given to disbelieve the trustworthy evidence of eye-witness, Jhabbulal as High Court had decided to give undeserved benefit of doubt to the respondents and had appreciated the evidence of PW1 Jhabbulal to find out drawbacks and shortcomings in his evidence when, in fact, there were none.

12. Coming to the appreciation of evidence of another eye- witness, Madan Lal, this Court finds that the first fact kept in mind by the High Court was that at the time of occurrence, this witness was aged about six years and that his examination in chief was recorded almost after ten years from the date of occurrence, because at the time of recording of his examination in chief before the Trial Court, he had mentioned his age to be 16 years. It was highlighted by the High Court that in his examination in chief, it was claimed by this witness that he was sleeping on a cot along with his two brothers, i.e., deceased Umesh and deceased Dharmendra whereas his mother was sleeping on another cot and that when the accused had started firing he had slipped beneath the cot over which he was sleeping, but at another place it was stated by him that he was sleeping with his mother and had taken shelter under the said cot and therefore, the witness was not consistent as to the place from where he had witnessed the incident. The High Court adverted to the statement made by this witness that his elder sister, Sarla and elder brother Rajesh were also sleeping under the Chhapper but had managed to run away and Sarla had concealed herself behind a heap of woods lying on the western side in the courtyard itself. After examining site plan Exhibit- "ka" 14 the High Court observed that in

the site plan, place where Sarla had allegedly taken shelter was not indicated nor any heap of woods was shown, and finally came to the conclusion that the witness was not reliable. The High Court took into consideration the statement made by this witness that when he had come out from beneath the cot, he had seen Sarla in the house and that many persons had assembled at his house after the occurrence but he was not able to identify them as he was a small child nor any of the persons assembled near his house had asked him as to who were the assailants and what they had done and therefore the High Court deduced that this witness was not present in the house at the time of the occurrence. A strange reasoning was adopted by the High Court to come to the conclusion that the witness was not a reliable one because he was a child of about six years of age at the time of occurrence. His statement in the trial court was recorded after a gap of about 10 years. It is inconceivable that child of his understanding would recapitulate facts in his memory witnessed by him long ago. One of the reasons assigned by the High Court to disbelieve this witness was that Rajesh and Smt. Sarla who were of matured age and were in a better position to depose about the incident were not produced before the Trial Court for which no explanation whatsoever was given by the prosecution. The High Court readily accepted submission made by the counsel for the respondents that Rajesh and Smt. Sarla were not produced before the Court because obviously they were not prepared to support the false story set up by PW1, Jhabbulal in the FIR which was lodged by him against the respondents on account of his personal animosity. The High Court also found weight in the submission advanced by the advocate for the respondents that had these witnesses been produced before the Court, their evidence would have gone against the prosecution. The High Court again took notice of the fact that according to witness Madan Lal he had taken shelter under the cot over which he was sleeping along with his two brothers Umesh and Dharmendra who were killed by the assailants in the incident and concluded that it was ridiculous to believe that this witness who was younger than his two deceased brothers had taken shelter under the same cot without his presence being noticed by the assailants. After noticing that Smt. Sarla and Rajesh who were elder to the witness Madan Lal were not alleged to have sustained any injury, the High Court proceeded to record a finding of fact that these three children were not present inside the house at the time of occurrence on the spacious plea that if Madan Lal, PW2, and Rajesh as well as Smt. Sarla had been present, they would not have been spared by the assailants and that the theory set up at the trial that all these three children had concealed themselves at different places is not only an improvement but does not find support from the evidence on record as well as the spot inspection made by the investigating officer.

13. The above stated reasons are the only grounds on which testimony of witness Madan Lal is disbelieved by the High Court. This Court fails to understand as to on what principle and on which experience in real life, the High Court made a sweeping observation that it is inconceivable that a child of Madan Lal's understanding would be able to recapitulate facts in

his memory witnessed by him long ago. There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. This witness has claimed on oath before the Court that he had seen five members of his family being ruthlessly killed by the respondents by firing gun shots. When a child of tender age witnesses gruesome murder of his father, mother, brothers etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence. This Court is of the firm opinion that it would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the spacious ground on which the reliable testimony of PW2, Madan Lal came to be disbelieved can hardly be affirmed by this Court. One of the reasons given by the High Court to disbelieve testimony of witness Madan Lal is that Rajesh and Smt. Sarla who were of mature age and were in a better position to depose about the incident were not produced before the Court. It is nobody's case that witness Madan lal was in charge of prosecution case. The Public Prosecutor was in charge of the case and it was for him to decide whether Rajesh and/or Smt. Sarla should be examined or not. The evidence of witness Madan Lal, in no uncertain terms, discloses that his brother Rajesh and sister Smt. Sarla were ready to depose before the Court about the incident. However, for non-production of his brother Rajesh and his sister Sarla before the Court, witness Madan Lal was never responsible. He had not taken any decision for examining his brother Rajesh and Smt. Sarla. It was the discretion and decision of the Public Prosecutor due to which his brother and sister were not examined as witnesses. At no stage of the trial, the defence had made a request to the Trial Court to call upon the Public Prosecutor to examine Rajesh and Smt. Sarla as witnesses. It is the case of the defence that Rajesh and Smt. Sarla had witnessed the incident and if they had been examined as witnesses, they would have deposed against the prosecution case that the respondents were not responsible for murders of five family members of Guljari and brother of the first informant. In such circumstances, it was incumbent upon and open to the defence to examine Rajesh and/or Smt. Sarla as defence witness. No prayer was made by the defence to examine Rajesh and Smt. Sarla even as court witnesses. Therefore, for non-examination of Rajesh and/or Smt. Sarla, witness Madan Lal could not have been blamed nor his evidence could have been brushed aside in a casual manner. The acceptance of submission made by the counsel for the respondents that Rajesh and Smt. Sarla were not produced because they were not prepared to support the false story set up by PW1, Jhabbulal in his FIR against the respondents on account of his personal animosity, is not understandable at all and appears to be figment of imagination of the defence. Nothing could be brought on record or elicited from the cross-examination of either

PW1 Jhabbulal or PW2 Madan Lal to show that they were ready and willing to allow real culprits who had committed heinous crime and virtually wiped off family of Guljari and murdered real brother of the first informant to go scot free and implicate the respondents falsely in such a serious case.

14. One of the reasons given by the High Court for disbelieving testimony of PW2, Madan Lal is that the evidence indicated that a large number of villagers had gathered outside the door of Gulzari Lal's house but not even one of them was examined to justify that PW2 Madan Lal was present in his house. The High Court has further held that presence of witness Madan Lal in his house becomes doubtful because if he had been present inside the house at the time of occurrence, his presence would have been noticed by the assailants and he would not have been spared by them. To say the least, these reasons are not tenable at all. As noticed earlier, the case of witness Madan lal is that on hearing sound of gun shots, he had slipped beneath the cot and from there witnessed the whole incident. This story appears to be probable because the incident had taken place during night time in the house and therefore it was possible for the witness to slip beneath the cot without being noticed by the assailants. It is nobody's case that the respondents, while killing Guljari and his family, had seen below the cot to find out whether any other member of Guljari's family was alive or not. Therefore, to say that Madanlal must not have been inside the room otherwise he would have been killed by the assailants is a far fitted reason which does not appeal to this Court. It is true that it has come in evidence that a large number of villagers had gathered outside the door of Guljari Lal's house. But this Court is of the opinion that it was not necessary for the prosecution to examine any of the witnesses to prove that he had seen PW2 Madan Lal in Madan Lal's house. PW2 Madan Lal himself is competent to state before the Court whether he was present in his house at the time of incident. Witness Madan Lal has given evidence in a simple manner without making any noticeable improvements and/or embellishments and, therefore, it was not necessary for the court to seek corroboration to his assertion that he was in his house when the incident had taken place. What is relevant to notice is that the court cannot forget the fact that at the time of incident, PW2 Madan Lal was a tender aged child. Normally, a child aged six years is not expected to be out of house at the dead of night and he is expected to be in the company of his parents. Moreover, the testimony of witness Lajveer Singh, PW3, who was posted at Police Station, Kayamganj, Farrukhabad shows that after registration of offences, ASI Gajraj Singh had recorded statements of those persons who were found to be conversant with the facts of the case and Gajraj Singh had also recorded statement of witness Madan Lal on August 11, 1991. If witness Madan lal had not been present in his house at the time when the incident had taken place, his police statement would not have been recorded by ASI Gajraj Singh at all. Thus, the reasons on which presence of PW2, Madan Lal is doubted is against the weight of evidence, human conduct and preponderance of probabilities. Further, at the time of incident, PW2, Madan Lal was of tender age and, therefore, incapable of

nurturing any grudge against any of the respondents. No evidence could be produced nor any suggestion was made to witness Madan Lal during his cross-examination that something serious had happened between the date of incident and recording of evidence of witness Madan Lal in court, between Madan Lal and the respondents that Madan Lal was out to implicate the respondents falsely in such a serious case.

15. One of the grounds mentioned by the High Court in the impugned judgment for disbelieving the case of the prosecution is that Rajesh who was brother of PW2, Madan Lal and Smt. Sarla who is sister of witness Madan Lal as well as few of those who had collected near the door of the house of Guljari after the incident were not examined as witnesses in this case. As far as this ground is concerned, the Court notices that Section 134 of the Indian Evidence Act specifically provides that no particular number of witnesses shall, in any case, be required for the proof of any fact. It is well known principal of law that reliance can be placed on the solitary statement of a witness if the court comes to the conclusion that the said statement is the true and correct version of the case of the prosecution. The courts are concerned with the merit and the statement of a particular witness and not at all concerned with the number of witnesses examined by the prosecution. The time-honoured rule of appreciating evidence is that it has to be weighed and not counted. The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, where, the court finds that the testimony of solitary witness is neither wholly reliable nor wholly unreliable, it may, in given set of facts, seek corroboration but to disbelieve reliable testimony of a solitary witness on the ground that others have not been examined is to do complete injustice to the prosecution. This Court, on re-appreciation of evidence, finds that the testimony of witness Madan Lal is cogent, consistent and reliable. Taking into consideration the manner in which witness Madan Lal had testified before the Court and the fact that nothing could be elicited in his lengthy cross-examination for days together to impeach his credibility, this Court is of the view that his testimony is reliable and can be accepted without any reservations. Therefore, non-examination of his brother or sister or few others who had gathered near the house of deceased Guljari Lal after the incident is of no significance and does not affect credibility of testimony of the said witness.

Cumulative effect of the above discussion is that the High Court was not justified in brushing aside testimony of PW2, Madan Lal while considering case of the prosecution against the respondents.

Yet another ground assigned by the High Court for disbelieving the testimony of first informant Jhabbulal and that of PW2 Madan Lal is that there was no electricity light in the village and, therefore, the claim made by both the witnesses that they had witnessed the incident in the light of electricity is untrustworthy. To begin with, this Court proposes to refer

to the First Information Report lodged by witness Jhabbulal. The said report was brought on the record as Exhibit Ka-1. In the report, it is clearly mentioned that at the time of occurrence of the incident, there was electricity light at the place of incident and with the help of the said light, the first informant was able to witness the incident wherein five members of deceased Guljari's family came to be murdered by the respondents. The witness Jhabbulal has further stated that his brother Babu Ram, who was sleeping in his shop was dragged out from the shop by the respondents by breaking open the door of the shop and thereafter was murdered by them by firing gun shots. Regarding murder of Babu Ram also, it is mentioned in the First Information Report that electric bulb was burning at his house at the time of occurrence of the incident and, therefore, he was able to witness the murder of his brother Babu Ram. PW2, Madan Lal has stated that his father, mother and three real brothers were murdered by the respondents by firing gun shots and had asserted that at the time of the incident one bulb was burning on the main gate of his house whereas another bulb was burning on the thatched roof, i.e., near the place where the deceased had slept during the night of the incident. Though both the witnesses were cross-examined at great length by the learned Counsel for the defence, nothing significant could be brought on record from which one can, with certainty deduce that there was no light of electricity bulbs at the place of the incident. Apart from what is mentioned by the two eye-witnesses regarding sufficiency of electricity light in which they had witnessed the incident, the sketch of the spot prepared by the Investigating Officer on August 11, 1991 in the presence of independent witnesses and produced as Exhibit Ka-14 shows that point `L' mentioned in the panchnama of place of occurrence, a bulb has been shown burning at the main gate of the house of PW2 Madan Lal whereas another bulb is shown burning at the place mentioned as `AL'. Thus, assertion made by the two eye- witnesses that they were able to witness the incident because of availability of sufficient electricity light gets corroboration from contemporaneous document, namely, Exhibit Ka-14. According to the High Court, the place pointed by PW2, Madan Lal where an electric bulb was hanging has not been shown in the site plan and on the contrary it has been shown at a different place. Even if it is assumed that the place mentioned by PW2, Madan Lal where an electric bulb was hanging is different from the place shown in the site plan, the fact remains that an electric bulb was hanging at the place of incident which is completely ignored by the High Court. It is relevant to notice that PW2, during the course of recording of his statement before the Court had mentioned that he had shown to the Investigating Officer the place where the bulb was hanging but he was not in a position to specify the reason as to why the place shown by him to the Investigating Officer was not mentioned in the site plan. It may be mentioned that the Investigating Officer ASI Gajraj Singh, unfortunately, expired before the commencement of the trial and, therefore, another officer was examined who had taken a little part in the investigation. Thus, the contradiction and/or omission in the statement of the witness recorded under Section 161 of the Criminal Procedure Code could not be brought on the record of the case. In such circumstances, there was no reason for the High Court to disbelieve

the claim made by PW2 Madan lal that he had shown to the Investigating Officer the place where the bulb was hanging. Jhabbulal had stated in this evidence that Guljari had taken electric line illegally be putting a wire on the main line which proceeded to the tube well of Suresh Chand DW1. The High Court relied upon the testimony of Suresh Chand that no villager had taken electricity from his tube well line and thereafter concluded that there was complete darkness in the whole village on account of Amavasya of rainy season and, therefore, it was not possible for the two eye-witnesses to witness the incident. It becomes absolutely necessary for this Court to scan the evidence of DW1. DW1 in his evidence before the Court stated that he was having a tubewell in village Lakhanpur prior to the date of incident and that tubewell was being operated with the electric power. It was also mentioned by him that the electricity connection was in running condition and that the electricity line passes through the village. What is stated by the witness is that during the night of the incident, he was not present in his village Lakhanpur but had gone to his sister's house situated in another village and that he had come back to his village on the third day of the date of the incident. If this witness was not present on the date of incident, he was least competent to depose before the Court as to whether on the date of incident there was electricity light in the village or not. A specific question as to whether on the fateful night electricity was taken illegally by putting Katiya to his wire was put to this witness. This witness was not able to answer this specific query naturally because he had admitted that on the date of incident he was not present in the village. The Trial Court rightly observed that it was not concerned with the question whether the electric power was being consumed by the villagers legally or illegally and that the Court was only concerned with the question whether there was sufficient light on the date of incident to enable the witnesses to see the incident. The High Court has misread the evidence of DW1 Suresh Chand as well as that of PW2 Madan Lal, wherein it was asserted by him that he had also taken illegal electricity connection and was consuming the same through the bulbs which according to him were burning on the date of incident. Thus the reliable evidence of PW1 and PW2 cannot be brushed aside on the ground that Investigating Officer had not taken into possession the bulbs hanging on the place of incident. Thus, the High Court was not justified in holding that there was no electric power in the whole village and that there was complete darkness on account of Amavasya of rainy season due to which it was impossible for the eye-witnesses to witness the incident. Further, the visibility capacity of urban people is not the standard to be applied to the villagers. PW2 Madan Lal has stated that the respondents had brought with them torches but as light of electricity was available in the house, torches were not put on. Thus, according to PW2 Madan Lal the respondents had in the light of electric bulb recognized the deceased persons and had fired gun shots on them. Further, if light available was sufficient for the accused persons to identify their targets for firing shots, there is no reason why the witnesses would not be able to identify the respondents as the assailants. The statement of PW1 Jhabbulal that Guljari had taken electric line illegally by putting a wire on the main line which proceeded to the tube well was

disbelieved by the High Court on the ground that the Investigating Officer had not mentioned either in the site plan or in the inspection note that electric line had been taken in an unauthorized manner from the main line which proceeded to the tube-well of Suresh Chand. It is common experience of one and all that site plan or panchnama of place of incident is being prepared to indicate the state of things found at the place of incident. In site plan, Investigating Officer is not supposed to note whether electric line had been taken in an unauthorized manner or not. That is not the purpose for which site plan is prepared in a criminal case. Thus, without sufficient reason the High Court disbelieved the claim made by PW1 Jhabbulal that deceased Guljari had taken electric line illegally by putting a wire on the main line. On the facts and in the circumstances of the case emerging from the record, this Court is of the opinion that the High Court was not justified in coming to the conclusion that there was complete darkness in the whole village and, therefore, it was not possible for the eye-witnesses to see the incident.

The High Court has further held that motive alleged against deceased Guljari was developed for the first time during trial by witness Jhabbulal and there was no motive for the respondents to commit the murders of as many as five persons of the family of Gulzari Lal. A conjoint and purposeful reading of FIR with the reliable testimony of PW1 Jhabbulal and that of PW2 Madan Lal makes it very clear that the respondents were agitated and angry when the daughter of respondent No. 1 had eloped with the son of the first informant. The evidence on record further shows that during the time of first elopement, on one day son of the first informant, i.e., Amar Singh, was spotted in the village and on learning about the fact that son of the first informant was seen in the village, the respondents were prepared to take revenge to what is known as to maintain honour of the family. However, the fact that Amar Singh was likely to be assaulted by the respondents had become known to wife of Guljari who had fore-warned Amar Singh and Amar Singh had, therefore, left the village to save his life. The evidence also indicates that the fact that Amar Singh had left the village all of a sudden because of information conveyed by wife of the deceased Gulzari that respondents were to assault him was later on learnt by the respondents and, therefore, the respondents were bearing a grudge against wife of Gulzari and against Gulzari. The record further shows that when the daughter of the respondent No. 1 had returned to the village, Guljari in the presence of the first informant had made a suggestion to the respondent No. 1 that he should get his daughter married with the son of the first informant upon which the respondent No. 1 had taken an offence and asked Gulzari not to play with the honour of his family. This Court is of the opinion that sufficient evidence has been led by the prosecution to establish motive which prompted the respondents to kill five members of family of deceased Guljari. What weighed with the High Court in disbelieving the motive suggested by the prosecution was the fact that in the FIR lodged by PW1 Jhabbulal, it was not stated that because wife of Gulzari had forewarned Amar Singh about impending assault on him by the respondents, the respondents

were not able to take revenge against Amar Singh and that Gulzari had suggested to the respondent No. 1 to get his daughter married with son of PW1. The High Court held that such story was developed for the first time during trial by witness Jhabbulal who was admittedly on inimical terms with the respondents. As far as this aspect is concerned, this Court notices that the FIR need not be an encyclopedia of all the facts and circumstances on which the prosecution relies. The main purpose of the FIR is to enable a police officer to satisfy himself as to whether commission of cognizable offences is indicated so that further investigation can be undertaken by him. The purpose of the FIR is to set the criminal law in motion and it is not customary to mention every minute detail of the prosecution case in the FIR. FIR is never treated as a substantive piece of evidence and has a limited use, i.e., it can be used for the corroborating or contradicting the maker of it. Law requires FIR to contain basic prosecution case and not minute details. The law developed on the subject is that even if an accused is not named in the FIR he can be held guilty if prosecution leads reliable and satisfactory evidence which proves his participation in crime. Similarly, the witnesses whose names are not mentioned in the FIR but examined during the course of trial can be relied upon for the purpose of basing conviction against the accused. Non-mentioning of motive in the FIR cannot be regarded as omission to state important and material fact. As a principle, it has been ruled by this Court that omission to give details in the FIR as to manner in which weapon was used by accused is not material omission amounting to contradiction. Further, this is a case wherein FIR was filed by a rustic man and, therefore, non-mentioning of motive in the FIR cannot be attached much importance. In Superintendent of Police, CBI and Ors. vs Tapan Kumar Singh MANU/SC/0299/2003 : AIR 2003 SC 4140, it has been held by this Court that mere absence of indication about source of light in the FIR for identifying assailants does not, in any way, affect prosecution version. The FIR is not the last words in the prosecution case and in some cases detailed FIR could be a ground for suspicion. What is relevant to find out is whether the FIR was lodged promptly and whether it is actuated by mala fides. The record of this case indicates that FIR regarding gruesome murder of six persons was filed promptly and without any avoidable delay and, therefore, false implication of any of the respondents in such a grievous case stands ruled out. There is nothing on the record to show that FIR was result of deliberation by the first informant with other persons. As the FIR was lodged promptly, the informant, i.e., Jhabbulal's evidence containing minor variations not affecting substratum of prosecution story cannot be discarded on the ground that motive which prompted the respondents to kill six persons was not mentioned in the FIR. Further, it is well settled that the prosecution is not supposed to prove motive when prosecution relies on direct evidence, i.e., evidence of eye- witnesses. In this case, the prosecution has examined first informant as PW1 who has lost his brother in the incident as well as PW2 Madan Lal who lost five members of his family. Their evidence is found to be trustworthy and unimpeachable. As observed earlier, their evidence does not suffer from major contradiction and/or improvements nor noticeable embellishment have been made by them. As the prosecution has led acceptable eye-witnesses

account of the incident, this Court is of the firm opinion that failure to establish motive would not entitle the respondents to claim acquittal.

16. There is yet another evidence in form of oral dying declaration which implicates the appellants in the murder of six persons i.e. oral dying declaration made by deceased Baburam before his brother Jhabbulal. The High Court committed serious error in disbelieving the oral dying declaration made by deceased Baburam before his real brother Jhabbulal (PW1) implicating the appellants as his assailants. The reasons given by the High Court for disbelieving oral dying declaration was that it was not mentioned by witness Jhabbulal either in his FIR or in his statement recorded under Section 161 of CrPC. As observed earlier FIR need not be an encyclopedia of minute details of the incident nor it is necessary to mention therein the evidence on which prosecution proposes to rely at the trial. The basic purpose of filing FIR is to set the criminal law into motion and not to state all the minute details therein. It is relevant to notice that six brutal and gruesome murders had taken place wherein fire arms were used. The hard reality of life is that the persons who has lost kith and kin in horrific incident is likely to suffer great shock and therefore law would not expect him to mention minutest details either in his FIR or statement under Section 161. The question before the Court is whether the assertion made by the witness that soon after the incident he had gone to the place where his injured brother was lying and on enquiry by him, his brother had told him that the appellants were his assailants, inspires confidence of the Court. Reading the evidence of the witness as a whole, this Court points that it has ring of truth in it. There is nothing improbable if a brother approaches his injured brother and tries to know from him as to how he had received the injuries nor it is improbable that an enquiry being made the injured brother would not give reply/information sought from him. The assertion by witness Jhabbulal that after the incident was over he had gone near his injured brother and tried to know as to who were his assailants, whereupon his injured brother had replied that the appellants had caused injuries to him, could not be effectively challenged during cross-examination of the witness nor it could be brought on record that because of the nature of the injuries received by Baburam he would not have survived even for few minutes and must have died immediately on the receipt of the injuries.

17. The net result of the above discussion is that the High Court has acquitted respondents who were charged for commission of six murders in a casual and slipshod manner. The approach of the High Court in appreciating the evidence is not only contrary to the well settled principles of appreciation of evidence but quite contrary to ground realities of life. The High Court has recorded reasons for acquittal of the respondents which are not borne out from the record and quite contrary to the evidences adduced by the reliable eye- witnesses. The High Court was not justified in upsetting well reasoned conviction of the respondents recorded by the Trial Court which after observing demur of the eye-witnesses had placed reliance on their

testimony. The High Court has not taken into consideration the full text of the evidence adduced by the witnesses and picked up sentences here and there from the testimony of the witnesses to come to a particular purpose. For example, the High Court has not taken into consideration the whole testimony of DW1 before coming to the conclusion that there was complete darkness in the village which prevented the eye-witnesses from witnessing the incident. The general impression this Court has gathered is that appreciation of evidence by the High Court is cursory and has done injustice to the prosecution.

18. On the facts and in the circumstances of the case, this Court is of the firm opinion that it is firmly established by the prosecution that respondents are persons who had committed six murders on August 10/11, 1991 and, therefore, liable to be convicted under Section 302 read with Section 34 IPC.

19. This Court has heard the learned Counsel for the parties regarding sentence to be imposed on each respondent for having committed offence punishable under Section 302read with Section 34 IPC. This Court notices that the Trial Court had sentenced all the three respondents to capital punishment. There is no manner of doubt that killing six persons and wiping almost the whole family on flimsy ground of honour saving of the family would fall within the rarest of rare case evolved by this Court and, therefore, the Trial Court was perfectly justified in imposing capital punishment on the respondents. However, this Court also notices that the incident had roughly taken place before 20 years, i.e., on August 10/11, 1991. Further, the High Court had acquitted the respondents by judgment dated April 12, 2002. After April 12, 2002 till this date, nothing adverse against any of the respondents is reported to this Court. To sentence the respondents to death after their acquittal in the year 2002 would not be justified on the facts and in the circumstances of the case. Therefore, this Court is of the opinion that interest of justice would be served if each of the respondent is sentenced to RI for life and a fine of Rs. 25,000/- each in default RI for two years for commission of offence punishable under Section 302 read with Section 34 IPC.

20. For the foregoing reasons, the appeal succeeds. The judgment dated April 12, 2002 rendered by the High Court of Judicature at Allahabad in Criminal appeal No. 574 of 2001 acquitting the respondents of the offences punishable under Section 302 read with Section 34IPC is hereby set aside. The judgment of the Trial Court convicting each of the respondents under Section 302 read with Section 34 IPC is hereby restored and each respondent is accordingly convicted under Section 302 read with Section 34 IPC. For the commission of offence punishable under Section 302 read with Section 34 IPC, each respondent is sentenced to RI for life and fine of Rs. 25,000/- each, in default, RI for two years. Out of the amount of fine, if paid, a sum of Rs. 50,000/- be paid to PW2, Madan Lal, as

compensation in view of the provisions of Section 357 of the Code. The appeal accordingly stands disposed of.

5. AG vs Shiv Kumar Yadav

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 1187-1188 of 2015 (Arising out of SLP (Crl.) Nos. 1899-1900 of 2015) and Criminal Appeal Nos. 1191-1192 of 2015 (Arising out of SLP (Crl.) Nos. 2215-2216 of 2015)

Decided On: 10.09.2015

Appellants: **AG**
Vs.
Respondent: **Shiv Kumar Yadav and Ors.**

Hon'ble Judges/Coram:
J.S. Khehar and A.K. Goel, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Mukul Rohatgi, AG, P.S. Patwalia, ASG, Kailash Vasdev,Colin Gonsalves, Sr. Advs., Devanshee P., Ajay Sharma, Binu Tamta, Samit, Ranjeeta Rohatgi, Gurmehar Sistani, Archit Upadhyay, Dhruv Sheoran, Natasha Vinayak, Rajat Singh,Sukhmani, Advs. for D.S. Mahra) Sumeeta Choudhary, Satya Mitra and Divya Jyoti Jaipuriar, Advs.

For Respondents/Defendant: D.K. Mishra, Ankit Aggarwal, M.Z. Ali, Abhinav Mishra, Advs. for Bankey Bihari, Adv.

Subject: Criminal

Catch Words

Mentioned IN

Acts/Rules/Orders:
Evidence Act - Section 138; Advocates Act; Criminal Law Amendment Act, 2013; Code of Criminal Procedure (CrPC) - Section 161, Code of Criminal Procedure (CrPC) - Section 164,Code

of Criminal Procedure (CrPC) - Section 164A, Code of Criminal Procedure (CrPC) - Section 173, Code of Criminal Procedure (CrPC) - Section 309, Code of Criminal Procedure (CrPC) - Section 311, Code of Criminal Procedure (CrPC) - Section 313, Code of Criminal Procedure (CrPC) - Section 376, Code of Criminal Procedure (CrPC) - Section 482; Indian Penal Code (IPC) - Section 376; Bar Council of Delhi Rules; Constitution of India - Article 21,Constitution of India - Article 22, Constitution of India - Article 22(1), Constitution of India - Article 227

Cases Referred:

Rajaram Prasad Yadav v. State of Bihar MANU/SC/0663/2013 : (2013) 14 SCC 461; Mannan Sk v. State of West Bengal MANU/SC/0568/2014 : (2014) 13 SCC 59; P. Sanjeeva Rao v. State of A.P. MANU/SC/0504/2012 : (2012) 7 SCC 56; State of Punjab v. Gurmit Singh MANU/SC/0366/1996 : (1996) 2 SCC 384; State of Karnataka v. ShivannaMANU/SC/0400/2014 : (2014) 8 SCC 916; Hofman Andreas v. Inspector of CustomsMANU/SC/1505/1999 : (2000) 10 SCC 430; Dayal Singh v. State of UttaranchalMANU/SC/0622/2012 : (2012) 8 SCC 263; Devender Pal Singh v. State (NCT of Delhi)MANU/SC/0217/2002 : (2002) 5 SCC 234; NHRC v. State of Gujarat (2009) 6 SCC 767;Swaran Singh v. State of Punjab MANU/SC/0320/2000 : (2000) 5 SCC 668; P. Ramachandra Rao v. State of Karnataka MANU/SC/0328/2002 : (2002) 4 SCC 578; Delhi Domestic Working Women' Forum v. Union of India MANU/SC/0519/1995 : (1995) 1 SCC 14; Natasha Singh v. CBI MANU/SC/0483/2013 : (2013) 5 SCC 741; Mohanlal Shamji Soni v. Union of India MANU/SC/0318/1991: (1991) Supp. 1 SCC 271; Zahira Habibulla H. Sheikh v. State of Gujarat MANU/SC/0322/2004 : (2004) 4 SCC 158; Sister Mina Lalita Baruwa v. State of Orissa MANU/SC/1265/2013 : (2013) 16 SCC 173; Raminder Singh v. State Crl. M.C. 8479/2006 and Crl. M.A. 14359/2006; Rama Paswan v. State of JharkhandMANU/SC/1945/2007 : (2007) 11 SCC 191; Nisar Khan v. State of UttaranchalMANU/SC/2296/2006 : (2006) 9 SCC 386; Hussainara Khatoon (I) v. Home Secy. State of Bihar MANU/SC/0119/1979 : (1980) 1 SCC 81; Vijay Kumar v. State of U.P.MANU/SC/0891/2011 : (2011) 8 SCC 136; Kishore Chand v. State of Himachal PradeshMANU/SC/0374/1990 : (1991) 1 SCC 286; Hardeep Singh v. State of PunjabMANU/SC/4976/2008 : (2009) 16 SCC 785; Ram Chander v. State of HaryanaMANU/SC/0206/1981 : (1981) 3 SCC 191; State of Rajasthan v. Ani @ HanifMANU/SC/0233/1997 : (1997) 6 SCC 162; Ritesh Tewari v. State of U.P.MANU/SC/0742/2010 : (2010) 10 SCC 677; Maria Margarida Sequeria Fernandes v. Erasmo Jack De Sequeria (dead) through L.Rs. MANU/SC/0225/2012 : (2012) 5 SCC 370;Rajeshwar Prosad Misra v. State of West Bengal MANU/SC/0080/1965 : (1966) 1 SCR 178;Jamatraj Kewalji Govani v. The State of Maharashtra MANU/SC/0063/1967 : (1967) 3 SCR 415; Raghunandan v. State of U.P. MANU/SC/0187/1974 : (1974) 4 SCC 186; Shailendra Kumar v. State of Bihar MANU/SC/0757/2001 : (2002) 1 SCC 655; Satyajit Banerjee v. State of West Bengal MANU/SC/0997/2004 : (2005) 1 SCC 115; U.T. of Dadra and Haveli v. Fatehsinh Mohansinh Chauhan MANU/SC/3471/2006 : (2006) 7 SCC 529; Iddar v.

AabidaMANU/SC/7857/2007 : (2007) 11 SCC 211; Himanshu Singh Sabharwal v. State of M.P.MANU/SC/1193/2008 : (2008) 3 SCC 602; Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd. MANU/SC/7886/2008 : (2008) 11 SCC 108; Hanuman Ram v. The State of RajasthanMANU/SC/8107/2008 : (2008) 15 SCC 652; Sudevanand v. State through CBIMANU/SC/0041/2012 : (2012) 3 SCC 387; Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi MANU/SC/0012/2012 : AIR (2012) SC 750; J. Jayalalithaa v. State of Karnataka MANU/SC/0994/2013 : (2014) 2 SCC 401; Salamat Ali v. State Crl. A. No. 242/2010; State (NCT of Delhi) v. Navjot Sandhu MANU/SC/0465/2005 : (2005) 11 SCC 600; Cf. Engle v. Isaac MANU/USSC/0163/1982 : 456 US 107 (1982); Mir. Mohd. Omar v. State of W.B. MANU/SC/0317/1989 : (1989) 4 SCC 436; State of Madhya Pradesh v. Shobha Ram and Ors. MANU/SC/0271/1966 : AIR 1966 SC 1910; State v. Mohd. Afzal and Ors. MANU/DE/1026/2003 : 2003 IV AD (Cr.) 205; Strickland v. Washington 466 U.S. 688 (1984); Khatri and Ors. v. State of Bihar and Ors. (1931) 1 SCC 627; Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar MANU/SC/0122/1979 : (1980) 1 SCC 108;Rajan Dwivedi v. Union of India MANU/SC/0138/1983 : (1983) 3 SCC 307; Madhav Hayawadanrao Hoskot v. State of Maharashtra MANU/SC/0119/1978 : (1978) 3 SCC 544;State v. Navjot Sandhu and Ors. MANU/SC/0465/2005 : AIR 2005 SC 3820; Lt. Col. S.J. Chaudhary v. State (Delhi Administration) MANU/SC/0094/1984 : (1984) 1 SCC 722; State of U.P. v. Shambhu Nath Singh MANU/SC/0221/2001 : (2001) 4 SCC 667; Akil @ Javed v. State of NCT of Delhi MANU/SC/1070/2012 : (2013) 7 SCC 125; Vinod Kumar v. State of Punjab MANU/SC/0068/2015 : (2015) 1 SCALE 542; Jasbir Singh v. State of PunjabMANU/SC/4529/2006 : (2006) 8 SCC 294

Subject Category:
CRIMINAL MATTERS - MATTERS RELATING TO SEXUAL HARASSMENT, KIDNAPPING AND ABDUCTION

Prior History / High Court Status:
From the Judgment and Order dated 04.03.2015 of the Hon'ble High Court of Delhi at New Delhi in Crl. M.C. 725 of 2015 and Crl. MA 2765 of 2015 (MANU/DE/0634/2015)

Disposition:
Appeal Allowed

A.K. Goel, J.

1. Leave granted. The issue raised for consideration in these appeals is whether recall of witnesses, at the stage when statement of accused Under Section 313 of the Code of Criminal Procedure ("Code of Criminal Procedure") has been recorded, could be allowed on the plea

that the defence counsel was not competent and had not effectively cross-examined the witnesses, having regard to the facts and circumstances of this case.

2. Facts relevant for deciding the issue lie in a narrow compass. On 6th December, 2014, a First Information Report was lodged alleging that the Respondent accused who was the driver of cab No. DL-1YD-7910, Swift Dzire, hired by the victim on 5th December, 2014 for returning home from her office committed rape on her. The statement of the prosecutrix was recorded Under Section 164 Code of Criminal Procedure on 8th December, 2014. After investigation, charge sheet was fled before the Magistrate on 24th December, 2014. Since the accused was not represented by counsel, he was provided legal aid counsel. Thereafter on 2nd January, 2015, the accused engaged his private counsel M/s. Alok Kumar Dubey and Ankit Bhatia in place of the legal aid counsel. Thereafter, the case was committed to the Court of Session. Charges were framed on 13th January, 2015. Prosecution evidence commenced on 15th January, 2015 and was closed on 31st January, 2015. The witnesses were duly cross-examined by the counsel engaged by the accused. Statement of the accused Under Section 313 Code of Criminal Procedure was recorded on 3rd February, 2015. On 4thFebruary, 2015, an application for recall of prosecutrix PW2 and formal witness PW-23 who booked the cab was made, but the same was rejected and the said order was never challenged. Thereafter, on 9th February, 2015, the accused engaged another counsel, who fled another application Under Section 311 Code of Criminal Procedure for recall of all the 28 prosecution witnesses on 16th February, 2015. The said application was dismissed on 18thFebruary by the trial court but the same was allowed by the High Court vide impugned order dated 4th March, 2015 in a petition fled Under Article 227 of the Constitution of India read with Section 482 Code of Criminal Procedure. Even though the specific grounds urged in the application were duly considered and rejected, it was observed that recall of certain witnesses was deemed proper for ensuring fair trial.

3. Aggrieved by the order of the High Court, the victim as well as the State have moved this Court.

4. On 10th March, 2015, when the matter came up for hearing before this Court, stay of further proceedings was granted but since the prosecutrix had already been recalled in pursuance of the impugned order and further cross-examined, the said deposition was directed to be kept in the sealed cover and publication thereof by anyone in possession thereof was restrained.

5. We have heard learned Attorney General appearing for the State, Shri Colin Gonsalves, learned senior Counsel appearing for the victim and Shri D.K. Mishra, learned Counsel appearing for the accused.

6. Learned Attorney General submitted that the view taken by the High Court was erroneous and true scope of power of recall has not been appreciated. Firstly, though the power of recall is very wide and could be exercised at any stage, it could not be exercised mechanically, without just and adequate grounds. At the end of the trial, exercise of such power was permissible only in exceptional situations. Once trial is conducted by a counsel, another counsel could not seek retrial or recall of all the witnesses merely by alleging that the previous counsel was not competent. At any rate, the court permitting such a course must record cogent reasons. Secondly, harassment of the victim on being recalled for cross-examination was a relevant factor which was required to be taken into account. Thirdly, expeditious trial in a heinous offence was another factor which was required to be taken into account. In this case, a further factor which the impugned order ignores is that the Respondent was not facing a criminal case for the first time. He was facing three cases of rape earlier and was well conversant with the legal matters. He had made his own informed choice in appointing a counsel. Interference by the High Court was permissible only when the view taken by the trial court declining prayer for recall was found to be perverse or unjust. It was further pointed out that the conclusion recorded by the High Court was contrary to the findings in the order rejecting various grounds raised in support of prayer for recall. Learned Attorney General made reference to decisions of this Court in ***Rajaram Prasad Yadav*** v. ***State of Bihar*** MANU/SC/0663/2013 : (2013) 14 SCC 461, ***Mannan Sk***v. ***State of West Bengal*** MANU/SC/0568/2014 : (2014) 13 SCC 59, ***P. Sanjeeva Rao*** v.***State of A.P.*** MANU/SC/0504/2012 : (2012) 7 SCC 56, ***State of Punjab*** v. ***Gurmit Singh***MANU/SC/0366/1996 : (1996) 2 SCC 384, ***State of Karnataka*** v. ***Shivanna***MANU/SC/0400/2014 : (2014) 8 SCC 916, ***Hofman Andreas*** v. ***Inspector of Customs***MANU/SC/1505/1999 : (2000) 10 SCC 430, ***Dayal Singh*** v. ***State of Uttaranchal***MANU/SC/0622/2012 : (2012) 8 SCC 263, ***Devender Pal Singh*** v. ***State (NCT of Delhi)***MANU/SC/0217/2002 : (2002) 5 SCC 234, ***NHRC*** v. ***State of Gujarat*** (2009) 6 SCC 767,***Swaran Singh*** v. ***State of Punjab*** MANU/SC/0320/2000 : (2000) 5 SCC 668.

7. Shri Gonsalves, learned senior Counsel adopted the submissions of learned Attorney General and further submitted that the High Court appears to have been impressed by the fact that the accused was in custody and thus had no reason to delay the trial. A presumption that an accused in custody will not delay the trial was not well founded and could not be a valid consideration for retrial or recall of prosecutrix and other witnesses. The prosecutrix had already faced court proceedings while recording her statement Under Section 164 Code of Criminal Procedure and while facing cross-examination for three days. He also placed reliance on ***P. Ramachandra Rao*** v. ***State of Karnataka***MANU/SC/0328/2002 : (2002) 4 SCC 578, ***Delhi Domestic Working Women' Forum*** v.***Union of India*** MANU/SC/0519/1995 : (1995) 1 SCC 14, ***Natasha Singh*** v. ***CBI***MANU/SC/0483/2013 : (2013) 5 SCC 741, ***Mohanlal Shamji Soni*** v. ***Union of India***MANU/SC/0318/1991 : (1991) Supp. 1 SCC 271, ***Zahira Habibulla H.***

Sheikh v. *State of Gujarat* MANU/SC/0322/2004 : (2004) 4 SCC 158, *Sister Mina Lalita Baruwa* v. *State of Orissa* MANU/SC/1265/2013 : (2013) 16 SCC 173, *Raminder Singh* v. *State* Crl. M.C. 8479/2006 and Crl. M.A. 14359/2006, decided on 20.02.2008 (Delhi H.C.)., *Rama Paswan* v.*State of Jharkhand* MANU/SC/1945/2007 : (2007) 11 SCC 191, *Nisar Khan* v. *State of Uttaranchal* MANU/SC/2296/2006 : (2006) 9 SCC 386, *Hussainara Khatoon (I)* v.*Home Secy. State of Bihar* MANU/SC/0119/1979 : (1980) 1 SCC 81 and *Vijay Kumar* v.*State of U.P.* MANU/SC/0891/2011 : (2011) 8 SCC 136.

8. Learned Counsel for the Respondent-accused supported the impugned order and submitted that though the previous counsel had cross-examined the witnesses, he had not asked relevant questions nor given suggestions which were required to be given. He placed reliance on *Kishore Chand* v. *State of Himachal Pradesh* MANU/SC/0374/1990 : (1991) 1 SCC 286, *Hardeep Singh* v. *State of Punjab* MANU/SC/4976/2008 : (2009) 16 SCC 785, *Ram Chander* v. *State of Haryana* MANU/SC/0206/1981 : (1981) 3 SCC 191, *State of Rajasthan* v. *Ani @ Hanif* MANU/SC/0233/1997 : (1997) 6 SCC 162, *Ritesh Tewari* v.*State of U.P.* MANU/SC/0742/2010 : (2010) 10 SCC 677, *Maria Margarida Sequeria Fernandes* v. *Erasmo Jack De Sequeria (dead) through L.Rs.* MANU/SC/0225/2012 : (2012) 5 SCC 370, *Rajeshwar Prosad Misra* v. *State of West Bengal*MANU/SC/0080/1965 : (1966) 1 SCR 178, *Jamatraj Kewalji Govani* v. *The State of Maharashtra* MANU/SC/0063/1967 : (1967) 3 SCR 415, *Raghunandan* v. *State of U.P.*MANU/SC/0187/1974: (1974) 4 SCC 186, *Shailendra Kumar* v. *State of Bihar*MANU/SC/0757/2001 : (2002) 1 SCC 655, Satyajit Banerjee v. State of West BengalMANU/SC/0997/2004 : (2005) 1 SCC 115, U.T. of Dadra and Haveli v. Fatehsinh Mohansinh Chauhan MANU/SC/3471/2006 : (2006) 7 SCC 529, Iddar v. Aabida MANU/SC/7857/2007: (2007) 11 SCC 211, Himanshu Singh Sabharwal v. State of M.P. MANU/SC/1193/2008 : (2008) 3 SCC 602, Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd. MANU/SC/7886/2008 : (2008) 11 SCC 108, Hanuman Ram v. The State of Rajasthan MANU/SC/8107/2008 : (2008) 15 SCC 652, Sudevanand v. State through CBI MANU/SC/0041/2012 : (2012) 3 SCC 387, Mohd. Hussain @ Julfikar Ali v. The State (Govt. of NCT) Delhi MANU/SC/0012/2012 : AIR (2012) SC 750, J. Jayalalithaa v. State of Karnataka MANU/SC/0994/2013 : (2014) 2 SCC 401, Salamat Ali v. State (Crl. A. No. 242/2010, High Court of Delhi).

9. We have considered the rival submissions.

10. It can hardly be gainsaid that fair trial is a part of guarantee Under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is

also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties. It will be sufficient to refer to only some of the decisions for the principles laid down which are relevant for this case.

12. In ***Rajaram*** case, the complainant was examined but he did not support the prosecution case. On account of subsequent events he changed his mind and applied for recall Under Section 311 Code of Criminal Procedure which was declined by the trial court but allowed by the High Court. This Court held such a course to be impermissible, it was observed:

13. *... In order to appreciate the stand of the Appellant it will be worthwhile to refer to Section 311 Code of Criminal Procedure, as well as Section 138 of the Evidence Act. The same are extracted hereunder:*

Section 311, Code of Criminal Procedure

> ***311. Power to summon material witness, or examine person present.****--Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.*

***

Section 138, Evidence Act

138. Order of examinations.--Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.--The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

14. *A conspicuous reading of Section 311 Code of Criminal Procedure would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311Code of Criminal Procedure and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person Under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Code of Criminal Procedure. It is, therefore, imperative that the invocation of Section 311 Code of Criminal Procedure and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined is*

concerned, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

13. After referring to earlier decisions on the point, the Court culled out following principles to be borne in mind:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in Under Section311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power Under Section311 Code of Criminal Procedure should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power Under Section 311 Code of Criminal Procedure should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 Code of Criminal Procedure simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power Under Section 311 Code of Criminal Procedure must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

14. In *Hoffman Andreas* case, the counsel who was conducting the case was ill and died during the progress of the trial. The new counsel sought recall on the ground that the witnesses could not be cross-examined on account of illness of the counsel. This prayer was allowed in peculiar circumstances with the observation that normally a closed trial could not be reopened but illness and death of the counsel was in the facts and circumstances considered to be a valid ground for recall of witnesses. It was observed:

> *6. Normally, at this late stage, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the unfortunate development that took place during trial i.e. the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the Appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstances, if the new counsel thought to have the material witnesses further examined the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.*

15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

17. In ***State (NCT of Delhi)*** vs ***Navjot Sandhu*** MANU/SC/0465/2005 : (2005) 11 SCC 600, this Court held:

> ***167.*** *... we do not think that the Court should dislodge the counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far. It is not demonstrated before us as to how the case was mishandled by the advocate appointed as amicus except pointing out stray instances pertaining to the cross-examination of one or two witnesses. The very decision relied upon by the learned Counsel for the Appellant, namely, Strickland v. Washington makes it clear that judicial scrutiny of a counsel's performance must be careful, deferential and circumspect as the ground of ineffective assistance could be easily raised after an adverse verdict at the trial. It was observed therein:*
>
> *Judicial scrutiny of the counsel's performance must be highly deferential. It is all too tempting for a Defendant to second-guess the counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining the counsel's defence after it has proved unsuccessful, to conclude that a particular act of omission of the counsel was unreasonable. Cf. Engle v. Isaac [MANU/USSC/0163/1982 : 456 US 107 (1982) at pp. 133-134). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of the counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance;....*

18. It may be proper to recall that the present case is in the category of cases where the trial is required to be fast tracked. In fact this Court directed in ***Shivanna***[MANU/SC/0400/2014 : (2014) 8 SCC 916] as under:

> ***2.*** *While we propose to consider this matter on merits after service of notice to the Respondent-accused, we feel acutely concerned as to why the Union of India should not take initiative and steps to evolve a procedure for fast-track justice to be adopted by the investigating agencies and the Fast Track Courts by proposing amendments to Code of Criminal Procedure for speedy justice to the victim.*

3. Fast Track Courts no doubt are being constituted for expeditious disposal of cases involving the charge of rape at the trial stage, but we are perturbed and anguished to notice that although there are Fast Track Courts for disposal of such cases, we do not yet have a fast-track procedure for dealing with cases of rape and gang rape lodged Under Section 376 Indian Penal Code with the result that such heinous offences are repeated incessantly.

4. We are of the considered opinion that there is pressing need to introduce drastic amendments to Code of Criminal Procedure in the nature of fast-track procedure for Fast Track Courts and here is an occasion where we deem it just and appropriate to issue notice and call upon the Union of India to file its response as to why it should not take initiative and sincere steps for introducing necessary amendment into Code of Criminal Procedure, 1973 involving trial for the charge of "rape" by directing that all the witnesses who are examined in relation to the offence and incident of rape cases should be straightaway produced before the Magistrate for recording their statement to be kept in sealed cover and thereafter the same be treated as evidence at the stage of trial which may be put to test by subjecting it to cross-examination. We are further of the view that the statement of victim should as far as possible be recorded before the Judicial Magistrate Under Section 164 Code of Criminal Procedure skipping over the recording of statement by the police Under Section 161 Code of Criminal Procedure which in any case is inadmissible except for contradiction so that the statement of the accused thereafter be recorded Under Section 313 Code of Criminal Procedure. The accused then can be committed to the appropriate court for trial whereby the trial court can straightaway allow cross-examination of the witnesses whose evidence were recorded earlier before the Magistrate.

5. What we wish to emphasise is that the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. We are of the view that if the evidence is recorded for the first time itself before the Judicial Magistrate Under Section 164 Code of Criminal Procedure and the same be kept in sealed cover to be treated as deposition of the witnesses and hence admissible at the stage of trial with liberty to the defence to cross-examine them with further liberty to the accused to lead his defence witnesses and other evidence with a right to cross-examination by the prosecution, it can surely cut short and curtail the protracted trial if it is introduced at least for trial of rape cases which is bound

to reduce the duration of trial and thus offer a speedy remedy by way of a fast-track procedure to the Fast Track Court to resort to.

6. Considering the consistent recurrence of the heinous crime of rape and gang rape all over the country including the metropolitan cities, we are of the view that it is high time such measures of reform in Code of Criminal Procedure be introduced after due deliberation and debate by the legal fraternity as also all concerned. We, therefore, deem it just and appropriate to issue notice to the Union of India through the Attorney General which the counsel for the Petitioner is directed to serve by way of dasti summons. The matter be posted again on 3-9-2013 for further consideration.

19. In continuation of the above, further order dated 25th April, 2014 [MANU/SC/0400/2014 : (2014) 8 SCC 913] was passed as follows:

10.1. Upon receipt of information relating to the commission of offence of rape, the investigating officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement Under Section 164 Code of Criminal Procedure. A copy of the statement Under Section 164 Code of Criminal Procedure should be handed over to the investigating officer immediately with a specific direction that the contents of such statement Under Section 164 Code of Criminal Procedure should not be disclosed to any person till charge-sheet/report Under Section 173 Code of Criminal Procedure is fled.

10.2. The investigating officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

10.3. The investigating officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

10.4. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the investigating officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

10.5. Medical examination of the victim: Section 164-A Code of Criminal Procedure inserted by Act 25 of 2005 in Code of Criminal Procedure imposes an obligation on the part of investigating officer to get the victim of the rape

immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim Under Section 164 Code of Criminal Procedure.

11. *A copy of this order thus be circulated to all the Directors General of Police of all the States/Commissioners of Police in Metropolitan cities/Commissioners of Police of Union Territories who are then directed to send a copy of this order to all the Police Stations-in-Charge in their States/Union Territories for its compliance in cases which are registered on or after the receipt of a copy of these directions. Necessary instructions by the DGPs/Commissioners of Police be also issued to all the Police Stations-in-Charge by the DGPs/Commissioners of Police incorporating the directions issued by us and recorded hereinbefore.*

20. In ***Mir. Mohd. Omar*** vs ***State of W.B.*** MANU/SC/0317/1989 : (1989) 4 SCC 436 after the statement of the accused Under Section 313 was recorded, the public prosecutor fled an application for his re-examination on the ground that some more questions are required to be asked. The application was rejected by the trial court but allowed by the High Court. This Court disapproved the course adopted and held:

16. ... Here again it may be noted that the prosecution has closed the evidence. The accused have been examined Under Section 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examination is undoubtedly uncalled for.

21. We may also note that the approach to deal with a case of this nature has to different from other cases. We may refer to the judgment of this Court in ***Gurmit Singh*** case, wherein it was observed:

8. ... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for

corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable....

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21. of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad refection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity....

22. We may now refer to the orders passed by the trial Court dated 18th February, 2015 and the High Court dated 4th March, 2015. Referring to the ground of the earlier counsel not being competent, the trial court observed that the counsel was of the choice of the accused. The accused was not facing a criminal trial for the first time. The cross-examination of witnesses was deferred time and again to enable the counsel to seek instructions from the accused. The cross-examination of the prosecutrix was deferred on 15th January, 2015 to enable the counsel to have legal interview with the accused. After part of cross-examination on 16th January, 2015, further cross-examination was concluded on 17th January, 2015. Cross-examination of PW 13 was deferred on the request of the accused. Similarly, cross-examination of PWs 22, 26 and 27 was deferred on the request of the defence counsel. After referring to the record, the trial court observed as under:

22. The aforesaid proceedings clearly bely the claim of the accused/applicant that the case has been proceeding at a "hurried pace" or that he was not duly represented by a defence counsel of his choice. The claim of the applicant that he was unwilling to continue with his earlier counsel is also nothing but a bundle of lie in as much as the accused never submitted before the court that he wants to change his counsel. Rather, it is revealed from the record that the earlier counsel, Sh. Alok Kumar was acting as per his instructions and having

legal interview with him. The accused cannot be permitted to take advantage of his submissions made on the first date i.e. 13/01/2015 that he wants to engage a new counsel as his subsequent conduct does not support this submission. I may also add that before proceeding with the case further, I had personally asked the accused in the open court whether he wants to continue with his counsels and only on getting a reply in the affirmative, were the proceedings continued further. It thus appears that the endeavor of the accused by fling this application is only to delay the proceedings despite the fact that all along the trial his request for adjournment have been duly considered and allowed and he has been duly represented by a private counsel of his choice.

23. I am also unable to accept the plea of the accused that the counsel representing him earlier was incompetent, being a novice and that he is entitled to recall all the prosecution witnesses now that he has engaged a new counsel. Although, Sh. Alok Kumr Dubey and Sh. Ankit Bhatia, both have enrolment number of 2014 as per the Power of Attorney executed by the accused in their favour, however, to my mind the competence of a Lawyer is subjective and the date of his enrolment with the Bar Council can certainly not be said to be a yardstick to measure his competence.

24. Moreover, the competence of the new counsel may again be questioned by another counsel, who the accused may choose to engage in future. This fact was also admitted by Sh. D.K. Mishra during the course of arguments on the application under consideration.

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27. At this stage, to judge as to whether certain questions should have been put to the witnesses in cross examination or should not have been put to them, would in my view result in pre-judging as to what are the material portions of the evidence and would also amount to re-appraising the entire cross examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the court Under Section311 Code of Criminal Procedure. I am supported in my view by the observations of Hon'ble Delhi High Court in its order dated 20/02/2008 in case titled as Raminder Singh v. State Criminal MC 8479/2006, where it has been held as under:

In the first place, it requires to be noticed that scope of Section 311 Code of Criminal Procedure does not permit a court to go

into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an application is fled Under Section 311 then not only would it be pre-judging what according to it are 'material portions' of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court Under Section 311 Code of Criminal Procedure. No judgment has been pointed out by the learned Counsel for the Petitioner in support of such a contention. Even on a practical level it would well nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time.

28. It may also be relevant to mention that Article 22(1) of the Constitution of India confers a Fundamental Right upon an accused, who has been arrested by the police to be defended by a legal practitioner of his choice. This Fundamental Right has been duly acknowledged by the Hon'ble Superior Courts in numerous pronouncements including the case of State of Madhya Pradesh v. Shobha Ram and Ors. MANU/SC/0271/1966 : AIR 1966 SC 1910 wherein it has been observed as under:

Under Article 22, a person who is arrested for whatever reason, gets three independent rights. The first is the right to be told the reasons for the arrest as soon as an arrest's made, the second is the right to be produced before a Magistrate within 24 hours and the third is right to be defended by advocate of his choice. When the Constitution lays down in absolute terms a right to be defended by one' own counsel, it cannot be taken away by ordinary law, and, it is not sufficient to say that the accused was so deprived, of the right, did not stand in danger of losing his personal liberty.

29. In the case of State v. Mohd. Afzal and Ors. MANU/DE/1026/2003 : 2003 IV AD (Cr.) 205, the Hon'ble Delhi High Court addressed the issue of Fundamental Right of the accused to be represented by a counsel from the point of his arrest especially in a case involving capital punishment. The case of US Supreme Court in Strickland v. Washington 466 U.S. 688 (1984) was cited before the Delhi High Court and the ld. Counsel for the accused in that case had argued that the law

required a conviction to be set aside where counsel's assistance was not provided or was ineffective. Hon'ble Delhi High Court took note of the observations in the said case as well as the Rulings of the Hon'ble Supreme Court in the case of MANU/SC/0374/1990 : (1991) 1 SCC 286 Kishore Chand v. State of Himachal Pradesh, (1931) 1 SCC 627 Khatri and Ors. v. State of Bihar and Ors., MANU/SC/0122/1979 : (1980) 1 SCC 108 Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, MANU/SC/0138/1983: (1983) 3 SCC 307 Rajan Dwivedi v. Union of India, MANU/SC/0119/1978 : (1978) 3 SCC 544 Madhav Hayawadanrao Hoskot v. State of Maharashtra while dealing with this issue. It was however observed that from hindsight it is easy to pick wholes in the cross examination conducted but applying the test in Strickland's case, it cannot be said that it was the constructive denial of the counsels to accused Mohd. Afzal. The observations of the Hon'ble Delhi High Court were met with the approval by Hon'ble Supreme Court when the matter was decided by the Hon'ble Apex Court by its ruling titled as State v. Navjot Sandhu and Ors.MANU/SC/0465/2005 : AIR 2005 SC 3820.

30. The Hon'ble Apex Court, after considering the facts of the case, nutshell that "we do not think that the court should dislodge the Counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far." While relying upon the ruling in the case Strickland's (supra), the Hon'ble Supreme Court observed that scrutiny of performance of a counsel who has conducted trial should be highly deferential.

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34. It may be noted that the recall of IO and prosecutrix has been sought on the ground besides others, that she has to be questioned as to why she did not give her sim of her mobile to the IO and why the IO did not ask her for the same. Similarly, it has been submitted that the accused though admitted his potency report but has not admitted the time and process of the potency test as stated by the IO and thus the 10 needs to be recalled. Further, SI Sandeep is required to be recalled for cross examination in order to cross examine him with regard to the document given by the Transporter, who brought the cab in question from Mathura to Delhi. It may also be mentioned that in his zest to seek recall of all the prosecution witnesses, the applicant has also sought recall of one lady constable Manju, who as per record was not even examined as a prosecution witness.

35. It is further necessary to mention that on 04/02/2015 accused had moved an application Under Section 311 Code of Criminal Procedure, thereby seeking recall of prosecutrix PW-2 and PW-23 Ayush Dabas. The application was dismissed. The present application has been fled now seeking recall of all PWs, including PW-2 and PW-23, while the order dated 04/02/2015 still remains unchallenged.

36. The application under consideration is thus nothing but an attempt to protract the trial and in fact seek an entire retrial. There is no change in circumstances except change of Counsel, which, to my mind, is no ground to allow the application. Interestingly, in para 17 of the application, it has been contended that the present counsel is not aware of the scheme and design of defence of the previous counsel and is thus at a loss and disadvantageous position to defend the accused and for conducting the case as per his acumen and legal expertise, the recalling of PWs are necessary. It may be noted that the defence of an under trial is not expected to vary from counsel to counsel and irrespective of change of counsel, an under trial is expected to have a single and true line of defence which cannot change every time he changes a counsel. Nor can a new counsel defend the case of such an under trial as per the new scheme and design in accordance with his acumen and legal expertise.

23. The High Court made a reference to the Criminal Law Amendment Act, 2013 providing for trial relating to offences Under Section 376 and other specified offences being completed within two months from the date of fling of the charge sheet. Reference has also been made to circular issued by the Delhi High Court drawing the attention of the judicial officers to the mandate of speedy disposal of session cases. The High Court also referred to the decisions of this Court in ***Lt. Col. S.J. Chaudhary*** v. ***State (Delhi Administration)***MANU/SC/0094/1984 : (1984) 1 SCC 722, ***State of U.P.*** v. ***Shambhu Nath Singh***MANU/SC/0221/2001 : (2001) 4 SCC 667, ***Akil @ Javed*** v. ***State of NCT of Delhi***MANU/SC/1070/2012 : (2013) 7 SCC 125 and ***Vinod Kumar*** v. ***State of Punjab***MANU/SC/0068/2015 : (2015) 1 SCALE 542, requiring the trials to be conducted on day to day basis keeping in view the mandate of Section 309 Code of Criminal Procedure.

24. After rejecting the plea of the accused that there was any infirmity in the conduct of the trial after detailed reference to the proceedings, the High Court concluded:

31. The aforesaid narration of proceedings before the learned Additional Sessions Judge clearly reflects that while posting the matter on day to day basis, the Court's only endeavour was to comply with the provisions of

Section 309 Code of Criminal Procedure as far as possible while ensuring the right of the accused to a fair trial. The earlier counsel had been seeking adjournment for consulting the Petitioner which was duly granted and under these circumstances the submission of learned Counsel for the Petitioner that justice hurried is justice buried, deserves outright rejection.

25. It was then observed that competence of a counsel was a subjective matter and plea of incompetence of the counsel could not be easily accepted. It was observed:

32. The other submission of learned Counsel for the Petitioner that Sh. Alok Dubey, Advocate was not competent to appear as an Advocate inasmuch as he had not even undergone screening test as required by Bar Council of Delhi Rules and was not issued practice certificate, this submission is not fortified by any record. Much was said against the competency of the earlier counsel representing the Petitioner. However, learned standing counsel for the State was right in submitting that competency of an Advocate is a subjective issue which should not have been attacked behind the back of the concerned Advocate....

33. Learned Additional Standing counsel for the State has furnished details of the number of questions put by the earlier counsel to the prosecution witnesses for showing the performance of the earlier counsel. Moreover, one cannot lose sight of the fact that the Advocate was appointed by the Petitioner of his own choice.

26. Inspite of the High Court not having found any fault in the conduct of the proceedings, it held that "although recalling of all the prosecution witnesses is not necessary" recall of certain witnesses was necessary for the reasons given in para 15(a) to (xx) on the application of the accused. It was observed that the accused was in custody and if he adopted delaying tactics it is only he who would suffer.

27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power Under Section 311 Code of Criminal Procedure is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the

observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

28. It will also be pertinent to mention that power of judicial superintendence Under Article227 of the Constitution and Under Section 482 Code of Criminal Procedure has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court[1]. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

30. Accordingly, we allow these appeals, set aside the impugned order passed by the High Court and dismiss the application for recall.

6. Delhi Domestic working women's forum vs Union of India

IN THE SUPREME COURT OF INDIA

Writ Petition (Crl.) No. 362 of 1993

Decided On: 19.10.1994

Appellants: **Delhi Domestic Working Women's Forum**
Vs.
Respondent: **Union of India (UOI) and Ors.**

Hon'ble Judges/Coram:
M.N. Venkatachaliah, C.J., S. Mohan and S.B. Majmudar, JJ.

Counsels:
For Appearing Parties: Satya Mitra Garg and H. Sudhakaran, Adv

Subject: Media and Communication

Subject: Criminal

Catch Words

Mentioned IN

Acts/Rules/Orders:
Constitution of India - Article 14, Constitution of India - Article 21, Constitution of India - Article 32; National Commission for Women Act, 1990 - Section 10; Indian Penal Code 1860, (IPC) - Section 341, Indian Penal Code 1860, (IPC) - Section 376B

Disposition:
Disposed off

Case Note:

Criminal - violence against women - Articles 14, 21 and 32 of Constitution of India, Section 10 of National Commission for Women Act, 1990 and Sections 341 and 376 of Indian Penal Code, 1860 - women domestic servants subjected to indecent physical assault by army personnel in train - writ petition filed by women's forum to espouse pathetic plight of such victims - trial in

such cases not to be frustrated by prolongation of investigation - National Commission for Women called upon to engage itself in drafting scheme providing relief to victims of such cases - subsequently Union of India to take necessary steps as regards framing scheme for compensation and rehabilitation to ensure justice to victims of such crimes of violence.

Referred Notifications:
MANU/HRDT/0004/1992

JUDGMENT

S. Mohan, J.

1. This public interest litigation invokes the benign provision of Article 32 of the Constitution of India, at the instance of the petitioner Delhi Domestic Working Women's Forum to espouse the pathetic plight of four domestic servants who were subject to indecent sexual assault by seven Army personnel.

2. The incident, with a filmy background, has outclassed even the movies. On 10th of February, 1993, six women, by name, Usha Minz, Shanti, Josephine Kerketta, Rosy Kerketta, Nilli and Lilli, domestic servants, were travelling by Muri Express. The journey as from Ranchi to Delhi. One of the victims Miss Lily described the incidence graphically as follows:

I was coming from my home town to Delhi by Muri Express. On 10.2.93 at about 11.00 PM, the Muri Express was at the Khurja Railway Station. At that time, 1 along with my village girls (1) Usha Minz d/o John Minz (2) Shanti. d/o Siri Anuas Minz (3) Josephine Kerketta d/o Junus Kerketta (4) Rosy Kerketta d/o Remis Kerketta (5) Nilli Ross d/o Boas Minz, was travelling in SHI. Coach . I slept at Berth No. 50. Our friend, Shanti, woke up and told that some persons were teasing her. When, I and my remaining friends got up, we saw that about 7/8 army 'jawan' had come near us. Then we all friends got up and sat on our respective seats. Then all those army men began to molest us. First they - two Sikhs and 6 cleaned saved men made me and my five friends sit on lower seats and then kissed and hugged us and lured on our body and breasts. On our objection they caught us from our hair and began to beat us. When we tried to cry, they shut our mouths. Then they threatened me and my friends that in case we will make any hue and cry they will throw us out of the running train and will kill us. On this we got frightened and sat there. From these 8 army men - two Sikhs and 6 clean shaved, one sardar and one clean shaved man forcibly made me to lie down on the lower berth and on the other adjacent lower berth another sardar took another girl and one clean shaved fauji took Rossy to bath room. Two other

army mean made shanti to lie down on the nearby seat. Another two men tried to take Usha and Nilli but both sat under the seat to hid themselves. Thereafter, first Sardar Fauji (whose name has been disclosed in the court s Dhir Singh s/o Puran Singh, PO: Dostpur, PS : Kalanaur, Distt: Gurdaspur (Punjab) forcibly put off my cloth and removed underwear, raped me. After him, another clean saved fauji, whose face is round and height is about 5'8" raped me. My friends, Shanti and Rosy were also forcibly raped by remaining army men. Thereafter, we tried to lodge a report with the police on the way, but nobody listened us. When the train stopped at New Delhi Railway Station, then I and m,y friends attempted to catch these persons. They all got down and ran here and there. However, I and my friends could catch hold of aforesaid sardar Dhir Singh, who had raped me. We all caught him. In the meanwhile, some persons gathered there. Some Army Officers and Policemen overpowered him and took him to MCO office. Then after a while they came in Station and handed over Shri Dhir Singh to you. Sardar Dhir Singh has raped me and his colleagues have raped my friend's.

3. This formed the basis of the first information report for offences under Section 376B read with Section 341 I.P.C. which was registered at the Police Station New Delhi Railway Station (Crime & Railways) as No. 049 of 1993 at 6.35 A.M. on 11th February, 1993. It appears after registering the F.I.R. the six rape victims were sent for medical check up.

4. The members of the petitioner-Forum went in groups to all the addresses given by the police to meet the victims. In none of the places they were allowed to meet the victims though the employers admitted gaining knowledge about the rape and the victims were with them. The petitioner-forum is very much concerned as the victims are its members, to get the needed social, cultural and legal protection. Further, the victims are helpless tribal women belonging to the State of Bihar at the mercy of the employers and the police. They are vulnerable to intimidation. Notwithstanding the occurrence of such barbaric assault on the person and dignity of women neither the Central Government nor the State Government has bestowed any serious attention as to the need for provision of rehabilitatory and compensatory justice for women. In such matters this Court has been affording relief. It is in this context the writ petition under Article 32 of the Constitution of India is moved. The grounds urged in support of the writ petition are as follows:

5. Speedy trial is one of the essential requisites of law. In a case of this character such a trial cannot be frustrated by prolongation of investigation. Therefore, this Court has to spell out the parameters of expeditious conduct and investigation of trial; otherwise the rights guaranteed under Articles 14 and 21 of the Constitution will be meaningless.

6. This Court ordered notice to respondents on 18.11.1993.

7. A counter affidavit was filed on behalf of respondents 2 and 4 stating, on the statement of Kumari Lily, F.I.R. No. 042/93 under Section 376B read with 34, Indian Penal Code, was registered. Accused Dheer Singh was arrested and sent to judicial custody. The case report under Section 173 Cr. P.C. had been filed in the Court of Chief Judicial Magistrate, Aligarh on 13.8.1993 against the accused persons, namely Dheer Singh and Mikhail Heranj. The case is pending trial before the District and Sessions Court, Aligarh.

8. It appears, apart from these two accused, others could not be identified. Two other accused, Pharsem Singh and B. Kajoor were discharged. Three other police personnel, namely, Head Constable Ranjeet, Constable Naresh Singh and Constable Shiv Sarup Singh were arrested as they were on guard duty in the Muri Express Train at the time of incident and failed to provide necessary protection to Tribal women/victims. The prosecution is in progress and it is stated that the case is likely to be committed.

9. At one stage of the case, the Court was informed that the victims could not be traced. This statement caused dismay in us. Therefore, a direction was issued to the State of Uttar Pradesh to trace the victims. This Court doubted whether the police were at all serious in this case. On our part, we could not tolerate this nonchalant attitude. Fortunately, the victims have been traced. As such we think the prosecution will go on with due diligence and the law be allowed to take its course.

10. While the matter stands thus, as to the prayer of the petitioner that respondents 1 to 3 will have to engage themselves in framing an appropriate scheme to provide inter alia compensation and rehabilitation to the victims of such crimes of violence, the submissions are as under:

11. The National Commission for Women is rightly engaged in the evaluation and suggestion of changes in various legislations pertaining to women. Yet steps are to be taken as regards framing of scheme for compensation and rehabilitation to ensure justice to victims of such crimes of violence. Victims of such violence, by and large belong to weaker sections of the society. They are not in a position to secure justice through civil courts. No doubt, the Indian Penal Code and the Indian Evidence Act have been amended. In spite of it, victims of such violence are not able to get adequate remedy in securing justice. Therefore, the first respondent- National Commission for Women must be called upon to engage themselves in the exercise of drafting such a scheme and impress upon the Union of India to frame a scheme as early as possible.

12. This stand is opposed by the third respondent. It is stated that the National Commission for Women was constituted by the National Commission for Women Act, 1990 (hereinafter referred to as 'the Act'). This Act came into force on 31.1.1992, as per Notification No. S.O.

99(E) dated 31.1.1992. The functions of the Commission are set out in Chapter HI of the Act. The prayer that the Commission must engage themselves in framing appropriate schemes and measures is beyond the mandate given to the National Commission for Women.

13. We have given our careful consideration to the above. It is rather unfortunate that in recent times, there has been an increase of violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such cries eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behavior and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings.

14. We will only point out the defects of the existing system. Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in Court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the Court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself. As stated in 'Modern Legal Studies', Rape and the Legal Process by Jennifer Temkin, 1987 Edition, page 7:

It would appear that a radical change in the attitude of defence counsel and judges to sexual assault is also required. Continuing education programmes for judges should include re-education about sexual assault. Changes in the substantive law might also be helpful in producing new ways of thinking about this type of crime.

15. Kelly writes:

> The most common cries were for more compensation and personal treatment from police officers. Victims remarked that, while they recognised officers had many cases to handle, they felt the officers did not seem sufficiently concerned with their particular case and trauma," Shapland concludes:
>
> The changes in the criminal justice system necessary to approximate moreclosely to the present expectations of victims are not major or structural. They are primarily attitudinal. They involve training the professional participants in the criminal justice system that the victim is to be treated courteously, kept informed and consulted about all the stages of the process. They involve treating the victim as a more equal partner... This might include a

shift in working practices of the professional participants that might initially appear to involve more work, more difficulty and more effort, but paradoxically may result in easier detection, a higher standard of prosecution evidence and fewer cases thrown out at court." O'Reilly stresses the attitudinal training thus:

We are now victim-oriented and have taken an active role in getting the entire helping network-lawyers, doctors, nurses, social workers, rape crises center workers - to talk and to interact together... We are then in a position to concentrate fully on the primary goal that unites us all-helping victims of sexual assault to get their lives back together.

16. In this background, we think it necessary to indicate the broad parameters in assisting the victims of rape.

1) The complainants of sexual assault cases should be provided with legal representation. It is important to have same one who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in Court but to provide her with guidance was to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.

2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should stage that the victim was so informed.

4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned

without undue delay, advocates would be authorised to act at the police station before leave of the Court was sought or obtained.

6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue in employment.

8) Compensation for victims shall be awarded by the Court on conviction of the offender any by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

17. On this aspect of the matter we can usefully refer to the following passage from 'The Oxford Handbook of Criminology ' (1994 Edn.) at pages 1237-38 as to the position in England:

Compensation payable by the offender was introduced in the Criminal Justice Act 1972 which gave the Courts powers to make an ancillary order for compensation in addition to the main penalty in cases where 'injury', loss, or damage' had resulted. The Criminal Justice Act 1982 made it possible for the first time to make a compensation order as the sole penalty. It also required that in cases where fines and compensation orders were given together, the payment of compensation should take priority over the fine. These developments signified a major shift in penology thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment. The Criminal Justice Act 1928 furthered this shift. It required courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, imposed a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons. Where reasons are given, the victim may apply for these to be subject to judicial review. The 1991 Criminal Justice Act contains a number of provisions which directly or indirectly encourage an even greater role for compensation.

18. Section 10 of the Act states that the National Commission for Women shall perform all or any of the following functions: namely;

(a) investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws.

(b) call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal.

19. Having regard to the above provisions", the third respondent will have to evolve such scheme as to wipe out the tears of such unfortunate victims. Such a scheme shall be prepared within six months from the date of this judgment. Thereupon, the Union of India, will examine the same and shall take necessary steps for the implementation of the scheme at the earliest.

20. The writ petition is disposed of subject to above directions.

7.Dastagir Sab & Anr. vs State of Karnataka

IN THE SUPREME COURT OF INDIA
Criminal Appeal No. 175 of 2003

Decided On: 22.01.2004

Appellants: **Dastagir Sab** and Anr.
Vs.
Respondent: State of Karnataka

Hon'ble Judges/Coram:
Doraiswamy Raju and S.B. Sinha, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Shanth Kumar, V. Mahaleand Rajesh Mahale, Advs
For Respondents/Defendant: Anil K. Mishra, Adv. for Sanjay R. Hegde, Adv.

Subject: Criminal

Catch Words

Mentioned IN

Acts/Rules/Orders:
Indian Penal Code (IPC) - Section 376(2)

Cases Referred:
State of H.P. v. Lekh Raj and Anr, MANU/SC/0714/1999;Budhsen v. State of U.P., MANU/SC/0103/1970; Dana Yadav alias Dahu and Ors. v. State of Bihar,MANU/SC/0763/2002; Malkhansingh and Ors. v. State of M.P., MANU/SC/0445/2003; Ashfaq v. State (Govt. of NCT of Delhi), MANU/SC/1042/2003; Narayanamma (Kum) etc. v. State of Karnataka and Ors. etc.,MANU/SC/0829/1994 Rafig v. State of Uttar Pradesh,MANU/SC/0196/1980; Sheikh Zakir v. State of Bihar,MANU/SC/0145/1983 Pramod Mahto and Ors. v. The State of Bihar, MANU/SC/0416/1989; State of Rajasthan v. Shri Narayan, MANU/SC/0520/1992

Prior History / High Court Status:
From the Judgement and Order dated 12.08.2002 of the Karnataka High Court in Crl. A. No. 205 of 1998 (MANU/KA/1087/2002)

Disposition:
Appeal Dismissed
Citing Reference:

Case Note:
Indian Penal Code, 1860 - Sections 376 (2) (g)--Rape--Conviction and sentence--Whether sustainable?--Held, yes--Accused arrested and shown to prosecutrix to ensure their identity--Hence, non-holding of test identification parade (T.I.P.) could not vitiate trial--Further, before F.I.R. was lodged, names of accused appellants disclosed to prosecutrix--On facts of case, holding of T.I.P. wholly unnecessary--Absence of injuries on person of prosecutrix--Would by itself be sufficient to discard prosecution case--Injury on body of person of victim--Not sine qua non to prove charge of rape--Presence of semen on cloth of victim--Also corroborating evidence of prosecutirx--No reason for prosecutrix to falsely implicate appellants.
No law states that non-holding of Test Identification Parade would by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case, would depend upon the facts and circumstances of each case. In the facts of this case, holding of T.I. Parade was wholly unnecessary.
Injury on the body of the person of the victim is not a sine qua non to prove a charge of rape. Absence of injury having regard to overwhelming ocular evidence cannot, thus, be the sole criteria for coming to a conclusion that no such offence had taken place.

Subject Category :
CRIMINAL MATTERS - CRIMINAL MATTERS IN WHICH SENTENCE AWARDED IS UPTO FIVE YEARS

JUDGMENT

S.B. Sinha, J.

1. The appellants herein have been found guilty of commission of offence under Section 376(2)(g) of Indian Penal Code and sentenced to undergo rigorous imprisonment for five years as also imposition of a fine of Rs. 10,000/-.

2. On 31.10.1993, father of PW1 and PW6, her brother had gone to cultivate their agriculture land. Around 11.30 a.m. when PW 1 was attending to her household works and nobody was at home, the appellants came to the house and asked her about the availability of a spray pump. She told the appellants that she did not have any. A little later again the appellants approached her and asked for water whereupon she gave them water for drinking. After some time again the appellants went to her and asked her to give the cycle pump whereupon she told them that she did not have any cycle pump, whereafter they went away. Around 12.30, PW 1 went to a nearby nala to fetch water for the purpose of washing clothes. While she was returning from the canal, both the accused persons came and took her forcibly to the cotton fields by gagging her mouth and committed forcible sexual intercourse with her against her consent. She was unable to cry as the cloth used was put in her mouth. Later, however, she removed the cloth put in her mouth and cried aloud. Hearing her cries, her father and her

brother came running to the spot and found the accused persons running away at a distance. Her father made an attempt to apprehend them, but they made good their escape. He also approached one Mahantesh Patil PW 19 who is an influential person of the village and requested him to see that something is done in this regard. PW 19 promised him that he will send for the accused and a panchayat will be held. The father of the prosecutrix, thereafter, informed the factum of commission of the offence to a number of persons including PW 2 Krishna Veni, PW 3 Krishna Murthy and PW 14 Sadashiva Rao. All of them gathered in the hut of PW 1 and made enquiries whereupon she narrated the acts committed by the accused persons. After 4 days of the incident the father of the prosecutrix lodged a First Information Report before the Sirwar Police Station.

3. Both the Courts below found the appellants guilty of commission of the said offence.

4. The principal ground urged by the learned counsel appearing on behalf of the appellants are that:

(i) the identification of the appellants in the Court for the first time by the prosecutrix without a prior Test Identification Parade having been held, the judgment of sentence must be held to be bad in law;

(ii) having regard to the fact that the place of occurrence being an agricultural field and the stuff of the agricultural produce was found to be as high as 5 feet to 6 feet, the absence of injury on her person is not probable;

(iii) in view of the medical evidence, no finding as regard commission of the offence can be held to have been established.

5. The prosecution is support of its case has examined as many as 26 witnesses. The prosecutrix Malleshwari examined herself as P.W. 1. She in her evidence detailed the circumstance in which the offence is said to have been committed. She also disclosed enough materials to show that she had the occasion to see the accused persons at least on three occasions almost immediately prior to the commission of offence and also when she was intercepted and forcibly committed sexual assault on her. It is further borne out from records that immediately upon hearing her cries when the appellants allegedly took to heels, her brother P.W. 6 Rambabu saw the appellants running away from the spot. The other witnesses including the father of the prosecutrix, the other labourers who were working in the field i.e. Gobindamma w/o Malappa, resident of Athnoor Village, Kabir Jayamma w/o Gangappa Malad, Laxmi w/o Amaresh Malad, Nagaraj s/o Gangappa Malad, Viresh s/o Gangappa Malad, Subamma w/o Rahiman Choudhary of Solapur, Ramjanamma w/o Bhandenawaz, Hussain s/o Choudhary Abi Sab, Mohammed s/o Lal Sab came immediately to the place of occurrence. The father of the prosecutrix got hold of the accused persons and allegedly they confessed their guilt but they refused to come with him. When the incident was narrated to the labourers and others including the P.Ws. 2, 3, 6 and 14, they expressed their anguish and wanted the boys to be punished. One Subamma went to the village and assaulted the appellant No. 1 with her chappal.

6. The fact that immediately after the incident the matter was narrated to PWs 2 and 3 is not in dispute. They supported the prosecution case. Further, PW 6 Rambabu who was then aged about 12 years also saw two persons running away from the spot. He knew the accused persons.

7. It is also not in dispute that the accused were arrested on 6.11.1993 and according to the investigating officer they were shown to her to ensure that they have arrested the correct persons and in that view of the matter it was impracticable to hold a Test Identification Parade. In view of the peculiar facts and circumstances of this case we are of the opinion that non-holding of a Test Identification Parade cannot be said to have vitiated the trial. The learned counsel appearing on behalf of the appellants, however, would submit that the prosecutrix in her evidence categorically admitted that she did not know the accused persons earlier but despite the same they have been named in the First Information Report. A bare perusal of the First Information Report would show that therein it had merely been stated "I came to know that the boy who has raped me is Dastagir and the boy who has held me and put the cotton in my mouth is Rajasab and both of them are of Athnoor village, if shown to me I can identify them".

8. It is, therefore, not difficult to perceive that before the First Information Report which was lodged on 5.11.1993 the names of the appellants were disclosed and the prosecutrix came to know thereabout.

9. No law states that non-holding of Test Identification Parade would by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case, would depend upon the facts and circumstances of each case.

10. In the facts of this case, holding of T.I. Parade was wholly unnecessary. Had such T.I. Parade been held, the propriety thereof itself would have been questioned before the Trial Court.

11. In State of H.P. vs Lekh Raj and Anr.MANU/SC/0714/1999 : 2000CriLJ44, this Court emphasized the purpose for holding test identification parade in the following terms:
"3....During the investigation of a crime the police agency is required to hold identification parade for the purposes of enabling the witness to identify the person alleged to have committed the offence particularly when such person was not previously known to the witness or the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement. Identification parade may also not be necessary in a case where the accused persons are arrested at the spot. The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak character. This Court in Budhsen v. State of U.P. MANU/SC/0103/1970 : 1970CriLJ1149 held that the evidence in order to carry conviction should ordinarily clarify as to how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which he allegedly played in the crime in question with reasonable particularity. In such cases test identification is considered a safe rule of prudence to generally look for corroboration of the

sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant."

(See also Dana Yadav alias Dahu and Ors. vs State of BiharMANU/SC/0763/2002 : [2002]SUPP2SCR363)

12. Yet again in Malkhansingh and Ors. vs State of M.P.MANU/SC/0445/2003 : 2003CriLJ3535 this Court observed:

"16. It is well settled that the substantive evidence is the evidence of identification in Court and the test identification parade provides corroboration to the identification of the witness in Court, if required. However, what weight must be attached to the evidence of identification in Court, which is not preceded by a test identification parade, is a matter for the Courts of fact to examine. In the instant case the Courts below have concurrently found the evidence of the prosecutrix to be reliable and, therefore, there was no need for the corroboration of her evidence in Court as she was found to be implicitly reliable. We find no error in the reasoning of the Courts below. From the facts of the case it is quite apparent that the prosecutrix did not even know the appellants and did not make any effort to falsely implicate them by naming them at any stage. The crime was perpetrated in broad day light. The prosecutrix had sufficient opportunity to observe the features of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. This is not a case where the identifying witness had only a fleeting glimpse of the appellants on a dark night. She also had a reason to remember their faces as they had committed a heinous offence and put her to shame. She had, therefore, abundant opportunity to notice their features. In fact on account of her traumatic and tragic experience, the faces of the appellants must have got imprinted in her memory, and there was no chance of her making a mistake about their identity..."

13. In Ashfaq vs State (Govt. of NCT of Delhi)MANU/SC/1042/2003 : 2004CriLJ936 , this Court observed:

"...Though as a matter of general principle, the point urged with reference to the omission to conduct earlier the test identification Parade may be correct, the question as to whether there is any violation of the same in a given case would very much depend on the facts and circumstances of each case and there cannot be any abstract general formula for universal and ready application in all cases..."

14. In the instant case, as noticed hereinbefore, PW 1 gave sufficient particulars of the persons committing the offence of criminal assault on her. They had been identified by their description by her brother. The appellants were chased and they were caught and allegedly

they had made a confession of their guilt. The relatives of the prosecutrix and other persons had also approached Mahantesh Patil, PW 19 to see that the culprits are brought to book and assurance in that behalf had been given. It was only when despite repeated attempts their grievances were not met, the First Information Report was lodged. Furthermore, in this case the names of the appellants have been mentioned in the First Information Report.

15. It has been brought on record that immediately after the incident the father of the prosecutrix went in search of the accused where he also met PW 19 Mahantesh Patil who had promised that he would send for the accused and see that justice is done but since he was not available subsequently for 2-3 days, the complaint was filed.

16. Further, it is well settled that absence of injuries on the person of the prosecutrix would not be itself be sufficient to discard the prosecution case.

17. The incident took place on 31.10.1993. PW 1 was examined by the Medical Officer at 4.15 p.m. on 5.11.1993. Dr. H. Vadiraj PW25 categorically stated that any abrasion or marks of violence would be visible for 24 hours and thereafter the same may disappear. Admittedly, according to the doctor, rupture of hymen of PW1 took place about one year prior to the occurrence and that may lead to the possible explanation as to why no visible injury was found on her private part.

18. In the cross-examination, it is elicited from this witness that while taking brief history of the incident from the victim, she clearly stated that she had been raped by Dastagir Sab, aged about 28 years and Rajasab, aged 25 years of Athnoor village on 31.10.1993 at 12 noon. Furthermore, the witness failed to state as to whether physical exercise also can lead to rupture of hymen.
19. The learned Session Judge having regard to the materials on record observed:

"She was wearing at the relevant point of time, one Lahanga, one Davani and a blouse. The two hooks on the top have been torn and the clothes which P.W. 1 was wearing at the relevant point of time were seized by the Investigating Officer subsequent to the complaint filed by P.W. 1 and they were subjected to the chemical analysis by the Investigating Officer. The chemical analysis report is available at Ex. P.29, item No. 1 is a sealed cloth packed said to contain one Lahanga. The result of the analysis disclosed that the presumptive chemical tests for the presence of seminal stains was found positive for item No. 1 and 5(1). Item No. 5(1) refers to dhoti which was subsequently seized from the possession of A-1. Therefore, the chemical analysis test positively proves that there was seminal stain both on Lahanga of the victim and the dhoti of A-1."

20. We may notice that the appellant No. 1 was examined by Dr. Chikka reddy PW 20 on 6.11.1993 whereupon the following injuries were found:

"1. Abrasion on the right side of the neck 1/2" x 1/2" with crest formation.

2. Abrasion on the lt. Side of cheek 3/4" x 3/4" crest formation.

21. Those injuries, according to the opinion of the doctor could be caused by scratching with nails.

22. So far as the alleged absence of injury on her body having regard to place of occurrence, as urged by the learned counsel for the appellant, is concerned, suffice it to point out that the learned Session Judge noticed that 'there were dried up cotton plants at the spot where the incident took place'. It was further noticed that when the prosecutrix made her lay on a land where there were cotton plants, it is nature that she would not sustain any visible injury.

23. The spot mahazar MO-1 showed that at the place of occurrence there were dried up cotton plants. Having regard to the aforementioned materials, both the learned Session Judge as also the High Court negatived the submission of the appellant to the effect that absence of injury on the back of the prosecutrix would lead to the conclusion that prosecution case should not be relied upon.

24. In Narayanamma (Kum) etc. vs State of Karnataka and Ors. etc. MANU/SC/0829/1994 : (1994)5SCC728 , this Court inter alia observed:
"4(i) According to the prosecutrix, she had been bodily lifted by Muniyappa and Venkataswamy, respondents, taken to the filed of Gopalappa where Somanna already present in waiting raped her while she was forcibly laid on the matted jowar crop. Since there were no marks of injury on the back of the prosecutrix and the field was reported to be having stones on the surface, the word of the prosecutrix was doubted by the High Court about the manner in which the crime was committed. The High Court unfortunately did not appreciate the importance of the use of jowar stalks, which in the month of October, when the occurrence took place, would have been more than a man's height and when trampled upon and matted would provide sufficiently a cushion for the crime being committed without the prosecutrix receiving any injury on her back. The surrounding crop would also provide a cover obstructing visibility to a casual passer-by. Thus we view that the absence of injuries on the back of the prosecutrix can be of no consequence in the circumstances."

25. The presence of semen on the cloth of the victim also corroborates the evidence of the prosecutrix.

26. Injury on the body of the person of the victim is not a since qua non to prove a charge of rape. Absence of injury having regard to overwhelming ocular evidence cannot, thus, be the sole criteria for coming to a conclusion that no such offence had taken place.

27. This Court in Rafiq vs State of Uttar PradeshMANU/SC/0196/1980 : 1980CriLJ1344 observed:
"5...The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life-styles may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot, accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. 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 circumstance. Indeed,

from place to place, from age to age, from varying life-styles and behavioral 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 presidential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed."

28. In Sheikh Zakir vs State of Bihar, MANU/SC/0145/1983 : [1983]3SCR312 , this Court observed:
"8...Insofar as non-production of a medical examination report and the clothes which contained semen, the trial court has observed that the complainant being a woman who had given birth to four children it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the Santhal tribe living in a remote area could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person of the complainant may not be itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable..."

29. A question furthermore would arise as to why she would falsely implicate the appellants. Both the Session Judge as also the High Court had rejected the defence plea raised in this behalf by the appellants. The learned Session Judge found:

"The PW1 has withstood the test of cross-examination and consequently her evidence need not be corroborated by any other eye witnesses or any other witnesses. There is no reason to doubt the evidence of PW 1 in any manner. The only motive suggested is that since Veerbhadra wanted to drive away Mohammed who was cultivating the property, a false complaint was filed against the accused persons. At any stretch of imagination, this motive suggested on the part of accused persons against the evidence of PW 1 cannot be accepted. This Mohammed in no way connected to accused persons. He is not the father of A-1 and A-2; he is not the brother of A-1 and A-2 and the accused persons are not residing in the house of said Mohammed. At any point of time, prior to the incident, Mohammed and the accused persons were not found together in any place. They have no common interest. Consequently, it is not possible to believe that by filing false case against accused persons, CW2 - Veerbhadra can evict the Mohammed from the land. Therefore, such a motive is there is one's imagination and consequently, such evidence cannot be accepted."

30. We agree with the said findings recorded by the learned Session Judge.

31. In Pramod Mahto and Ors. vs The State of BiharMANU/SC/0416/1989 : 1989CriLJ1479 , this Court observed:
"9....We found no merit in those contentions because even if communal feelings had run high, it is inconceivable that an unmarried girl and two married women would go to the extent of staking their reputation and future in order to falsely set up a case of rape on them for the sake of communal interest..."

32. In State of Rajasthan vs Shri NarayanMANU/SC/0520/1992 : 1992CriLJ3655 , this Court held:

"5. The accused was a distant relative whom the prosecutrix had met for the first time about 5 or 6 years before at the wedding of her sister-in-law. Thereafter she had not many occasions to meet him. Her relations with the accused were not strained. The relations of her husband with the accused were also not strained. In the circumstances there was no motive or reason for the prosecutrix or her husband to falsely involve the accused in the commission of a crime which would not put her chastity at stake. Her husband ha come to celebrate Diwali with his wife and family members and quarrel with anyone, more so a relative, would be farthest from his thought. Even the complaint filed by the accused on the 23rd was a fall out of the incident at which he was beaten. Unless the evidence discloses that she and her husband had strong reasons to falsely implicate the accused, ordinarily the court should have no hesitation in accepting her version regarding the incident..."

33. For the reasons aforementioned, we do not find any merit in this appeal, which is dismissed accordingly.

8. Rakesh @ Kake vs Govt. of NCT Delhi (State)

IN THE HIGH COURT OF DELHI

Crl. A. No. 150/2004

Decided On: 10.01.2006

Appellants: **Rakesh @ Kake**
Vs.
Respondent: **Govt. of NCT of Delhi (State)**

Hon'ble Judges/Coram:
Manmohan Sarin and Manju Goel, JJ.

Counsels:
For Appellant/Petitioner/plaintiff: K. Priyadarshi, Adv

For Respondents/Defendant: Ravinder Chadha, Addl. Public Prosecutor and Jagdish Prasad, Adv.

Subject: Criminal

Catch Words

Mentioned IN

Acts/Rules/Orders:
Indian Penal Code (IPC) - Section 376(2), Indian Penal Code (IPC) - Section 452, Indian Penal Code (IPC) - Section 506, Indian Penal Code (IPC) - Section 506(2); Code of Criminal Procedure (CrPC) - Section 313, Code of Criminal Procedure (CrPC) - Section 428

Case Note:
Indian Penal Code, 1860

Sections 376(2)(g), 452, 5D6(2) - Rape of prosecutrix by appellant carrying Screw driver along with companion--Applicant's plea of. false implication due to inability of him to go through marriage Schedule with prosecutrix--No evidence in support--Plea is bogus and afterthought

Indian Penal Code, 1860

Sections 376(2)(g) - Rape--Role of neighbours--Held, not unusual for neighbours to be oblivions to happening in adjoining quarter--Not uncommon for neighbours to go about their usual course without intervening with happenings in neighbourhood

Indian Penal Code, 1860

Sections 376(2)(g) - Rape--Gynaecological report--Did not confirm rape or sexual assault--No injury on genitals--No sperms on vaginal swab--Held, prosecutrix facing two youths, one of them armed with a Screw driver--There could hardly be any struggle resulting in injury

Indian Penal Code, 1860

Sections 376(2)(g) - Rape--Sentence--Accused undergone 7 Years imprisonment--No past criminal antecedents--Conduct in jail satisfactory--Held, considering young age of appellant & absence of past criminal antecedents--Modifying term of 10 years and fine of Rs. 5,000/- and in default, for simple imprisonment of 6 months.

JUDGMENT

Manmohan Sarin, J.

1. Appellant-Rakesh @ Kake by this appeal assails the impugned judgment dated 20th January, 2004 and order of sentence dated 29th January, 2004. The appellant was convicted for the offences under section 376(2)(g) IPC, 452IPC and 506(2) IPC. Appellant was sentenced to life imprisonment and a fine of Rs.1000/-, in default of payment of fine, SI for three months for

the offence under section 376(2)(g) IPC. For the offence under section 452IPC, appellant was sentenced to RI for three years and a fine of Rs. 500/- and in default, SI for one month. For the offence under section 506(2) IPC, appellant was sentenced to three years RI and a fine of Rs.500/- and in default of payment of fine, SI for one month. The above sentences are to run concurrently.

2. The prosecution case, in brief, before the trial court was that the appellant carrying a screw driver along with his companion one Sunil, trespassed into the house of the prosecutrix-`R', at about 10 AM on 15th January, 1999. At that time, both her parents were away. Appellant using foul language told 'R' an unmarried minor girl, that he wanted to have sex with her and upon her refusal, dragged her on the floor. He threatened her with the screw driver and broke open the string of her salwar and forcibly had sexual intercourse with her. Thereafter, his companion also raped her. Appellant and his companion left extending threats that if she disclosed the incident to any one, they would kill her family members. The incident happened in the presence of `R's younger sister aged 10 years old, who had been slapped and made to sit in a corner. The appellant's companion Sunil had sent out the younger brother of the prosecutrix-`R' to purchase gutka for him. Prosecutrix-`R' states that she tried to raise alarm but nobody heard her.

3. The residence of `R' is said to be one room in the corner premises, beyond which there were empty plots, though located in a populated area. Prosecutrix-`R' being shattered by the sexual assault, around 4 p.m. had consumed naphthalene balls as she wanted to end her life, but she felt sick and vomited. She claims that the neighbours knew about the incident. Prosecutrix-`R' narrated the incident to her mother when she returned at night from work. Report was lodged which was registered as DD No.73 on 15th January, 1999. Prosecutrix's-`R' statement was recorded on the same night being Exhibit 2/A. Medical check up of the Prosecutrix-`R' was done at the Deen Dayal Hospital where she was accompanied by her mother. X-ray was also done later. Accused persons were arrested on her pointing out.

4. Prosecution to prove the case had examined Prosecutrix-`R' and her younger sister PW-3. Ossification test was also carried out which confirmed the age of Prosecutrix-`R' as more than 15 years but less than 17 years. Prosecutrix-R's mother was also examined. She deposed that she learnt of the rape of her daughter on her returning from work at about 10.30 p.m. She also deposed that appellant's mother and their relations attempted to offer her money so as not to proceed with the complaint. She declined telling them that it was also their obligation to protect her daughter.

5. The M.L.C carried an endorsement Alleged history of rape by two identified youth. They were not named in the MLC. PW-8, Dr. Poonam Lal had carried out the gynecological

examination and proved her report. Medical examination of Prosecutrix-`R' revealed an old hymen tear and vagina admitting two fingers tightly. No external injuries on the genital parts were seen. PW-8 opined that old tear in the hymen could be on account of many reasons like heavy exercise. It may be due to earlier sexual intercourse. She concluded that it was difficult to say from clinical examination whether she had been subjected to intercourse or not now. The medical examination of the appellant as also the co-accused had confirmed that they were both capable of sexual intercourse.

6. Learned counsel for the appellant assailed the judgment of the trial Court as being riddled with contradictions and not being based on any cogent evidence. Counsel for the appellant submitted that appellant had been falsely implicated in the case. Appellant's marriage had been fixed with the prosecutrix on 17.11.1998. However, just 10-15 days prior to marriage, another girl to whom he was married in childhood, appeared on the scene with her parents. They quarreled with the appellant, due to which his marriage could not be performed with the prosecutrix. It is urged that the prosecutrix's parents were, Therefore, annoyed with him and have falsely implicated him in this case.

7. Counsel for the appellant next urged that the gynecological report did not confirm any evidence or rape or sexual assault. Rather vagina was admitting two fingers tightly and the hymen had an old tear. There were no injuries on the genitals. No sperms were detected on the vaginal swab. Hence sexual intercourse was not confirmed. He urged that the vital piece of evidence, namely, the Salwar of the prosecutrix had not been seized and produced on record. Counsel further urged that there were inherent improbabilities in the prosecution case. The incident is stated to have taken place in the morning at around 10.00 a.m. in a highly populated area. The prosecutrix is stated to have been screaming, incredibly, nobody heard her screams or came to her rescue. It was strange that though the alleged offence was committed at 10.00 A.M. in the morning, as per the prosecutrix's version, to the knowledge of neighbours nobody informed the Police, till late at night. The FIR does not name accused while their identity was known. There were contradictions between the statement made by prosecutrix while recording FIR and her deposition in Court. The statement of the child witness Shalini has made the prosecution case doubtful. While claiming to know both the accused but on being asked, who is Rakesh, she had pointed towards the appellant Sunil, who is no more. She also did not depose that the act of rape had been committed on her twice. The story regarding the consumption of naphthalene balls in an attempt to suicide, has been found not to be supported by any of the witnesses. No independent witness has been examined in the case. The above sums up the Appellant's challenge in appeal.

8. Let us consider the appellant's plea of having been falsely implicated in the case due to his inability to go through the marriage scheduled with the prosecutrix on 17.11.1998. In his

statement under Section 313 Cr.P.C, appellant claimed that since the parents of the girl whom he had married in childhood came on the scene and quarrelled, he could not go through the marriage with the prosecution which annoyed latter's parents and hence this false case. Appellant neither led any evidence in support of the above nor was any suggestion given either to the prosecutrix's mother or the prosecutrix despite several opportunities having been availed of. It is apparent that the above plea is a bogey which deserves no credence and an after thought.

9. Let us now consider the improbabilities of the incident and alleged contradictions urged by the appellant's counsel. The plea is that the incident took place in a thickly populated area at about 10.00 a.m. yet nobody came to the rescue of the prosecutrix even though she screamed. We may note that it has come in evidence of the Investigating Officer that even though the area was thickly populated, the premises in question were located on the corner of the street and beyond that it was open area. Hence there was no crowd or houses very close to her house. Further, the prosecutrix herself claimed that her neighbours knew about the incident yet nobody had the courage to stop them. It is not unusual for neighbours to be oblivious to the happening in the adjoining quarter. It is significant that there had been no suggestion given that either the incident did not take place or that the prosecutrix had any motive to falsely implicate the accused. It is not uncommon for the neighbours to go about their usual course without intervening with the happening in the neighbourhood. The prosecutrix, an unmarried girl, was facing two youths, one of them was armed with screw driver, holding out threat to life. In these circumstances, there could hardly be any struggle, which would result in injury on her person or on her genitals. The younger sister had been slapped and made to sit in a corner, while the younger brother was sent out. The decision regarding the lodging of a report in rape cases is naturally taken by the parents and in this case the mother promptly took the decision on her return from work.

10. We are in agreement with the trial Judge, who has found the statement of the prosecutrix reliable and trustworthy. We also find that the statement of the prosecutrix is corroborated by that of her younger sister, the child witness, in all material respects. It is not of any material consequence that while deposing, the child witness at one stage got mixed up with the name and had pointed towards Sunil, when being asked as to who Rakesh the appellant was. In her deposition, it has clearly come that the appellant and the other accused both of them had committed sexual assault, namely, rape. She had also deposed that when one accused was doing wrong act, the other was pointing the screw driver. She also deposed that first Rakesh had left the house and thereafter Sunil left, which is in conformity with the deposition by the prosecutrix. We find testimony of the prosecutrix and her sister reliable, trustworthy and worthy of acceptance.

11. Coming to the medical evidence, while it is true that no definite conclusion could be drawn on the basis of the statement of Dr. Poonam and the gynecological examination and without there being presence of sperm on the slides prepared from vaginal swab, the appellant has been found to be capable of sexual intercourse. Human semen was detected on micro slides marked 1a and 1b, prepared from the undergarments of the appellant. Accordingly, based on the statements of the prosecutrix, her sister and that of Gynaecologist Dr. Poonam read with CFSL report, it can be safely concluded that the prosecutrix had been subjected to forced sexual intercourse by the Appellant and Co-accused, within the meaning of Section 376 of IPC. The contradictions, which are sought to be brought up by the defence are immaterial and of no consequence. These are bound to happen when evidence in Court is recorded after lapse of considerable time. We, accordingly, do not find any ground made out for interference with the well reasoned judgment of the trial Court.

12. Counsel for the appellant lastly urged that the accused was a young man of 21 years at the time of offence and has already undergone sentence of nearly 7 years. He submitted that the accused has no past criminal antecedents. The conduct of the appellant in jail has been satisfactory. The other co-accused Sunil died during the trial. He submitted that in these circumstances the sentence of life imprisonment would be harsh and disproportionate. Counsel urged that the prosecutrix got married around 5 years back and is having children and is settled in life and the Court, Therefore, may show clemency towards the appellant.

13. There is no doubt that the appellant along with co-accused committed rape of a minor girl. The offence has been committed in a dare devil manner. However, we are of the view that considering the young age of the appellant, when the offence was committed and the absence of any past criminal antecedents, ends of the justice would be met by modifying the sentence of the appellant under Section376(2)(g) IPC to a term of 10 years and fine of Rs.5,000/- and in default of payment of fine to undergo simple imprisonment for a period of six months. The sentence for the commission of offence under Section 452 as also 506IPC would remain the same. Accordingly, the sentence of the appellant shall stand modified as under:-

To undergo rigorous imprisonment for 10 years for the offence punishable under Section 376(2)(g) IPC and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo simple imprisonment for a period of 6 months;

To undergo rigorous imprisonment for a period of 3 years for the offence punishable under Section 452 IPC and to pay a fine of Rs.500/- and in default of payment of fine to undergo simple imprisonment for a period of 1 month;

To undergo rigorous imprisonment for a period of 3 years for the offence punishable under Section 506(2) IPC and to pay a fine of Rs. 500/- and in default of payment of fine to undergo simple imprisonment for a period of 1 month.

The benefit under Section 428 CrPC. would also be available to the appellant. All the sentences shall run concurrently.

14. Appeal stands disposed of with the above direction.

9. Ranjit Hazarika vs State of Assam

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 190 of 1996

Decided On: 28.02.1996

Appellants: **Ranjit Hazarika**
Vs.
Respondent: **State of Assam**

Hon'ble Judges/Coram:
Dr. A.S. Anand and S.B. Majmudar, JJ.

Subject: Criminal

Catch Words

Mentioned IN

Acts/Rules/Orders:
Code of Criminal Procedure, 1973 (CrPC) - Section 164,Code of Criminal Procedure, 1973 (CrPC) - Section 313;Indian Penal Code (45 Of 1860) (IPC) - Section 376

Disposition:
Appeal Dismissed

Cases Referred:
State of Punjab vs Gurmit Singh, MANU/SC/0366/1996

Citing Reference:

Case Note:

Criminal - rape - Sections 8 and 45 of Evidence Act, 1872 and Indian Penal Code, 1860 - conviction of accused relying evidence given by prosecutrix - medical evidence does not belies testimony of victim and her parents - evidence of victim in sexual assault not be suspected - lack of corroboration does not vitiates such evidence - held, conviction relying in testimony of victim justified.

ORDER

1. Through this appeal by special leave, the appellant has called in question his conviction and sentence for the offence under Section 376 IPC as recorded by the trial court and upheld by the High Court of Assam.

2. According to the prosecution case, the prosecutrix, a young girl of 14 years of age (according to the medical evidence, the age was clinically found to be between 13-17 years) was subjected to rape by the appellant on 18-5-1987. The prosecutrix was witnessing a performance along with her girl friends at Dhanaising Chapori which finished at about 3.30 a.m. As she was leaving for her home, the appellant offered to walk with her to her house but on the way, subjected her to sexual intercourse without her consent and threatened her not to inform anybody about the occurrence. The prosecutrix, after having been subjected to rape, rushed to her house and informed her parents about the occurrence. The FIR was lodged at Teok Police Station. The investigation was taken in hand. The prosecutrix was sent up for medical examination and after completion of investigation, the appellant was tried for the offence under Section 376 IPC.

3. The prosecution, in support of its case, examined apart from the prosecutrix, her parents, besides the doctor and the investigation officer. The appellant, in his statement under Section 313 CrPC, denied the prosecution allegations.

4. The prosecutrix has, in her statement recorded at the trial as also her earlier statement recorded under Section 164 CrPC, clearly narrated the manner in which the appellant forcibly performed sexual intercourse with her without her consent on the roadside after taking the prosecutrix forcibly in his arms and removing her panties. Her statement has remained virtually unchallenged in the cross-examination. The statement of the prosecutrix has been amply corroborated by her mother and her father, PW 2 and PW 3 respectively, who are the two persons to whom the prosecutrix immediately narrated the story about the occurrence. Their evidence was not challenged in the cross-examination at all.

5. The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private pans. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".

6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In it Singh, MANU/SC/0366/1996 : 1996CriLJ1728 to which one of us (Anand, J.) was a party, while dealing with this aspect observed:

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as 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. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

We are in agreement with the aforesaid view.

7. Both the courts have considered the evidence of the prosecutrix and relied upon the same. We see no reason to take a different view. Even though no corroboration of her testimony was

essential to record the conviction of the appellant, we find that in this case there is sufficient corroboration of her testimony available from the evidence of her parents, PW 2 and PW 3. The conviction and sentence of the appellant are well merited and have been recorded on a proper appreciation of evidence. This appeal has no merits. It fails and is dismissed.

Template application

Application to secure the copy of charge sheet under Section 25(2)

IN THE COURT OF SH, LD. ADDITIONAL SESSION JUDGE, COURT, NEW DELHI

In re : State Vs.

F.I.R No.:

P.S.:

U/S:

N.D.O.H:

APPLICATION U/S 25(2) OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT,2012 FOR THE SUPPLYING OF THE COPY OF FINAL REPORT .

Respectfully submitted as under

1. That above mentioned case is pending disposal before this Hon'ble Court and today fixed for evidence.
2. That neither the child nor her parents has been provided with the copy of documents specified U/S 207 CrPC as mandated U/S 25(2) of POCSO Act.
3. That the copy of the above mentioned documents is required by the counsel of the child for the perusal and proper preparation of the case.
4. That S-25(2) of the Protection Children from the Sexual Offences Act provides that "The Magistrate shall provide to the child and his parents or his representative, a copy of the documents specified under secion207 of the Code, upon the final report being filed by the police under section 173 of that Code."
5. That in the light of the above mentioned mandatory provision, the child or his parents has not been provided with the copy of final report as yet.

It is, therefore, most respectfully prayed that the copy of the final report may kindly be supplied to the counsel of the child in the interest of justice.

Delhi Applicant/Father of Child

Through

Dt. Counsel for the complaint

Application for interim compensation

In The Court Of……, Ld. Additional Sessions Judge, …… Court, …….

In Re: STATE Vs. XXX

FIR No. ……..

P.S. ……

U/S: ……..POCSO Act.

APPLICATION UNDER RULE 7(1) OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES, 2012 FOR THE GRANT OF INTERIM COMPENSATON TO THE CHILD FOR HER IMMDIATE NEEDS.

Respectfully submitted as under:

1. The above mentioned FIR had been registered at …….. Police Station under Section……POCSO Act on ……. and the survivor child has been medically examined at …….. Hospital vide MLC No……..

2. The statement in FIR and MLC clearly show that the child had been sexually assaulted/raped by the accused.

3. Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 empowers the Special Court to pass an order for compensation and this Rule also talks about the procedure for the award of compensation. The relevant provisions of this rule are being reproduced below:

"*Rule-7(1): The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation, at any stage after registration of*

the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, in any.

(2) ……..

(3) ……..

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victim Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the Compensation ordered by the Special Court within 30 days of receipt of such order."

4. The child victim has suffered a lot of mental and emotional trauma due the rape being committed by……. The child is currently receiving counselling from ……and residing ……. The child is from a very poor family and will not be able to afford the treatment for her emotional and psychological well-being.

It is, therefore, most respectfully prayed that the claim of the child may kindly be considered compassionately and an appropriate and adequate interim compensation may kindly be awarded to the child in the light of above mentioned facts and rules.

Delhi — Applicant/ Guardian/Parents

Through

Dt. — Counsels

Tips for parents, teachers, citizens to handle first response of child sexual abuse

POCSO Act Text

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

[Act No. 32 of 2012]

[19th June, 2012]

PREAMBLE

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

Whereas clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

And whereas the State parties to the Convention on the Rights of the Child are required to undertake alt appropriate national, bilateral and multilateral measures to prevent--

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Be it enacted by Parliament in the Sixty-third Year of the Republic of India as follows:--

Section 1 - Short title, extent and commencement

(1) This Act may be called the Protection of Children from Sexual Offences Act, 2012.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 2 - Definitions

(1) In this Act, unless the context otherwise requires, --

(a) "aggravated penetrative sexual assault" has the same meaning as assigned to it in section 5;

(b) "aggravated sexual assault" has the same meaning as assigned to it in section 9;

(c) "armed forces or security forces" means armed forces of the Union or security forces or police forces, as specified in the Schedule;

(d) "child" means any person below the age of eighteen years;

(e) "domestic relationship" shall have the same meaning as assigned to it in clause (f) of section 2 of the Protection of Women from Domestic Violence Act, 2005(43 of 2005);

(f) "penetrative sexual assault" has the same meaning as assigned to it in section 3;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "religious institution" shall have the same meaning as assigned to it in the Religious Institutions (Prevention of Misuse) Act, 1988(41 of 1988);

(i) "sexual assault" has the same meaning as assigned to it in section 7;

(j) "sexual harassment" has the same meaning as assigned to it in section 11;

(k) "shared household" means a household where the person charged with the offence lives or has lived at any time in a domestic relationship with the child;

(l) "Special Court" means a court designated as such under section 28;

(m) "Special Public Prosecutor" means a Public Prosecutor appointed under section 32.

(2) The words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860), the Code of Criminal Procedure, 1973(2 of 1974), the Juvenile Justice (Care and Protection of Children) Act, 2000(56 of 2000) and the Information Technology Act, 2000(21 of 2000) shall have the meanings respectively assigned to them in the said Codes or the Acts.

Section 3 - Penetrative sexual assault

A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mourn to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 4 - Punishment for penetrative sexual assault

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

Section 5 - Aggravated penetrative sexual assault

(a) Whoever, being a police officer, commits penetrative sexual assault on a child--

(i) within the limits of the police station or premises at which he is appointed; or

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child--

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.--When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which--

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987(14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life-threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

Section 6 - Punishment for aggravated penetrative sexual assault

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Section 7 - Sexual assault

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

Section 8 - Punishment for sexual assault

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

Section 9 - Aggravated sexual assault

(a) Whoever, being a police officer, commits sexual assault on a child--

(i) within the limits of the police station or premises where he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as a police officer; or

(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child--

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the security or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or

under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or

(g) whoever commits gang sexual assault on a child.

Explanation.--when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits sexual assault on a child, which--

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987(14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or

(l) whoever commits sexual assault on the child more than once or repeatedly; or

(m) whoever commits sexual assault on a child below twelve years; or

(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or

(o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or

(p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits sexual assault on a child knowing the child is pregnant; or

(r) whoever commits sexual assault on a child and attempts to murder the child; or

(s) whoever commits sexual assault on a child in the course of communal or sectarian violance; or

(t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

Section 10 - Punishment for aggravated sexual assault

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Section 11 - Sexual harassment

A person is said to commit sexual harassment upon a child when such person with sexual intent,--

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefor. Explanation,--Any question which involves "sexual intent" shall be a question of fact.

Section 12 - Punishment for sexual harassment

Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Section 13 - Use of child for pornographic purposes

Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes--

(a) representation of the sexual organs of a child;

(b) usage of a child engaged in real or simulated sexual acts (with or without penetration);

(c) the indecent or obscene representation of a child,

shall be guilty of the offence of using a child for pornographic purposes.

Explanation.--For the purposes of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

Section 14 - Punishment for using child for pornographic purposes

(1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine.

(2) If the person using the child for pornographic purposes commits an offence referred to in section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(3) If the person using the child for pornographic purposes commits an offence referred to in section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine.

(4) If the person using the child for pornographic purposes commits an offence referred to in section 7, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than six years but which may extend to eight years, and shall also be liable to fine.

(5) If the person using the child for pornographic purposes commits an offence referred to in section 9, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than eight years but which may extend to ten years, and shall also be liable to fine.

Section 15 - Punishment for storage of pornographic material involving child

Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both.

Section 16 - Abetment of an offence

A person abets an offence, who--

First.--Instigates any person to do that offence; or

Secondly.--Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I.--A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II.--Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III.--Whoever employ, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.

Section 17 - Punishment for abetment

Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.

Explanation. -- An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment.

Section 18 - Punishment for attempt to commit an offence

Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

Section 19 - Reporting of offences

(1) Not withstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), any person (including the child), who has apprehension that in offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,--

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be--

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit

(3) Where the report under sub-section (1) is given by a child the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents, are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) N o person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

Section 20 - Obligation of media, studio and photographic facilities to report cases

Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

Section 21 - Punishment for failure to report or record a case

(1) Any person, who fails to report the commission of an offence under subsection (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions, of sub-section (7) shall not apply to a child under this Act.

Section 22 - Punishment for false complaint or false information

(1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.

Section 23 - Procedure for media

(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided mat for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

Section 24 - Recording of statement of a child

(1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.

(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

Section 25 - Recording of statement of a child by Magistrate

(1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973(2 of 1974) (herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

Section 26 - Additional provisions regarding statement to be recorded

(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

Section 27 - Medical examination of a child

(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding mat a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973(2 of 1974).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

Section 28 - Designation of Special Courts

(1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005(4 of 2006) or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973(2 of 1974), be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000(21 of 2000), shall have jurisdiction to try offences under section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

Section 29 - Presumption as to certain offences

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

Section 30 - Presumption of culpable mental state

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.--In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

Section 31 - Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973(2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

Section 32 - Special Public Prosecutors

(1) The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.

(2) A person shall be eligible to be appointed as a Special Public Prosecutor under sub-section (7) only if he had been in practice for not less than seven years as an advocate.

(3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (a) of section 2 of the Code of Criminal Procedure, 1973(2 of 1974) and provision of that Code shall have effect accordingly.

Section 33 - Procedure and powers of Special Court

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.--For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973(2 of 1974) for trial before a Court of Session.

Section 34 - Procedure in case of commission of offence by child and determination of age by Special Court

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000(56 of 2000).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.

Section 35 - Period for recording of evidence of child and disposal of case

(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

Section 36 - Child not to see accused at the time of testifying

(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

Section 37 - Trials to be conducted in camera

The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973(2 of 1974).

Section 38 - Assistance of an interpreter or expert while recording evidence of child

(1) Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.

(2) If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child.

Section 39 - Guidelines for child to take assistance of experts, etc

Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons

having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.

Section 40 - Right of child to take assistance of legal practitioner

Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973(2 of 1974) the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.

Section 41 - Provisions of sections 3 to 13 not to apply in certain cases

The provisions of sections 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with the consent of his parents or guardian.

Section 42 - Alternative punishment

[36][Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.]

[36] Substituted by the Criminal Law (Amendment) Act, 2013 (Act No. 13 of 2013) w.e.f. 03.02.2013 for the following : -

"Where an act or omission constitute an offence punishable under this Act and also under any other law for the time being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree."

Section 42A - Act not in derogation of any other law

[37][The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.]

Section 43 - Public awareness about Act

The Central Government and every State Government, shall take all measures to ensure that--

(a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;

(b) the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act.

Section 44 - Monitoring of implementation of Act

(1) The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005(4 of 2006), shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed.

(2) The National Commission or, as me case may be, the State Commission, referred to in sub-section (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the Commissions for Protection of Child Rights Act, 2005(4 of 2006).

[37] 1. Inserted by the Criminal Law (Amendment) Act, 2013 (Act No. 13 of 2013) w.e.f. 03.02.2013.

(3) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, also include, its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005(4 of 2006).

Section 45 - Power to make rules

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:--

(a) The qualifications and experience of, and the fees payable to, a translator or an interpreter, a special educator or any person familiar with the manner of communication of the child or an expert in that field, under sub-section (4) of section 19; sub-sections (2) and (3) of section 26 and section 38;

(b) Care and protection and emergency medical treatment of the child under sub-section (5) of section 19;

(c) The payment of compensation under sub-section (8) of section 33;

(d) The manner of periodic monitoring of the provisions of the Act under sub-section (1) of section 44.

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Section 46 - Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removal of the difficulty:

Provided that no order shall be made under this section after the expiry of the period of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Schedule - Schedule

THE SCHEDULE

[See section 2(c)]

Armed forces and Security forces constituted under

(a) The Air Force Act, 1950(45 of 1950);

(b) The Army Act, 1950(46 of 1950);

(c) The Assam Rifles Act, 2006 (47 of 2006);

(d) The Bombay Home Guard Act, 1947(3 of 1947);

(e) The Border Security Force Act, 1968 (47 of 1968);

(f) The Central Industrial Security Force Act, 1968 (50 of 1968);

(g) The Central Reserve Police Force Act, 1949 (66 of 1949);

(h) The Coast Guard Act, 1978 (30 of 1978);

(i) The Delhi Special Police Establishment Act, 1946 (25 of 1946);

(j) The Indo-Tibetan Border Police Force Act, 1992 (35 of 1992);

(k) The Navy Act, 1957 (62 of 1957);

(l) The National Investigation Agency Act, 2008 (34 of 2008);

(m) The National Security Guard Act, 1986 (47 of 1986);

(n) The Railway Protection Force Act, 1957 (23 of 1957);

(o) The Sashastra Seema Bal Act, 2007 (53 of 2007);

(p) The Special Protection Group Act, 1988 (34 of 1988);

(q) The Territorial Army Act, 1948 (56 of 1948);

(r) The State police forces (including armed constabulary) constituted under the State laws to aid the civil powers of the State and empowered to employ force during internal disturbances or otherwise including armed forces as defined in clause (a) of section 2 of the Armed Forces (Special Powers)Act, 1958 (28 of 1958).

Works Cited

A. K. Asthana v Union of India and Anr. n.d. (Delhi High Court).

AG v Shiv Kumar Yadav and Ors. n.d. (2016) 2 SCC 402 (Supreme Court of India).

n.d. "Constitution of India."

Dastagir Sab v State of Karnataka. n.d. (2004) 2 SCC 106 (Supreme Court of India).

Delhi Domestic Working Women's Forum. n.d. (1995) 1 SCC 14 (Supreme Court of India).

Delhi High Court. n.d. "Guidelines for recording of evidence of vulnerable witnesses in criminal matters."

Francis, Merlin. 2016. *Most accused in Pocso cases got bail in last 3 yrs.* 2 March. Accessed October 14, 2016. http://timesofindia.indiatimes.com/city/bengaluru/Most-accused-in-Pocso-cases-got-bail-in-last-3-yrs/articleshow/51219040.cms.

Jarnail Singh v State of Haryana. n.d. (2013) 7 SCC 263 (Supreme Court of India).

Judy Cashmore, Rita Shackel. 2013. "The long-term effects of child sexual abuse." *Australia Institute of Family Studies* Paper No. 11.

Ministry of Health & Family Wefare (Government of India). 2014. "Guidelines & Protocols Medico -Legal care for survivors/victims of Sexual Violence."

2012. "Protection of Children from Sexual Offences Act."

Rakesh v Govt. of NCT. n.d. 2006 SCC OnLine Del 39 (Delhi High Court).

Ranjit Hazarika v State of Assam. n.d. (1998) 8 SCC 635 (Supreme Court of India).

State of TN v Ravi Alias Nehru. n.d. (2006) 10 SCC 534 (Supreme Court of India).

State of UP v Krishna Master. n.d. (2010) 12 SCC 324 (Supreme Court of India).

Vishnu v State of Maharashtra. n.d. (2006) 1 SCC 283 (Supreme Court of India).

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