

#4

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Delivered on: 20th November, 2019

CRL.A. 258/2014

ANIL KUMAR

.... Appellant

versus

STATE

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. S.B. Dandapani, Advocate.
Appellant produced in custody.
For the Respondent : Mr. Ashish Dutta, APP for State.
SI Rajeshwar, P.S. Palam Village.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

SIDDHARTH MRIDUL, J (OPEN COURT).

1. The present appeal assails the judgment dated 16th December, 2013 and the order on sentence dated 20th December, 2013, rendered by the learned Additional Sessions Judge, Dwarka Courts, New Delhi, in Sessions Case No. 94/13, arising out of FIR No. 102/2012, Police Station-Palam Village, whereby, the appellant was convicted for the commission of offences under Sections 363/376(2)(f)/457 of the

Indian Penal Code, 1860 (hereinafter referred to as 'IPC' and sentenced to undergo as under:-

(a) 20 years rigorous imprisonment and fine of Rs.25,000/- and in default of payment of fine, further imprisonment for a period of 6 months for the offence punishable under Section 376(2)(f) IPC;

(b) 5 years rigorous imprisonment and fine of Rs.10,000/- and in default of payment of fine, further imprisonment for a period of 3 months for the offence punishable under Section 363 IPC and;

(c) 3 years rigorous imprisonment and fine of Rs.10,000/- and in default of payment of fine, further imprisonment for a period of 3 months for the offence punishable under Section 457 IPC.

2. The facts, as are necessary for the adjudication of the present appeal, are adumbrated as follows:-

a) On the 27th April, 2012, at 11:42 p.m., on information received in Police Station- Palam Village, from the Police Control Room (PCR), to the effect that, a minor girl had been raped, after breaking open the lock of her house, DD No. 64A

was recorded and its contents were intimated to ASI Asha Rani, PW-15.

b) ASI Asha Rani, PW-15, reached the spot, where the offence is stated to have occurred i.e. RZF-754, Gali No. 1, Raj Nagar Part-II, Palam Colony and met the complainant Mr. Kripal Singh Yadav, PW-4, the father of the prosecutrix 'S' (real name withheld in order to conceal her identity). Mr. Kripal Singh Yadav, PW-4 stated that, he is a driver by profession and has two children, namely, a daughter 'S', aged about 7 years and son Vishal, aged 2 years. It was further stated by PW-4 that, on the 27th April, 2012, he along with his wife had gone to the Friday Market, after leaving their children inside their rented accommodation and locking the premises from the outside. When the parents of the minor victim returned home at around 10:45 p.m, they found that the lock of the said accommodation had been broken and the door was closed from the inside. Subsequent upon their knocking on the door of the premises, it was opened by the prosecutrix 'S', who then started weeping loudly and exclaimed that the Uncle, who had been visiting their house, had beaten her up.

c) Simultaneously, PW-3, Ms. Rangeeta, the mother of the minor girl noticed that the latter was bleeding from her private parts. Upon further enquiry as to what had transpired, the prosecutrix told that the parents in a terrified voice that, an Uncle, who had come to their house earlier as well, had come in their absence and took her to a dark place saying that, her Papa is calling her on the roof, then took off her pant and inserted his private organ into her private organ. The prosecutrix complained that, she had felt intense pain at that time, whereafter that Uncle had left her outside their house and made himself scarce. The prosecutrix told her father, PW-4 that, it is owing to this fear, that she had locked the door from within. PW-3, Ms. Rangeeta made a call to the Police Control Room (PCR) at telephone No. 100, which was marked to ASI Asha Rani, PW-15 and the latter arrived and prepared a rukka (Ex.PW-4/A & 1/D) at 11:58 p.m. on 27.04.2012 and got the subject FIR (Ex.PW-1/C) registered at 3:30 a.m on 28.04.2012, on the basis of the above said statement of Mr. Kripal Singh Yadav. Thereafter, ASI Asha Rani, PW-15, took the minor girl to DDU Hospital, where she was admitted for treatment.

d) A perusal of the MLC (Ex.PW-13/A), in relation to the prosecutrix 'S' records that, she had been escorted to the Hospital for medical examination by Pw-3, Ms Rangeeta, mother of the victim and Pw-15, WSI Asha Rani, at 1:50 a.m on 28.04.2012 on account of an alleged sexual assault by a neighbor as endorsed thereon. The examining doctor Dr.Narender Kumar (not examined as prosecution witness) found the following injuries present on the prosecutrix:-

Exh.PW-13/A

"Name: 'S' d/o Kripal Singh, aged 7 years, sex: female

DD 64/A

E.no.89162. MLC no. 7613 dated: 28.04.2012

Brought for medical examination: alleged h/o sexual assault as told by B/B mother(Rangeeta)

L/E 1. Bruise present 2x2 cm (approx.) side upper chest light pink colour

2. Bruise present 3x3 cm (approx.) side neck light pink colour

Pt ref to Gyne opinion "

Subsequent upon the medical examination of the prosecutrix, the exhibits provided by the doctor were seized vide seizure memo Ex.4B on 28.04.2012.

e) The minor girl was thereafter referred to Dr. Arpita Gangwani, PW-13, the consulting Gynecologist for an opinion on the very same day on 28.04.2012, who rendered it subsequently which is extracted in-extenso, as follows:-

“Findings

1. *BPU (f) (f)*
2. *Hymen torn*
3. *Posterior vaginal wall tear of 4 cm. bleeding from edges (+)*
4. *Posterior fourchette tear/ midline perineal tear/ limb above the sphincter(+)*
5. *Anal sphincter intact*

Samples:

1. *Vaginal swabs*
2. *Panty (undergarment) + pants*
3. *Blood sample in plain vial*

Final opinion: Grievous Injury ”

f) PW-15, ASI Asha Rani visited the spot, where the incident had occurred and prepared a rough site plan (Ex.PW-15/A). PW-15 also took the broken lock into possession and recorded the statements of witnesses under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as ‘Cr.PC’). On the basis of the suspicion raised by the complainant Mr. Kripal Singh Yadav, PW-4, the name of the perpetrator emerged as Mr. Anil Kumar s/o Mr. Bishamber, r/o

Bijnour, U.P., the appellant herein, who is stated to have been residing in the neighborhood of the complainant. Subsequent thereto, the tenanted room of the appellant, where the offence was alleged to have been committed, was inspected and the statement of his landlord recorded, in accordance with law. The Investigating Officer thereafter obtained non-bailable warrants against the accused, Anil Kumar and a police team was dispatched to Bijnour to apprehend him. Subsequent upon his apprehension from Bijnour, the appellant was brought back to Delhi, where he was interrogated and arrested vide arrest memo (Ex.12/A) on 18.05.2012 by Inspector Mahender Singh, PW-18.

3. It was the case of the prosecution that the appellant made a disclosure statement (Ex.12/C), admitting his involvement in the offence, and pointing out the spot where the incident had occurred, and leading the police to the spot from where the iron rod (Ex.Pw-7/C), with which he had broken open the lock of the door of the complainant's accommodation, was recovered. The disclosure statement also led to the recovery of the clothes, with which the appellant had wiped out his body and that of the prosecutrix, after the

commission of the crime, which was duly seized by the Investigating Officer. The appellant was thereafter got medically examined and the exhibits given by the doctor, in relation to him, were seized. All the exhibits of the case were sent to the Forensic Science Laboratory (for short 'FSL') for forensic examination; and the case file subsequent upon the investigation, was handed over to WSI Kusum Lata, PW-17, who prepared the charge-sheet and submitted the same to the concerned Magistrate.

4. The learned trial court framed charges under Sections 363/376 (2) (f)/457 IPC, against the appellant, to which the appellant pleaded not guilty and claimed trial.

5. In order to establish its case against the appellant beyond doubt, the prosecution examined 19 witnesses. The statement of the accused under Section 313 of the Cr.PC, was thereafter recorded, in which he denied in-toto the charges against him and stated that, he had been falsely implicated. The appellant further stated that, he had been implicated in this case at the behest of his brother, namely, Sunil, with whom he had a property dispute at Bijnour and who was also a resident of Delhi. However, the appellant did not examine any witness in his defence. The trial court, vide its judgment dated 16th December,

2013, came to the conclusion that the prosecution had been successful in establishing the charges against the appellant, beyond any doubt, and convicted him accordingly.

6. The trial court, vide the order on sentence dated 20th December, 2013, sentenced the appellant as follows:-

“9. In view of the aforesaid discussion, the convict is sentenced to as under:-

(1) To rigorous imprisonment for a period of 5 years alongwith fine of Rs.10,000/- for the offence punishable u/s.363 IPC. He shall suffer further imprisonment for a period of 3 months in case of default in payment of fine.

(2) To rigorous imprisonment for a period of 20 years alongwith fine of Rs.25,000/- for the offence punishable u/s.376 (2) (f) IPC. He shall suffer further imprisonment for a period of 6 months in case of default in payment of fine.

(3) To rigorous imprisonment for a period of 3 years alongwith fine of Rs.10,000/- for the offence punishable u/s.457 IPC. He shall suffer further imprisonment for a period of 3 months in case of default in payment of fine.”

7. Mr. S.B. Dandapani, learned counsel appearing on behalf of the appellant, assailed the findings arrived at by the trial court, by inviting our attention to the improvements in the testimony of the prosecutrix and the inherent contradictions between her testimony and that of her parents, PW-3 and PW-4. Further, it would be urged that the biological and DNA Test did not incriminate the appellant for the

commission of the sexual assault. Lastly, it was urged that, there was no evidence that the appellant broke open the lock of the complainant's accommodation with an iron rod and the prosecution had failed to examine any witness, in this behalf.

8. Insofar as, the submission made on behalf of the appellant to the inherent contradictions that exist in the testimony of the prosecutrix 'S' and the divergent deposition made by her parents is concerned, it would be necessary and appropriate in this behalf to extract the testimony of the minor victim, in full.

"Without oath

I do not know the date and the month of the incident. On that day, my parents had gone to market in the evening. Anil uncle came to our room and told me that my parents are calling me upstairs. Anil uncle used to reside adjacent to coupon shop near our house. I did not say anything to him. He took me in his lap and took me to his home. He then laid me on a bed and put his male organ into my female organ. He had taken off my pant before doing so. He did not say anything to me and then left me in a dilapidated house. When he did so to me, I felt pain and also started bleeding. I cried in pain. After doing the act, he put on the pant to me.

From the aforesaid dilapidated house, I went myself to my house. My parents returned home after I had reached there. Thereafter I narrated the incident to my mother. My parents took me to a doctor. The doctor did not do anything to me and we returned home. Police officials reached our house during the night. Police officials made inquiries from me but I did not tell them anything. I did not show them the house of Anil uncle

where he had taken me. Police officials took me to the hospital during the night.

I identify Anil uncle. He is present in court today. (Witness has correctly identified accused Anil, present in court today).

Xxxxxx by Sh. L.S. Gautam, counsel for accused from Legal Aid.

Nobody had tutored me what to depose in the court today. My parents have brought me to the court today. Misal and Sajan are my two brothers. Kanchan and Kiran are the names of my two sisters. I do not know who is the eldest amongst us. My parents stay together in the same house.

On the date of incident and at the time of incident, my parents had gone to the market. I cannot tell the time when Anil uncle took me. However, it was dark at that time, There are houses on both sides of the house, in which we resided and people resided in those houses. I had seen Anil uncle before the date of incident also as he used to come to our house to give keys. I had seen him two or three times. I do not know the details of those keys.

On the date of incident when my parents had gone to market, I along with my brother Misal was present inside the room. We had not bolted the room from inside. It was locked from outside by my parents. Nobody saw Anil uncle taking me in his lap.

I had not worn underwear on that day. It is wrong to suggest that I had worn underwear on that day. The doctor to whom my parents had taken me, did not ask me how I had suffered injuries and why I was bleeding. Anil uncle had taken me to the roof of his house where he was residing. Many persons were residing in that house. I do not know their names. They did not see Anil uncle and myself. There was darkness on the roof where incident took place. I do not know what type of clothes were worn by the accused Anil at that time. I did not notice any articles lying in that room on the roof. If is wrong to

suggest that a person residing in adjacent room to our room had beaten me and I had told this fact to my mother. Vol. Anil uncle had beaten me. It is further wrong to suggest that photographs of Anil uncle have been shown to me and I was asked to identify him as a culprit. I did not see the accused after the date of incident till today. However, his photograph had been shown to me but I do not know by whom and when. It is wrong to suggest that accused was identified to me by my mother outside the court.

It is wrong to suggest that accused has been falsely implicated in this case at the instance of my parents.

Reply to Court question;- *I do not remember whether I was produced before any Magistrate or Judge by the police officials at any point of time.*

At this stage, the statement u/s 164 Cr.P.C. Of the witness Ex. PWII/A is Shown to her. She Identifies her signatures at points Y1, Y2, Y3, Y4 and Y5 on the same. She, however, does not remember, when she put these signatures on the statement.”

9. In this behalf, it is observed that the case of the appellant is founded on the assertion that, there were many contradictions in the testimonies of the material witnesses on important aspects of the evidence such as the finding of his photo; the handkerchief alleged to have been tied around the eyes of the victim; the response of the accused and the factum of wearing of the underwear by her, at the time of the commission of the offence by the victim.

10. Mr. S.B. Dandapani, learned counsel appearing on behalf of the appellant, who invited our attention to the deposition of the

prosecutrix 'S', urged that although, she has stated that she was not wearing underwear on that fateful night, the parents have testified to the contrary. It was further asseverated on behalf of the appellant that, whereas, on the one hand, PW-3 Ms. Rangeeta, the mother of the prosecutrix 'S' states that, she had never seen the appellant in the neighbourhood, on the other the minor victim testified that the latter had taken her to his house earlier also. In this behalf, it is urged that the present is a case of mistaken identity.

11. Mr. S.B. Dandapani, learned counsel appearing on behalf of the appellant, on instructions from the latter, who is present in the Court, would also assail the correctness of the sentence of 20 years rigorous imprisonment imposed upon him by stating that the same was harsh, excessive and not commensurate with the offence for which, he has been convicted.

12. On the contrary, Mr. Ashish Dutta, learned APP appearing on behalf of the State, would invite our attention to the clear and un rebutted testimony of the prosecutrix 'S', read in conjunction with the corroborating testimony of her parents, as well as, the MLC Ex.13/A and the FSL report Ex.PA, to urge that, there was no warrant or reason in the present case to interfere with the finding of guilt

arrived at, by the trial court.

13. We have heard learned counsel appearing on behalf of the parties and given our careful consideration to the evidence on record. At the outset, there is no gainsaying the settled position of law that, in cases of sexual assault, the sole deposition of the prosecutrix, if credit-worthy and reliable, is legally sufficient by itself sustain a verdict of guilty.

14. The Supreme Court of India in “***State of Rajasthan vs. Om Prakash***”, reported as (2002) 5 SCC 745, while upholding the conviction of the appellant therein, held as follows:

“16. The Hon’ble Supreme Court, in State of Rajasthan v. Om Prakash, reported as (2002) 5 SCC 745, dealing with a similar question in the case of a child rape, while upholding the conviction of the appellant therein and reversing the decision of the High Court in that behalf, relied upon earlier decisions and made the following observations:

“13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In State of Punjab v. Gurmit Singh [(1996) 2 SCC384], referring to State of Maharashtra v. Chandra Prakash Kewalchand Jain [(1990) 1 SCC 550] this Court held that 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. It has also been observed in the

said decision by Dr Justice A.S. Anand (as His Lordship then was), speaking for the Court that 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.

14. In State of H.P. v. Gian Chand [(2001) 6 SCC] Justice Lahoti speaking for the Bench observed that the court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined.”

15. From a perusal of the evidence on record and its appreciation in accordance with the rudimentary principles of jurisprudence, we are of the considered view that in the instant case, the following facts have been established beyond the pale of doubt.

(a) that the prosecutrix ‘S’ was subjected to vaginal intercourse on the night intervening between 27th April, 2012 and 28th April, 2012. The plain reading of the testimony of the prosecutrix ‘S’, considered in conjunction with the observations

of PW-13 on the MLC of the prosecutrix establish beyond doubt, that the prosecutrix 'S', had been sexually assaulted soon before she had been examined by PW-13.

b) Further from the uncontroverted testimony of PW-9, Ms. Sushma Gupta, the Principal of the School, where the minor girl victim was a student, it is found that the prosecutrix was just seven years old, when she was brutally ravished.

16. It is the settled position of law that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable case of the prosecution. In **State of U.P. Vs. Naresh** reported as (2011) 4 SCC 324, wherein the Apex Court has observed that :

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

inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

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

17. The solitary question therefore that requires determination by this Court, is whether the appellant was guilty of having committed the sexual offence on the person of the minor victim. In this behalf, it would be necessary and profitable to extract and appreciate the relevant portion of the findings arrived at by the learned trial court, which are reproduced as follows:-

"18. The prosecutrix had first of all brought the incident to the notice of her parents i.e. PW3 and PW4. According to her mother, PW3, the prosecutrix told her that it was the uncle residing in the adjacent house who did it. PW4 has stated that prosecutrix told him and his wife that the uncle who had come a few days before for taking the keys, did it. In the FIR also, PW4 has stated that his daughter told him that the uncle who had earlier also visited their house had come, taken her out and sexually assaulted her. PW4 has further deposed in his testimony that since accused Anil Kumar had come to his house a few days before the incident to receive the keys of a Gramin Sewa Vehicle, he suspected him of

having sexually assaulted his daughter. He knew his name as both used to ply Gramin Sewa Vehicle on the same route. He has also deposed that his daughter had told him that the uncle had taken her to the adjoining house. No suggestion has been given to PW4 in this regard in his cross examination implying thereby that the accused admits that he and PW4 were plying Gramin Sewa Vehicle on the same route and both were known to each other,

19. *Now it is the case of the prosecution that PW4 had taken police officials to the room of the accused in the house No.RZF-753, Gall No.1, Raj Nagar Part-II, New Delhi where from a photograph of the accused was recovered, which was shown to the prosecutrix in the hospital and she identified the person in the photograph to be her assailant.*

20. *To understand how the investigation progressed after the call of rape was received in the Police Station and how the police zeroed in upon the accused to be the assailant, it would be relevant to reproduce the following portions of testimony of the IO, W ASI Asha Rani, who has been examined as PW-15:-*

"On 27.4.2012 I was posted as SI in P.5. Palam Village, New Delhi. On that day at about 11:58 p.m. when I was present at my home, I received a call from the Duty Officer on my mobile phone asking me to reach House No.RZF-754, Gail No.1, Raj Nagar Part-II, Palam Colony, New Delhi, where an incident of rape has taken place with a minor girl. He also told me that ASI Ram Karan, the SHO and other staff have already reached there. Accordingly I reached the aforesaid spot and found ASI Ram Karan and SHO Inspector Satbir Singh present there alongwith a male person, a female person and a minor girl. A broken lock was also lying on the ground. I made inquiries from the aforesaid husband wife, who were the parents of the minor girl, who had been raped. I left ASI Ram Karan at

the spot and myself took the minor girl and her parents to DDU Hospital in a government vehicle. The minor girl namely Sabnam was admitted in the hospital on account of serious injury on her private part. I received a call from police station that Ms. Mcdel Marine from NGO has arrived there. Accordingly I went to the police station and got her also to hospital. I recorded the statement of father of the victim girl and then came to the police station leaving Ms. Marine at the hospital. On reaching the police station, I prepared rukka and got the FIR registered. After registration of the FIR. I again reached the spot of incident where I met ASI Ram Karan. He handed over to me a silver colour lock which I seized vide seizure memo already Ex.PW10/A bearing my signature at point B. I prepared the site plan of the spot of incident at the instance of ASI Ram Karan and also recorded his statement. The site plan is Ex.PW15/A bearing my signature at point A. Meanwhile Const. Jagbir reached the spot alongwith original rukka and copy of FIR and handed over the same to me. Thereafter the complainant i.e. father of the victim girl came to the spot who told me that the person who has been coming to their house for taking keys resides in a room on the top floor of House No.RZF-753 i.e. adjacent to their house. He took me to that room where I found that the goods lying there were scattered. A photograph was lying amongst the clothes near the bed. The complainant identified the photograph to be that of Anil who drives his vehicle (Chhota Hathi). I took into possession the photograph vide seizure memo already Ex.PW4/C bearing my signature at point B. The photograph is Ex.PW15/B. I came downstairs and searched for the landlord but he could not be found. I showed the photograph to the neighbours, who told me that this boy is residing in the room of the said

house on its roof. They drew my attention to a mobile number written in white colour on the wall of the house and told me that it is the mobile number of the landlord of the house. I dialed that number and the phone was picked up by one Sh. Mahander. He told me that he is in Rajasthan and would reach Delhi in one or two days.

On 29.4.2012 I again reached House No.RZF-7538, Gali No.1, Raj Nagar-2, Palam, where I met a person, who disclosed his name to be Mahender and stated that Anil is his tenant and is native resident of Bijnor, U.P. I recorded his statement. I also locked the room on the roof of the house where incident had taken place.

On 02.5.2012 I obtained the birth certificate of the victim girl from the school in which he was studying."

21. In this regard following portion of cross examination of PW-15 is very relevant and needs to be reproduced:-

"I cannot tell the number of tenants residing in house NO. RZF-754 at that time. I cannot tell the total number of rooms in that house. There were about four or five rooms on the ground floor. There is a main gate in the house which was open when I reached there. I could not get any documentary proof regarding the residence of accused in that house as a tenant. I had made inquiries from Sh. Mahender, the owner of the house but I did not seize his ownership documents. I do not know since when the accused had been a tenant in that house and what was the monthly rent.

The photograph of the accused was recovered from the room on 28.4.2012 and the same was shown by me to the victim child on 4.5.2012 when she had regained full

consciousness. I do not know when she had been discharged from the hospital. I met her at her home on 4.5.2012. The TIP of the accused was not conducted. There was no room adjacent to the room of the victim in that house. There was a kitchen adjacent to that room and there was another room on the other side of the kitchen. No body was present in that another room when I had reached there. No inhabitant of that house was prepared to give any statement."

22. The ld. Counsel for the accused has failed to point out anything in cross examination of PW-15 which may show that the photograph of the accused was not recovered by her from the room of the accused in house No.RZ-753 and that the prosecutrix had not identified him from the photograph when it was shown to her after her discharge from the hospital on 4.5.2012. Her testimony in this regard is corroborated by the deposition of PW4 who also has not stated anything contrary to the same in his cross examination. It was argued by ld. Counsel for the accused that since no TIP has been conducted, it cannot be believed that the accused has been identified by the prosecutrix. The argument has no force. When the prosecutrix has identified the accused from the photograph shown to her by the IO, there was no occasion for conducting TIP as the accused would have in all probability refused to take part in TIP on the ground that his photograph has already been shown to the prosecutrix. The alibi taken by the accused that his photograph was given by his brother Sunil to the police officials in order to get him implicated in this case, seems to be an afterthought only as the same has not been put to any of the prosecution witnesses including PWA and PW15. It has nowhere been suggested to these witnesses that the photograph of the accused was infact handed over to police by accused's brother Sunil.

23. It was also sought to be disputed on behalf of the accused that the prosecution has not established that he was residing as a tenant in a room in house No. RZ-753

in which, the prosecutrix is alleged to have been ravished. In this regard, my attention has been drawn by the ld. APP to the testimony of PW-7, who is the owner of the said house and deposed that he had given a room on the first floor of the house on rent to accused Anil Kumar about ten months ago and his belongings were still in the room. There is nothing in the cross examination of PW-7 to suggest that he is a planted witness. I find his deposition trustworthy. I do not see any reason on record to disbelieve his testimony.

24. Now I may refer to the deposition of prosecutrix who has been examined as PW-14. She did not know her age or the address. Several preliminary questions were put to her before recording her testimony and it was after getting the satisfaction that she understands the questions put to her and is able to give rational answers, she was examined. However, her testimony was recorded without oath as she did not know the meaning and sanctity of oath. She did not know the month and date of the incident. She deposed that on that date her parents had gone to market in the evening. Anil uncle came to their room and told her that her parents are calling her upstairs. Anil uncle used to reside adjacent to coupon shop near her house. She did not say anything to him. He took her in his lap to his home, laid her on a bed and put his male organ into her female organ. He had taken off her pant before doing so. Thereafter she did not say anything and left her in a dilapidated house. She fell intense pain and also started bleeding when he did so to her. She cried in pain and after doing the act, accused put on the pant to her. From the dilapidated house she went herself to her house. Her parents returned home after she returned home and she narrated the incident to her mother. Her mother took her to a doctor who did not do anything to her and they returned to their room. Police officials reached their house during the night. They made enquiries from her but she did not tell them anything. She did not show them the house of Anil uncle where he had taken her. Police officials took her to the hospital during the night. She identified the accused Anil in Court. In the cross examination, she deposed that nobody had tutored her

about what to depose in the court. She also deposed that her parents stayed together in the same house and at the time of incident, they had gone to the market. She could not tell the time when Anil uncle took her but stated that it was dark at that time. She had seen uncle before the date of incident also as he used to come her house to give keys. She had seen him on two or three occasions. She also deposed that on the date of incident, when her parents had gone to the market, she alongwith her brother Misal was present in the room. They had not bolted the door from inside. It was locked by her parents from outside. Nobody had seen Anil uncle taking in his lap. She also deposed that she had not worn underwear on that day and there was darkness on the roof where incident had taken place. She did not know what type of clothes were Anil had worn at that time and did not notice any article lying in that room. She denied the suggestion that a person residing in the room adjoining to their room had beaten her and stated voluntarily that Anil uncle had beaten her. She also deposed that she did not see accused Anil after the date of incident till the date when her testimony was recorded but added that his photograph had been shown to her but did not know by whom and when. She did not remember when she was produced before a Magistrate or a judge by the police officials at any point of time. Her statement recorded u/s 164Cr.P.C. was shown to her and she identified her signatures at points Y1, Y2, Y3, Y4 and Y5. She did not remember when she put these signatures on the statement.

25. *From the aforesaid testimony of the prosecutrix it is evident that she is a reliable and truthful witness. Her deposition seems to be genuine, untutored and having a ring of truth in it. Even being of very tender age, she has narrated the incident very clearly and has withstood the cross examination as well. Nothing contrary has been elicited in her cross examination, which contains some tricky questions also. Her testimony is corroborated by her statement u/s 164 Cr.P.C. (Ex. PW11/A) and also finds support from the testimony of her parents PW3 and PW4, to whom she had described the incident first of all. It is quite manifest from her testimony that she had no*

doubts about the identity of the person who ravished her. She has specifically stated that she had seen the assailant i.e. the accused before the date of incident also as he had come to their house to give keys. She identified him from the photograph shown to her by IO on 04.05.2012. Her testimony does not suffer from any embellishments or prevarications.

26. Apart from the testimony of PW3, PW4 and PW12, I find further evidence on record pointing towards the guilt of the accused. It is evident from the testimony of PW-12 that he alongwith ASI Omkar Singh and HC Satyavan had gone to Bijnore on 17.5.2012 in search of the accused and they apprehended the accused in the Police Station Bijnore and brought him to Delhi. The accused was produced before PW-15 who, on the directions of the SHO, handed over the case file as well as the accused to PW-18. The accused was interrogated and arrested by PW-18 on 18.5.2012 vide arrest memo Ex.PW12/A. His disclosure statement Ex. PW12/C was also recorded by PW-18. These two witnesses have further deposed that accused led them to the spot of occurrence i.e. a room on the first floor of house No. RZF-753/B, Raj Nagar, Part-II and pointed out the same vide memo Ex. PW7/C. They have further deposed that the accused got recovered a red, blue and white colour check shirt from the said room saying that he had worn the same at the time of committing the crime. The accused also led them to the roof of the house where from he got recovered another shirt of black and white colour saying that he had wiped off himself and the victim by it after committing the crime and had thrown it on the roof after washing it. From the roof itself the accused had again got recovered an iron rod saying that he had broken open the lock of the room by it in which the victim was present.. The shirts as well as the iron rod were sealed by PW18 in separate pullindas and were seized by him vide seizure memo Ex. PW7/B and PW7/C respectively.

27. There is no cross examination of PW-15 in this regard. Just one question has been put to PW-13 in this regard to which he has replied that he 'id not prepare

site plan of the spot from wherefrom the shirts and iron rod were got recovered by the accused.

28. *Therefore, it is established on record that after the arrest of accused in this case by PW-18, he made disclosure statement Ex. PW12/C. In this statement, accused has stated that after sexually assaulting the prosecutrix, he wiped off himself as well as the niwar of the cot by an old torn shirt and thereafter he washed the shirt and threw it alongwith the iron rod upon the roof of the house. He has also stated that he can show the spot of incident to the Police officials and also can get recovered his shirt as well as the iron rod.*

29. *It is pursuant to the disclosure statement of the accused that he led the police officials to the room on the first floor of the house No.RZF-753B and pointed out the said room to be the spot of incident and also got recovered his shirt as well as iron rod. It is worthwhile to note here that those recoveries were effected by the accused in presence of an independent witness i.e. PW-7, the owner of the said house and, therefore, there does not appear any reason to doubt the same. Also I do not find anything in the cross examination of PW-7 to suggest that he is a planted witness and the recoveries were not effected in his presence. Therefore, the prosecution has firmly established that the accused pointed out the spot of incident i.e. the room on the first floor of the house No, RZF-753B and also got recovered the iron rod with which he had broken upon the lock of the room of the prosecutrix and also the shirt with which he had wiped off his body, the body of the prosecutrix and the niwar of the cot after committing the crime. Therefore, the relevant portion of his disclosure statement becomes admissible in evidence as it distinctly relates to the knowledge of the accused regarding the place of incident, recovery of iron rod with which the lock of victim's room was broken open and recovery of blood stained shirt of the accused with which he had wiped off his body and that of prosecutrix.*

30. *PW-7 has stated that on 29.4,2012, two police officials had come to his house alongwith the*

prosecutrix, who showed the room of the accused to those police officials saying that she had been raped in that room. She had also shown the cot made of white niwar in the room upon which she was raped. He further deposed that the blood stained portion of the niwar was cut and seized vide seizure memo Ex. PW7/A.

31. PW-15 states that the prosecutrix took her to the house of PW-7 on 4.5.2012 and in the presence of PW-7 pointed out the room of the accused in which she had been ravished. Witness further deposed that she collected the pieces of the niwar of the bed lying in the room and seized the same vide seizure memo Ex. PW7/A. Though these two witnesses have given two different dates on which the prosecutrix led the police officials to the room of the accused and the pieces of niwar were seized by the police, yet I find that the date mentioned by PW-15 is the correct date. Due to lapse of time PW-7 may not have recollect the correct date when these proceedings took place and hence nothing averse to prosecution case can be held in view of his such testimony. Their remains no manner of doubt that PW-15 had seized a piece of white niwar from the aforesaid room in the house of PW-7, which he had let out to the accused. The aforesaid piece of niwar in sealed condition was sent to the FSL alongwith the underwear, vaginal swab and blood sample, of the prosecutrix. As per the undisputed DNA report Ex. P-A, female profiles were generated from all the four samples and all the profiles were found to be similar in nature. Therefore, it is established that the blood found on the niwar on the cot in the tenanted room of the accused was that of the prosecutrix. This further strengthened the charges against the accused that he had brought the prosecutrix to his room and sexually assaulted her, consequent upon which prosecutrix started bleeding from her private part and the blood had fell upon the niwar of the cot. There is no challenge from the side of the accused to the said DNA report. The accused has also failed to explain how the blood of the prosecutrix was found upon the cot placed in his tenanted room.

32. It was submitted by the Id. Counsel for the accused that the fact that no male DNA profile was generated from the underwear of the prosecutrix and her vaginal swab, it makes the case of the prosecutrix doubtful that she had been sexually assaulted. The argument is too fallacious to be accepted. Firstly for the reason that the prosecutrix had deposed in her cross examination that she was not wearing any underwear at the time of incident. Therefore, there was no question of any male DNA profile to be found on the same. Secondly, it is manifest from the record that after the prosecutrix was subjected to sexual act by the accused, she started bleeding profusely from her private part which may have washed away all the spermatozoa and for this reason, no male DNA profile could be isolated from her vaginal swab. Further, as noticed herein above, the fact that the prosecutrix was subjected to sexual assault, cannot be disputed in view of the findings of PW-13 upon the MLC.

33. The accused has failed to give any reason which lead him to flee to Bijour after the rape incident came to light. He has himself admitted in his statement u/s 313 Cr.P.C. that he was apprehended from Bijour. This points towards the guilty conscience of the accused. Further the accused has given false answers in his statement u/s 313 Cr.P.C. by clarifying that he was residing as a tenant in a room of House No. RZF-753B, Raj Nagar Part-II, which fact is clearly proved by the owner of the house i.e. PW7 himself. The accused has himself also got recovered the blood stained shirt and iron rod from the roof of the house, which would not have been possible, had he not been residing there as a tenant, The false answers given by the accused in this regard in his statement u/s 313 Cr.P.C. also points towards his complicity in the crime.

34. The accused claims false implication in this case at the instance of his brother Sunil. He has not lead any evidence to show that he had any property dispute with Sunil or that Sunil hated him to such an extent that he would implicate him (accused) in a false rape case. The alibi put forward by the accused is too far fetched. The

name of the accused to be the assailant has surfaced during the same night in which incident had taken place and his room had been visited by PW15 only after few hours of the incident and recovered his photograph therefrom. It is not understandable how the accused's brother Sunil would have come to know about the incident soon after its taking place and named accused as the assailant and gave accused's photograph to the Police. Accused has not lead any evidence nor did he suggest to any prosecution witness that his brother Sunil lived in the vicinity of the place which offence took place or that he was known to PW3 (the father of prosecutrix) or that he was present at the spot during the night after the incident took place. Hence, I find that the alibi put forward by the accused is absolutely false and concocted having no legs to stand upon.”

18. An objective consideration of the above extracted findings in the backdrop of the evidence on record, leaves no manner of doubt that the prosecution has been able to establish the charges against the appellant in full. The appellant failed to lead any evidence in support of his assertion that, he had been falsely implicated on behalf of his brother, namely, Mr. Sunil, owing to a property dispute, nor has any suggestion been made by him to any of the material witnesses, *qua* that being the motive for them to falsely implicate him, in the admitted rape on the minor child.

19. In view of the foregoing and having regard to the facts and circumstances of the case and the principles laid down by the Hon’ble

Supreme Court, in the judgment extracted hereinabove, we find no compelling or substantial reasons to differ with the cogent findings arrived at, by the learned trial court, based upon just appreciation of the material evidence available on record in this case. The trial court has correctly arrived at the conclusion of the guilt of the appellant, after carefully considering and analysing the evidence on record including the testimony of the prosecutrix. The appeal is resultantly devoid of merit and is accordingly dismissed.

20. Before we part with the judgment, it would incumbent on our part to deal with the alternative submission made on behalf of the appellant by Mr. S.B. Dandapani, Advocate, *qua* the length of the sentence imposed upon him.

21. It is trite to state that it is necessary for the Court to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in Article 39 of the Constitution of India which, *inter alia*, stipulates that the State shall, in particular, direct its policy towards securing that, the tender age of the children is not abused and also that children are an given environment, opportunities and facilities to develop in a healthy

manner and in conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment.

22. Further, let it not be forgotten that, this is a case of rape on a girl child, only seven years old, at the time of the commission of the offence, by a neighbour, who was on visiting terms with the family of the victim. Nothing can be more heinous than a crime committed on the person of a child by one, who has social, moral and human obligation and is duty-bound by morality to provide her unflinching protection from all harm. In our view, consequently, the sentence awarded to the appellant by the trial court also does not warrant any modification. Therefore, the judgment dated 16th December, 2013 and the order on sentence dated 20th December, 2013, are both hereby upheld and the appeal is dismissed.

SIDDHARTH MRIDUL
(JUDGE)

I.S. MEHTA
(JUDGE)

NOVEMBER 20, 2019
RS