

Judgement Reserved On 24.09.2019

Judgement Delivered On 18.12.2019

Court No. - 46

Case :- CRIMINAL APPEAL No. - 5375 of 2010

Appellant :- Surendra

Respondent :- State Of U.P.

Counsel for Appellant :- Sanjiv Singh, Animesh Chatterjee, Apul Mishra, Ashok Kumar Tripathi, Chetan Chatterjee, Namwar Singh, Yogesh Kumar Srivastava

Counsel for Respondent :- Govt. Advocate

Hon'ble Naheed Ara Moonis, J.

Hon'ble Anil Kumar-IX, J.

(Delivered by Anil Kumar-IX, J.)

1. This criminal appeal has been filed against the judgement and order dated 20.09.2003 passed by Additional Session Judge (Fast Track) Court No. 14, Mathura in Session Trial No. 972 of 2002, (State Vs. Surendra) arising out of Case Crime No. 223 of 2002, under Section 376 I.P.C., Police Station Raya, District Mathura, whereby sole appellant Surendra has been convicted and sentenced to life imprisonment with fine of Rs. 5,000/- under Section 376 I.P.C., with default stipulation.

2. Prosecution case in brief is that the informant Chandra Pal has lodged first information report on 05.02.2002 at 01.15 P.M. at P.S. Raya, District Mathura alleging therein that on 05.02.2002 at about 12.00 noon he was going towards Raya from his village Gongga. At about 12.30 P.M. when he reached near the field of Charan Singh, on hearing the shrieks of a child from the field of Charan Singh, he stopped there and went to that field. When he reached there, he saw that appellant/accused was committing rape on an innocent girl child of about 2-½ to 3 years. There was blood on the spot and the child was lying in a pool of blood. At that moment, Murari s/o Masi, Pappu s/o Bagari both resident of village Gongga and Jagveer s/o of Nekse resident of Dhaku also reached there. Seeing them, the accused/appellant tried to escape from there but they caught him on the spot after applying

some force. The victim was in very serious condition. There were injuries with blood on private part of the victim. On being asked accused/appellant told his name as Surendra s/o Shanker Singh Bhat @ Sunil Bhati resident of Gokleshwar, District Dharchula (Nepal). Some persons living on the side of the road near the railway station told them the name and father's name of the victim and also told them that her parents were searching her for a long time. The informant Chandra Pal along with other persons brought the victim and the accused/appellant to the Police Station Raya and lodged the first information report by giving his written report Ext. Ka-1 which was scribed by Rakesh Bansal s/o Kishan Lal Bansal resident of Hathras road Raya, Mathura. The entry was made in general diary (G.D.) of Police Station vide Report No.20 at 13.15 hours on 05.02.2002 by Sri Vijay Singh (PW 4) and investigation was handed over to PW 5, Sub-Inspector Indra Pal Singh Tomar.

3. After registration of the first information report at Police Station the victim was sent to the government hospital with lady Constable Sushma of P.S. Raya for her treatment and medical examination. She was medically examined on 05.02.2002 by Dr. Sunita Majumdar Medical Officer Women Hospital, Agra and prepared injury report (Ext. Ka-6).

According to the injury report Ext. Ka-6 she was of average built, weak condition pulse 110 per minute, there was no mark of injury anywhere on the external body surface. In internal examination, vagina admits little finger easily. Vagina smear prepared and sent for pathological examination.

Injuries noted are as follows:

- (i) *Left lateral vaginal tear at 5 o' clock position 1cm in length, breadth 0.3 MM, muscle deep bleeding present. This tear was stitched bleeding on this side was controlled.*
- (ii) *Right lateral vaginal tear at 7 o' clock position*
 - (a) *Skin tear externally 1.5cm x 0.3cm*
 - (b) *muscle deep extending internally (apex could not traced) bleeding present tight vaginal packing done duration of injuries 1 and 2 about 6 hours.*

Victim was advised to admit in district female hospital for examination of injuries and primary T/T Sedation, X-ray of right wrist including carpels and right elbow for age determination, vaginal smear for pathological

examination to ascertain the presence of spermatozoa and spermatic fluid, victim was referred to S.N. Medical College, Agra for the repair and further T/T of injury no.2 which could not be stitched due to lack of proper pediatric anesthesia. There was no other medical examination report or x-ray report of the victim on record as was advised by the doctor.

4. On request letter dated 05.02.2002 of Station Officer P.S. Raya, accused appellant was also medically examined by Dr. B.P. Sarswat Medical Officer District Hospital Mathura on the same day at 3:00 PM. The medical examination report exhibited as Ext. Kha-6.

According to the medical examination report Ext. Ka-6 accused/appellant Surendra was brought by Constable Santosh Kumar and Sahadat Police Station Raya. He was examined on 05.02.2002 at 3:00 P.M. According to the report he was young healthy man of about 25 years well built and well nourished. The following injuries were found on his body.

(i) multiple abrasion in an area of 16 cm x 6 cm in front of left knee and upper front of left leg size varying from 2 cm x 1 cm to 1 cm x 0.5 cm.

(ii) Abrasion 2 cm x 1 cm on medial aspect of right knee joint.

(iii) Abrasion 2 cm x 1 cm on front of right leg middle part.

(iv) External clothes pant and shirt were not teared except on the cuff of the shirt was having blood stained, under garments also having blood stains on both underwear. His clothes were sealed and handed over to the Constable for examination by forensic expert for necessary examination including blood group.

(v) Finger nails scrapped also collected and preserved sealed along with clothes for examination by forensic expert.

(vi) He was not under influence of alcohol or any other thing.

(vii) There was no wetting of pubic hairs but pubic hairs sample taken and sent to forensic expert.

(viii) There were no female hair on his body.

(ix) There was slight redness on glans and prepuce but no external injury on penis.

(x) Genital part was fully developed and he was a young person and can do sexual acts.

(xi) There was no smacma (white layer) around the glans penis and there was no gonorrheal discharge on genital organs.

In the opinion of doctor injury nos. 1, 2 and 3 were fresh, simple and caused

by friction.

Two underwears, one cuff of shirt and finger nails scrapping and pubic hair sealed and handed over to accompanying Police Constable for examination by forensic expert.

5. After the registration of F.I.R. at the police station, Investigating Officer Indrapal Singh Tomar started investigation on 05.02.2002. He recorded statement of Head Constable Vijay Singh, who had registered the F.I.R. on the basis of written report of the informant. He has recorded statement of informant Chandra Pal on 05.02.2002 and he copied medical examination reports of the victim and the accused in the case diary on 06.02.2002. He inspected the spot on the pointing out of the informant and prepared site plan Ext. Ka-4. He had recorded statement of Kallu, father of the victim and statement of Murari one of the eye witnesses of the incident. On 28.03.2002 Investigating Officer had recorded statement under Section 161 Cr.P.C. of eye witness Pappu. On 10.04.2002 he recorded statement of eye witness Jagveer and after completion of investigation he submitted charge sheet Ext. Ka-5 against accused Surendra under Section 376 I.P.C.

6. As the case was exclusively Triable by the Court of sessions, hence it was committed to the Court of Sessions and numbered as Session Trial No. 972 of 2002. After that, this session trial was made over to the Court of Additional Sessions Judge (Fast Track) Court No. 14 Mathura for final trial and disposal of the case. After hearing of the learned counsel for the appellant as well as Public Prosecutor, learned Trial Judge has framed the charge under Section 376 I.P.C., against accused/appellant on 15.01.2003, which was read over and explained to the accused in Hindi, who pleaded not guilty and claimed to be tried.

7. After framing of charge prosecution was directed to adduced its evidence by which it proposes to prove guilt of the accused. The prosecution has examined as many as five witnesses. The brief sketch of the witnesses examined by the prosecution is as hereinunder:-

(I) **PW 1, Chandra Pal** is the informant and eye witness of the case, he has deposed that on the date of occurrence at about 12.00 noon he was going to Raya town from his village 'Gonga' and at about 12.30 PM when he reached near the field of Charan Singh, he heard shriek of a

female child and rushed towards that field. When he reached in the field of Charan Singh, he saw that a man was committing rape on innocent child aged about 2-1/2 to 3 years. There was blood on the spot and all over body of the victim. There were injuries and blood on her private part. Murari and Pappu, who belonged to the village of this witness also reached on the spot. When the culprit saw them, he tried to escape but was caught by them on the spot. He disclosed his name as Surendra s/o Sunil Bhati, resident of District Gokleshwar (Nepal). The accused was identified by this witness in the Court room. He further deposed that he along with other persons brought the victim and the accused to the police station Raya. When he reached with victim on the road before the Railway station, the persons living on the side of the road told him the name of the victim and her father's name and also told that her parents were searching her since very long time. They also told that the accused carried her in the field in his lap and committed rape on her. He got the F.I.R. Scribed by Rakesh Bansal s/o Kishan Lal Bansal resident of Raya and lodged the F.I.R. on the basis of aforesaid written report which has been proved by PW 1 as Ext. Ka-1.

PW 1, Chandra Pal was put to a lengthy cross-examination but nothing adverse could be elicited from him in his cross examination. He has told the purpose for going from 'Gonga' to Raya for marketing at 12.30 P.M. He was going to Raya town on foot and Murari (PW2) was also with him.

(ii) **PW 2, Murari** is an independent eye witness. His statement has been recorded before the Trial Court on 03.07.2003. He has deposed in his examination in chief that about 1-½ years ago at about 12 to 12.30 hour he was going to Raya town from the village 'Gonga' along with Chandrapal (PW 1). Behind them Pappu (not examined) was also coming towards Raya town, when they reached near the field of Charan Singh situated near Southern cabin of Railways, they heard a loud cry of a child. On hearing the shriek of the child, they went into the field of Charan Singh. When they reached there, they saw that accused of the case Surendra was committing rape on the child. The child was about 2 ½ to 3 years old. There was blood on all over her body. Chandrapal

(PW1) and Pappu (not examined) had also witnessed the incident. The accused tried to run away from there but was caught by them on the spot. The accused disclosed his name as Surendra. He was identified by this witness in the court room. When they were going to the police station along with the victim and accused for lodging the F.I.R., they saw that some persons who were residing on the road side were searching the victim, they identified the victim. Victim and accused were brought to the police station by Chandra Pal (PW1), Pappu and this witness. The F.I.R. was lodged by Chandra Pal (PW1), the condition of the victim was serious, there were injuries on her thigh.

In his detailed cross examination, he has fully supported the contents of the F.I.R. and statement of PW 1 Chandra Pal.

(iii) **PW 3, Kallu** is father of the victim. In his examination-in-chief he has deposed that the occurrence is of about 1-½ years ago. The age of the victim was 2-1/2 to 3 years. The victim disappeared while playing. He along with his neighbours were searching her. At about 12.30 PM victim was brought there (police station) by some person of village 'Gonga' P.S. Raya, then he reached there and came to know that the accused Surendra who was apprehended and brought there by them had committed rape on her daughter (victim). Those persons told him that accused was caught by them while he was committing rape on the victim in the field of Charan Singh. He further deposed that victim sustained injuries in her private part due to commission of rape on her. Her condition was very serious and there was blood on all over her clothes. After registration of F.I.R. victim was sent to District Hospital Mathura for medical treatment. The victim was brought in the Court below by this witness at the time of recording his statement. At the time of recording of the statement of this witness in the Court, the victim was about 4 years old but was unable to speak properly, some questions were asked by the Court but the victim could not speak.

(iv) **PW 4, Constable Vijay Singh** was posted as Head Constable in the concerned police station at the time of alleged incident. He has registered this case on the basis of written report and has also made entry in General Diary (G.D.). In his statement, he has proved concerned G.D.

report No.20 dated 05.02.2002 at 13.15 hour Ext. Ka-3 and chik F.I.R. Ext. Ka-2. In his cross examination he has admitted that at some places in chik F.I.R. there were overwritings and whitenings. He has also stated that at the time of registration of F.I.R. scribe Rakesh Bansal s/o Kishan Lal Bansal, witnesses Murari and Pappu, resident of village 'Gonga', Jagveer resident of Dhaku, Mohan Singh Punia resident of Bisawali along with the victim and accused Surendra were present there. He had not seen any member of the family of the victim there. Chik F.I.R. was sent to the Court on next day. There is overwriting at the top of the chik F.I.R. Ext. Ka-2 and G.D. Ext. Ka-3.

(v) **PW 5, Indra Pal Singh Tomar** has deposed that on the date of incident i.e. 05.02.2002, he was posted as Sub-inspector in police station Raya, F.I.R. was lodged in his presence. He was handed over the investigation of this case on 05.02.2002 and on that day recorded the statement of Head Constable Vijay Singh, who had registered F.I.R. of this case, besides him statement of informant Chandra Pal (PW1) was also recorded and medical reports were copied in case diary by him. On 06.02.2002, he prepared site plan at the pointing out of the complainant vide Ext. Ka-4. He recorded the statement of father of the victim Kallu and witness Murari on the same day, i.e. 28.03.2002. He recorded the statements of Pappu and Jagveer on 10.04.2002. After investigation, he has submitted charge sheet in Case Crime No. 223 of 2002, under Section 376 I.P.C. against the accused Surendra. He has proved the charge sheet paper no. 4A/2 which is Ext. Ka-5 in the record. In his cross examination he has stated that victim was not produced before the Court by him. He had not seen the clothes of the victim, which were worn by her at the time of incident. He had not taken sample of blood stained and plain earth from the spot. He had not recorded statement of the doctor. Statement of father of the victim Kallu was recorded by him on 06.02.2002.

(vi) **PW 6, Dr. Sunita Mazumdar** has conducted medical examination of the victim on 05.02.2002 at about 3 PM and has prepared medical examination report. She has proved injury report of the victim which is Ext. Ka-6 on the record. She has also stated that she could not

count the teeth of the victim as she was uncooperative and was weeping bitterly. She had referred the victim to S.N. Medical College, Agra for her further treatment as the injuries to her were grievous in nature, but not mentioned in the report. In her cross examination PW 6, Dr. Sunita Mazumdar has stated that report of the pathology and radiologist was not brought before her, therefore, she has not prepared supplementary medical examination report.

8. After the closure of prosecution evidence the statement of the accused/appellant Surendra under Section 313 Cr.P.C. was recorded on 01.09.2003. Accused stated that he had been falsely implicated in this case on the basis of false and fabricated evidence. He further stated that he had come to Raya in search of work of watchman for himself. The complainant and his companions assaulted him and falsely implicated in this case after snatching his money and luggage from him. He demanded opportunity for adducing evidence in defence.

9. In defence Dr. B.P. Sarswat, who was posted as emergency Medical Officer in District Hospital Mathura at the time of occurrence was examined as DW 1. He had conducted medical examination of the accused-appellant Surendra on 05.02.2002 on request of Station Officer of concerned police station. In his statement, he has proved medical examination report Ext. Kha-1 of the accused Surendra.

10. After hearing learned counsel for the parties, scrutinizing and evaluating the evidence, the learned Trial Court has recorded conviction of the accused Surendra under Section 376 I.P.C. and passed sentence as already mentioned in Para 1 of this judgement.

11. Being aggrieved by the judgement and order of the learned Trial Court, this appeal has been preferred by the accused appellant.

12. We have heard Sri A.K. Tripathi, learned counsel for the appellant and Sri Ajit Ray, learned A.G.A. appearing on behalf of the State and perused the entire material on record.

13. Learned counsel for the appellant has mainly raised following points:-

(i) Both the eye witnesses PW 1, Chandra Pal and PW 2, Murari are the chance witnesses, they are resident of different village "Gonga". There

are material contradictions and inconsistencies in the statements of both the aforesaid witnesses; their testimonies inspire no confidence. PW 3 Kallu, father of the victim is not an eye witness. He happened to reach there after the alleged incident. In fact the accused/appellant had come to Raya in search of work of watchman. The complainant and others snatched his money and luggage and falsely implicated him in this case.

(ii) There are overwritings, cuttings in chik F.I.R., and it was sent to the concerned Magistrate on next day. The F.I.R., has not been lodged by the father of the victim. It was prepared after consultation with Police which creates serious doubt on prosecution version.

(iii) Testimonies of aforesaid witnesses of fact Chandra Pal and Murari are not supported by the medical evidence. The doctor has not given any opinion about commission of rape on the victim.

(iv) Bloodstained clothes of the victim and the appellant were not taken by the I.O., and were not sent to expert for its examination.

(v) Place of occurrence has not been proved, sample of bloodstained and plain earth has not been collected by the I.O., from the spot.

(vi) Learned counsel for the appellant further contended that learned Trial court has convicted and sentenced the appellant against the settled principle of law, hence not sustainable in the eyes law. Learned counsel for the defence lastly argued that sentence awarded to the appellant is too severe and harsh. He is already in custody in this offence for about 17-½ years. He is a very poor person. A lenient view be taken keeping the long detention and background of the appellant.

14. Sri Ajit Ray, learned A.G.A. appearing on behalf of the State has refuted the arguments advanced by the learned counsel for the appellant that the first information report is prompt; PW 2 Chandra Pal and PW 3 Murari are independent eye witnesses and they have fully supported the prosecution version. The appellant was caught by them on the spot. PW 3 Kallu has also supported the prosecution version. Ocular testimonies are fully corroborated by the medical evidence. He has further contended that minor contradictions in the statements of witnesses will not affect the prosecution case. There will be no adverse effect on the prosecution version by overwriting and whitening as shown in the F.I.R.

Prosecution case is fully proved by cogent evidence of the independent eye witnesses supported with medical evidence, therefore, mere defect in investigation will not be a ground to discard the testimony of the eye witnesses.

15. Now, we have to scrutinize and consider the reliability of witnesses of fact examined by the prosecution. The prosecution has examined PW 1, Chandra Pal, PW 2, Murari and PW 3, Kallu as witnesses of fact.

16. PW 1, Chandra Pal stated the purpose of his going to Raya town from his village 'Gonga' and how he reached the spot at the time of incident he has stated that he himself has seen the accused committing rape on the victim..

PW 1 is not related to the victim or his father Kallu. He was not even knowing the father's name of the victim which was told him by the persons living on the side of the road before railway station. He is not inimical to the accused. He along with other persons caught the accused on the spot and handed over to the Police. There is no material contradiction on any point in his statement. In his lengthy cross-examination this witness remained firm and reiterated again and again that he had seen the entire occurrence.

17. PW 2, Murari has deposed in his examination-in-chief and reiterated in his cross examination that at the time of incident, he has also reached the spot with Chandrapal (PW1) and had seen that accused of this case Surendra was committing rape on the victim and he was apprehended on the spot by them.

PW 2, Murari is not related to the victim or his family members, he has seen the victim and accused for the first time on the spot. In prompt F.I.R. Ext. Ka-2 and in statement of PW 1, Chandra Pal his name has been mentioned as an eye witness of the occurrence. In his statement he has stated the purpose for going to Raya on that day. PW 4, Constable Vijay Singh has also stated that this witness was present with the informant at the time of registration of F.I.R.

18. PW 3, Kallu is father of the victim. He was not an eye witness but he reached to the Police Station after the occurrence. He has stated that victim is his daughter and at the time of occurrence her age was 2-1/2 to

3 years. He has also stated that there was injury on her private part, there was blood on her body and clothes. Her condition was very critical. After lodging of F.I.R., victim was sent to District Hospital, Mathura for treatment. He has also stated that accused was caught and brought to the Police Station by PW 1, Chandra Pal and PW 2, Murari.

At the time of recording of the statement of PW 3, Kallu in the Court, the victim was also in his lap. PW 3, Kallu stated that she could not speak. Some questions were also asked by the Trial Court, but she did not speak.

19. Learned counsel for the appellant submitted that both the eye witnesses PW 1, Chandra Pal and PW 2, Murari are of different village "Gonga" which is about one kilometer from the spot. It is further submitted that both the aforesaid witnesses are chance witnesses and their testimonies are not reliable. As regards, their being chance witnesses there is no doubt, but it is not rule of law that the chance witnesses cannot be believed. The reason for a chance witnesses being present on the spot and his testimony requires close scrutiny and if same is otherwise found reliable, his testimony cannot be discarded merely on the ground of his being chance witness.

Regarding reliable testimony of chance witnesses, in **Sachchey Lal Tiwari Vs. State of U.P. (2004) 11 Supreme Court Cases 410** Hon'ble Apex Court has held as under:

"Coming to the plea of the accused that PW 2 was a "chance witness" who has not explained how he happened to be at the alleged place of occurrence it has to be noted that the said witness was independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing an independent witness as "chance witness" it cannot be implied thereby that his evidence is suspicious and his presence at the scene doubtful. Murders are not committed with previous notice to witnesses - soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression

"chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence. The courts below have scanned the evidence of PW 2 in great detail and found it to be reliable. We find no reason to differ".

In Sarvesh Narain Shukla Vs. Daroga Singh And Others (2007) 13 Supreme Court Cases 360; it was held by Hon'ble Apex Court that if the chance witness has explained his presence by stating that he had gone for 'Darshan' and was on his way back home and Court comes to the conclusion that testimony of such a chance witness is credible, the evidence cannot be thrown out merely on the ground that the witness happened to be present by chance.

In Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh (1991) 13 SCC 627; it was held by Hon'ble Apex Court that the witness being a resident of the locality in the vicinity where the occurrence had taken place, his presence at the market place could not be considered to be unnatural.

In the instant case PW 1, Chandra Pal and PW 2, Murari, both have explained their presence on the spot at the time of incident. In his cross-examination PW 1, Chandra Pal has deposed that he was going from his village "Gonga" to Raya town for marketing purpose as and he had to purchase sugar, oil, chillies etc. PW 2 Murari has deposed that he is a driver by profession and used to drive Jeep, he was going from his village to Jeep Stand Raya for driving work. Both the aforesaid witnesses are of nearby village "Gonga" and for their personal work they were going to Raya town on foot on the fateful day and when they reached near the field of Charan Singh, they heard cries of the victim and reached on the spot. Thus, both the above witnesses have given proper explanation of their presence on the spot at the time of incident. Accused/appellant was also caught and handed over to the police by both the aforesaid witnesses. Therefore, their presence on the spot at the time of incident is natural and believable. There is no material contradictions in the

evidence of the witnesses to doubt their testimony. They were totally independent witnesses, who had no cause to give false evidence against the appellant and their evidence is acceptable regarding the time, place and manner of incident as well as the identity of the accused/appellant.

20. Learned counsel for the appellant submitted that appellant is resident of 'Nepal' and on the date of occurrence he had come Raya in search of work of watchman. He further submitted that both the said eye witnesses PW 1 and PW 2 snatched his money and luggage from him and implicated him in this false case. The above submission of learned counsel for the appellant is unbelievable because it has not been specified anywhere that what luggage and how much money was with the appellant which was snatched by the witnesses. There is no evidence of any such kind in support of above submission.

21. PW 1, Chandra Pal and PW 2, Murari are the eye witnesses of the incident, there is no inconsistency in their statements, they have fully supported prosecution version, they are not related to the victim, they had no animus against the accused, hence their testimonies are cogent, credible and trustworthy.

22. As regards corroboration of ocular testimony with medical evidence, the victim was medically examined on the same day at 3.00 PM at Government Hospital, Mathura. Medical examination report is Ext. Ka-6, which has been proved by PW 6, Dr. Sunita Mazumdar. On private part of victim left lateral vaginal tear and right lateral vaginal tear were found. Bleeding was also present there. Medical examination report of the victim thus fully supported the ocular testimonies of PW 1 and PW2. Learned counsel for the defence raised two objections on medical examination report of the victim. First objection was raised about inconsistency regarding period of injury and second objection was raised about the absence of opinion of doctor regarding commission of rape.

As regards first objection, the occurrence of the incident was at 12.30 PM and victim was medically examined at 3 PM. According to it, duration of injury was of 2-1/2 hours, in medical examination report duration of injury is mentioned as 6 hours. Thus, there is difference of 3-

1/2 hours between the two but in this regard opinion of the doctor cannot be specified and there may be variation. In examination-in-chief, PW 6 Dr. Sunita Mazumdar has herself stated that the injury of the victim may also be of about 12.00 noon on 05.02.2002. It is also established legal position that if there is difference between reliable ocular testimony and medical report, ocular testimony shall prevail.

As regards second objection raised by learned counsel for the defence, though PW 6 Dr. Sunita Mazumdar has not given any opinion about the commission of rape, but she has proved the injuries on the private part of the victim, which itself supports the ocular version regarding commission of rape on the victim.

23. Accused/appellant was also medically examined by the DW 1 Dr. B.P. Sarswat on 05.02.2002 at 4.25 PM in Government Hospital, Mathura. The medical examination report is Ext. kha-1 which has been proved by DW 1, Dr. B.P. Sarswat. According to the injury report Ext. kha-1, injury nos. 1, 2 and 3 were abrasions on leg and injury no.9 was slight redness on glans penis of the accused. According to the doctor (DW 1) above injuries of the accused were due to friction and may be caused by falling on earth and also by committing rape on hard surface. Besides above injuries of the appellant, blood stains were also found on the cuff of the shirt of the accused and also on both the under garments of the appellant which was handed over to Police Constable by doctor (DW 1) for examination by the expert but examination report is not available on record, injury report of the appellant and his blood stained clothes also corroborate the prosecution version.

24. Learned counsel for the defence submitted that there are whitenings and overwriting at several places in chik F.I.R., and F.I.R. was sent to concerned Magistrate after two days from the date of incident which creates a strong doubt about prosecution version in respect of the alleged incident. We have perused the original records of this case. According to the F.I.R., incident occurred at 12.30 PM on 05.02.2002 and F.I.R. was registered at the concerned Police Station at 01.15 PM, distance of Police Station from the place of occurrence is 1.5 furlong. From the above, it emerges that F.I.R. of this case is a prompt F.I.R. In chik F.I.R.

there are whitenings at three places and overwriting figure '6' of Section '376' I.P.C. but there is no such overwriting or whitening on carbon copy of the concerned G.D., Report No.20, time 13.15 of 05.02.2002, time of occurrence, time of registration and copy of written report of the informant transcribed on back of the chik F.I.R. The place where whitenings or overwriting are made on chik F.I.R. will have no adverse effect on prosecution version which has been proved by the cogent testimony of eye witnesses supported by medical evidence.

25. As regards the second objection raised regarding sending the F.I.R. after two days, the F.I.R. was registered on 05.02.2002, signature of the Magistrate on it was of 07.02.2002 i.e. after about two days. In this case F.I.R. was lodged promptly, accused was caught on the spot, victim and accused were medically examined in government hospital on the same day. After a few hours of the occurrence on the same day the statement of the informant was recorded by I.O., therefore, there would not be any adverse effect in sending the copy of F.I.R. to the concerned Magistrate after two days. It has been held by **Hon'ble Apex Court in Anil Rai Vs. State of Bihar (2001) 7 SCC 318** that delay in sending the copy of F.I.R. to the area Magistrate is not material where the F.I.R., is shown to have been lodged promptly and investigation was started on that basis.

26. As regards, omission of Investigating Officer to take sample of bloodstained earth from the spot and bloodstained clothes of the victim and accused and to send them for forensic examination by expert is concerned, it is mere slackness, carelessness and fault on the part of I.O. which stands completely covered by the cogent credible ocular testimony corroborated by medical evidence and the prosecution version cannot be disbelieved only on this ground as held by **Hon'ble Apex Court in Maqbul @ Zubir & others Vs. State of U.P., A.I.R. (2010) SC 762**. In the case at hand, in the F.I.R. place of occurrence was the field of Charan Singh, the Investigating Officer has inspected the place of occurrence on the next day i.e. on 06.02.2002 at the pointing of the informant and has prepared site plan Ex ka-4 in which place of occurrence has been shown at Southern east of field of Charan

Singh. PW1 Chandra Pal and PW 2 Murari, both the eye witnesses have deposed that the incident occurred in the field of Charan Singh. PW 2 Murari has made it more specific by saying that incident occurred near Southern Cabin of Railway Station in the field of Charan Singh. Thus, there is no doubt about the place of occurrence which is at South East part of the field of Charan Singh.

On the basis of discussion made herein above and also considering material evidence on record, we are of the considered opinion that findings of conviction for the offence punishable under Section 376 I.P.C. recorded by the learned Trial Court are well substantiated by the evidence on record. The learned Trial Court has appreciated the evidence in right perspective. We do not find any justification to interfere with the findings of conviction recorded against the appellant under Section 376 I.P.C., therefore, the conviction recorded against the accused/appellant under Section 376 I.P.C., is hereby affirmed.

Learned counsel for the appellant submitted that punishment awarded to the appellant is too severe and harsh. It is further argued that appellant is a poor married person and has two children, nobody is there to look after them properly. Because of poverty and being resident of 'Nepal' nobody could do proper pairvi of his case and his appeal was filed after the delay of 318 days. He is languishing in custody in this offence from the date of registration of F.I.R. of this case i.e. 05.02.2002 and till now he has passed more than 17-½ years in jail.

The offence of rape occurs in Chapter XVI of Indian Penal Code. It is an offence affecting the human body. Rape is defined in Section 375 I.P.C. and Section 376 speaks about the punishment. Section 375 and Section 376 I.P.C. have been substantially changed by Criminal Law Amendment Act No.43/1983 and amendment made thereafter by Act No.13/2013 and Act No.22/2018. In case at hand, the date of incident is 05.02.2002 i.e. after the enforcement of the Act 43/1983 (Criminal Law Amendment Act 1983). At the time of incident for commission of rape on woman below 12 years of age the minimum prescribed punishment was imprisonment for 10 years and maximum punishment was imprisonment for life and also fine. One proviso was also there that

Court may, for adequate and special reason mentioned in judgement, impose sentence less than 10 years. [Section 376 sub section (2)(f)].

Learned Trial Court has awarded maximum prescribed sentence i.e. imprisonment for life and fine of Rs.5,000/- with default stipulation. Now, we are considering whether the maximum punishment was warranted in this case or in the circumstances of the case appellant is entitled for some leniency. In case before us the age of the victim at the time of incident was about 2-½ to 3 years, she was not even able to speak properly as has been mentioned by the trial Court in impugned judgement. According to DW-1 Dr. B.P. Sarswat, who conducted medical examination of the accused on 05.02.2002, appellant was healthy man of 25 years, well built and well nourished. In above circumstances victim was not in position to resist. Appellant/accused committed rape on such an innocent child of tender age.

In **State of Madhya Pradesh Vs. Santosh Kumar**, AIR 2006 SC 2648, Hon'ble the Apex this Court held that in order to exercise the discretion of reducing the sentence, the statutory requirement is that the court has to record adequate and special reasons in the judgement and not fanciful reasons which would permit the court to impose a sentence less than the prescribed minimum. The reason has not only to be adequate but also special what is adequate the special would depend upon several factors and no straitjacket formal can be indicated.

In **Kamal Kishore and others Vs. State of Himachal Pradesh**, AIR 2000 SC 1920, Hon'ble the Apex Court held that the expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons.

In the case of **Mukesh and Anr. vs. State for NCT of Delhi & others reported in 2018 (8) SCC 149**.

Regarding award of sentence Hon'ble the Supreme Court has expressed view as here under:-

“Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.”

In State of M.P. Vs. Bala alias Balaram, AIR 2005, SC 3567, Hon’ble Supreme Court, Hon’ble Supreme Court held as under:

“The crime here is rape. It is a particular heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 IPC. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is imperative. The proviso to Sections 376(1) and 376(2) IPC give the power to the court to award a sentence, lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason. It is true that reformation as a theory of punishment is in fashion but under the guise of applying such theory, the courts cannot forget

their duty to society and to the victim. The court has to consider the plight of the victim in a case involving rape and the social stigma that may follow the victim to the grave and which in most cases, practically ruins all prospects of a normal life for the victim.”

In view of the aforesaid pronouncement of Hon'ble Supreme Court, we are of the view that since in this case a three years hapless girl has been ravished by the appellant, it would be a misplaced sympathy to show any leniency to the accused/appellant. Here is the case where the crime committed by the accused-appellant not only delicts the law but it has a deleterious effect on the civilized society. Gravity of the crime has to be necessarily assessed from the nature of the crime. Ordinarily, the offence of rape is grave by its nature. Even in ordinary criminal terminology a rape is a crime more heinous than murder as to destroys the very soul of hapless woman. The appellant ravished the chastity of a girl of less than 3 years old, jeopardized her future prospect of getting married, enjoying marital and conjugal life, has been totally devastated. Not only that, she carried an indelible social stigma on her head and deathless shame as long as she lives.

In view of what has been indicated herein above, the judgement and order dated 20.9.2003 passed by the Additional Sessions Judge (Fast Track) Court No. 14, Mathura in ST No. 972 of 2002 (State Vs. Surendra) arising out of Case Crime No. 223 of 2002, under Section 376 IPC, PS Raya, district Mathura do not call for any interference by this Court. Accordingly the appeal is **dismissed**.

The appellant is in jail. He shall remain in jail to serve the sentence awarded to him by the learned Trial Court.

Let a copy of the judgement be sent along with the lower Court record to the Court below immediately for compliance and necessary entry be made in the relevant register.

Judgement be certified and be placed on record.

Order Date:-18.12.2019 (Anil Kumar-IX, J.) (Naheed Ara Moonis,J)
Rahul/-