

Reserved/AFR

Court No. - 46

Case :- CRIMINAL APPEAL No. - 4395 of 2009

Appellant :- Kalua

Respondent :- State of U.P.

Counsel for Appellant :- R.K. Verma, Anwar Mehdi Zaidi, Braham Singh, Chandra Pal Singh, Irshad Ahmad, Manish Kr. Pandey, Susheel Kumar Tiwari

Counsel for Respondent :- Govt. Advocate

Connected with

Case :- CRIMINAL APPEAL No. - 5145 of 2009

Appellant :- Mahmooda @ Vakeel

Respondent :- State of U.P.

Counsel for Appellant :- Dinesh Raghav, Amit Kumar Srivastava, Braham Singh, Manish Kumar Pandey

Counsel for Respondent :- Govt. Advocate

Hon'ble Naheed Ara Moonis, J.

Hon'ble Anil Kumar IX, J

(Delivered by Hon'ble Naheed Ara Moonis, J)

After being convicted and sentenced in Session Trial No. 782 of 2007, arising out of case crime No. 278 of 2007, under Sections 376, 452, 506 of Indian Penal Code and Section 3(1)(xii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (hereinafter referred to as the "SC and ST Act"), Police Station Dilari, district Moradabad by the learned Additional Sessions Judge, Court No. 2, Moradabad vide judgement and order dated 14.7.2009, accused-appellant Kalua filed Criminal Appeal No. 4395 of

2009, whereas accused-appellant Mahmooda alias Vakeel filed Criminal Appeal No. 5145 of 2009 separately.

By the impugned judgement and order, learned Additional Sessions Judge, Moradabad convicted and sentenced both the appellants to rigorous imprisonment for life and a fine of Rs. 20,000/- (rupees twenty thousand only) each, under Section 376(2)(g) IPC and in default of payment thereof, the appellants were directed to undergo one year's further imprisonment; five years rigorous imprisonment and a fine of Rs. 5,000/- (rupees five thousand only) each under Section 452 IPC and in default of payment of fine, the appellants were further directed to undergo six months rigorous imprisonment and rigorous imprisonment for five years under Section 506 IPC and two years rigorous imprisonment and a fine of Rs. 5,000/- each under Section 3(1)(xii) of SC and ST Act and in default of payment of fine, both the appellants were directed to further undergo three months' imprisonment.

However, all the sentences were directed to run concurrently.

Since both the afore-captioned criminal appeals have been filed against the judgement and order dated 14.7.2009 passed by the learned Additional Sessions Judge, Moradabad in ST No. 782 of 2007,

both the appeals have been heard analogously and are being disposed of by means of this common judgement.

In the present judgement, we would like to withhold the name of the victim lady in view of the provisions of Section 228A IPC and in pursuance of the observations of Hon'ble Supreme Court in *State of Himachal Pradesh Vs. Shree Kant Shekari*, AIR 2004 SC 4404). The prosecutrix hereinafter referred to as 'the victim'.

The facts, as unfolded by the prosecution, in short conspectus, are that a written report was handed over by the victim of the case at the police station Dilari, district Moradabad on 12.5.2007 at 12.45 PM to the effect that the victim is Jatav by caste. On 11.5.2007, her family members had gone to the house of Vijay Yadav to celebrate his victory in the election. The victim was sleeping in the house along with small kids and door of the house was opened. At about 11.00 PM, Kalua, son of Jagan along with Mahmooda, son of Suleman and one unknown person to whom she could not recognize, entered into her house. When she woke up, she saw that Kalua and Mahmooda were having country made pistol in their hands. They pointed the pistol at her neck and threatened her to kill in case she makes any hue or cry and dragged her inside the room and asked her to

lit "*Dibiya*" (an earthen pot) and do whatever they are asking. Thereafter, Kalua and Mahmooda stuffed cloth in her mouth and committed gang rape on her, whereas third person to whom she could not recognize was watching at the door. They stayed in the house for about half an hour and while leaving, they had threatened her that in case she narrates the incident to any one or she reports the matter to the police, she alongwith her husband would be eliminated. After the departure of the accused, on the shriek and shrill, Gajram Singh, son of Nathu and Smt. Munesh, wife of Rajendra Singh from neighbourhood rushed to the spot, but by then the accused made their escape good. After the arrival of her husband, the victim narrated him about the incident and lodged the report accompanied with him.

On the basis of the aforesaid written report, a case was registered against both the accused as Case Crime No. 278 of 2007, under Sections 376/453/506 IPC and Section 3(1)(xii) of SC and ST Act, police station Dilari, district Moradabad (Ext. Ka-7).

After the registration of the case, as the case was also under the SC and ST Act, the investigation thereof was entrusted to PW-4, Circle Officer Satya Prakash Singh, who copied the contents of the report in the case diary and recorded the statement of Asif Ali, who prepared Chik FIR. On 13.5.2007, he

recorded the statement of the victim and witnesses namely Munsh, Raghuveer and Vikram under Section 161 Cr.P.C., inspected the place of incident and prepared site plan (Ext. Ka-6). On 15.5.2007, the investigating officer copied the medical report of the victim in the case diary and took into possession the *Salwar*, which the victim was wearing at the time of incident, which was got sealed and memo thereof was prepared (Ext-Ka-5). The *Salwar* (Ext. Ka-5) was sent to the Forensic Science Laboratory, Agra for examination (Paper Nos. 5/6).

PW-4, CO Satya Prakash Singh was transferred to another circle. After his transfer, the further investigation of the case was entrusted to Circle Officer Sushil Kumar, who after completion of investigation and making necessary formalities, submitted charge sheet against both the appellants under Sections 376, 452, 506 IPC and 3(1)(xii) of SC and ST Act. The charge sheet proved by him exhibited as Ka-9.

As the case was exclusively triable by the Court of Sessions, learned Magistrate committed the case to the Court of Sessions where the case was registered as ST No. 782 of 2007 and learned Additional Sessions Judge, Court No. 2, Moradabad vide order dated 31.10.2007 framed the charges against both the accused-appellants under Sections 376, 452, 506

IPC and 3(1) (xii) of SC and ST Act, which were read over and explained to the accused in Hindi, who pleaded not guilty of the charges and claimed to be tried.

To bring home the guilt of the appellants beyond the hilt, the prosecution has examined as many as four witnesses. PW-1 is the victim of the case, PW-2, Munesh is the eye-witness of the case, PW-3, Dr. Kadira Sultana, is the medical officer, who had medically examined the victim and PW-4, CO Satya Prakash Singh, the investigating officer of the case.

PW-1 is the first informant and victim of the case. She reiterated the versions mentioned in the FIR. She further deposed that she was sleeping in Verandah with her children of tender age. At about 11.00 PM, three persons entered into her house, out of whom she recognized Kalua, son of Jagan and Mahmooda, son of Suleman. She could not recognize the third person. Kalua and Mahmooda were armed with country made pistol. They pointed the country made pistol and dragged her to another room where they got Dibiya burnt and thereafter committed rape upon her one by one. At the time of committing rape, accused stuffed cloth on her mouth. While leaving, accused threatened that in case she reported the matter to any one, she will be eliminated. On her

shriek Gajram and Munish rushed to the spot, but by that time accused made their escape good. She also deposed that her husband had gone to attend the rally. She further stated that she knew both the accused as they used to come for canvassing.

PW-2, Smt. Munesh, wife of Rajendra, deposed in her examination-in-chief that her house is adjacent to the house of the victim. On the date of incident at about 11.30 PM, on the shrieks of the victim, when she rushed to the spot, she saw that three persons were coming out of the house of the victim, two of them were Kalua and Mahmooda. She did not recognize the third person. She further deposed that she knew accused Kalua and Mahmooda from before. She recognized accused Kalua and Mahmooda in light of *Dibiya*. The victim told her that Kalua and Mahmooda have forcibly committed rape on her. Accused Kalua and Mahmooda are the resident of neighbouring village and used to pass through the road in front of her house. At that time several persons of the village have gathered at the spot. Gajraj also reached at the spot. This witness was put to lengthy cross examination and has denied that false case has been registered under pressure of Vijay Yadav.

PW-3, Dr. Kadira Sultana who has conducted the medical examination of the victim, deposed that

on 12.5.2007, she was posted at the District Hospital, Moradabad as Medical Officer. On that day, she had conducted the medical examination of the victim, who was brought by Constable Safia Shaheen of police station Dilari, district Moradabad. There was no visible injury on the person of the victim. Hymen was not present and her vagina admits two finger easily. She prepared two slides of vaginal smear and sent them for examination. She proved the report as Ext. Ka-1. She further deposed that on examination of slides, no dead or alive spermatozoa was found. Doctor opined that no definite opinion about rape can be given. The age of the victim was found above 19 years. She prepared supplementary report and proved it as Ext. Ka-2, x-ray report dated 14.5.2007 prepared by Radiologist Dr. Jagmal Singh proved and marked as Ext. Ka-3 and report prepared by Dr. Ranjana Gupta, Pathologist of District Hospital, Moradabad proved and marked as Ext. Ka-4. She was not cross examined despite opportunity was given to the defence. He had proved recovery memo, site plan and the charge sheet submitted against both the appellants Kalua and Mahmooda.

PW-4, Circle Officer Satya Prakash Singh was the first investigating officer of the case, who conducted investigation, whose evidence has already been discussed above.

After the closure of prosecution evidence, statements of the accused-appellants were recorded under Section 313 Cr.P.C., who denied the charges levelled against them and stated that they have falsely been implicated in this case and the witnesses are deposing falsely against them.

The learned Additional Sessions Judge, Court No. 2, Moradabad after hearing learned counsel for the parties and after scrutinizing and assessing the evidence on record, convicted and sentenced the appellants as stated in the first paragraph of the judgement.

Hence, this appeal.

Heard Shri A.M. Zaidi, learned counsel for the appellant-Kalua in Criminal Appeal No 4395 of 2009 and Shri Amit Kumar Srivastava, learned counsel for the appellant-Mahmooda alias Vakeel in Criminal Appeal No. 5145 and perused the record of the case.

Learned counsel for the appellants submitted that there is inordinate delay in lodging the FIR as the FIR of the incident, which took place at 11.00 PM on 11.5.2007, has been lodged on 12.5.2007 at 12.45 PM for which no plausible explanation has been rendered by the prosecution. Learned counsel for the appellants further submits the appellants have been falsely implicated in this case due to election rivalry and that testimony of the victim (PW-1) is

inconsistent with the prosecution version. Learned counsel also submitted that the prosecution story seems to be improbable that two persons would ask the victim to lit *Dibiya* before indulging in alleged commission of gang rape. The investigating officer had not taken the care expected of him to collect *Dibiya* which is alleged to be the source of light in which witnesses had identified both the appellants. Learned counsel contended that absence of any injury on the person of victim as opined by Dr. Kadira Sultana, who was examined as PW-3 has falsified the prosecution story as cooked up against the appellants. Both the appellants are languishing in jail since last more than twelve and a half years, the sentence of life imprisonment awarded by the learned Trial Court is too harsh, hence they deserve to be released as they have already undergone sentence of twelve and a half years.

In addition to the aforesaid submission, Shri A.M. Zaidi, learned counsel appearing for the appellant Kalua made a feeble attempt that appellant belongs to scheduled caste community, as such his conviction under the SC and ST Act is unsustainable.

On the contrary, Shri Vikas Sahai, learned Additional Government Advocate has supported the findings of the learned trial court and submitted that the judgement is well reasoned and based upon

appreciation of evidence. He further submits that the findings recorded by the learned trial court do not call for any interference by this Court. Learned A.G.A. also contended that since both the appellants are accepting that they deserve to be released as they have already undergone more than twelve and a half years of sentence, meaning thereby that they have accepted their guilt, hence they deserve no indulgence who were involved in outraging chastity and modesty of the victim, who is a married woman.

The first contention of the learned counsel for the appellants is in respect of delay in lodging FIR. A prompt FIR lends credence to the case of the prosecution. Promptness in filing FIR gives assurance of veracity of information and reflects first hand account of occurrence and persons responsible therefor. Object to insist upon prompt FIR is to obtain information regarding circumstances in which crime was committed, names of actual culprits, parts played by them as well as names of eye witnesses. FIR is valuable piece of evidence though not substantive evidence. In cases where there are delay in lodging the FIR, the informant must give an explanation for the same. Undoubtedly, delay in lodging the FIR does not make prosecution case improbable when such delay is properly explained, but deliberate delay in lodging the FIR is always fatal. In cases where there

are delay in lodging the FIR, the Court has to look for a plausible explanation for such delay.

In the instant case, the delay has been explained by the first informant/victim in the FIR itself. The incident took place at 11.30 PM on 11.5.2007. The victim in her report has clearly mentioned that when the incident took place, her husband along with other family members had gone on tractor to celebrate the victory of Vijay Yadav and she was alone in the house along with two children of tender age. In her cross-examination, she has mentioned that her husband returned home at 10.00 AM on 12.5.2007. She further deposed that she made a complaint about the incident to the neighbours, but she was not in a condition to go to the police station, hence she did not go to the police station and waited for her husband to come. She stated that at 10.00 AM, when her husband came back, she narrated the incident to her husband. Thereafter, she got the FIR ascribed by one Thakur and thereafter she left for the police station for lodging the FIR on foot. The house of the victim is 3 kms. away from the police station, it must have taken sometimes to reach the police station to lodge the FIR.

In *Tara Singh and others Vs. State of Punjab*, AIR 1991 SC 63, Hon'ble Supreme Court held that mere delay in lodging the FIR by itself cannot give

scope for an adverse inference leading to rejection of the prosecution case outright.

The Court further held thus:

" It is well-settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go to the police station for giving the report."

In ***Zahoor and others Vs. State of U.P.***, AIR 1991 SC 40, Hon'ble Supreme Court held that mere delay by itself is not enough to reject the prosecution case unless there are clear indications of fabrication.

Hon'ble Supreme Court in ***State of Punjab Vs.***

Gurmit Singh and others, 1996 SCC (2) 384 Hon'ble Supreme Court held as under:

In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

Hon'ble Supreme Court in the case of ***Ram Naresh and others Vs. State of Chhatisgarh***, AIR 2012, SC 1357, has held that the delay, if any, in lodging the FIR, if explained properly, is in no way fatal to the case of the prosecution.

In view of the above facts and the

pronouncements of Hon'ble Supreme Court, in our opinion, the delay in lodging the FIR has very well been explained by the prosecution.

The next contention of the learned counsel for the appellants is that the appellants have falsely been implicated in this case due to election rivalry at the behest of Vijay Yadav M.L.A. and evidence of the prosecutrix is inconsistent. Both the accused in their statements recorded under Section 313 Cr.P.C. have not made a whisper that they have falsely been dragged in this case at the behest of Vijay Yadav, M.L.A. or any other persons. Moreover, the defence has not put forth any evidence to show that the accused have been falsely implicated. Further no suggestion has been given by the defence in this regard. The victim in the FIR as well as in her evidence before the court has given a vivid description of the incident in respect of committing rape by both the accused-appellants in turn. She has also categorically stated in her cross-examination that both the accused-appellants committed rape on her one by one and when she tried to raise an alarm, they stuffed cloth in her mouth and threatened her of dire consequences. In Indian society no woman will make such a false allegation ruining her future life, because such allegation is destructive of the whole personality of the victim. A murderer destroys the physical body

of a victim, but a rapist degrades the very soul of the helpless female. It is often stated that a woman who is raped undergoes two crisis; the rape and the subsequent trial. While the first seriously wounds her dignity, destroys her sense of security and may often ruin her physically, the second is no less potent of mischief inasmuch as it not only force her to live through the traumatic experience, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focussed upon her. Since, it is a most humiliating event in a woman's life which leads to fear for existence and sense of powerlessness, no body would make such a false allegation of gang rape at the behest of others, therefore, the contention of the learned counsel for the appellants that the accused have falsely been dragged in this case has no leg to stand.

Moreover, the victim was put to lengthy cross-examination, but nothing adverse could be elicited from her so as to make the prosecution story doubtful.

In *Arjun and others Vs. State of Rajasthan, 1994 Suppl (1) SCR 616*, it was argued before the Supreme Court that as parties were on inimical terms and some criminal proceedings were pending between them even at that time when the occurrence took

place. Further PW-1 in that case was the brother of the deceased and informant in that case was son of deceased.

The Supreme Court brushed aside the argument of the learned counsel for the appellants therein and has held as under:

"We are not convinced by the aforesaid argument that either on account of animosity or on account of relationship, the witnesses did not divulge the truth but fabricated a false case against the appellants. It is needless to emphasis that enmity is a double edged sword which can cut both ways. However, the fact remains that whether the prosecution witnesses are close relatives of the deceased victim or on inimical terras with the deceased involved in the crime of murder, the witnesses are always interested to see that the real offenders of the crime are booked and they are not, in any case, expected to leave out the real culprits and rope in the innocent persons simply because of the enmity. It is, therefore, not a safe rule to reject their testimony merely on the

ground that the complainant and the accused persons were on inimical terms. Similarly the evidence could not be rejected merely on the basis of relationship of the witnesses with the deceased."

In *Hari Obula Reddy and others Vs. State of Andhra Pradesh*, (1981) 3 SCC 675, a three Judge Bench of the Supreme court has observed thus:

"It is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony, nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence."

Hon'ble Supreme Court in *Ramashish Rai Vs. Jagdish Singh*, (2005) 10 SCC 498, has held that the requirement of law is that the testimony of inimical witnesses has to be considered with caution. If otherwise the witnesses are true and reliable their testimony cannot be thrown out on the threshold by branding them as inimical witnesses. By now, it is well-settled principle of law that enmity is a double-

edged sword. It can be a ground for false implication. It also can be a ground for assault. Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence."

So far as the evidence of the prosecutrix is concerned, we find that evidence of the prosecutrix is consistent throughout. The victim, in her FIR as well as her examination on oath has clearly stated that both the accused entered her house, pointed pistol on her neck, dragged her to another room and asked her to lit Dibiya and thereafter committed rape on her one by one for about half an hour. After the departure of the accused when she made noise, witness, PW-2, Smt. Munesh rushed to the spot and saw the accused running. Although, the victim was subjected to lengthy cross examination, but nothing could be elicited to doubt her testimony.

In the case of ***State of Punjab Vs. Gurmit Singh***, AIR 1996 SC 1393, Hon'ble Apex Court observed as under:

"Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection 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, should shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult

to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

In the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat***, AIR 1983 SC 753, Hon'ble Supreme Court held thus:

In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for

corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society and its profile."

Hon'ble Supreme Court in ***State Of Maharashtra vs Chandraprakash Kewal Chand Jain***, 1990 SCR (1) 115 held thus:

A prosecutrix of a sex-offence cannot be put on par with an

accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence

which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

"It is only in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

Hon'ble Supreme Court in ***State of A.P. Vs. Bodem Sundara Rao***, 1995 (6) SCC 230, has cautioned the Courts while dealing with the cases of sexual crime against women in the following words:

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The Courts are, therefore, expected to deal with the cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."

The next contention of learned counsel for the appellants is in respect of improbability of the prosecution story as accused would not have asked

the victim to lit the light (*Dibiya*) rather could have committed the rape concealing their identity.

The victim in her report as well as in her evidence on oath has stated that on the fateful day at about 11.00 P.M. when she was sleeping along with her children and the door of the house was opened, at that time, all the three accused including both the appellants entered into her house, she woke up and saw that accused Kalua and Mahmooda were armed with country made pistol. They pointed the pistol at her neck and dragged her to another room and threatened her of dire consequences in case she would make a noise. Thereafter both the appellants had asked her to lit *Dibiya* and thereafter they committed rape on her. From the perusal of the aforesaid deposition of the victim, it appears that both the accused have been identified by her and, therefore, there seems to be no improbability in the prosecution story that the accused would not have asked the victim to lit *Dibiya* to conceal their identity. The victim in her cross-examination has stated that she knew the appellants as they had come for canvassing. Even if there is insufficient light, a witness can identify a person with whom he/she is fairly acquainted or is in intimate terms from their voice, features and gait etc.

In our opinion, there was no improbability in the evidence of the victim that accused asked her to lit

Dibiya. In view of the above, the contention of the learned counsel for the appellants that the prosecution story is improbable has no leg to stand.

The other contention of learned counsel for the appellants is that the prosecution case is inconsistent with the medical report as no spermatozoa dead or alive was found in the medical examination as opined by the doctor.

The medical evidence is only an advisory in character given on the basis of the symptoms found on examination of the victim. The expert witness is expected to put before the Court all materials inclusive of the date 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 may form its own opinion on those materials after giving due regard to the experts, opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer, but of the Court, who is an expert of all experts. Merely because, no spermatozoa was found on the vaginal slides cannot make the prosecution story doubtful.

In *Pratap Misra Vs. State of Orissa, AIR 1977 SC 1307*, Hon'ble Supreme Court has observed thus:

"..... it is well settled that medical jurisprudence is not an exact science and it is indeed difficult

for any Doctor so say with precision and exactitude as to when a particular injury was caused as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."

In this context we feel that it would be quite appropriate to reproduce the opinion expressed by Modi in his book Modi Textbook of Medical Jurisprudence and Toxicology, 24th Edition, at page 639, which reads as under:

"To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of 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 given his opinion that no rape had been committed. "

Salwar, which the victim was wearing at the time of incident and which was exhibited as Ext. Ka-5 was sent to the Forensic Science Laboratory, Agra. Forensic Science Laboratory, Agra vide its report dated 30.6.2007 has confirmed the presence of semen and spermatozoa on *Salwar* of the victim, which fortified the case of the prosecution in respect of rape on the victim on the alleged date and time.

The last contention urged by Shri A.M. Zaidi on behalf of appellant-Kalua is that since appellant Kalua also belongs to scheduled caste, as such his conviction under the SC and ST Act would not be sustainable.

Before adverting to this submission of learned counsel, it would be useful to quote Section 3(1)(xii) of the SC and ST Act:

Section-3- Punishment for offences of atrocities-

(1) Whosoever, not being a member of a scheduled caste or scheduled tribe;
(xii) being in a position to dominate the will of a woman belonging to a scheduled caste or scheduled tribe and

used that position to exploit her sexually to which she would not have otherwise agreed.”

Perusal of the evidence shows that the accused-appellants were in a position to dominate the will of the victim, a married lady and sexually abused her without her consent. Such plea was never raised by the learned counsel for the appellant-Kalua before the trial court or at the time of filing of this appeal and at the very fag end, at the time of hearing, this plea has been taken on the basis of certain document filed on behalf of the accused-appellant Kalua, which cannot be taken into account at this stage. Moreover, learned trial court held that both the accused-appellants do not belong to scheduled caste community and were in a position to dominate the will of the victim.

In the instant case a heinous crime has been committed and the accused must suffer for its consequences. It is well established that sexual activities with the girl/woman have a traumatic effect, which persists throughout her life. A rapist not only violates personal integrity, but leaves indelible marks on the very soul of the helpless female. In this case a married woman aged 19 years has been raped by the two accused on the point of pistol.

In *Madan Gopal Kakkad vs Naval Dubey And another*, 1992 SCR (2) 921, Hon'ble Supreme Court

held:

"JUSTICE DEMANDS, THE COURT AWARDS"

Before parting with the judgment, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should be mercilessly and inexorably punished in the severest terms.

We feel that Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so

demand.

We have carefully scrutinized and examined the evidence of PW-1, the victim, PW-2, Smt. Munesh, PW-3, Dr.Kadira Sultana and PW-4, CO Satya Prakash Singh and we find that they have been correctly marshalled and assessed by the learned Trial Court.

Since, there is ample evidence including eyewitness account, medical report and report of the Forensic Science Laboratory to base conviction, accordingly the conviction of the appellants for the aforesaid offence stands affirmed.

So far as the quantum of sentence is concerned, Section 376 IPC has been amended by the Criminal Law (Amendment) Act, 2013 (Act No. 13 of 2013) with retrospective effect from 03.2.2013 by inserting section 376-D IPC for gang rape in place of Section 376(2)(g) IPC where rigorous imprisonment shall not be less than twenty years, but which may extend to life imprisonment for the remainder of that person's natural life. The unamended Section, for the punishment under Section 376(2)(g) IPC, it provided for rigorous imprisonment for a term which shall not be less than ten years, but which may be for life and shall also be liable to fine provided that Court may for adequate and special reasons to be mentioned

in the judgement, impose a sentence of imprisonment of either description for a term of less than ten years.

Now the question falling for consideration is whether there are adequate and special reasons warranting exercise of discretion to reduce the sentence of imprisonment for life. Adequate and special reasons would depend upon facts of each case and no strait jacket formula can be prescribed.

On the quantum of sentence, the mitigating circumstances urged by the learned counsel for the appellant-Kalua are that he is aged about 53 years; his daughters are of marriageable age; there is no earning members in his family; his family is at the verge of starvation and that he is not a previous convict.

The mitigating circumstances submitted on behalf of learned counsel for the appellant-Mahmooda alias Vakil is that he has three daughters and two sons; the elder daughter is aged about 17 years and is of marriageable age. There is no bread earner in his family; his wife is fostering the children by doing household work in others houses and that he is not a previous convict.

Learned counsel for both the appellants further submitted that both the appellants have realized the mistake committed by them and they are remorseful of their conduct to the society to which they belong and now they want to transform themselves.

Learned counsel for the appellants also submitted that the appellants were awarded maximum imprisonment for life under Sections 376(2)(g) IPC and a fine of Rs. 20000/- and that they have already undergone about twelve years and six months of the awarded sentence and the sentence may be reduced to the period already undergone.

In support of his contention in respect of quantum of sentence, learned counsel for the appellants has relied upon the judgement of Hon'ble Supreme Court in **Dinesh alias Budha**, 2006 (2) JIC 896 (SC); **G.V. Siddaramesh Vs. State of Karnataka**, 2010 (2) JIC 100 (SC) and **Bavo alias Manubhai Ambalal Thakore Vs. State of Gujarat**, 2012 (1) JIC 667 (SC).

In **Dinesh alias Buddha Vs. State of Rajasthan** (Supra) relied upon by the learned counsel for the appellants was a case in which an eight year old scheduled caste girl was ravished by the appellant therein. The

appellant was awarded life imprisonment under section 376(2)(f) IPC with the aid of section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Hon'ble Supreme Court while setting aside the conviction of the appellant under Section 3(2) (v) of SC and ST Act, reduced the sentence of the appellant from life imprisonment to ten years RI.

The facts of the aforesaid case is not applicable to the fact of the present case as in the aforesaid case life imprisonment was awarded by the court below only by applying the provision of Section 3(2)(v) of the SC and ST Act. In the present case life imprisonment was awarded under Section 376(2)(g) IPC.

G.V. Siddaramesh Vs. State of Karnataka (Supra) was a case under Sections 304-B and 498-A IPC, in which Hon'ble Supreme Court while confirming the conviction of the appellant under Section 304-B IPC, reduced the sentence from life imprisonment to ten years RI.

In **Bavo alias Manubhai Ambalal Thakore Vs. State of Gujarat**, AIR 2012 SC 979, the accused was convicted for the offence under Section 376(2)(f) for committing rape on a seven year old girl and was awarded life

imprisonment by the Trial Court, which was upheld by the High Court. In appeal, Hon'ble Supreme Court considering the fact that the victim therein was aged about 7 years and the accused was aged 18/19 years on the date of incident and also the fact that incident took place about ten years ago, reduced the sentence from life imprisonment to ten years by holding that award of life imprisonment, which is maximum prescribed is not warranted.

While dealing with the quantum of sentence, Hon'ble Supreme Court in **B.G. Goswami Vs. Delhi Administration**, 1973 AIR 1457, held as under:

"Now the question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations, which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act, which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also

designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. Too lenient as well as too harsh sentences both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal. In the present case, after weighing the considerations already noticed by us and the fact that to send the appellant back to jail now after 7 years of the annoy and harassment of these proceedings when he is also going to lose his job and to earn a living for himself and for his family members and for those dependent on him, we feel that it would meet the ends of justice if we reduce the sentence of imprisonment to that already undergone but increase the sentence of fine from Rs- 200/- to Rs. 400/-. Period of imprisonment in case of default will remain the same."

In **Shyam Narain Vs. State (NCT of Delhi)** (2013) 7, SCC 77, it has been held by the Hon'ble Apex Court that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed

regard being had to the nature of the offence and the manner in which it has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim, but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. The Court further observed as under:

"On certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It has to be borne in mind that while carrying out this complex exercise, it is obligatory on the part of the Court to see that impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim."

Elaborating on the duty of the Court while imposing sentence for an offence, Hon'ble Apex Court in **Sumer Singh Vs. Surajbhan Singh and others**, (2014) 7 SCC 323 has held that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalized judicial discretion and not an individual perception or a moral propensity.

In **Shimbu and Others Vs. State of Haryana**, AIR 2014 SC 739, the Supreme Court while dealing with the issue with regard to imposition of sentence for the offence of gang rape, observed as under:

" A perusal of the above provision shows that the legislative

mandate is to impose a sentence, for the offence of gang rape, for a term, which shall not be less than 10 years, but it may extend to life and shall also be liable to fine. The proviso to Section 376(2) IPC, of course lays down that the Court may, for adequate and special reasons to be mentioned in the judgement, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case, where gang rape is committed is not less than 10 years though in exceptional cases, the Court by giving "special and adequate reasons", can also award the sentence of less than 10 years.

It is a fundamental rule of construction that a proviso may be considered in relation to the main provision to which it stands as a proviso, particularly, in such penal provisions. Whether there exist any "special and adequate reason" would depend upon a variety of factors and

the peculiar facts and circumstances of each case. This Court, in various judgements, has reached the consensus that no hard and fast rule can be laid down in that behalf for universal application."

In **Dholya alias Rajendra and others Vs. State of Rajasthan through Public Prosecutor**, 2014 (4) RLW (Raj) 3031, the Division Bench of Rajasthan High Court while affirming the conviction of the appellants therein under Section 376(2)(g) IPC, reduced the sentence from life imprisonment to ten years rigorous imprisonment by holding that the trial court in making the choice of sentence of life imprisonment did not make any discussion whatsoever at all as to why it has chosen maximum sentence and further why the minimum sentence of ten years would not be sufficient.

In **Yogendra Singh alias Bablu Vs. State of Rajasthan**, 2015 RLW 960 the facts of the case was that while the prosecutrix was going to his teacher's house for obtaining important questions, both the accused arrived by a taxi. One of the accused caught hold of her hand and dragged her in the taxi while the

other accused gagged her mouth. Both the accused took the victim to a deserted place and committed gang rape upon her. The Division Bench of Rajasthan High Court relying upon the decision of Hon'ble Supreme Court in **Bavo alias Manubhai Ambalal Thakore** (Supra), while affirming the order of the trial court awarding life imprisonment under Section 376 (2)(g) IPC, reduced the sentence of the appellant therein to ten years rigorous imprisonment.

In **Jasbir Singh and others Vs. State of Delhi**, (Criminal Appeal No. 420 of 2002) decided on 18.5.2018, the case of the prosecution was that when the prosecutrix was going along with her husband at about 11 PM, three persons surrounded them. Two of them pointed a knife at her whilst the third dragged her to the backside of the market into the park where all the three accused committed rape upon her one by one. The fourth accused had taken away her husband. The Division Bench of Delhi High Court while affirming the conviction of the appellants under Section 376(2)(g) IPC, reduced the sentence to ten years.

In **Kulwinder Singh alias Billu Vs.**

State of Punjab (criminal Appeal No. 242 of 2013) and other connected matters, decided on 13.3.2019, the facts of the case were that the victim was pursuing the course of Chartered Accountant. On the fateful day at about 8.30 PM, when the victim was coming back to her house along with his friend Mohit Joshi. When she was in transit, suddenly the bike of Mohit Joshi developed some technical defect. The prosecutrix was riding Activa. She parked her Activa. At that time four persons on two motorcycles came there and snatched her mobile and purse. One of the accused gagged her mouth and forcibly made her to sit on motor cycle in between them. They took her to jungle where accused Kulwinder Singh alias Billu and Narinder alias Neelu forcibly committed rape on her. The Division Bench of Punjab and Haryana High Court while upholding the conviction of the appellants therein under section 376(2)(g) IPC, reduced the sentence to 12 years without remission.

In view of the aforesaid pronouncement of Hon'ble Supreme Court as well as of other High Courts on the quantum of sentence and also considering the mitigating circumstances urged on behalf of the appellants, this Court

while upholding the conviction of the appellants under Sections 376(2)(g), 452, 506 IPC and 3(1)(xii) of SC and ST Act, reduced the sentence of the appellants to 14 years under Section 376(2)(g) IPC. However, the fine imposed by the trial court shall remain intact. The amount of fine of Rs. 20,000/- (rupees twenty thousand) each be deposited by the appellants, which shall be paid to the victim forthwith.

Accordingly, both the appeals are partly allowed.

Office is directed to send a copy of this judgement along with the record of this case to the court concerned/learned Sessions Judge, Moradabad forthwith for compliance.

Dated: 18.11.2019

Ishrat