AFR
Reserved on 25.11.2022
Delivered on 27.01.2023

Court No. - 42

1. Case :- CRIMINAL APPEAL No. - 6192 of 2011
Appellant :- Lal Jeet and Tej Bahadur
Respondent :- State of U.P.
Counsel for Appellant :- Suresh Singh Yadav, Kuldeep Johri
Counsel for Respondent :- Govt. Advocate

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2. Case :- CRIMINAL APPEAL No. - 5681 of 2011
Appellant :- Chintu @ Tej Prakash
Respondent :- State of U.P.
Counsel for Appellant :- Ajay Kumar Srivastava, Ajay Kumar Kashyap, Subhash Chandra Yadav
Counsel for Respondent :- Govt. Advocate

Hon'ble Suneet Kumar,J.
Hon'ble Umesh Chandra Sharma,J.

(Per : Umesh Chandra Sharma,J.)

1. These appeals have been preferred by the convicted accused appellants against the order of conviction and sentencing passed by ASJ, Court No.4, Pilibhit on 25.08.2011 in Crime No.1051 of 2010, under Section 376(2)(g) IPC, PS Newriya, District Pilibhit, whereby the accused appellants were convicted under Section 376(2)(g) IPC and were awarded life imprisonment and Rs.10,000/- fine each and in case of non-payment of fine they had to undergo for one year's additional rigorous imprisonment.

2. Heard Sri Kuldeep Johri and Sri Ankur Singh Kushwaha, learned amicus curiae appearing for the

appellants, learned AGA for the State and perused the record.

3. At the outset as per CJM report dated 11.05.2022 and the office report dated 17.11.2022 the accused-appellant, Lal Jeet has died, therefore, the appeal so far as Lal Jeet is concerned, stands abated.

4. In brief, facts of the case are that informant Tej Ram, father of the victim aged about 7 years lodged FIR in PS Newriya, District Pilibhit, alleging that on 30.09.2010 his daughter, student of class-three in primary school, Tandola, was playing outside the house at around 7 p.m. when Lal Jeet, son of Budh Sen, Tej Bahadur, son of Hori Lal, and Chintu, son of Kali Charan, residents of neighbouring Village Himmat Nagar @ Chiraindapur, on the pretext of bringing gutkha carried her to a drain situated in the east of the village and forcibly raped her. The victim did not return for a long time, her parents along with other villagers went to search with torches, and heard the victim's scream coming from the side of the drain, then the informant, his wife Tarawati, his elder brother Ram Pal, younger brother Prem Pal and many other villagers reached there, and saw that Lal Jeet and Chintu were catching hold his daughter and Tej Bahadur was doing bad things with her. Seeing them all the three accused persons ran away leaving the victim covered in blood. In the morning all three were again seen in the village. The villagers were very angry and agitated, they caught them. The victim was taken to Kusum Hospital, Pilibhit, for treatment at night. They could not go to the

police station due to lack of facilities and thereafter brought the girl and the accused to the police station. Informant requested to register the report and take necessary action.

5. On the basis of the written complaint the case was registered against all the three accused persons being Crime No.1051 of 2010, under Section 376 IPC. The Investigating Officer (I.O.) started investigation, recorded the statement of the witnesses. The victim was medically examined, X-Ray was done and supplementary medical report was prepared. Visiting the spot along with the complainant a map was drawn and the shirts and underwears of the accused were taken into possession and sent to FSL by the I.O. On finding sufficient evidence against all the three appellants a charge sheet under Section 376 IPC was submitted to the court. The case was committed to the court of sessions wherefrom the file was transferred to the concerned court.

6. On 31.01.2011 accused persons were charged under Section 376(2)(g) IPC. They denied the charge and claimed trial.

7. The prosecution examined following **witnesses** to prove the charges:-

(i) PW-1, informant, Tej Ram; (ii) PW-2, victim; (iii) PW-3, Dr. R.K. Maheshwari; (iv) PW-4, Constable Netra Pal Singh; (v) PW-5, Dr. Mahavir Singh; (vi) PW-6, S.O, Tapeshwar Sagar; (vii) PW-7, Dr. Vijay Laxmi.

8. The prosecution produced the following **documentary evidence** to prove the prosecution case:-

(i) Ex.Ka-1, written complaint; (ii) Ex.Ka-2, X-Ray report; (iii) Ex.Ka-3, chik FIR; (iv) Ex.Ka-4, photocopy GD; (v) Ex.Ka-5, report of the vaginal slide; (vi) Ex.Ka-6, map; (vii) Ex.Ka-7, recovery memo of underwear and shirt of the victim and upper cloth of the pocket of the shirt of the accused, Tej Bahadur; (viii) Ex.Ka-8, recovery memo of the blood stained underwear of the accused persons upon which as per investigating officer there was blood of the victim; (ix) Ex.Ka-9, charge sheet; (x) Ex.Ka-10, medical report of the victim; and (xi) Ex.Ka-11, supplementary medical report of the victim.

9. Following **material exhibits** were produced during the trial:

(i) Material Ex.1, X-Ray plate and underwear of the victim; (ii) Material Ex.2, shirt of the victim; (iii) Material Ex.3, underwears of the accused persons.

10. After closer of the prosecution evidence statement of the accused persons were recorded u/s 313 CrPC. All the accused persons denied the case and the allegations. In addition to that accused Lal Jeet stated that before this incident Salig Ram and Bhimsen of his village had contested the election of Gram Pradhan. Bhimsen had won the election. The complainant and Bhimsen felt bad. The injury to the daughter of the informant was caused at

some other place or in some other manner, but due to electoral rivalry he has been falsely implicated.

11. Accused Chintu had also denied the prosecution version of the case and in addition to that has given the same explanation. Tej Bahadur has also given similar explanation. Accused appellants have not produced any evidence in their defence.

12. It would be proper to produce a brief narration of the evidence of the witnesses.

13. According to PW-1, informant, Tej Ram, accused persons are the residents of the neighbouring village Charaindapur. At the time of incident his daughter aged about 7 years, student of class-three, was playing outside of the house at about 7 p.m. On the pretext of bringing gutkha, accused took her outside the village to a dirty drain. All the three accused raped the victim. When she was not seen, PW-1 and others went out to search her. On hearing her cry, he reached near the drain along with Ram Pal, Prem Pal and his wife. They saw that Tej Bahadur and Lal Jeet were holding her while Lal Jeet was raping her. She was covered in blood. Seeing them, all the three accused ran away. PW-1 took the victim to the hospital. Next day in the morning all three accused persons were again seen in the village. He caught them with the help of the villagers. Thereafter, they went to the police station. The report was written by Amarjeet outside the police station. The witness has proved the written complaint Ex.A-1. He had given the complaint to diwanji

who wrote a report on that basis. Investigating Officer had taken his statement at the police station.

14. During cross-examination the witness recognized all the accused persons and in reply to the questions repeated the version of the examination-in-chief and admitted that before him the accused persons did not take his daughter for taking gutkha. When the girl did not come for an hour, he went out to search her with 10-15 villagers with torches, but without sticks. When she was taken away, she was wearing black shirt and blue jeans. When he reached near the drain, the sound of her crying was heard. Her bloodied pant and shirt were lying there. The girl was in an injured condition. She was conscious for a while and then fainted. When he reached the spot, all the three accused were also there. They tried to catch them but they ran away. His daughter was about 300 yards away when he flashed the light. They were to the west of the girl. When the torch was lit first, these accused persons were near the girl and had caught hold her but later on fled after seeing the light. Their faces were visible. The pant of accused Lal Jeet and Tej Bahadur had come off and the underwear was sliding down. They were trying to take the girl away. The accused had run away with their pants. After reaching there they took the girl to the hospital where he was advised to take her to the government hospital. Thereafter, the girl was taken to the police station and therefrom to the Government Hospital, Newriya, where they were referred to the District Hospital, Pilibhit. His three shirts were stained

with the girl's blood. Munshi had said to write whatever you want to give. Two sarees of his wife were stained with blood. Amar Deep had taken his signature. He had narrated the complaint to Amar Deep and none else. He did not give blood stained shirt and wife's sarees to the Investigating Officer but the blood stained clothes of the girl were given to him. He went to the government hospital where doctor seeing the deteriorating condition of the girl referred her to Government Hospital, Pilibhit, where she was admitted for 13 days. For two days the girl remained unconscious, then she started regaining consciousness. Accused were caught together in the morning and taken along with them. After admitting the girl he did not go to the village and stayed together. His daughter was found in an empty place and there was a ditch before it. West of it is the garden of Ganga Ram. North is a road which goes to Sanjana. There is a drain in the south which would be 1.5 meter wide and 1 meter deep and is flooded during the rainy season. Paddy was harvested at that time. The witness denied that due to the enmity of Gram Pradhan election he felt bad and has falsely implicated the accused persons. He also denied that his daughter had sustained injuries elsewhere and in any other manner. He had stated to the Investigating Officer that he was carrying the torch, if he did not write, he cannot tell the reason. If it is not written in the complaint, he cannot tell the reason. He replied that it is wrong to say that today for the first time in the court he was telling about seeing the incident in the light of torch.

Two torches were shown to the Inspector but he neither took it in possession, nor, did he write it.

15. PW-2, victim was firstly tested under Section 118 of the Indian Evidence Act, 1872 (in short 'the Act, 1872'), and when the court found that she understands the meaning of affidavit and is capable to be testified, she was testified on oath, she deposed that she knows the accused persons but does not know them by name. They are the residents of Chiraindapur. At the time of incident she was playing outside her house. These three accused persons came to her, asked her to bring gutkha and took her outside the village. There was farm land on both sides where these three did dirty work with her. They removed her underwear and licked her legs. Pointing towards accused Tej Bahadur, the witness said that earlier he did bad things with her. Then pointing towards Lal Jeet she told that he had done bad things with her, then pointing towards the third accused Chintu she said that he did bad things with her. She was playing. Chintu had given her some medicine. Pointing towards Chintu she told that he had pressed her neck. After doing bad things with her all the three accused ran away. Her father, uncle and elder uncle came from her house and had seen these people on the spot. Her mummy dressed her at home. Her father took her to the doctor at night.

16. In cross-examination she replied that when she was playing outside the house, accused persons carried her in their arms in the dark night. At that time her father and uncle were not there, brother was there. She cried and

shouted then these accused persons gave her medicine. Her brother did not cry. When she cried, villagers did not reach the place where she was taken. Her elder brother had called his parents. Father, uncle and elder uncle had come later. The accused persons had taken her outside the village and pushed her, she fell on the ground. Her head collided on the ground and hurt her back. The injury was severe. She was conscious when her father came there. She regained conscious after some time. Therefrom she had come with her parents near the government tap which is away from her house and is installed in front of the field. She had informed her parents, uncle and elder uncle that three persons had taken her away. The villagers had caught these three and brought them. It is wrong to say that she was giving false testimony at the behest of her parents and other people. It is wrong to say that the accused persons had not taken her. It is wrong to say that she suffered injury in some other manner or in any other place.

17. PW-3, Dr. R.K. Maheshwari, radiologist deposed that he had prepared X-Ray report of the victim and found: (i) right knee joint epiphysis around knee joint were not fused (ii) about right wrist joint, he found that epiphysis around wrist were not fused. He proved X-Ray report Ex.Ka-2 and X-Ray plate Material Ex.1. He denied the suggestion that he had done X-Ray of any other person in place of the victim. He also denied that forged X-Ray report was prepared by him.

18. PW-4, Constable Moharrir, Netra Pal Singh, has proved chik FIR Ex.Ka-3 and *kaymi* GD Ex.Ka-4 and deposed that on 30.09.2010, at 10:20 a.m, he had prepared chik FIR and had entered the case in original G.D. In cross-examination he admitted that no date is mentioned regarding presentation of chik FIR before the concerned C.O. He further replied that this chik FIR was presented before C.J.M. on 04.10.2010. He admits that special report is not available in the file. He also admits that name of the persons who came to lodge the FIR has not been mentioned in G.D. Ex.Ka-4. It is also not mentioned that how the accused were tied and from which vehicle they were carried to the police station. He admits that injuries of the accused persons are not mentioned in Ex.Ka-4, but he denied the suggestion that Ex.Ka-3 and Ex.Ka-4 were forged and ante-timed.

19. PW-5, Dr. Mahavir Singh, Senior Consultant, District Hospital, Pilibhit, deposed that on 01.10.2010, he had examined vaginal smear slide of the victim sent by Dr. Vijay Laxmi of PHC, Newriya. He deposed that in examination he did not find spermatozoa but he found red blood cells in large quantity. He proved his report Ex.Ka-5. He denied that he was falsely deposing.

20. PW-6, S.O, Tapeshwar Sagar, deposed that on 30.09.2010, the case was lodged in his presence. He started investigation, copied chik FIR, recorded the statement of the informant, FIR writer-Netra Pal Singh and the statement of the accused persons. He copied the medical report, inspected the place of occurrence and

prepared the map Ex.Ka-6. He took the lining of the pocket of the accused Tej Bahadur and underwear and shirt worn by the victim, sealed it and prepared specimen seal. He prepared recovery memo Ex.Ka-7 in his hand writing. He also took blood stained underwear of all three accused and kept in polythene, did chitbandi and put in cloth sealed, prepared specimen seal and recovery memo Ex.Ka-8 in his own hand writing, copied both the recovery memo in C.D, recorded the statement of witnesses of recovery, witness Prem Pal, victim and Tarawati, copied the pathology report and X-Ray report, recorded the statement of S.I, Rajendra Babu, Constable Netrapal Singh, Home Guard Daulat Ram and complaint writer Amar Deep. On 27.10.2010 he sent the clothes to FSL, Lucknow, through Constable, Subedar Singh. He proved the docket Ex.Ka-8. He copied the supplementary report and submitted charge sheet Ex.Ka-9 to the court. During the testimony he proved the underwear and black shirt of the victim as Material Exs.1 and 2, underwears of the accused-persons as Material Exs.3, 4 and 5 respectively.

21. In cross-examination this witness replied that witness Tej Ram or the villagers had not produced the torch used by them. Tej Ram had informed the names of some witnesses, such as, Prem Pal, Ram Pal and Tarawati and had not informed the names of 10-15 persons. He admits that till the time of submission of charge sheet, FSL report was not obtained. He has admitted that concerned G.D. is not referred in case diary, its copies are also not available on the file. He admits that he has not

entered time of closer of investigation in C.D. According to him he did not find blood on the spot but had found blood on the shirt of the victim which is not written in Ex.Ka-7. According to him there was blood on the underwears of the accused persons which is written in recovery memo. It was prepared at police station. Recovery memo (Ex.Ka-7) of victim's clothes was prepared on spot. He admits that in Exs.Ka-6, 7 and 8 names of the accused persons are not mentioned. On asking the colour of the underwears of the accused persons, he replied that one underwear is brown and the second is green in colour and another is light almond colour. He further deposed that underwear of the victim is brown in colour. One shirt is black. He further deposed that Tej Ram and his wife neither showed their blood stained clothes, nor, those were taken into possession. He denied the suggestion that he had done all the investigation sitting at the police station and has submitted false charge sheet on the basis of fake investigation. He denied that Exs.Ka-6, 7 and 8 were prepared ante-time.

22. PW-7, Dr. Vijay Laxmi deposed that on 30.09.2010, during her posting she had examined the victim, at 11:30 a.m. brought by Constable Durga Prasad, Police Station Newriya, with injury letter.

23. During the internal examination she found that the outer part of the victim's vagina was swollen and red in colour. It was very difficult to do the internal examination. The victim was fainting repeatedly due to pain and

swelling. The vagina was cut from both sides and fresh blood was oozing. There were deep wounds up and down inside the vagina opening from which blood was oozing. The lower wound was up to the anus. The lower part of the inside vagina was coming up to the anus. There was deep wound inside the vagina that its examination was difficult. In the said situation the victim was immediately referred to the surgery department for advance treatment. X-Ray was advised to determine her age, hence, referred to the radiologist. Two samples of the victim's vaginal discharge were prepared. It was sent to the pathology for examination. She had prepared the medical report Ex.Ka-10 and supplementary medical report Ex.Ka-11 on 20.10.2010, in her own writing. The injury of the victim was of serious nature and fatal for her life due to which she could have died.

24. In cross-examination this witness admitted that she had not given any opinion about rape. On asking by the court the witness replied that the condition of the child was so serious that she did not think about the opinion of rape. The girl was fainting and there was heavy bleeding which could prove fatal. Further, she was questioned why was the girl sent to you. She answered that the victim was sent for testing, if she had died during examination its responsibility would fall on her. On asking whether she read injury letter. She answered that she had read it, wherein, it was requested to inform about the medical result and report whether the victim had been raped. On asking whether the victim was raped or not, she replied

that there was no clear narrative about rape, that is why she did not give clear report. When there is no possibility of someone dying, the victim gives a clear opinion regarding rape, the girl's condition was so bad that is why she could not think about it. On asking when a woman is in very serious condition, one gets emotional and forgets everything. She replied not on emotion, she wanted to refer the victim for proper treatment. A question was again put, whether in the circumstances would suggest that the victim was raped. She replied that if there is fresh injury in the internal organs then I would give an opinion, I am sure that she has been raped. A question was again asked that the victim of this case had suffered injuries on her internal organs then in that case why did she not give an opinion regarding rape. She replied that she made a mistake at that time, did not pay attention. On being questioned whether she did it intentionally. She replied that it is impossible.

25. After that learned counsel for the accused persons started cross-examination, to which she replied that in injury report, pathology report, supplementary medical report and X-Ray report she had not mentioned about the opinion of rape. She further replied that the victim was raped, she is saying not on the basis of memory but after seeing the report. She admits that in her report she did not give any opinion regarding rape of the victim. Life of the victim would have been lost, is not in her report. The hymen gets torn when the victim was raped. In her report it is written that it is difficult to identify the hymen

separately. PW-7 further replied that in internal organs of the victim, semen was not found anywhere. If a girl falls or collided on a cut sugarcane or cut structure or cut round stick and the bite goes towards the anus, it is not possible to get such inquiries. On falling the injury would come at one place. The nature of injury suffered by the victim cannot come from sliding and falling. It is correct to say that the victim must have been raped. But PW-7 admits that she has told this for the first time in the court today and had not mentioned it in any report. She denied the suggestion that she was not telling the right things and she was lying in the court and is not giving correct statement based on the medical examination report.

26. After closure of the prosecution evidence statement of all the three accused persons were recorded u/s 313 CrPC as already mentioned at page-4 wherein they denied the allegations and had not produced any evidence in defence.

27. The appeal is being decided in the backdrop of above noted evidence as under:-

I. In this case, according to prosecution the occurrence took place on 29.09.2010, at about 07:00 p.m. in the evening, FIR was lodged on 30.09.2010, being Crime No.1051 of 2011, under Section 376 IPC against the named accused-appellants at 10:20 a.m. The distance of police station from the concerned village is 9 kms, after the incident, the victim was first admitted in Kusum Hospital, Pilibhit, in the night and thereafter, she was

referred to the Government Hospital, Newriya, Pilibhit, from there victim was referred to the District Hospital, Pilibhit, for further treatment.

II. Next day on 30.09.2010 the accused persons were caught by the informant and the villagers. Thus, it cannot be said that any undue delay was caused in lodging the FIR.

III. In **Bable Vs. State of Chhattisgarh, AIR 2012 SC 2621,** it is held that FIR is not a substantive piece of evidence and it is not an encyclopedia. In **Jarnail Singh Vs. State of Punjab, (2009) 9 SCC 719** and **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537**, it is also held that the only requirement is that at the time of lodging the FIR, the informant should state all those facts which normally strike to mind and help in assessing gravity of the crime or identity of the culprit briefly.

IV. In **State of UP Vs. Manoj Kumar Pandey, AIR 2009 SC 711, (three-Judge-Bench)** and in **Santosh Moolya Vs. State of Karnataka, (2010) 5 SCC 445,** it is held that normally the prosecution has to explain delay and **lack of prudence** does not apply *per se* to rape cases.

V. In **Mukesh Vs. State NCT of Delhi and others, AIR 2017 SC 2161 (three-Judge-Bench), Munshi Prasad Vs. State of Bihar, 2002 (1) JIC 186 (SC)** and in several other cases it has been held that if causes are

not attributable to any effort to concoct a version and the delay is satisfactorily explained by prosecution, no consequence shall be attached to mere delay in lodging the FIR and the delay would not adversely affect the case of the prosecution. Delay caused in sending copy of FIR to Magistrate would also be immaterial if the prosecution has been able to prove its case by reliable evidence. Thus, it is concluded that there is no delay in lodging the FIR in this case.

VI. The present case is based on direct evidence and on the evidence of the victim. Hence, there is no need to prove the motive behind the commission of crime. From the evidence the *mens rea* to commit the alleged offence has been proved beyond reasonable doubt. It is also proved from the evidence of the prosecution witness that there was no enmity or false implication of the accused persons. In the said crime though the accused persons have suggested the witnesses of fact that due to enmity of Gram Pradhan election the accused persons have been falsely implicated, but it is not proved that either the accused persons or any family member of their family or any friend was the candidate in Gram Pradhan election.

VII. **Burden of proof** rests on the shoulder of the prosecution. As per section 134 of the Act, 1872, no particular number of witnesses is required to prove any fact. Plurality of witnesses in a criminal trial is not the legislative intent. If the testimony of a sole witness is found reliable on the touchstone of credibility, accused can be convicted on the basis of such sole testimony as

held in **Sudip Kumar Sen Vs. State of West Bengal, (2016) 3 SCC 26, Jarnail Singh Vs. State of Punjab, 2009 (1) Supreme 224, Syed Ibrahim Vs. State of Andhra Pradesh, AIR 2006 SC 2908, Avtar Singh Vs. State of Haryana, AIR 2013 SC 286.**

VIII. In this case only informant, father of the victim and the victim were examined as eye-witness.

IX. In **Sucha Singh Vs. State of Punjab, (2003) 7 SCC 643, Bhagwan Singh Vs. State of Madhya Pradesh, 2002 (44) ACC 1112 (SC), Bhagwan Jagannath Markad (supra), Shyamla Ghosh Vs. State of West Bengal, AIR 2012 SC 3539, Amit Vs. State of UP, AIR 2012 SC 1433** and in so many other cases it is held that the testimony of a witness in criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence, in such situation the court has to adopt careful approach in analysing the evidence of such witness and if the testimony of the related witness is otherwise found credible, the accused can be convicted on the basis of testimony of such related witness.

X. In **Hukum Singh Vs. State of Rajasthan, 2000 (41) ACC 662 (SC), Sadhu Saran Singh Vs. State of UP, (2016) 4 SCC 357, Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC)** and in **Bhagwan Jagannath Markad (supra),** it is held that non-examination of the material evidence is not a mathematical formula for discarding the weight of the

testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with stroke of pen. Court can convict an accused on statement of a sole witness even if he is relative of the deceased and non-examination of independent witness would not be fatal to the case of prosecution.

XI. In **Nand Kumar Vs. State of Chhatisgarh, (2015) 1 SCC 776, Rohtash Kumar Vs. State of Haryana, (2013) 14 SCC 434** and **Bhagwan Jagannath Markad (supra),** it is held that prosecution need not examine its all witnesses. Discretion lies with the prosecution whether to tender or not, witness to prove its case. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive.

XII. Generally now-a-days people avoid to be witness and appear in witness-boxes specially in criminal cases due to the fear of enmity, therefore, independent witnesses do not come forward to be testified on oath in a court of law.

XIII. In **Sandeep Vs. State of UP, (2012) 6 SCC 107, Hukum Singh and others Vs. State of Rajasthan, 2001 CrLJ 511 (SC)**, sections 226 and 231 CrPC has been examined and it is held that it is expected from the public prosecutor to produce evidence in support of the prosecution and not in derogation of the prosecution case. If he knew at this stage itself certain witnesses might not

support the prosecution case, he is at liberty to state before the court that fact. It would be unreasonable to insist on the public prosecutor to examine those persons as witnesses for prosecution.

XIV. In **Chhotanney Vs. State of UP, AIR 2009 SC 2013, Gangadhar Behera Vs. State of Orissa, (2002) 8 SCC 381** and in **Bhagwan Jagannath Markad (supra)** it is held that doubt should be reasonable only then benefit of doubt can be given to the accused persons. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute a reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must be grow out of the evidence in the case. Exaggeration of the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape.

XV. In **Raja Vs. State of Karnataka, (2016) 10 SCC 506, State of UP Vs. Chhoteylal, AIR 2011 SC 697 and Santosh Moolya** (supra) and in so may other cases the Apex Court held that in a case of rape testimony of prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and

appears to be credible. The accused can be convicted on the basis of sole testimony of the prosecutrix without any further corroboration provided the evidence of the prosecutrix inspires confidence and appears to be natural and trivial. Woman or girl raped is not an accomplish and to insist for corroboration of the testimony amounts to insult to womanhood. The evidence of a victim of a sex offence is entitled to great weight absence of corroboration notwithstanding. Corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases but such evidence cannot be expected in sex offences having regard to the very nature of the offence. It would therefore be adding insult to the victim to insist of corroboration drawing inspiration from rules devised by the courts in the western world. As a general rule, there is no reason to insist of corroboration except from the medical evidence where having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to disqualification that corroboration can be insisted upon when a woman having attained majority is found in a compromising position and there is likelihood of her having levelled such an acquisition on account of the instinct of self-preservation or when probability factor is found to be out of tune.

XVI. In the present case the victim was only 7 years old at the time of incident and from the medical report and the evidence, her testimony has been corroborated. In **Ganga Singh Vs. State of MP, AIR 2013 SC 3008,** it is held

that where a girl child is the victim of offence of rape punishable under Section 376 IPC, she has to be given some weight as is given to an injured witness and her evidence needs no corroboration.

XVII. In **State of Tamil Nadu Vs. Ravi @ Nehru, 2006 (55) ACC 1005 (SC),** a girl of five years old was raped and the opinion of the doctor was that penis would not have gone inside the girl's vagina, the Supreme Court held that the opinion of the doctor was irrational when hymen was found torn. Even a slight penetration of penis into vagina without rupturing the hymen would constitute rape. Evidence of victim of sexual assault stands at par with the evidence of an injured witness. Conviction of her sole testimony without corroboration is justifiable.

XVIII. In this case an argument has been advanced by the counsel for the appellants that the statement of the victim has not been recorded by the Magistrate under Section 164 CrPC. In **Baijnath Sigh Vs. State of Bihar, 2010 (70) ACC 11 (SC), Utpal Das Vs. State of West Bengal, AIR 2010 SC 1894,** it is held that statement recorded under Section 164 CrPC cannot be used as substantive evidence. It can be used only to corroborate or contradict the witness in accordance with the provisions under Sections 145 and 157 of the Evidence Act. It appears that considering the tender age of the victim, the IO did not produce her before the Magistrate for recording her statement under Section 164 CrPC.

XIX. For the fault of the Investigating Officer the prosecution would not suffer.

28. In the case at hand informant PW-1 has proved the facts of the case, the only contradiction is that according to FIR version when the informant and other persons reached on the spot, they found that Lal Jeet and Chintu were catching hold the victim and Tej Bahadur was raping her. Contrary to that PW-1 has deposed in the court that when he alongwith other persons reached on the spot they saw that Tej Bahadur and Lal Jeet were holding the victim while Lal Jeet was raping her. It might be a writing mistake. The evidence has to be considered as a whole.

29. So far as the victim is concerned, she has deposed that all three accused persons did bad things with her. They removed her underwear and licked her legs. Pointing towards the accused Tej Bahadur, Lal Jeet and Chintu, she deposed that they did bad things with her. All the three accused persons had taken her out side the village and pushed her on the ground, thereafter, they raped her. Thus, the argument has no force and is accordingly rejected.

Medical Evidence

30. Earlier the medical evidence has been discussed in detail. From the evidence of the PW-3 Dr. R.K. Maheshwari, Radiologist, it is proved that knee and wrist joints were not fused and the victim was of a very tender age.

31. PW-5 Dr. Mahavir Singh had examined vaginal smear slide of the victim though he did not find spermatozoa but he found red blood cells in large amount.

32. The victim was medically examined by PW-7, Dr. Vijay Laxmi, her evidence has been discussed at page nos.12-14, wherein, she has finally admitted and deposed that the victim was raped.

33. As per Section 45 of the Evidence Act, a doctor is a medical expert and the medical evidence is only an evidence of opinion and is not conclusive. In **Vishnu @ Undrya Vs. State of Maharashtra, (2006) 15 SCC 283,** Apex Court held that the opinion of medical officer is to assist the court, he is not the witness of fact, and the evidence given by medical officer is of an advisory character and is not binding on the witnesses of fact. In **Solanki Chimanbhai Ukabhai Vs. State of Gujarat, AIR 1983 SC 484,** Supreme Court observed that ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence makes of the medical evidence, is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witness.

34. In the present case the injury report and the evidence of PW-7 is not contrary to the prosecution evidence and it can be said that both corroborate each other. It has not been proved that the injuries to the

victim had been caused at any other place and in any other manner.

35. Pointing to the evidence of the witnesses it has been argued by the learned counsel for the appellants that the place of occurrence has not been proved beyond reasonable doubt. In this respect the evidence may be re-evaluated.

36. According to the FIR version on the pretext of bringing gutkha the victim was carried to a drain situated in the east of the village, where she was forcibly raped. During the course of search, the witnesses and the villagers heard the victim's scream from the side of drain, they reached there and found that Lal Jeet and Chintu were catching hold the victim and Tej Bahadur was raping her. PW-1, in his evidence has deposed the same fact. In cross-examination also this witness has deposed that where his daughter was found, it is an vacant place and a ditch before that. In the west, there is garden of Gangaram, a road in the north which goes to Sanjana. There is a drain in the south.

37. Map Ex.Ka-6 has been proved by the I.O, PW-6. The place of occurrence is shown by letter 'X' which is somewhat south to the alleged drain. Just adjacent to the place 'X' at place 'A', the upper part of the pocket of the shirt of accused Tej Bahadur (which was torn by the victim) had been found. Hence, it is concluded that there is no variation about the place of occurrence between the facts of the FIR and the evidence of the informant PW-1.

PW-2, the victim has also deposed that these persons took her outside of the village, there was farm land on both sides where these three did dirty things with her. Though in cross-examination this witness has deposed that there from she had come with her parents to the government tap which is away from her house and is installed in front of the field. On the basis of this evidence counsel for the appellants argued that there is no government tap near the place of occurrence.

38. The victim is not saying that she was raped at, or near the government tap. It appears that there is government pipe under the drain some steps away from the place of occurrence about which this witness was deposing or there might be tap near the place of occurrence not shown by the I.O. in the map Ex.Ka-6. The Court is of the opinion that on the basis of this evidence it cannot be said that there is contradiction or variation between the evidence of PW-1 and PW-2 about the place of occurrence as narrated in the complaint.

39. It would be proper to examine the status of section 376 IPC at the time of the alleged occurrence. Section 376 IPC was amended by Act No.13 of 2013 w.e.f. 03.02.2013. Earlier section 376 was substituted by Act 43 of 1983, (w.e.f. 25.12.1983) section 376 before substitution by Act of 13 of 2013, stood as under:-

> *"1. Subs. by Act 13 of 2013, sec. 9, for section 376 (w.r.e.f. 3-2-2013). Earlier section 376 was substituted by Act 43 of 1983, sec. 3 (w.e.f. 25-12-1983). Section 376(1) and explanation, before substitution by At 13 of 2013, stood as under:*

> *"376. Punishment for rape.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:*
>
> *Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.*
>
> *Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."*

40. It has been established that at the time of commission of crime the victim was aged about 7 years and below 12 years of age. Hence, in case of rape with girl of a tender age, if the charges are proved beyond reasonable doubt, the accused shall be punished with imprisonment of either description for a term which shall not be less than 7 years, but which may be for life or for a term which may extend to 10 years and shall also be liable to fine. Though as per the proviso the court may, for adequate and special reasons mentioned in the judgement, imposed sentence of imprisonment for a term of less than 7 years. As per Explanation-1 where a woman is raped by one or more persons in a group acting in furtherance of the common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. It has been proved that it is a

case of gang rape by all the accused persons with the victim.

Some relevant judgments:-

41. In **Gopal Krishan Vs. State of Punjab, (2003) SCC OnLine 280 (P&H),** the accused raped a minor girl of 6 years. The evidence of the prosecutrix, her mother and the medical and medico-legal report showed that libiya minora and hymen of the victim was ruptured to the extent of nearly one inch and was bleeding profusely. The accused in his defence pleaded that no semen was found at his clothes and the clothes of the victim. Rejecting the plea, Court held that emission of semen was not an essential requirement for conviction in a rape case as the explanation attached to Section 375 clearly specifies that mere penetration is sufficient to constitute an offence of rape. The conviction and sentence of the accused was therefore, proper.

42. In **Krishna Lal Vs. State of Haryana, AIR 1980 SC 1252,** the Apex Court observed that a socially sensitised Judge is better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into it. The Court cannot cling to a fossil formula and insist on corroborative testimony. Judicial response to human rights cannot be blunted by legal bigotry.

43. In **State of Himachal Pradesh Vs. Asharam, AIR 2006 SC 381,** Apex Court reiterated that the evidence of

a victim of rape is entitled to great weight, absence of corroboration notwithstanding. The Court identified the following factors as rationale for the rule to be followed in rape cases:—

(1) A woman/girl in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would have to face the whole world.

(3) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(4) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable family.

(5) It would almost inevitably result in great mental torture and suffering to herself.

(6) The fear of being taunted by others will always haunt her.

(7) She would naturally like avoidance of publicity to the incident and so also her husband, family members etc. would avoid publicity due to fear of social stigma.

(8) The fear of the victim being herself considered to be promiscuous would haunt her regardless of her innocence.

(9) The fear of facing interrogation by investigating agency, Court and to face stiff cross-examination by counsel for the defence (accused) and risk of being disbelieved may act as a deterrent to the victim.

44. In **State of Punjab Vs. Gurmit Singh, (1996) 2 SCC 384,** the Apex Court observed that 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 the victim, a rapist degrades the very soul of the helpless female. The Court should, therefore, shoulder greater responsibility while trying an accused on charges of rape and sexual molestations.

45. In **State of Punjab Vs. Ramdev Singh, AIR 2004 SC 1290,** the Apex Court advised the subordinate courts to display a greater sense of responsibility and be more sensitive while dealing with the cases involving sexual assaults on women particularly of girls of tender age. Such cases should be dealt with sternly and severely. The Court reiterated its earlier stand that was taken in **Krishna Lal** (Supra).

46. Having regard to the above noted precedents and discussion, this Court is of the considered view that the accused appellants committed gang rape with the victim, a girl of a tender age, not understanding any one characteristics of sex and pleasure related to it. Even her sexual organs were not developed properly. The victim was of the age of a girl child of the accused persons, even then they committed such cruel, merciless, illegal and uncivilized act with her.

47. In view of the above discussion, it is concluded that the learned trial court committed no illegality in holding the accused persons guilty of committing gang rape.

48. Alternatively, it has been argued by the counsel for the accused appellants that the accused appellants are in jail since 2010. Considering the age and future life of the accused, if this Court finds that the charges are proved beyond reasonable doubt, a lenient view may be adopted so far as sentencing is concerned. In this regard learned counsel for the appellants relied on the following judicial precedents:-

49.(1) In **Bhura Vs. State of UP, (2022) SCC OnLine (All) 151**, wherein the sentence of life imprisonment was modified to RI for 13 years with a fine of Rs.3,000 under section 376(2)(g) IPC for committing the rape of a 14 year old girl. In the case one of accused was held juvenile.

50.(2) In **Thongam Tarun Singh Vs. State of Manipur, (2019) 18 SCC 77,** section 376(2)(g) IPC, the sentence of imprisonment of 15 years and 10 years were reduced to 8 years and 2 years. In the case the victim was about 16 years old.

51.(3) In **Manoj Mishra @ Chhotkau Vs. State of UP (Criminal Appeal No.1167 of 2021 (arising out of SLP (Cri) No.7828 of 2019)** as per FIR, the victim was aged about 14 years (as per doctor, she was 16 years of age) the appellant had undergone sentence for more than 8 years. The Apex Court directed that the appellant be released on payment of fine. The Apex Court accepted the period spent in jail as full sentence and directed to release the accused.

52. Learned AGA argued that having regard to the difference in age of the victims, facts and circumstances of the cited cases and the present case, the sentence of life imprisonment cannot be commuted.

53.(4) In **Bavo @ Manubhai Ambalal Thakore Vs. State of Gujarat, (2012) 2 SCC 684,** the victim was aged about 7 years. The trial court convicted the appellant under section 376(2)(f) IPC and sentenced him to undergo imprisonment for life. The High Court conformed the conviction and sentence. The incident occurred nearly 10 years ago, at the time of incident the accused was about 18/19 years of age. He had already served nearly 10 years of rigorous imprisonment. The

Apex Court held that award of life imprisonment is not warranted in this case. It was modified to RI for 10 years.

54. Learned AGA argued that in the facts of the present case, it is a case of gang rape by three responsible persons who committed the brutal sexual offence with a 7 year old girl child, hence, the principles laid down in the said case cannot be applied to the present case. The appellants were mature and family persons, therefore, they cannot be treated at par to the accused of 18/19 years of age.

55.(5) In **Rajendra Datta Zarekar Vs. State of Goa, (2007) 14 SCC 560,** the victim was aged about 6 years. It was a rape by single young man of 20 years, wherein only fine was reduced from Rs.10,000/- to Rs.1,000/- but the sentence of 10 years RI was maintained by the Apex Court. Hence, the appellants cannot claim parity with the case at hand.

56. The prosecution relied on the citation **Dinesh @ Buddha Vs. State of Rajasthan, (2006) 3 SCC 771,** wherein, the victim was below the age of 12 years. It was a case under section 376(2) proviso and 376(2)(f) IPC, the sentence was imposed below 10 years RI. The Apex Court held that normally sentence in such a case be not less than 10 years. Courts are obliged to respect the legislative mandate in this regard. Recourse to the aforesaid proviso can be had only for special and adequate reasons and not in a casual manner which would depend upon variety of factors and the peculiar

circumstances of each case. In paragraph-12, Apex Court held that sentence must depend upon the conduct of the accused, the state and age of the victim and the gravity of the criminal act, the socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations. Crimes of violence upon women need to be severely dealt with, object of law is to protect the society and deter the criminal to be achieved by imposing an appropriate sentence. The courts should impose proper sentence commensurate with gravity of crime. In paragraph-6 the Apex Court held that the courts should deal with cases of sexual crime against women sternly and severely.

57. In rebuttal the prosecution relied on the judgement **State of UP Vs. Naushad, AIR 2014 SC 384,** in which the sentence of life imprisonment was upheld.

58. In **Shyam Narayan Vs. State NCT of Delhi, AIR 2013 SC 2209,** a girl aged about 8 years was brutally raped by the accused. The trial court and the High Court confirmed the charge of rape and sentenced the accused to imprisonment for life. On appeal, Supreme Court upheld the sentence of life imprisonment for the act of the accused and dismissed the plea of mitigating circumstances put forth for reduction of sentence to mandatory 10 years. The court observed that punishment ought to be commensurate to gravity of crime and the accused must get to “just desert” apart from the deterrence aspect of sentencing.

59. The Court observed “rape is a monstrous burial of girl’s dignity in the darkness. Her dignity and purity of physical frame is shattered and she may not be able to assert the honour of a woman for no fault of her”.

60. It is not a case of rape by juvenile, a single accused with a mature lady or with a girl who is on the verge of attaining the age of puberty or majority. The victim was not knowing even the nature of the offence. Therefore, considering the nature of injuries, age of the victim, age of the accused persons and that it is a case of gang rape with a little girl, this Court is of the view that the trial court has rightly imposed the sentence of life imprisonment and fine of Rs.10,000/- each. This Court does not find any sufficient and cogent ground to reduce the sentence. It is informed by the learned AGA that presently the victim is a young-unmarried-girl. At present she is about 19 years of age. The accused are the residents of the neighbouring village. If the sentence is reduced and they are released, social and personal safety problems may cause serious prejudice to the victim.

61. On the basis of aforenoted discussion, this Court is of the view that there are no mitigating circumstances present to reduce the sentence already imposed by the trial court. Accordingly, the order of punishment and sentence by the trial court is found to be appropriate and no interference is warranted.

62. The appeals being devoid of merit are liable to be dismissed.

ORDER

63. The appeals are **dismissed**. The order of punishment and sentence passed by the trial court is affirmed. The appellants, Tej Bahadur and Chintu @ Tej Prakash are already serving the sentence in jail.

64. The ASJ-IV, Pilibhit, to ensure compliance.

65. Let a copy of this order alongwith record of the trial court be sent back to the ASJ-IV, Pilibhit, for taking necessary steps and for the consignment of the records.

66. Sri Kuldeep Johri and Sri Ankur Singh Kushwaha, learned amicus curiae appearing for the appellants shall be paid Rs.7,500/- each as fee.

Order Date :- 27.01.2023
Shahroz

(Umesh Chandra Sharma,J.) (Suneet Kumar,J.)