* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 16th May, 2013
Pronounced on : 22nd May, 2013

\+ CRL.A. 214/2011

MUMTAZ ...Appellant
Through : Ms.Charu Verma, Adv.

Versus

STATE (GOVT. OF NCT OF DELHI) ...Respondent
Through : Ms.Rajdipa Behura, APP for the State.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

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G.P.MITTAL, J.

1. In the recent past, Delhi - the Capital City of our Country has witnessed unprecedented protests by *'Aam Aadmi'* (common man) and there was public outcry to make the city safe for women who have been guaranteed equal rights to live with dignity. Delhi was referred to as 'Rape Capital' by every newspaper highlighting instances and plight of rape victims. People from all strata of society came on the street with the demand of 'Death Penalty for Rapists'. To address the concern of the citizens and to ensure speedy trial of rapists, Fast Track Courts were created to deal with the cases of sexual offences. Aim was to provide speedy justice and also send a strong message to the offenders as well the to the potential offenders that legal system is capable of tackling the

problem and punishing the guilty without any delay thereby providing some solace to the victims of sexual assault that the guilty has been punished as per procedure established by law.

2. Being conscious of misuse of the provisions of rape and the effect it can have on the accused, in the context of evaluating the testimony of the rape victim, following observations were made by the Supreme Court in *Rajoo & Ors. v. State of Madhya Pradesh AIR 2009 SC 858* :

> *'....It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication.... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.'*

3. In this case registered under Sections 354/323 IPC, the Appellant has been convicted under Sections 363/376(2) (f)/323 IPC. This Appeal raises many issues leading to serious concern with reference to the duties of the Trial Court to ensure protection of statutory rights as well as right to have fair trial in criminal cases guaranteed under Article 21 of the Constitution of India. Further the purpose of providing legal aid and effectiveness of the existing legal aid system and whether it is able to achieve the desired purpose also comes to the fore. This Appeal is a glaring example as to how mountain can be made out of molehill by the victim and her mother.

4. How poverty leads to unending misery for an accused and how the concept of providing legal aid to those persons, who are not able to defend themselves by getting legal assistance at their own expenses, has failed to achieve the desired purpose, can be best answered by the Appellant who had been sentenced to undergo rigorous imprisonment for ten years with fine for rape which he did not commit. This case also brings in limelight the need to have an experienced counsel on the panel of legal aid especially for heinous crimes like the present one so that the legal aid provided to such an accused is not for 'namesake' or an 'eye wash' only.

5. Facts giving rise to the prosecution of the Appellant are narrated in the complaint Ex.PW1/A made by the child victim (name of the child victim withheld to conceal her identity and hereinafter referred to as 'J'). She made statement to the police that the Appellant came to her house to ask for a utensil to keep vegetables (*subzi ke liye bartan mangaa*). Her father asked her to give the utensil. She gave the utensil to the Appellant and on the pretext of giving toffee to her, the Appellant took her to the gali and thereafter lifted her in his lap and started pressing her (*bheechnein laga*). She raised alarm and many persons from *jhuggis* gathered there. At that time, the Appellant slapped on her face resulting into an injury on her lip. Thereafter the crowd brought the Appellant to her mother and she ('J') narrated the incident to her mother. On the basis of the above statement made by 'J', case FIR No.299/2009 under Sections 354/323 IPC was registered at PS Seelampur. After completion

of investigation, a chargesheet was filed against the Appellant for committing the offences punishable under Sections 354/323 IPC.

6. The Appellant was charged by learned MM for committing the offences punishable under Sections 323/354 IPC on 09.08.2009. When the child victim i.e. PW-1 'J', who was aged about nine years on the date of her examination, was examined by the Court of Magistrate, she gave a new twist to the case by stating before learned MM of she being repeatedly raped by the accused. On the basis of the statement made by the child victim, learned MM committed the case to the Court of Session. Another charge for committing the offences punishable under Sections 363/376/323 IPC was framed by learned Addl. Sessions Judge on 03.10.2009.

7. The prosecution examined seven witnesses to prove its case. Child victim 'J' was again examined as PW-1A. Statement of the Appellant was also recorded under Section 313 CrPC.

8. After considering the testimonies of material prosecution witnesses especially the child victim and her mother, believing the testimony of the child victim, observing that it was truthful and convincing requiring no further corroboration, the Appellant was convicted under Sections 363/376/323 IPC vide impugned judgment dated 23.07.2010.

9. It is pertinent to note here that though the Appellant was charged and also convicted for committing the offences punishable under Sections 363/376/323 IPC, while awarding sentence learned Addl. Sessions Judge lost sight of the charges for which the Appellant was tried and convicted. While passing the order dated 27.07.2010 on the point of sentence, the Appellant was sentenced under Section 376(2) (f) IPC to undergo rigorous imprisonment for ten years with fine of Rs.10,000/-, in default to undergo rigorous imprisonment for one year, further under Section 323 IPC to undergo simple imprisonment for six months with fine of Rs.500/-, and in default to undergo simple imprisonment for ten days. Further he was sentenced under Section 506 IPC to undergo rigorous imprisonment for two years with fine of Rs.1000/- and in default to undergo rigorous imprisonment for two months although the Appellant was neither charged nor convicted under Section 506 IPC.

10. On behalf of the Appellant, conviction and sentence under Sections 363/376(2) (f) IPC has been challenged mainly on the ground of improbabilities in the case of prosecution as also on total change of version by the child victim and her mother from what was initially given at the time of registration of the case which makes the entire case unbelievable. Learned counsel for the Appellant has submitted that when initially the case of the prosecution was that the child was lifted by the accused and she was pressed by him in his grip and also slapped, at the most, he could have been convicted under Sections 354/323 IPC for which he was initially charged and to that extent the Appellant does not

dispute that he had lifted the girl in his lap and when she cried, he slapped her resulting into an injury on her lip.

11. Learned APP for the State has supported the version of the child victim and submitted that the explanation has been given by PW-2 and her mother that due to shame, they did not disclose about the rape at the time of medical examination of 'J'. It is urged that the Appellant has failed to make out any case to persuade this Court to take a different view in the matter than the view taken by the learned Trial Court. Learned APP tried to convince this Court that it is settled legal position that conviction can be based on the sole testimony of victim of rape and here the victim was a nine year old girl, who has been repeatedly raped by the Appellant, and her testimony does not suffer from any infirmity. Referring to the MLC, learned APP has submitted that absence of injury on private parts is no ground to disbelieve the version of PW-1 'J' as no animus has been suggested to PW-1A and PW-2 during cross examination which could be a reason to falsely implicate the Appellant in this case.

12. Since the Appellant has been convicted on the basis of testimony made by the child victim and her mother during their examination before the Court which is at total variance to the version given at the time of registration of FIR, a mammoth exercise is required to be undertaken to dig out the truth from the improved and embellished version of the prosecution witnesses.

13. To note the inconsistencies, embellishments and exaggeration, it is necessary to highlight the salient features of the statement of the child victim in the complaint Ex.PW1/A on the basis of which FIR was registered and thereafter during her examination before learned MM on 18.09.2009. Her third statement was recorded by learned Addl. Sessions Judge while conducting trial for the offences punishable under Sections 363/376/323 IPC. Careful scrutiny of the statement of the mother of the child victim recorded under Section 161 CrPC and her statement recorded before the Court is also necessary for the reason that not only she was present at the time when the Appellant allegedly took away her daughter but also at the time of his apprehension, medical examination of the child victim as well at the time of arrest of the Appellant. The different versions are extracted hereunder:-

In Complaint Ex.PW1/A:

(i) Child victim 'J' states she resides at the given address alongwith her family and stated to be a student of class IV.

(ii) On 07.08.2009 at about 8.00 pm, one boy came to her house and asked for a utensil to keep vegetables (*subzi ke liye bartan manga*).

(iii) At the instance of her father, she gave the utensil to him.

(iv) On the pretext of giving her toffee, he took her to the gali and thereafter lifted her in his lap and started pressing her (*bheechnein laga*).

(v) She raised alarm calling Mummy-Mummy.

(vi) On hearing the noise, many persons from the *jhuggi* gathered there and at that time that boy slapped on her face resulting into an injury on her lips.

(vii) The crowd which had gathered there brought that boy, whose name was revealed as Mumtaz, to her mother and she ('J') narrated the incident to her mother.

(viii) The public persons handed over Mumtaz to ASI Yamuna Prasad who as per the endorsement on Ex.PW1/A, ASI Yamuna Prasad was on patrolling duty alongwith Ct.Mobin Ali when at about 10.30 pm on seeing the crowd collected there, they stopped there. Accused Mumtaz was handed over to them and he recorded the statement of 'J' and sent rukka for registration of FIR.

Supplementary statement of 'J' recorded by police on 18.08.2009

The Accused was arrested in her presence, his personal search was conducted but nothing was recovered and his arrest memo was prepared which was signed by her.

It is strange that 'J' – a nine year old girl was cited as a witness to arrest memo and personal search memo.

Statement of PW-1 'J' recorded by learned MM on 18.09.2009

(i) Accused came to her to ask for a utensil which she handed over at the instance of her father.

(ii) Accused pressed her mouth and took her away.

(iii) Accused took her towards Shastri Park in a dark room where he laid down on her, opened the chain of his pant, removed his shirt and did '*galat kaam'*.

(iv) Accused had penetrated his 'susu karne wala'.

(v) She tried to raise alarm but he shut her mouth.

(vi) Then after wearing the clothes, he took her to a field (khet) where again he did the same act after making her lie down on the grass.

(vii) Accused took her to her house and left her outside her room where he was apprehended by her '*Ammi'* (mother) and brother.

(viii) Accused was beaten and taken to the police station and handed over to the police.

Statement of PW-1A 'J' recorded by learned ASJ on 16.01.2010

(i) 'J' was going to bring sweetmeats when accused met her near the stairs of her house and told her that her father was calling her.

(ii) He took her to Shastri Park at his *jhuggi* where he removed his clothes and her clothes, made her lie down and sat on her and put his private part into her private part. *(Apne pesab karne wale ko mere pesab karne wali jagah me lagaya aur mujhe dard hua*).

(iii) When she cried, he gagged her mouth with a cloth, hit her on her face with *danda* and fist and also hit on her stomach with *danda*.

(iv) She started crying and when somebody asked as to why he was beating her, he replied that she was his niece.

(v) Thereafter he took her to Shastri Park and did the same act with her.

(vi) He again took her to a room and asked her to sleep there, instructed her not to go out as police was outside and again he did the same act with her.

(vii) At the time of doing the same act, he also said that her mother and father also do the same act which he was doing with her, on which she also said that his mother and father might be doing the same.

(viii) She asked him to leave her to her house.

(ix) He accompanied her, offered her water, *dal khichri*, and one ice-cream which she threw.

(x) On way back, he threatened to break the leg of her father if she disclosed the incident to anyone.

(xi) She was left near her house near a biryani shop and was abused by him.

(xii) He was caught by her brothers and other persons near the biryani shop.

(xiii) She narrated the incident to her brothers Ashif, Monu and Sonu and thereafter to her mother.

(xiv) She informed the police that the accused had done *badtamizi* with her.

(xv) She was taken to the hospital but she did not tell about rape to the doctor.

(xvi) She had pain in the stomach for which she was taken to a nearby doctor who gave her some medicine and thereafter her underwear was not getting dirty, earlier it was getting dirty.

Cross examination of PW-1A 'J'

(i) She narrated the entire incident to the police as well as to the Magistrate.

(ii) Accused did *galat kaam* with her on two occasions, once in a room and then on the grass in a park.

(iii) No blood came out after the wrong act.

Statement of Amina – mother of the child victim, recorded under Section 161 CrPC on 08.08.2009

(i) She was residing at the given address alongwith her family and 'J' her daughter, aged about nine years, was a student of class-IV.

(ii) On 07.08.2009 at about 8.00 am, one boy came to her house and asked for a utensil which was given by 'J' on instructions of her father.

(iii) After the utensil was given, he also took 'J' alongwith him on the pretext of giving toffee to her.

(iv) After sometime, she heard the cries of her daughter who was calling Mummy-Mummy and when she came out, she saw her daughter in the grip of the accused, whose name was revealed as Mumtaz.

(v) While 'J' was crying, she was slapped by him.

(vi) Public persons gathered there and police also reached afterwards.

(vii) Police made inquiries from her daughter and recorded her statement.

(viii) Her daughter was taken by the police to hospital and she accompanied her.

(ix) After registration of FIR, site plan was prepared at her instance, Mumtaz was arrested and memos were prepared.

Statement of PW-2 Amina – mother of the child victim recorded before the Court on 16.01.2010

(i) In the year 2009, at about 6.00/7.00 pm when she was present in her house alongwith her children, accused came to her house and asked for a utensil for which she refused but her husband asked her (PW-2 Amina) to give it to him.

(ii) She gave the utensil and asked 'J' to hand over the same to the accused on the ground floor as they were living on the first floor.

(iii) Thereafter 'J' went missing and they started searching her.

(iv) Accused brought 'J' near the biryani shop where he was apprehended by public persons as by that time everybody in the locality knew that 'J' was missing.

(v) She asked 'J' whether accused had done any *badtamizi* to which she said 'yes'.

(vi) 'J' was in bad shape and was not able to walk properly and informed that she was unable to urinate and defecate.

(vii) She tried to take her for urination but she could not urinate.

(viii) Accused was taken by them to the police station alongwith the child.

(ix) The SHO sent them to the IO and she was asked to check the private part of the child.

(x) She checked and found that there was swelling and thereafter the child was taken to GTB hospital where she was examined by the doctor.

(xi) In reply to Court questions put to her as to whether she disclosed the incident to the doctor, she denied saying that on account of shame, it was not disclosed.

Cross examination of PW-2 Amina – mother of the child victim

(i) She only asked 'J' whether he had done any *badtamizi* and 'J' did not say anything of her own.

(ii) The son of her landlord informed the police that 'J' was missing.

(iii) Police did not come to help to search the child.

(iv) Doctor tried to inquire from them repeatedly but they did not state the entire incident on account of shame.

(v) The police official knew that the child had been sexually assaulted as he had made inquiries in the police station in presence of SHO where the child had disclosed those facts.

(vi) Dr.Furkan (local doctor) had given some medicines.

(vii) She did not inform the police that she (PW-2) also sustained injuries when the accused was beaten by public persons.

14. As per statement of PW-3 Ct.Mobin Ali and PW-4 ASI Yamuna Prasad, during patrolling on 07.08.2009 when they reached near K-Block, Khatta, they saw a crowd gathered there. The child 'J' alongwith her mother met them and Mumtaz was produced before them stating that he had kidnapped her daughter. 'J' was got medically examined at GTB Hospital and after recording the statement of 'J', FIR was got registered. Accused Mumtaz was also arrested and got examined at Shashtri Park Hospital.

15. MLC of the child victim reveals that 'J' was medically examined on 08.08.2009 at 12.40 am and the history recorded on the MLC is as under :

'Alleged h/o assault at about 8.00 pm on 07.08.09
No h/o LOC, ENT, bleed, convulsion, vomiting
L/e swelling over upper lip
c/o pain over upper lip
O/E. pt. conscious, oriented
Pulse – 100/min
Chest]
CB] NAD
CNS]
P/A]
MI – Mole over Rt. Eyebrow
Adv. Syrup Ibugesic
5ml BD X 3 days'

16. Ex.PW2/9 is a small undated prescription slip by Dr. Furkan (local doctor), wherein Tab. Cifran and some antacid syrup has been prescribed which cannot be connected with this incident.

17. MLC Ex.PW6/A of the accused shows the date and time of examination at Shastri Park Hospital as 08.08.2009 at 07.07 am. The history recorded in the MLC as under:

'Brought by ASI Yamuna Prasad 5128D, PS Seelampur for medical examination.

O/EConscious
Oriented
Pulse 95/min
BP 116/74
Systemic examination – NAD

<u>Injuries:</u>

1. *Abrasion lower lip*
2. *Abrasion left lumbar area*

3. Abrasion over left scapular area'

18. Although it is prosecution's case that PW-3 Ct. Mobin Ali and PW-4 Yamuna Prasad stopped at K-Block Khatta on seeing the crowd, no public witness is associated with the investigation of this case. It is worth mentioning that at every stage different versions have been given by PW-1A 'J', the child victim and PW-2 Amina, mother of the child victim, as noted above in para 13 of this judgment.

19. In *Ratansinh Dalsukhbhai Nayak vs. State of Gujarat, 2004 Cri.L.J. 19*, the Apex Court while discussing its earlier decision in *Dattu Ramrao Sakhare v. State of Maharashtra*, observed as follows :

> *'In Dattu Ramrao Sakhare v. State of Maharashtra (1997)5SCC341 it was held as follows:*
>
> *A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored".*

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and Intelligence as well as his understanding of the obligation of an oath.

The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it; is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shake and moulded, but it is also an accepted norm that, if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.'

20. Who can be termed as a 'Sterling Witness' has been dealt with in the case of *Rai Sandeep @ Deepu vs. State of NCT of Delhi 2012 (131) DRJ 3 (SC)* wherein the quality of the testimony of the prosecutrix, which can be made as a basis to convict the Appellant, was considered in detail and it was so held :

'15. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with

each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.'

21. On comparative analysis of the oral testimony of PW-1A 'J' and PW-2 Amina, it is seen that they have narrated entirely different versions from that which was narrated immediately after the occurrence to PW-3 Ct.Mobin Ali and PW-4 ASI Yamuna Prasad who, while on patrolling, happened to reach the spot. The act of the Appellant did not exceed the stage of lifting the child in his lap and holding her in his grip till she raised alarm due to which he slapped her which drew the attention of PW-2 Amina, after which he being apprehended there and then and handed over to PW-3 Ct.Mobin Ali and PW-4 ASI Yamuna Prasad at the spot, rules out the possibility of taking away the child from the lawful custody of her parents to three different places and commit rape on her repeatedly and again bring her back to her house.

22. The so called explanation given by PW-2 Amina i.e. due to shame rape was not reported, has to be disbelieved for the reason that the Appellant was a young man of 25 years on that date whereas the child 'J' was just nine years old, had she been raped two-three times by the Appellant at different locations within such a short span of time, her private part would have shown marks of violence, tear as well as severe bleeding. Her condition would have been such at the time of reporting the matter to the police as well as during her examination at GTB hospital that even without uttering a word tell tale signs on her body would have revealed the offence of being raped thus requiring urgent medical aid including surgery to repair the tear. But she did not even have any bleeding what to talk of any other injury on her private part or other part of the body. This belies the entire deposition of PW-1A 'J' and PW-2 Amina in the Court which is unacceptable so far as accusation of rape is concerned. The MLC of the victim also rules out any possibility of rape being committed on her. The deposition of PW-1A 'J' and PW-2 Amina before the Court is not of sterling quality. In the given facts, learned Addl. Sessions Judge erred in placing reliance on *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* and *Ranjit Hazarika v. State of Assam* (Supra) to convict the Appellant for committing the rape.

23. From the above, it can be noticed that initially the case projected in FIR was that when 'J' handed over the utensil to the Appellant, he lifted her and pressed her in his grip and slapped her when she cried Mummy-Mummy. Later on, while deposing before learned Magistrate,

PW-1A 'J' stated that she was raped twice but at the time of her examination before learned ASJ, she claimed to have been raped thrice by the Appellant within that short duration. PW-2 Amina, mother of the child victim though, has stated in her statement recorded under Section 161 CrPC, that she heard the cries of her daughter immediately and the Appellant was apprehended there and then but while deposing before the Court, perhaps to make the allegations of rape believable, she talked of searching around after her daughter got missing and the police was informed by son of her landlord about her missing daughter, there is no material to support this version.

24. In the case *Alagarsmy & Ors. v. State by Deputy Superintendent of Police AIR 2010 SC 849***,** the Supreme Court has highlighted the importance of FIR observing as under:

> *'The importance of FIR cannot be underestimated, as it is first version, on the basis of which the investigation proceeds. This Court, has from time to time, emphasized the importance of the FIR and as such, there can be no question about the necessity to examine the credibility of the FIR.'*

25. Undisputedly, father of PW-1 who is husband of PW-2 was present in the house at that time but he has not been associated with the investigation for reasons not known. It does not Appeal to common sense that a stranger will ask for some utensil from the ground floor and the family i.e. the mother and father sitting inside would send 'J' downstairs to give the utensil.

26. On critical examination of the aforesaid evidence, I do not find it to be a case of rape as tried to be projected during examination of PW-1 'J' and her mother PW-2 Amina for more than one reason.

27. Statements of the child victim and her mother in the instant case require proper and deep scrutiny. Surprisingly, the father of the child victim, who was very much present at home when the Appellant came to their house asking for utensil to keep vegetables, has been kept behind the curtain for unknown reasons. Where evidence of victim in rape case does not inspire confidence when scrutinised viz-a-viz her conduct, conviction for rape cannot be sustained.

28. In the case of *Narender Kumar v. State (NCT of Delhi) AIR 2012 SC 2281***,** it was observed as under:

> *'23. The Courts, while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or significant discrepancies in the evidence of witnesses which are not of a substantial character.*
> *However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However, great the suspicion against the accused and however strong the moral belief and conviction of the Court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted*

for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.(vide Tukaram and Anr. v. The State of Maharashtra MANU/SC/0190/1978 : AIR 1979 SC 185; and Uday v. State of Karnataka MANU/SC/0162/2003 : AIR 2003 SC 1639)'

29. It is trite that a victim of sexual assault is not an accomplice of the crime but a victim of another person's lust therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. The law that emerges on the issue is that if the evidence of victim is natural, convincing and found to be worthy of credence, conviction can be based without looking for corroboration.

30. It appears that only at the stage of 313 CrPC, the Appellant had occasion to open his lips and at that time, he has given the reason for his implication in this case that he had done labour work at the house of PW-2 Amina on fourth floor and balance payment of Rs.2000/- was due which when he had demanded he was given beating and falsely implicated in this case. No doubt, no such suggestion was given to any of the prosecution witnesses but it has already been recorded that legal aid counsel failed to effectively cross examine the witnesses.

31. Unfortunately, learned Addl. Sessions Judge, who is an experienced Judge, was swayed by the heinousness of the crime i.e. rape of a child, which was never committed by the Appellant or complained of by the victim or her family to the police or to the Doctor though the

child was taken to GTB Hospital, which is a well equipped hospital, immediately for medical examination. The question that arises for determination in this Appeal is whether improvements made by a witness during examination before the Court which has the effect of changing the entire case of the prosecution, can be made basis of conviction for an offence which was never complained of or revealed to have been committed through medical examination or investigation so much so that till filing of the chargesheet, even the SHO/IO was never informed that child was raped.

32. On careful examination of entire evidence, I am of the view that learned Addl. Sessions Judge committed grave illegality in convicting the Appellant for committing the offences punishable under Sections 363/376(2)(f) IPC without any legal evidence worthy of credit available on record.

33. From the statement of PW-1A 'J',the child victim and PW-2 Amina, her mother, the prosecution has been able to prove its case only to the extent that the accused lifted the child in his lap when she was handing over the utensil to him and pressed her and when she cried, he slapped her. Thus, the offence that can be said to have been proved against the Appellant is of only under Section 354/323 IPC.

34. The Appellant Mumtaz appears to be a migrant labour from Bihar who came to Delhi to earn his livelihood. Learned Addl. Sessions Judge failed to take note of the fact that he was known to the family of the

victim which can be inferred from the fact that as per complaint Ex.PW1/A lodged by the child victim 'J', he came to her house to take some utensil to keep vegetables and she gave the utensil to him as per directions of her father. Though the Appellant was residing in the same area, IO preferred to mention him as a vagabond without giving any place as to where he was spending his night i.e. footpath, rickshaw garage, night shelter or any other place. IO preferred to record his address as to that of his native place in Bihar and sent intimation of arrest by post to Bihar. Trial Court Record shows that even that envelope was received back undelivered. So from day one, the Appellant had no parokar or even legal aid to represent or defend him. The Appellant was arrested for committing the offence punishable under Sections 323/354 IPC and both the offences are bailable. He was produced before learned MM praying for judicial custody remand and learned MM remanded him to judicial custody for 14 days without passing any bail order in the case.

35. On the next date, on the expiry of judicial remand, he was again produced for extension of judicial remand and learned Link MM passed the bail order and in default, remanded him to judicial custody for another 14 days. Throughout trial and even during pendency of Appeal, he remained in custody as it appears that except the legal aid provided to him during trial there was none for him to bank upon.

36. A perusal of Trial Court Record shows that despite being booked for bailable offence, the Appellant throughout remained in custody for obvious reason i.e. poverty and failure of state machinery to take

effective steps to inform his family about his arrest in this case. This resulted into a situation that till he was under trial for a bailable offence, he had no surety and thereafter he was committed to the Court of Sessions for the offence of rape.

37. The prosecution has examined seven witnesses in this case and except namesake cross examination of PW-1A 'J' and PW-2 Amina i.e. the child victim and her mother, cross examination of remaining witnesses have been recorded as 'NIL'. A right to cross examination a witness apart from being a natural right is a statutory right under Sections 137 and 138 of Indian Evidence Act. The legal aid counsel provided to the Appellant during trial was rather proforma which can be gathered from the fact that there is no effective cross examination even of the material witnesses.

38. Right to cross examine in criminal trial includes right to confront the witnesses against him not only on fact but by showing that the examination-in-chief was untrue. The requirement of providing counsel to an accused at State expenses is not mere formality rather it refers to an experienced counsel who can defend the accused in the manner permissible under the law with his professional expertise.

39. In *Hussainara Khatoon & Ors. v. Home Secry. State of Bihar (1980) 1 SCC 98***,** the Supreme Court has considered the plight of under trial prisoners languishing in Jail even in bailable offences merely for the reason that they are so poor that neither they can engage a good counsel

nor the sureties as has happened to the Appellant before us. Explaining the need of country wide programme to provide effective professional help to the poor and needy undertrials, the Supreme Court expressed its concern to have a system that can protect their right guaranteed under Article 21 of the Constitution, it was observed:

> *'6. Then there are several under-trial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that under-trial prisoners who are produced before the Magistrates are un-aware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that be-half Sometimes the Magistrates also refuse to release the under-trial prisoners produced before them on their personal bond but insist on monetary bail with Aureties, which by reason of their poverty the under-trial prisoners are unable to furnish and which, therefore, effectively- shuts out for them any possibility of Mease from pretrial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have revoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nationwide legal service programme to provide free legal services to them. It is now well settled, AS a result of the decision of this Court in Maneka Gandhi v. Union of India, MANU/SC/0133/1978 : [1978]2SCR621 that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair sad 'Just',*

Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the courts process that he should have legal services available to him. This Court point-ed out in M.H. Hoskot v. State of Maharashtra, 1978CriLJ1678 : "Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional experties, and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side, Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer--power for steering the wheels of equal justice under the law". Free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure. It is not necessary to quote authoritative pronouncements by judges and jurists in support of the view that without the service of a lawyer an accused person would be denied 'reasonable, fair and just' procedure. Black, J., observed in Gideon v. Wainwright, (1963) 372 US 335: 9 L Ed 799:

Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any perm held into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for Mm. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed who fail to hire the beat lawyers they can get to prepare and present, their defences. That Government hires lawyers to procedure and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed

fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him.'

40. The Appellant suffered not only on account of not being able to get services of an experienced counsel though he was tried for an offence for which minimum punishment prescribed is 10 years with fine but also for the reason that the Trial Court was not diligent enough to ensure that witnesses are effectively cross examined and that while deciding the case, the object is to discern the truth by relying only on sterling witnesses.

41. It is painful to note that while laying down guidelines for police and hospitals and sending the copies of the impugned judgment to Commissioner of Police and GTB Hospital. Learned ASJ has failed in discharge of his duties as the Trial Court has to discern the truth after considering or evaluating the testimony of material prosecution witnesses on the touchstone of basic human conduct, improbabilities and effect of deposition before the Court which was in total variance to the initial case of the prosecution i.e. case registered for committing the offence punishable under Sections 354/323 IPC, which was given the colour of committing the offence punishable under Sections 363/376(2)(f) IPC at the time of deposition before the Court. Learned

Addl. Sessions Judge based conviction of the Appellant relying on the judgments *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR 1983 SC 753* and *Ranjit Hazarika v. State of Assam (1998) 8 SCC 635* that solitary statement of the victim is sufficient to base the conviction but failed to evaluate the same on the test of the well laid principles in this regard as laid down in a catena of judgments (*Rupeshwar Tanti vs. State of Gujarat 2012, Cri.L.J. 2549, Narender Kumar v. State (NCT of Delhi) AIR 2012 SC 2281, Rai Sandeep @ Deepu v. State of NCT 2012 (8) SCC 21)* and consider the effect of improvements and embellishments.

42. Learned Addl. Sessions Judge, while conducting the trial, failed to protect the statutory right to have a fair trial guaranteed under Article 21 of the Constitution. With cross examination of six out of eight witnesses have been recorded as 'NIL', other two material witnesses i.e. PW-1A 'J',the child victim and PW-2 Amina, mother of the child victim not being effectively cross examined by the legal aid counsel, should have put the learned Addl. Session Judge on alert to take corrective measures even by appointing another experienced counsel to defend the Appellant to achieve the desired purpose of providing legal aid to poor persons. More so, it became essential as the Appellant was being tried for an offence punishable under Section 376(2)(f) IPC wherein minimum sentence prescribed is ten years.

43. The impugned judgment is just reproduction of the testimony of witnesses citing judgments that uncorroborated testimony of victim can form basis of conviction but without addressing to the second test i.e. of

sterling quality as well the effect of improvements and embellishments which changed the entire nature of the case.

44. While laying down guidelines for police and doctors, some introspection was required by learned Addl. Sessions Judge about his duties as Trial Court Judge. However, by writing perfunctory judgment, the Appellant/accused had been convicted for committing the offence of rape on a girl under 12 years of age. What should be the approach of Trial Court in a criminal trial was enumerated in *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble (2003) 7 SCC 749* and *Zahira Habibullah Sheikh v. State of Gujarat AIR 2006 SC 1367*.

45. In *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble* (Supra), the Supreme Court observed that :

> *'The courts exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice in a case where the role of the prosecuting-agency itself is put in issue.'*

46. In *Zahira Habibullah Sheikh v. State of Gujarat* (Supra), it was observed :

'This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.'

47. Before coming to the aspect as to whether for the offence under Sections 354/323 IPC the Appellant is liable to be convicted, it is necessary to record certain other facts to highlight the manner in which the concerned police official treated the Appellant after his apprehension in this case. In the entire chargesheet, local address of the Appellant has not been mentioned either by the complainant or by the police. The mere

fact that father of 'J' asked her to give the utensil to the Appellant shows that he was known to the family of the child victim and he must be resident of that area. Despite the crowd being gathered at the time of apprehension of the Appellant/accused and he being handed over to the police at about 10.30 pm, there is no mention of the Appellant being given beating by the public which could result into the injuries recorded in his MLC Ex.PW6/A i.e. *abrasion lower lip, abrasion left lumbar area and abrasion over left scapular area*. He (the Appellant) has been got examined at another hospital in Shastri Park at 07.07 am, though the prosecutrix was got examined in the midnight and her condition was absolutely normal except minor injury on her lip. Therefore nothing prevented the police officer to get the Appellant examined at the same time in the same hospital and the injuries on the person of the Appellant remain unexplained.

48. The learned ASJ got carried away by the heinous nature of the crime and in that, lost sight of the basic principles underlying criminal jurisprudence that only legally admissible evidence can be made basis of conviction. In the absence of any credible evidence to prove rape of the child victim by the Appellant, learned Addl. Sessions Judge should not have allowed himself to be swayed by the nature of offence which for the first time was disclosed by PW-1 'J' at the time of deposing as a witness to prove the allegations for the offence punishable under Sections 323/354 IPC. If conviction is based and punishment is awarded on farfetched conjectures and surmises, it would amount to doing violence to the basic principles of criminal jurisprudence. No doubt, an accused

was involved in a heinous crime especially rape on a child of tender age, but he must be dealt with firmly and punished but only on the basis of creditworthy evidence.

49. The conviction of the Appellant for the offence punishable under Sections 363 and 376(2)(f) IPC and sentence awarded to him under Sections 363, 376(2) and 506 IPC are hereby set aside. The Appellant is convicted for the offence punishable under Sections 354/323 IPC. He is sentenced to undergo rigorous imprisonment for two years for the offence punishable under Section 354 IPC and further to undergo rigorous imprisonment for three months for the offence punishable under Section 323 IPC. Both the sentenced shall run concurrently. The period of detention has been already undergone by the convict in judicial custody in this case which shall be set off under Sec. 428 CrPC.

50. As per nominal roll of the Appellant, as on 21.02.20012, he has already undergone two years, six months and twelve days in judicial custody in this case.

51. Appeal stands disposed of in above terms. The Appellant be set at liberty forthwith if not wanted in any other case.

52. Copy of this judgment be sent to the concerned Jail Superintendent immediately for necessary compliance.

53. Copy of this judgment be transmitted to all the District & Session Judges as also to the Director, Delhi Judicial Academy to sensitize the Judicial Officers on the various aspects deliberated in the judgment.

54. LCR be returned alongwith copy of the judgment.

G.P. MITTAL
(JUDGE)

MAY 22, 2013
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