State vs . Mehraj on 17 January, 2023

IN THE COURT OF METROPOLITAN MAGISTRATE-02,
NORTH EAST DISTRICT, KARKARDOOMA COURTS,
DELHI
PRESIDED BY: SH. VIPUL SANDWAR

JUDGMENT

State Vs. Mehraj FIR NO. : 234/2010, U/s 325/377 IPC PS : NEW USMANPUR A. CIS No. of the Case : 52/2019 B. FIR No. : 234/2010 C. Date of Institution : 20.10.2010 D. Date of Commission of Offence : 24.07.2010 E. Name of the complainant : Naushad S/o Rafiq, R/o H. No.728, Gali No.12, C-Block, Shree Ram Colony, Kachi Khajuri, Delhi.

F. Name of the Accused, his : Mehraj S/o Shakir, R/o H. Parentage & Addresses No. 237, Gali No.12, D-

Block, Shree Ram Colony, Kachi Khajuri, Delhi.

G. Offence complained of : U/s 325/377 IPC H. Plea of the Accused : Pleaded not guilty and claimed trial.

I. Order reserved on	: 06.12.2022
J. Date of Order	: 17.01.2023
K. Final Order	: ACQUITTED

Brief Statement of Reasons for Decision of the Case

1. The present FIR is based on the complaint of complainant FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.1 of 26 Naushad wherein he has mentioned that his son Shahnawaz had gone to collect sticks on 23.07.2010 at around 02:50 pm behind Nanaksar Gurudwara, Khadar and has not returned. On the next day i.e. 24.07.2010 when the complainant went in search of his son behind Nanaksar Gurudwara he found his son in the bushes. He enquired from his son and was informed that accused Mehraj S/o Shakir, R/o 237, D-Block, Gali No.12, Shree Ram Colony, Kachi Khajuri, Delhi has beaten him and done "galat kaam" with him due to which he became unconscious. Thereafter, he brought the son to his house who was later taken to the hospital by the PCR van.

2. FIR was registered and has been investigated by the officials of Police Station New Usmanpur and IO/ASI Satyapal filed the charge sheet against the accused persons upon which cognizance was taken by the Court on 20.10.2010.

3. Accused appeared before the Court and copy of chargesheet along with other documents under Section 207 Cr.P.C. was supplied to him.

4. Vide order dated 08.02.2011 in view of notification No.61(6)/(state commission)/ADI/DWCD/2007/10197/223 dated 04.08.2010, the case was transferred to Children Court. Charge was framed vide order dated 03.03.2011 for the offence punishable Under Section 325/377 IPC against accused by Ld. ASJ-01, North-East, Karkardooma Courts, to which the accused pleaded not guilty and claimed trial. Vide order dated 18.05.2011, passed by Ld. District Judge and Additional Sessions Judge (IC) the matter was directed to be remanded back to the Transferee FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.2 of 26 Court in view of notification of Registrar General, Hon'ble High Court of Delhi dated 15.03.2011. Vide order dated 19.05.2011 of Ld. ASJ-01, the file was remanded back to this Court.

5. Thereafter, matter was listed for Prosecution Evidence. The Prosecution has examined 11 witnesses in support of its case. In nutshell, the testimony of the prosecution witnesses is as follows :-

(i) PW1 ASI Sushila was the Duty Officer and on receiving rukka Ex. PW1/A recorded by ASI Satyapal through Ct. Subodh registered the present FIR. Thereafter, she sent the rukka and copy of FIR to ASI Satyapal through Ct. Subodh. She also recorded DD No.16A for registration of FIR. The said witness was cross-examined by Ld. counsel for accused.

(ii) PW2 Shahnawaz is the victim and the prime witness of the prosecution. He has deposed that on 23.07.2010 at about 02:00 pm he had gone to pick wooden sticks from a place near Nanaksar Gurudwara. He has also stated that he used to call the accused Mehraj (mama) who was known to him from before. He has stated that accused Mehraj met him near Nanaksar Gurudwara and asked him to accompany stating that many wooden sticks are lying at a distance ahead. The accused took him to a lonely spot behind the bushes some 47 steps from the meeting point. The accused directed to put of the half pant of the witness. On his refusal the accused started beating the witness and forcibly put of his wearing half pants. Thereafter, accused also put of his pant and the witness was laid down on the ground by the accused. It is the statement of witness that the accused committed unnatural offence ("accused ne apni phunno meri tatti FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.3 of 26 wali jagah mein ghused di"). The witness felt severe pain in his back side, private part. The accused tried to gag the mouth and pressed his neck when the witness tried to raise an alarm. The witness has deposed that as a consequence of unnatural offence he became unconscious. Later he was lifted by his father on the next day and was taken to the hospital. The witness correctly identified the accused in the Court. The witness was cross examined at length by Ld. counsel for accused.

(iii) PW3 Naushad is the father of victim PW2 Shahnawaz has stated that he found his son lying and slightly moving in the bushes in an unconscious condition when he

lifted him. He has also deposed that a rope made of coconut fiber was tied on the neck of his son at that time. When his son gain consciousness he was informed by his son that brother-in-law (sala) of Tasleem kabadi has beaten him. He was also informed by his son that accused Mehraj has done wrong act (gandi baat) with him. He was also informed by his son that he was beaten by a wooden stick (kantedar lakadi) by the accused who also tried to strangulate him. He accompanied the police to the shop of Tasleem and identified accused Mehraj who was arrested. On the third day from the incident he called the photographer and got photographs of his son clicked. Photographs are Mark X1 to X9.

The said witness was cross examined at length by Ld. counsel for accused.

(iv) PW4 Ct. Subodh was on emergency duty and after receiving DD No.13A, he alongwith ASI Satpal went to GTB hospital. He took the rukka prepared by the IO and went to the PS for registration of FIR. After registration of FIR, he came back to the GTB hospital and handed over the copy of FIR and FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.4 of 26 original rukka. The witness was cross-examined by the Ld. counsel for accused.

(v) Ct. Shyam received five pullandas sealed with the seal of GTB hospital which were deposited in maalkhana and took them to FSL Rohini through RC No.98/21/10. He deposited the pullandas in FSL Rohini. The witness was cross-examined by the Ld. counsel for accused.

(vi) PW6 ASI Satyapal was the IO and after receiving DD No.13A he alongwith Ct. Subodh went to GTB hospital and obtained the MLC of the victim Shahnawaz. He also recorded the statement of PW3 Naushad in the hospital itself. He prepared the tehrir and sent it through Ct. Subodh for registration of FIR. He also recorded the statement of victim Shahnawaz after he was declared fit by the doctors for statement. He took the pullandas with the seal of GTB hospital into his possession. He was taken to the place of incident by PW3 Naushad and he prepared the site plan. He arrested accused Mehraj at the instance of Naushad. He completed the investigation and file the chargesheet.The witness was cross-examined by the Ld. counsel for accused.

(vii) PW7 Dr. Parmeshwar Ram, CMO, Accident and Emergency, GTB hospital identified the signatures and handwriting of Dr. G. S. Harish who had conducted the MLC of accused Mehraj. The said witness was cross examined by the Ld. counsel for accused.

(viii) PW8 Dr. Banarsi, CMO, LPS hospital identified the signatures of Dr. Ranjan who had examined the patient PW2 Shahnawaz. The said witness was cross examined by the Ld. counsel for accused.

(ix) PW9 Dr. Jolly, Department of Opthalnology, GTB FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.5 of 26 hospital identified the signatures of Dr. Kshitij Kumar on the MLC of Shahnawaz. The witness could not identified the signatures of other doctor on the MLC of Shahnawaz. The said witness was cross examined by the Ld. counsel for accused.

(x) PW10 Dr. Mithlesh Kumar Mishra, Senior Resident, GTB hospital gave the final opinion on patient Shahnawaz regarding injuries on the basis of surgical reports. The said witness was cross examined by the Ld. counsel for accused.

(xi) PW11 Dr. Tomar Laxmi Kant Ram Kumar Singh, Department of Medicine prepared the MLC of Shahnawaz and referred him to neurosurgery emergency, surgery emergency orthopedic emergency, ENT, eye emergency. The said witness was cross examined by the Ld. counsel for accused.

6. PE was closed on 07.12.2013 and on 16.04.2014, statement of accused under Section 313 Cr. PC readwith section 281 Cr. PC was recorded and thereafter, matter was fixed for DE. The accused examined only one witness in his defence. Dr. Ravi Bishnoi, Nursing Officer, GTB hospital was examined as DW1 and stated that the relevant records have been weeded out. The said witness was cross examined by Ld. APP for the State. Thereafter, DE was closed on 10.08.2017 and the matter was fixed for final arguments.

7. Final arguments heard. Case record perused meticulously.

8. This Court has thoughtfully considered the material on record and arguments advanced with due circumspection.

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9. In the present case, the prosecution has argued that the accused has committed offence punishable under S. 377 IPC. It is defined as follows:

> "377. Unnatural offences. -Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> Explanation.-Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

10. In A vs State, (2022) 286 DLT 634, Hon´ble Delhi Court has observed that:

> "It is important to note that while the unamended section 375 referred to 'sexual intercourse with a woman', section 377 refers to 'carnal intercourse against the order of nature' inter-alia with a woman. The use of two different phrases, namely 'sexual intercourse' in section 375 and 'carnal intercourse' in section 377 is not without reason. The question therefore is, what does the phrase 'carnal intercourse against the order of nature' appearing in section 377 IPC mean?

11. The genesis of this section is found in clauses 361 and 362 of the Indian Penal Code as originally drafted in 1837, which criminalized 'unnatural offences'. It may not be out of place to briefly set-out

the notes of Lord T.B. Macaulay, when he first addressed the issue of unnatural offences in clauses 361 and 362. These clauses and the notes appended thereto were as under:

> "It is important to note that while the unamended section 375 referred to 'sexual intercourse with a woman', section 377 refers to 'carnal intercourse against the order of nature' inter-alia with a woman. The use of two different phrases, namely 'sexual intercourse' in section 375 and 'carnal FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.7 of 26 intercourse' in section 377 is not without reason".

36. The question therefore is, what does the phrase 'carnal intercourse against the order of nature' appearing in section 377 IPC mean?

37. The genesis of this section is found in clauses 361 and 362 of the Indian Penal Code as originally drafted in 1837, which criminalized 'unnatural offences'. It may not be out of place to briefly set-out the notes of Lord T.B. Macaulay, when he first addressed the issue of unnatural offences in clauses 361 and 362. These clauses and the notes appended thereto were as under:

> 361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.
>
> 362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."

Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. We leave without comment to the judgment of His Lordship in Council the two Clauses which we have provided for these offences. We are unwilling to insert, either in the text, or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision." (Emphasis supplied)

38. Our research on the jurisprudence of section 377 as it has evolved since, does not reveal any FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.8 of 26 attempt to give any comprehensive definition in any judicial decision, as to what is, or what is not, or why an act amounts to - 'carnal intercourse against the order of nature'.

39. As we see from the above note penned by Lord Macaulay, from the very beginning, there is reluctance to legislatively or judicially define with any exactitude, the phrase - 'carnal intercourse against the order of nature'.

40. The legal lexicons and legal literature define the words 'intercourse', 'sexual' and 'carnal' and those words when used in juxtaposition, in the following way:

> i) P. Ramanatha Aiyar's 'Major Law Lexicon' 4th Edition (2010) defines "intercourse", in its widest connotation, as 'social communication between individuals'. Black's Law Dictionary 11th Edition defines "intercourse" as "physical sexual contact, especially involving the penetration of the vagina by the penis";
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> ii) In the heterosexual context, the judicial connotation given to "sexual intercourse" is penile-vaginal penetration. This connotation is found in Sakshi (supra);
>
> iii) The word "carnal" is understood in P. Ramanatha Aiyar's 'Major Law Lexicon' 4th Edition (2010) to mean anything pertaining to the flesh or to the sensual.

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> iii) The word "carnal" is understood in P. Ramanatha Aiyar's 'Major Law Lexicon' 4th Edition (2010) to mean anything pertaining to the flesh or to the sensual.

41. While interpreting the definition of 'rape' in section 375 IPC, the phrase "sexual intercourse"

has been discussed by the Hon´ble Supreme Court in Sakshi (supra) to say:

> "18. The main question which requires consideration is whether by a process of judicial interpretation the provisions of Section 375 IPC can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/ vaginal penetration within its ambit. Section 375 uses the expression "sexual intercourse" but the said expression has not been defined.
>
> The dictionary meaning of the words "sexual intercourse" is heterosexual intercourse involving penetration of the vagina by the penis. The Penal Code, 1860 was drafted by the First Indian Law Commission of which Lord Macaulay was the President. It was presented to the Legislative Council in 1856 and was passed on 6-10-1860. The Penal

> Code has undergone very few changes in the last more than 140 years. Except for clause sixthly of Section 375 regarding the age of the woman (which in view of Section 10 denotes a female human being of any age) no major amendment has been made in the said provision. Sub-section (2) of Section 376 and Sections 376-A to 376-D were inserted by the Criminal Law (Amendment) Act, 1983 but sub-section (2) of Section 376 merely deals with special types of situations and provides for a minimum sentence of 10 years. It does not in any manner alter the definition of "rape" as given in Section 375 IPC. Similarly, Section 354 which deals with assault or criminal force to woman with an intent to outrage her modesty and Section 377 which deals with unnatural offences have not undergone any major amendment."

FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.10 of 26 "20. Sections 354, 375 and 377 IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one-and-a-half century. Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute sexual intercourse necessary for the offence of rape has been held to come within the purview of Section 375 IPC. The wide definition which the petitioner wants to be given to "rape" as defined in Section 375 IPC so that the same may become an offence punishable under Section 376 IPC has neither been considered nor accepted by any court in India so far. Prosecution of an accused for an offence under Section 376 IPC on a radically enlarged meaning of Section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." (Emphasis supplied)

42. However, as observed above, section 377 IPC refers not to sexual intercourse but to carnal intercourse, whereby it is clear that the intention of the Legislature was to engraft a different offence in section 377 IPC vis-à-vis section 375 IPC, which is why a different phrase was employed.

43. Though the restrictive meaning of the phrase 'sexual intercourse' will not deter the court from interpreting the phrase 'carnal intercourse' in its fullest ambit, we must be guided by the legal interpretation given by the Hon'ble Supreme Court to the phrase 'sexual intercourse' in Sakshi (supra), which is heterosexual intercourse involving penetration of the vagina by the penis. This interpretation turns inter-alia on the explanation appended to section 375, which points to the requirement of 'penetration', for an act to amount to sexual intercourse. A similar explanation appearing in section 377 makes FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.11 of 26 'penetration' a necessary ingredient of the offence of 'carnal intercourse' as well. The offence under section 377 would therefore arise when there is 'penetrative intercourse' which is 'against the order of nature'.

44. Therefore, in our opinion, 'carnal intercourse against the order of nature' appearing in section 377 must have the following ingredients:

i. it must have to do with flesh and sensuality, namely it must be carnal;

ii. there must be intercourse between individuals, without restricting it only to human-to-human intercourse;

iii. it must involve penetration other than penile- vaginal penetration, since by the very nature, intent and purpose of section 377, it must refer to an unnatural act, such as 'penile-anal penetration', 'digital penetration' or 'object penetration'.

45. Subject to the requirement of the above ingredients, we however completely agree that attempting to define the phrase 'carnal intercourse against the order of nature' with exactitude is neither possible, and perhaps not even desirable.

Accordingly, though we hesitate to give the phrase 'carnal intercourse against the order of nature' any exhaustive meaning, we hold, that as a matter of law, any physical act answering to all the above ingredients, committed upon a minor is per-se 'carnal intercourse against the order of nature'.

12. The prosecution has also charged the accused for offence punishable under S. 325 IPC. It reads as follows:

"325. Punishment for voluntarily causing grievous hurt.--Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. "Grievous hurt" has been defined in Section 320 IPC, which reads as follows:

"320. Grievous hurt.--The following kinds of hurt FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.12 of 26 only are designated as 'grievous': First.--Emasculation.

Secondly.--Permanent privation of the sight of either eye.

Thirdly.--Permanent privation of the hearing of either ear.

Fourthly.--Privation of any member or joint. Fifthly.--Destruction or permanent impairing of the powers of any member or joint.

Sixthly.--Permanent disfiguration of the head or face.

Seventhly.--Fracture or dislocation of a bone or tooth Eighthly.--Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

13. In Mathai v. State of Kerala, (2005) 3 SCC 260 : 2005 SCC (Cri) 695 : 2005 SCC OnLine SC 87 at page 263, Hon'ble Supreme Court has observed that:

> "Some hurts which are not like those hurts which are mentioned in the first seven clauses, are obviously distinguished from a slight hurt, may nevertheless be more serious. Thus a wound may cause intense pain, prolonged disease or lasting injury to the victim, although it does not fall within any of the first seven clauses. Before a conviction for the sentence of grievous hurt can be passed, one of the injuries defined in Section 320 must be strictly proved, and the eighth clause is no exception to the general rule of law that a penal statute must be construed strictly."

14. As discussed above the to prove the carnal intercourse against the order of nature, the primary witness of the prosecution is PW1 i.e. the victim himself. The age of PW1 when FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.13 of 26 the incident had occurred was 7 to 7.5 years and while deposing as PW1 he was 12 years of age.

15. In Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341) it was held by hon´ble Supreme Court that:

> "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 demeanor 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, shaked 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.

16. In Bhagwan Singh and Ors. V. State of MP (2003) 3 SCC 21, hon´ble Supreme Court has cautioned that:

FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.14 of 26 "It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him. See: Paras 14 15 of State of Assam vs. Mafizuddin Ahmed (1983) 2 SCC 14. In that case evidence of child witness is appreciated and held unreliable thus:

"14. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its judgment: -

.. the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any possibility of coaching and tutoring.

15. A bare perusal of the deposition of PW-7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his Nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his deposition, it is evident that he was not a free agent and has been tutored at all stages by someone or the other".

17. We have also taken note of the fact that even after the alleged involvement of the three accused by the child witness in his statement under Section 161 Cr.P.C to the police, no test identification parade was held. In such circumstances, in our opinion, mere dock identification of the accused by the child in the court cannot be accepted with certainty as a reliable identification [see Japal Singh vs. State of Punjab, 1996(4) Crimes 74 (SC)].

18. In Panchhi v. State of U.P., (1998) 7 SCC 177 at page 181 Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.15 of 26 witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

19. In Hamza v. Muhammedkutty, (2013) 11 SCC 150 it has been observed by hob´ble Supreme Court that:

"But the High Court has rightly relied on the observations of this Court in Suresh v. State of U.P. [(1981) 2 SCC 569 : 1981 SCC (Cri) 559] that children mix up what they see and what they like to imagine to have seen. Glanville Williams says in his book The Proof of Guilt, 3rd Edn., published by Stevens & Sons:

> "Children are suggestible and sometimes given to living in a world of make-believe. They are egocentric, and only slowly learn the duty of speaking the truth."

Hence, the proposition laid down by the courts that as a rule of practical wisdom, the evidence of child witness must find adequate corroboration. (Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] (emphasis supplied)"

20. In the present case the prosecution has set up a case that the accused has committed carnal intercourse against the victim on 23.07.2010. The primary witness of the prosecution is the victim himself who has deposed as PW2. PW2 in his examination in chief has stated that on 27.07.2010 at about 2p to 3pm he had gone to pick wooden sticks from a place, nearby FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.16 of 26 Nanaksar Gurudwara. He met accused Mehraj there who asked him to join his company saying that there are so many wooden sticks lying at a distance ahead. The accused took PW1 to some lonely place behind the bushes and directed him to put off his half pants. On refusal of PW1 accused started to give him beating and forcibly put off his wearing half pants. Thereafter accused put off his pants and laid PW1 on the ground. PW1 stated that accused committed unnatural offence (i.e. accused ne apni phunno meri tatti wali jagah main ghused di). He has also deposed that the accused gaged his mouth and pressed his neck when he tried to raise alarm. During his crossed examination PW1 has stated that he does not know the meaning of word "ling" or "shauch ke sathan". He has also clarified that the accused first gave him beating to his chin and face, then tied a rope at his neck.

21. PW3, father of victim has deposed that he saw his son lying and slightly moving in the bushes and grass in an unconscious condition. When he lifted him in his arms and took him to his house along with his wife. He has also deposed that at that time a rope made of coconut fibre was tied on the neck of my son. In his cross examination dated 20.08.2011 he has clarified that when he found PW1 the rope made of coconut fibre was still tied on his neck and was still wet with water and blood. He has stated that the victim told him that "Mehraj ne mere sath galat kam kiya hai".

22. With regard to the medical evidence placed on record the prosecution has examined PW7 who has identified signatures and FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.17 of 26 hand writing of Dr. G.S. Harish who had conducted the medical examination of accused Mehraj. During his cross examination the said witness has clarified that as per the record there was no injury in the penis of the accused. PW8 identified the signatures of Dr. Ranjan who had examined the victim. During his cross examination PW8 has stated that MLC Ex. PW9/A of the victim was prepared in his presence. He has also accepted that there is alteration in the MLC at point X, Y and Z. To explain he has stated that in sexual assault cases most of the times patient gives history on repeated asking and after providing complete privacy to him. He has also deposed that as per MLC there was no local examination of the anus of the victim. He has gone to the extend to deposed that there is no document on judicial record which shows the anus examination of the victim. PW8 has denied the suggestion that he persuaded Dr. Tomar Lakshmi Kant Ram Kumar (PW11). To make correction at point X, Y and Z by saying "correction karna padega". PW9 identified the signatures of Dr. Kshitij Kumar on the MLC of the victim. The said witness in his cross examination has stated that the time mentioned in the MLC is 9:10 am. On a question he has stated that the judicial file

does not contain any record on which Dr. Kshitij Kumar has stated nature of injury as "simple" on the MLC of the victim. PW10 gave the final opinion regarding the injury as grievous based on surgical records of the case. During his cross examination he has stated that the judicial file does not contain the surgical records on which his opinion is based. He has also stated that as per the MLC no anus examination of the victim was done. PW11 prepared the MLC of the victim in his own hand writing. In his cross examination he has stated that he did not FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.18 of 26 conduct any medical examination of the anus of the victim. He has confirmed that correction in the MLC was done by him at point X, Y and Z. He has also made correction and has changed female to male at point Z, and from assault to inflected sodomy by known person at point X. He has deposed that CMO Dr. Banarsi (PW8) after checking the MLC told him that "correction karna padega" after which he made the corrections. He has stated that he can not tell about any penetration.

23. As deposed above the testimony of PW2 that is the victim himself is the sole testimony that is being relied by the prosecution. PW2 is a child witness and as warned above his testimony has to be dealt with precaution. Testimony of his father is a hearsay as he is deposing what was told to him by PW2. PW2 has nowhere mentioned above the presence of coconut fibre rope around his neck. It came to light for the first time during the testimony of PW3. No such rope has been recovered by the police officials. IO examined as PW6 has nowhere mentioned about the coconut fibre rope found at the spot. In his cross examination dated 13.09.2013 IO has stated that he did not recover anything from the spot, including any coconut rope. He has also deposed that he did not observe any blood at the spot. Therefore, the testimonies of the victim and his father does not completely corroborate each other.

24. As per the deposition of PW3 he came back home with his son and wife at about 9:30am and made a call at 100 number at about 10:00am. Police came to his house and took his son to GTB Hospital. Perusal of the MLC of the victim Ex. PW9/A FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.19 of 26 shows the time as 9:10am. The same has been affirmed during the cross examination of PW9. It is beyond understanding as to how can the medical examination of the victim be conducted at 9:10am when the police took the victim to GTB Hospital only after 10:00am as stated by PW3. Moreover, there has been alteration on MLC at point X, Y and Z which have not been explained. PW11 who prepared the MLC has stated that he made the corrections at point X, Y and Z of MLC on the instructions of CMO Dr. Banarsi (PW8) whereas during his cross examination PW8 the then CMO denied that he persuaded PW11 to make the correction at point X, Y and Z of the MLC. PW9 has stated that nothing is available on record on which the nature of injury was shown as simple. The surgical records as mentioned by PW10 on which he based his nature of injury as grievous was not available. None of the doctors examined by the prosecution has stated that any examination of the anus of the victim was ever done. PW10 has also stated that the injuries on the body of the victim can be sustained by falling of bajri, stones or rocky places.

25. In State (Govt. of NCT of Delhi) v. Mullah Muzib, 2015 SCC OnLine Del 7228, Hon'ble Delhi High Court has highlighted the importance of medical evidence in cases punishable under S. 377 IPC and has reported the following cases:

"In Mirro v. Emperor, reported at AIR 1947 All 97, it was held that in a case of completed offence under section 377 IPC medical evidence could and should be definite against the accused. In Channabasappa s/o Shanmukhappa v. State of Honnali Police, reported at 2010 (2) KCCR 1385, it was opined that since there was no penetration and medical evidence didn't support the FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.20 of 26 prosecution version, conviction was set aside. In Kailash Laxman v. State of Maharasthra, reported at 2010 CriLJ 3255, it was observed that as no injuries were found in the medical evidence; prosecution failed to prove its case beyond reasonable doubt.

In Phool Singh v. State, reported at 2011 (3) JCC 2235, it was held that the prosecution case did not corroborate with the medical evidence. Hence the conviction of the accused was set aside. In Devi Das (1928) 10 Lah 794, it was opined that in a charge of sodomy stains of semen constitute important evidence. Great weight must be attached to the Chemical Examiner's report.

In Emperor v. Sain Dass, as reported at AIR 1926 Lah 322, it was opined that a charge of attempting to commit sodomy is very easy to bring and very difficult to refute, the evidence in support of this charge has to be very convincing in order to convict the accused.

In Bal Mukundo Singh (1935) 39 CWN 1051, it was observed that it is unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reason that testimony is entitled to special weight.

In the case of Swaran Singh Ratan Singh v. State of Punjab AIR 1957 S.C. 637, it was held that in criminal cases mere suspicion, however, strong, cannot take place of proof.

In Dilip Maheshwari v. State of M.P., as reported in 1995 Cr LR 80 (MP) it was held that where there was prosecution for sodomy and there exist delay in filing the FIR and where delay was not explained, evidence was not reliable and there was also non-corroboration of medical evidence, the accused was held entitled to benefit of doubt. In Sekaran S/o Munusamy v. State of Inspector of Police, as reported in 2010 CriLJ 2341 it was held that conviction under section 377 of IPC on the basis of uncorroborated testimonies can lead to miscarriage of justice".

26. In State of Haryana v. Bhagirath, (1999) 5 SCC 96 : 1999 SCC (Cri) 658 : 1999 SCC OnLine SC 577 at page 101, it has been observed by Hon'ble Supreme Court that "The opinion given by a medical witness need not FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.21 of 26 be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another

doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."

27. The Apex Court in Govindaraju @ Govinda v. State (2012) 4 SCC 722, court has discussed in detail the scope and power of the appellate court and reiterated that the presumption of innocence of an accused is reinforced by the order of acquittal. Relevant portion of the judgment reads as under:

> "11. Besides the rules regarding appreciation of evidence, the Court has to keep in mind certain significant principles of law under the Indian Criminal Jurisprudence, i.e. right to fair trial and presumption of innocence, which are the twin essentials of administration of criminal justice. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity should be traceable in the findings recorded by the Court, either of law or of appreciation of evidence.
>
> 12. The Legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 Cr.P.C. This is an indication that appeal from acquittal is placed at a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 Cr.P.C. has been introduced as an additional stage between the order of acquittal FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.22 of 26 and consideration of the judgment by the appellate Court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub- sections (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the Courts.
>
> 13. Under the scheme of the Cr.P.C., acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the Appellate Court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law."

28. In a criminal trial, the burden on the prosecution is beyond reasonable doubt. The reasonable doubt is a rule of caution laid down by the Courts of Law in respect of assessing the evidence in criminal cases. In Awadhi Yadav v. State of Bihar, (1971) 3 SCC 116 at page 117, Hon'ble Supreme

Court has observed that:

> "Before a person can be convicted on the strength of circumstantial evidence, the circum- stances in question must be satisfactorily estab- lished and the proved circumstances must bring home the offence to the accused beyond reason- able doubt. If those circumstances or some of them can be explained by any other reasonable hypothesis then the accused must have the benefit of that hypothesis. But in assessing the evidence imaginary possibilities have no place. What is to be considered are ordinary human probabilities."

29. In Bhagirath (supra) at page 99 Hon'ble Supreme Court has observed that:

> "But the principle of benefit of doubt belongs ex- clusively to criminal jurisprudence. The pristine doctrine of benefit of doubt can be invoked when FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.23 of 26 there is reasonable doubt regarding the guilt of the accused. It is the reasonable doubt which a consci- entious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to the accused at the end of the criminal trial. Benefit of doubt is not a legal dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the Judge conscientiously and reasonably entertains doubt regarding the guilt of the accused. It is nearly im- possible in any criminal trial to prove all the ele- ments with a scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the ex- pression "reasonable doubt" is incapable of defi- nition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge."

30. Francis Wharton, a celebrated writer on criminal law in the United States has quoted from judicial pronouncements in his book Wharton's Criminal Evidence (at p. 31, Vol. 1 of the 12th Edn.) as follows:

> "It is difficult to define the phrase 'reasonable doubt'. However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Shaw in the Webster case. He says:
>
> 'It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

31. In the treatise The Law of Criminal Evidence authored by H.C. Underhill it is stated (at p. 34, Vol. 1 of the 5th Edn.) thus:

> "The doubt to be reasonable must be such a one FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.24 of 26 as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt."

32. In Shivaji Sahabrao Bobade v.State of Maharashtra (1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : (1974) 1 SCR 489 Hon'ble Supreme Court cautioned that:

> "the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt."

33. The evidence brought on record by the prosecution, is not sufficient to link the accused to the commission of the crime. As discussed above, the prosecution has failed to prove any medical evidence as required for proving the offence punishable under S. 377 IPC. The prosecution has heavily relied on the testimony of the victim himself, but the said witness is a child witness and has not been corroborated by other witnesses. No medical examination of the anus of the victim or penis of the accused has been done which is a sine qua non for proving the carnal intercourse. The testimonies of the doctors are contradictory and FIR No.234/10 State vs. Mehraj PS New Usmanpur Page No.25 of 26 without any basis. They have been unsettled in their cross- examination and nothing has been brought to prove the injuries as required in offence punishable under S. 325 IPC.

34. At this juncture, it would be relevant to note that S. 325 IPC is an aggravated from of offence and if the prosecution fails in proving the elements of that section, conviction can be done under S. 323 IPC, if that sections requirements are fulfilled. S. 323 deals with Punishment for voluntarily causing hurt. As discussed above, since the prosecution has failed to establish the nature of the injury or the basis on which the medical opinion has been given coupled with the fact that PW10 has stated that the injuries on the body of the victim can be sustained by falling of bajri, stones or rocky places the beyond reasonable doubt burden even for S. 323 IPC is not discharged by the prosecution.

35. Thus, in view of the above discussion, the Prosecution has not been able to establish beyond reasonable doubt that accused Accused Mehraj is found not guilty in the present case and resultantly, stands acquitted in the present case.

36. Accused is directed to furnish bonds in the sum of Rs.10,000/- each with a surety of like amount u/s 437A Cr.P.C and is directed to be present before the Ld. Appellate Court as and when directed. Digitally signed by VIPUL SANDWAR VIPUL Date:

SANDWAR 2023.01.17
16:16:34
+0530

Announced in the open
Court on 17th January, 2023

(VIPUL SANDWAR)
MM-02/NE/KKD COURTS

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