Mukhtayar Ahmad vs State Of U.P. on 30 May, 2018

Bench: Naheed Ara Moonis, Chandra Dhari Singh

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Reserved

Court No. - 46

Case :- CRIMINAL APPEAL No. - 5633 of 2009

Appellant :- Mukhtayar Ahmad

Respondent :- State Of U.P.

Counsel for Appellant :- S.M.G. Asghar,Govind Saran Hajela,Sudhanshu Srivastava,Swetashw

Counsel for Respondent :- Govt. Advocate

Hon'ble Naheed Ara Moonis,J.

Hon'ble Chandra Dhari Singh,J.

(Delivered by Hon.Chandra Dhari Singh,J.)

01. The instant criminal appeal has been filed against the judgment and order dated 05.09.2009 passed by the Additional Sessions Judge, court no.4, Saharanpur in Sessions Trial No.105 of 2008, whereby the appellant Mukhtayar Ahmad s/o Rafique Ahmad was found guilty of the offence punishable under Sections 376 and 506 I.P.C. and was sentenced to undergo imprisonment for life for the offence punishable under Section 376 I.P.C. and fine of Rs.5000/-. He was also sentenced one year R.I. under Section 506 I.P.C.. In default of payment of fine, he shall further undergo R.I. for six months. Both the sentences shall run concurrently.

02. Heard Sri Swetashwa Agarwal, learned counsel for the appellant and Sri Ram Yash Pandey, learned A.G.A. for the State and perused the record.

03. Briefly stated the facts of the case are that an F.I.R. was lodged against the accused Mukhtayar Ahmad stating therein that he had raped his own daughter. It is further stated in the F.I.R. that he had given divorce to his first wife 10 years ago and remarried with an other woman. After some time he brought his daughter/prosecutrix and son from the place of his first wife and both daughter and son of the accused started living with the appellant. The appellant had a bad character and when her daughter/victim was brought by him then she was minor girl aged about 7-8 years. After 4-5 years, the appellant started molestating her whenever he got chance to do so. In the F.I.R., it is stated that he committed rape upon her continuously for one and half years. When she told her brother Bilal about the incident, his brother Bilal had not reacted in any manner and kept silence. When she narrated the incident to her step mother, step mother told her that nothing was wrong in the behavior of the appellant. The incidents were narrated to her maternal uncle. Thereafter, an F.I.R. has been lodged by the prosecutrix. After lodging the F.I.R., the police started investigation against the accused person and after completing investigation a chargesheet has been submitted against the appellant before the court concerned. The court below framed the charges against the appellant and the case was committed for trial. The appellant submitted that he was falsely implicated in the said case in connivance with the maternal uncle and mother of the prosecutrix. He pleaded for trial. The prosecution in support of its case, examined four witnesses namely P.W.1 prosecutrix, P.W.2, Constable Anand Pal, P.W.3 Dr. Alka Dixit and P.W.4, S.I. Vinod Kumar. The accused person examined two witnesses in defence namely D.W.1, Akbar Alam and D.W.2 Salma, second wife of the appellant.

Analysis of witnesses

04. The F.I.R. was lodged by the prosecuterix, in which, it is stated that she was molested by her own father from age of eight years when she came back to the house of her father from the house of her maternal uncle. Her brother Bilal was also living with her father in the same house. She stated that when she became major and the appellant started raping her about from one and half years, when she opposed his act, he threatened to kill her and, therefore, due to fear, she could not say anything to the member of the family or to the mother and the maternal uncle. After some time, when the act was repeatedly done by the appellant then she told her brother Bilal about the incident but Bilal has not said anything. Thereafter she narrated the incident to her maternal uncle. An F.I.R. was lodged.

05. P.W.-1 prosecutrix stated in the testimony that she narrated the incident of rape on her to brother and maternal uncle. She supported the version of the F.I.R. and also proved her signature on the F.I.R. She deposed that she also told the incident to her step mother but her step mother has not taken seriously and nothing has been done on her part. In the cross examination the prosecutrix has stated that she had been raped for one and half year by the appellant and when she protested, she was threatened consequences of life. She told the incident to her uncle and step mother but nobody has helped her. She told that her age was about 18 years at the time of the incident.

06. P.W.2, Anand Pal, Constable, P.S. Mandi, District Saharanpur deposed that he obtained a letter of the D.I.G. by which, it was directed that the case to be lodged against the appellant. He stated that he wrote chick report and has given signature on the report and same was entered into G.D. as Entry

no.48 at 9.30 P.M. He also stated in the cross examination that chick report was sent to the C.O. in the morning. He stated that in the application before the D.I.G. no date was mentioned of the incident. Since at that time, no lady constable was available, therefore, he has not inquired about the date of incident from the prosecutrix.

07. P.W.3, Dr. Alka Dixit has examined the prosecutrix and in the medical report it is mentioned that the prosecutrix was major girl aged about 18 years old. The hymen of the victim was torn. As per the medical report, she was habitual of intercourse and no sign of rape was available on the private part of her body..

08. P.W.4, Vinod Kumar, S.I., who had investigated the case, stated in the deposition that he has recorded the statement of the prosecutrix as well as other witnesses under Section 161 Cr.P.C.. He also initiated the proceedings under Section 82 Cr.P.C. against the appellant. He stated that on 10.09.2007, the appellant surrendered before the court below and he was sent to the jail. He further stated that the prosecutrix stated before the police that rape was committed by the appellant but she has not given any certain date of the incident. She stated that she had been repeatedly raped by the appellant for one and half years and before that she was molested by the appellant. She stated under Section 161 Cr.P.C. before the police that she has told about the incident to her step mother but her step mother has done nothing. She also informed her brother Bilal, but he did not say anything.

09. Under Section 313 Cr.P.C. accused appellant denied all the charges and submitted that he has falsely been implicated in the case for the reason of grabbing the property at the behest of maternal uncle and mother of the prosecutrix.

10. The defence also examined D.W.1, Akbar Alam and D.W.2, Salma, second wife of the appellant. D.W. 1 Akbar Alam stated in the deposition that mother of the prosecutrix was a characterless woman and she left her husband long back, when the kids were very small. He further stated that the appellant got married 10 years back. Appellant along with his son Bilal, prosecutrix and his second wife were living in one room and he was living in adjacent room of the house but they never heard anything about the alleged incident.

11. D.W.2, Salma, she is the second wife of the appellant. She stated in her deposition that the prosecutrix has never complained about the rape committed by appellant. She was not aware about any such type of incident. She stated that she is living with her husband along with prosecutrix and Bilal, step son and her daughter. She stated that she never went to her father's house as relationship between her father and her husband-accused/appellant was not cordial. Therefore, she always avoid to visit her father's house. In the cross examination she has supported the version which was given in the chief examination. Nothing has been come out contradictory in the cross examination of the D.W.2.

12. We heard Sri Swetashwa Agarwal, learned counsel for the appellant and Sri Ram Yash Pandey, learned A.G.A. for the State.

13. Sri Swetashwa Agarwal, learned counsel for the appellant submitted that F.I.R. dated 18.08.2007 is in fact the second F.I.R. of the occurrence and the same is hit by Section 162 Cr.P.C.. The actual F.I.R. is the first application dated 07.08.2007 moved by the victim before the S.S.P., Saharanpur which has been proved by her as Ex.Ka-1. The entire prosecution case based on the F.I.R. dated 18.08.2007 has thus no legs to stand upon. He further submitted that the informant/victim-P.W.1 came out with entirely different version in the first application to the S.S.P. dated 07.08.2007 proved by her as Ex.Ka-1 and thereafter in the second application to the D.I.G. dated 18.08.2007 proved by her as Ex.-Ka-2 which resulted into lodging of the F.I.R., which clearly goes to show that she took shifting stands from time to time, thereby exaggerating and incorporating colourful allegations in the F.I.R., which creates strong doubt towards her act and conduct. Once the first application to the S.S.P. moved on 07.08.2007 was preferred after the alleged incident of 16.07.2007 i.e. about 21 days, in a typed application form, then it does not appear any reasoning as to why the allegations of forcible rape for 1-1/2 years and molestation were not incorporated therein and were subsequently brought on record in the second application moved before the D.I.G. on 18.08.2007 which resulted into registration of the F.I.R.

14. There is an inordinate and unexplained delay in lodging of the F.I.R. which has not at all been explained by the prosecution side. As per the first report to the S.S.P. on 07.08.2007 the incident occurred on 16.07.2007 which was reported after a delay of almost 21 days. Thereafter the second application to the D.I.G. on 18.08.2007, whereupon F.I.R. was lodged contains allegations of rape for the last 1-1/2 years, which could only be reported after the said delay of 1-1/2 years.

15. It is submitted that P.W.-3, Doctor Alka has clearly proved the medical report and the supplementary medical report and disclosed the age of the girl to be 18 years in her opinion. On a specific question being put to her, she clearly stated that no signs of rape were present and no definite opinion about rape could be given. Further a perusal of the medical examination report of the victim clearly reveals no mark of any internal or external injury upon her person which further belies the prosecution case taken in the first application moved to the S.S.P. on 07.08.2007 that the victim was badly beaten up by fists on 16.07.2007.

16. The learned counsel for the appellant further submitted that alleged victim admitted herself to be a major girl and she came out with material contradictions in her testimony, wherein she came out with the allegations of rape for the last 1-1/2 years and that she called her maternal uncle through telephone. At the same time she also proved the application given to the S.S.P. on 07.08.2007 as Ex.ka-1 wherein a different story was put forth that she herself went to her maternal uncle's house on 17.07.2007.

17. He submitted that she stated in the deposition that there are only two rooms in the house one belongs to the appellant even without a door in which five family members used to reside namely Mukhtayar (appellant) Salma (second wife), Bilal (son from the first wife), victim (daughter from first wife) and Km.Afroz (daughter from second wife). She further admitted that in the second room her uncle namely Akbar along with his wife Shaheen and son Junaid resides therein. In such circumstances, it is totally unbelievable that the alleged victim was subjected to persistent rape and nobody came to know about the incident. She clearly admitted in her testimony that their

house/place of incident is located on a main road with shops and bus stand nearby and lots of crowd present most of the time as well as the availability of conveyance nearby, in such view of the matter, it is beyond comprehension that she was subjected to forcible rape, inasmuch as she had all the opportunity to leave the house and go to her first mother and maternal uncle to save herself, especially under the circumstances, when even earlier she used to visit them and was a major girl aged about 18 years. It was highly impossible that sexual abuse has not been noticed by other family members, therefore, possibility of false implication cannot be ruled out.

He further submitted that testimony of D.W.1 and D.W.2 were the best witnesses of the case and were the residents of the same house who have been completely ignored and have not at all been dealt with by the trial court, thereby causing grave prejudice to the appellant and resulting into miscarriage of justice. Once their testimony is seen, it is clear that the present case is a case of false implication.

18. Lastly he submitted that Section 376 (2) I.P.C. prescribes ten years minimum punishment and the maximum punishment being life imprisonment. It is not necessary for the trial court to award maximum punishment in each and every case, especially under the present facts and circumstances, when the case does not fall in the category of rarest of rare cases. He relied upon a judgment of the Supreme Court in the case of Bavo alias Manu Bhai Ambalal Thakore vs. State of Gujrat, reported in 2012 (2) SCC 684. In this case the Hon'ble Supreme Court modified the sentence of life imprisonment to ten years rigorous imprisonment in the background when the rape was committed, victim was minor girl aged about 07 years and the minimum statutory punishment prescribed was 10 years.

19. He relied upon another case of this Court in the case of Amarnath Pasi vs. State of U.P., 2017 (101) ACC 54. In this case conviction of the appellant was upheld but the sentence of life imprisonment was altered and reduced to 11 years and 7 months imprisonment already undergone by the appellant.

It is further submitted that the appellant was the sole bread earner of the family. His second wife Salma along with his minor daughter Afroz and Bilal son from the first wife Shahnaz are dependent upon him. He has to settle his son Bilal as also his daughter Afroz, therefore, he prayed for leniency on the point of sentence.

20. Learned counsel for the appellant informed that the appellant is a patient of paralysis as well as loss of sight, apart from various other ailments. The said fact stands admitted by P.W.1-victim, who clearly stated that the appellant has suffered from paralysis. Similarly D.W.-1,Akbar Alam also clearly stated about the paralysis/lakwa to the accused appellant which testimony remains unchallenged even in the judgment of the trial court. Further the medical evidence of his ailment containing medical reports were brought on record in original vide list bearing paper no.45 Kha. He further submitted that the present appeal has merit and the appellant herein has falsely been implicated in this case in connivance with his first wife and his brother-in-law.

21. Per contra learned A.G.A. appearing on behalf of the State vehemently opposed the appeal and submissions made by the learned counsel for the appellant. He submitted that the victim has been raped continuously for one and half years and the appellant had also threatened the victim. He further submitted that there is no illegality in the judgment and order passed by the trial court. He submitted on the sentence part that since this is a heinous crime where father has raped his own daughter, therefore, in such cases leniency by the Court would send wrong message in the society, such type of cases deserve exemplary punishment, so that persons of deviant behaviour may choose not to do so. Therefore, matter should be treated as rarest of rare case. Sentence of life is proportionate to the crime committed. Therefore, no leniency should be given in reducing/modifying sentence awarded by the trial court. He further submitted that the present appeal has no merit and it deserves to be dismissed.

22. We have considered the rival submissions made by the learned counsel for the parties and perused the material on record. Before we proceed to examine the impugned order of the court below and the facts of the case, it is desirable to refer the settled legal propositions which has bearing in the instant case.

Evidential value of the prosecutrix statement

23. Evidence of the prosecutrix or woman, who has been raped, is very crucial piece of testimony to prove the case against the accused. It is now well settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix. If it is found to be natural, trustworthy and worthy, being reliable in the case of rape, the onus at behest on prosecution to prove firmly each ingredients of evidence it seeks established and such onus never shifts. The victim, who reports a rape case, suffers at each stage i.e. after reporting to the police, during investigation and trial witness of victim also suffers harassment, humiliation, financial loss, lost of time resulting mental pain and suffering to the victim and her witnesses.

24. The most important question in a prosecution for the offence of rape is how exactly to appreciate the testimony of the rape victim. One important aspect is whether the testimony invariably requires corroboration or not and in case corroboration is required or desired, what is the nature and extent of such corroboration and the source of such corroboration.

25. In the case of State of Punjab vs. Gurmit Singh and others AIR 1996 SC 1393, the Hon'ble Supreme Court held that the Court can rely upon the evidence of the prosecutrix even without seeking corroboration. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony. The Hon'ble Supreme Court further observed that the evidence of a girl or of a woman who complains of rape or sexual molestation should not be viewed with doubt, disbelief or suspicion. The Hon'ble Supreme Court further held that the evidence of a victim of a sexual offence is entitled to great weight even without corroboration.

26. In the case of State of Punjab vs. Ram Dev (AIR) 2009 SC 1290, the Hon'ble Supreme Court held that there is no rule of law that testimony of the prosecutrix cannot be acted without corroboration in material particulars.

27. In the State of M.P. vs. Dayal Sahu 2005 Criminal Law Journal 4374 (SC) the Hon'ble Supreme Court observed as follows:-

> "once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required .....Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence."

28. In the case of Wahid Khan vs. State of U.P. (2010) 2 SCC 9 the Hon'ble Supreme Court held that :-

> " 16.The law on the point is now too well settled. No doubt, it is true that Dr. B. Biswas, who had initially conducted the medical examination of the prosecutrix, has not appeared on behalf of the prosecution to depose. But, that alone is not sufficient to discard the prosecution story. Corroboration is not the sine qua non for conviction in a rape case."

29. In this regard, the most celebrated observations of Justice Vivian Bose in the case of Rameshwar v. State of Rajasthan AIR 1952 SC 54 may be quoted :

> "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...."

It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracized by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward looking as the western countries are.

Thus, in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible....."

Delayed F.I.R. in rape cases

30. The delay in lodging an FIR in a rape case is not of much "significance" as the victim has to muster courage to come out in open and expose herself in a "conservative social milieu".

In rape cases the delay in filing the FIR by the prosecutrix or by the parents in all circumstance is not of significance. Sometimes the fear of social stigma and on occasions the availability of medical treatment to gain normalcy and above all psychological inner strength to undertake such a legal battle.

31. In the case of H.P. vs. Shree Kant Shekari, (2004) 8 SCC 153 the Hon'ble Supreme Court has held as follow:-

> "17. The High Court has also disbelieved the prosecution version for the so-called delay in lodging the FIR. The prosecution has not only explained the reasons but also led cogent evidence to substantiate the stand as to why there was delay. The trial Court in fact analysed the position in great detail and had come to a right conclusion that the reasons for the delay in lodging the FIR have been clearly explained.
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> 18. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of first information report does not in any way render the prosecution version brittle. These aspects were highlighted in Tulshidas Kanolkar v. State of Goa.
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> 19. The High Court by hypothetical calculations has concluded that there were discrepancies and has come to the presumptuous conclusion on mere surmises and conjectures that there was unexplained delay in lodging the FIR. In view of the above, conclusions of the High Court are not to be sustained.

32. In the case of Sohan Singh and another vs. State of Bihar (2010) 1 SCC 68 the Hon'ble Supreme Court has held as under:-

> 12. As far as delay in lodging the FIR is concerned, we are also satisfied that it cannot be termed to be inordinately delayed. Even otherwise, in our considered opinion too, it cannot be said that there has been inordinate or unexplained delay in lodging the

FIR.

13. When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR. Precisely this appears to be the reason for little delayed FIR. As mentioned hereinabove, the delay has already been found to be properly explained by both the courts below. Thus, we are not required to deal with this issue any more.

33. In the case of Deepak vs. State of Haryana (2015) 4 SCC 762 the Hon'ble Supreme Court has held as under:-

"14. Coming to the first submission relating to the lodging of the FIR for the commission of the offence is concerned, in our considered opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but also considering the facts and circumstances of the case, it was natural.

15. The Courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family. Indeed, this has been the consistent view of this Court as has been held in State of Punjab vs. Gurmit Singh .

16. Keeping this well settled principle in mind, we find that the FIR in this case was lodged on 04.04.2007 when the prosecutrix disclosed to her mother of the incident first time as to what had happened with her hardly two weeks before the date of disclosure and the mother, in turn, immediately made a complaint to the police station and disclosed to the SI, who visited her place on coming to know of the incident. The late disclosure of the offence by the prosecutrix was also well justified by her in her statement recorded under Section 164 of the Code and also in her evidence wherein she said that the appellant had taken her photographs and had also recorded her talks with him on mobile. The accused was, as per her version, threatening her from raising any kind of alarm with the use of such evidence in his possession.

17. The conduct of the prosecutrix, in this regard, therefore, appears to us to be most natural. She did not inform the incident immediately to the parents and waited for two weeks to eventually disclose to her mother. It was for the reason that the appellant was all along threatening the prosecutrix of the dire consequences with the use of the evidence, which he was having with him against her."

34. In the case of State of Himachal Pradesh vs. Sanjay Kumar alias Sunny (2017) 2 SCC 51 the Hon'ble Supreme Court held as under:-

"29. Likewise, delay of three days in lodging the FIR by PW-1, after eliciting the information from her daughter PW-2, is inconsequential in the facts of this case. It is not to be forgotten that the person accused by the prosecutrix was none else than her Uncle. It is not easy to lodge a complaint of this nature exposing the prosecutrix to the risk of social stigma which unfortunately still prevails in our society. A decision to lodge FIR becomes more difficult and hard when accused happens to be a family member. In fact, incestuous abuse is still regarded as a taboo to be discussed in public. This reticence hurts the victims or other family members who struggle to report. After all, in such a situation, not only the honour of the family is at stake, it may antagonize other relations as well, as in the first blush, such other members of family would not take charge of this nature very kindly. We also find that the so-called dispute between the parties was so trivial in nature that it would not have prompted PW-1 to lodge a false complaint, putting her minor daughter of impressionable age to risks of serious kinds, as pointed out above.

30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevent such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long lasting effects on such victims.

> 31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance {See Bhupinder Sharma v. State of Himachal Pradesh}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

Absence of injury

35. The Hon'ble Supreme Court has confirmed conviction in several cases of rape despite non existence of injuries on the date of medical examination.

36. The Hon'ble Supreme Court in the case of Rajinder alias Raju vs. State of Himachal Pradesh (2009) 16 SCC 69 has held as follows:-

> "12. The learned counsel for the appellant relied upon few decisions of this Court, namely, (1) Pratap Misra vs. State of Orissa, (2) Sadashiv Ramrao Hadbe vs. State of Maharashtra, (3) Narayan vs. State of Rajasthan and (4) Radhu vs. State of M.P. That the accused is not bound by his pleading and that it is open to him to prove his defence even from the admissions made by the prosecution witness or the circumstances proved in the case admits of no doubt. However, so far as decision in the case of Pratap Misra is concerned, this Court on consideration of the evidence let therein held that the appellants had sexual intercourse with the prosecutrix with her tacit consent and the connivance of her husband. This Court held that there was no material at all to prove the allegation of rape. Even the medical evidence therein did not support the prosecution case. We are afraid, the decision of this Court in Pratap Misra turned on its own facts and is of no help to the appellant herein.

> 13. In Sadashiv Ramrao Hadbe this Court while reiterating that in a rape case, the accused could be convicted on the sole testimony of prosecutrix if it is capable of inspiring the confidence in the mind of the Court, put a word of caution that the Court should be extremely careful while accepting the testimony when the entire case is improbable and unlikely to have happened. This is what has been stated:
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> "9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to have happened."

37. In the case of Utpal Das and another vs. State of West Bengal (2010) 6 SCC 493 the Hon'ble Supreme Court has held as under:-

> "22. The learned counsel for the appellants however, submitted that the medical examination report of the victim shows that no injuries were found on her private parts or on any part of her body. We are required to note that victim Sita Rani Jha is a married grown up lady and blessed with two children and in such circumstances the absence of injuries on her private parts is not of much significance. The mere fact that no injuries were found on private parts of her body cannot be the ground to hold that she was not subjected to any sexual assault. The entire prosecution story cannot be disbelieved based on that singular assertion of the learned counsel."

38. In the case of O.M. Baby (dead) by legal representative vs. State of Kerala (2012) 11 SCC 362 the Hon'ble Supreme held as follows:-

> "15. Insofar as absence of injuries on the body of the victim is concerned, the evidence on record discloses that in the first medical examination itself, i.e. Ext. P-1 it is recorded that the victim was walking in pain. The evidence of PW 11, Dr. Shirley Vasu, Assistant Professor of Forensic Medicine, who had examined the victim for determination of her age, clearly shows that circum areolar bite mark contusion of both breast was noted along with laceration of lower lip. In these circumstances, it cannot be said that in the present case, the prosecution has not succeeded in showing that the victim had not suffered any external injuries whatsoever. In any event, absence of injuries or mark of violence on the person of the prosecutrix may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her as in the present case. Such a view has already been expressed by this Court in Gurcharan Singh v. State of Haryana and Devinder Singh v. State of H.P."

39. In the instant case, the P.W.3 Dr. Alka Dixit examined the prosecutrix and did her internal and external examination. On the examination, she neither found injury on her body nor on her private parts. Hymen was already torn previously and two fingers can enter. It is undisputed facts that at the time of incident, she was unmarried girl. The Doctor did not give any conclusive opinion about the committal of rape, but opined that if the hymen of unmarried girl was found ruptured, then there is the possibility of rape being committed upon her so the testimony of the prosecuterix is fully corroborated with medical evidence.

Sentencing Policy

40. The learned counsel appearing for the appellant submitted that the sentence awarded by the court below is too excessive when the case does not fall in the category of rare of rarest cases. He prayed that the sentence of life imprisonment may be reduced to the sentence already undergone by the appellant as he is suffering from paralyses as well as loss of sight. He submitted that the appellant is a man of clean antecedents having no criminal history apart from the present criminal case. Therefore, in view of the above facts and circumstances, he deserves the mercy of the court.

41. The crucial stage in every criminal proceeding is the stage of sentencing. It is the most complex and difficult stage in the judicial process. The Indian legal system confers ample discretion on the judges to levy the appropriate sentence. However, this discretion is not unfettered in nature rather various factors like the nature, gravity, the manner and the circumstances of the commission of the offence, the personality of the accused, character, aggravating as well as mitigating circumstances, antecedents etc., cumulatively constitute as the yardsticks for the judges to decide on the sentence to be imposed. Indisputably, the sentencing Courts shall consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the crime committed.

42. Before we evaluate the case at hand in the light of above established principle that all punishments must be directly proportionate to the crime committed, it is imperative to comprehend the legislative intent behind Section 376 IPC which is as under:

> "376. Punishment for rape.-- (1) Whoever, except in the cases provided for in sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.
>
> "(2) Whoever'-
>
> (a) being a police officer, commits rape--
>
> (i) within the limits of the police station to which such police officer is appointed; or
>
> (ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in area by the Central or a state Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i)commits rape on a woman when she is under sixteen years of age; or

(j) commits rape on a woman incapable of giving consent or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman;or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine."

43. A perusal of the above provision shows that the legislative mandate is to impose a sentence, for the offence under Section 376 (2) for a term, which shall not be less than 10 years, but it may extend to life and shall also be liable to fine. The proviso to Section 376 (2) IPC, of course, lays down that

the Court may, for "adequate and special reasons" to be mentioned in the judgment, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where gang rape is committed by a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, is not less than 10 years though in exceptional cases, the Court by giving "special and adequate reasons", can also award the sentence of less than 10 years.

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

45. It is on this proviso to the Section, the accused is relying upon and praying for a reduction of sentence of imprisonment for a term which has already undergone i.e. less than 10 years. Based on the following three grounds, the accused seeks for reduction of sentence than prescribed by the statute:

> Firstly, on the ground that the accused appellant is a patient of paralysis as well as loss of sight and his health is in bad condition.
>
> Secondly, that the accused person is sole bread earner of the family and occurrence of the incident long back of 2007; and Lastly, that now the victim is happily married woman.

46. In the case of State of M.P. vs. Munna Choubey and another (2005) 2 SCC 710 the Hon'ble Apex Court has held as follows:-

> "8. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but a deep sense of some deathless shame."
>
> "9. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that, "State of criminal law continues to be- as it should be- a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern

where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh v. State of M.P this Court while refusing to reduce the death sentence observed thus:

"[It will be a mockery of justice to permit the accused] to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."

"10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal v. State of Tamil Naidu."

"12.Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences."

"13. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle MCGDautha v. State of Callifornia that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof

formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished."

"15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system."

"17. Similar view has also been expressed in Ravji v. State of Rajasthan. It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance."

"19. In both sub-sections (1) and (2) of Section 376 minimum sentences are prescribed. Both in cases of sub-sections (1) and (2) the Court has the discretion to impose a sentence of imprisonment less than the prescribed minimum for 'adequate and special reasons'. If the Court does not mention such reasons in the judgment there is no scope for awarding a sentence lesser than the prescribed minimum."

47. Dinesh alias Buddha vs. State of Rajasthan (2006) 3 SCC 771 the Hon'ble Supreme Court has held as follows:-

"12. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal

is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.

13. The legislative mandate to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but which may extend to life and also to fine reflects the intent of stringency in sentence. The proviso to Section 376(2) IPC, of course, lays down that the court may, for adequate and special reasons to be mentioned in the judgment, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' RI, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' RI can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for "special and adequate reasons" and not in a casual manner. Whether there exist any "special and adequate reasons" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard-and- fast rule can be laid down in that behalf of universal application."

48. In the case of Shimbhu and another vs. State of Haryana (2014) 13 SCC 318 the Hon'ble Supreme Court held as follows:-

"16. In State of M.P. vs. Bala, this Court held that the long pendency of the criminal trial or offer of the rapist to marry the victim are no relevant reasons for exercising the discretionary power under the proviso of Section 376(2) IPC. This Court further held as under:

"11. The crime here is rape. It is a particularly heinous crime, a crime against society, a crime against human dignity, one that reduces a man to an animal. The penal statute has prescribed a maximum and a minimum punishment for an offence under Section 376 I.P.C. To view such an offence once it is proved, lightly, is itself an affront to society. Though the award of maximum punishment may depend on the circumstances of the case, the award of the minimum punishment, generally, is

imperative. The provisos to Section 376(1) and 376(2) I.P.C. give the power to the court to award a sentence lesser than the minimum for adequate and special reasons. The power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction. The reasons must be relevant to the exercise of such discretion vested in the court. The reasons must be set out clearly and cogently. The mere existence of a discretion by itself does not justify its exercise. The long pendency of the criminal trial or the offer of the rapist to marry the victim are not relevant reasons. Nor is the age of the offender by itself an adequate reason."

"12. The punishments prescribed by the Penal Code reflect the legislative recognition of the social needs, the gravity of the concerned offence, its impact on the society and what the legislature considers as a punishment suitable for the particular offence. It is necessary for the courts to imbibe that legislative wisdom and to respect it."

"19. Thus, the law on the issue can be summarized to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or the victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute. The power under the proviso should not be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation."

"21. It is imperative to mention that the legislature through the Criminal Law (Amendment) Act, 2013 has deleted this proviso in the wake of increasing crimes against women. Though, the said amendment will not come in the way of exercising discretion in this case, on perusal of the above legislative provision and catena of cases on the issue, we feel that the present case fails to fall within the ambit of exceptional case where the Court shall use its extraordinary discretion to reduce the period of sentence than the minimum prescribed."

49. In Kamal Kishore vs. State of H.P. (2000) 4 SCC 502, a three-Judge Bench of the Hon'ble Supreme Court arrived at the conclusion that the fact that the occurrence took place 10 years ago and the accused or the victim might have settled in life is no special reason for reducing the statutory prescribed minimum sentence, stating:

"22. The expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. What the Division Bench of the High Court mentioned (i.e. occurrence took place 10 years ago and the accused might have settled in life) are not special to the accused in this case or to the situations in this case. Such reasons can be noticed in many other cases

and hence they cannot be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons nor instance can be cited regarding special reasons, as they may differ from case to case."

Conclusion

50. The case requires to be considered in the light of the aforesaid settled legal propositions. Learned counsel for the appellant submitted that the prosecutrix was major on the date of the incident and it is admitted that she was residing in a house consisting of two rooms. One belongs to the appellant even without door in which five family members used to reside namely Mukhtayar (appellant) Salma (second wife), Bilal (son from the first wife), victim (daughter from first wife) and Km.Afroz (daughter from second wife). In the second room uncle of the prosecturix Akbar Alam along with his wife Shaheen and son Junaid resides therein. In such circumstances, it is totally unbelievable that the alleged victim was subjected to persistent rape and nobody came to know about the incident. Learned counsel for the appellant further submitted that there is an inordinate and unexplained delay in lodging the F.I.R. which has not at all been explained by the prosecution side. As per the first report to the S.S.P. on 07.08.2007 incident occurred on 16.07.2007 which was reported after a delay of almost 21 days. Thereafter, the second application to the D.I.G. on 18.08.2007, based whereupon F.I.R. was lodged contains allegations of rape for the last 1-1/2 years, which could only be reported after the said delay of 1-1/2 years and supplementary medical report discloses age of the victim to be 18 years and Dr.Alka, P.W.3 specifically stated in her testimony that no definite opinion about rape could be given. Further a perusal of the medical examination report of the victim clearly reveals no mark of any internal or external injury upon her person which further belies the prosecution case taken in the first application moved to the S.S.P. on 07.08.2007 that the victim was badly beaten up by fists on 16.07.2007.

51. In the cross examination P.W.1, the prosecutrix stated that on 12.12.2005, there was marriage of his uncle Akbar. In this marriage guests had come and they gathered in the house. Her mother did not come. No one known to her who had participated in the marriage. Now three years have passed and prior to that no incident of rape had happened. She stated that she had forgotten the date when she came with her father. She further stated in the testimony that after escaping from the appellant on 16/17.07.2007 at 5.00 A.M., she came in the house of maternal uncle (Mama) and maternal grand father (Nana). She had not phoned to her maternal uncle and grand father (Nana) about the incident. On 17.07.2007, at about 8-9 A.M. she narrated about the incident to the maternal uncle and grand father (Nana). Pressure was not created on the appellant by Sayyad Anwar Ali Bag Wale to give half property to her mother, the appellant refused to do so. She stated that she is not aware that there are two shops and two rooms in the name of appellant in the Aziz Coloney. But there is one shop in the name of the appellant at the Behat Road. She had never gone to Ghaziabad to give any affidavit. She has stated in the testimony that she has repeatedly been raped by the appellant and incident has been told to the step mother and brother but nobody has come forward to help her out. Therefore, in the cross examination, nothing has come out contradictory to the chief examination of the prosecutrix. She stated in the testimony that after the incident she did not return the house of the appellant. On 07.08.2007 she made a complaint to S.S.P. Saharanpur and D.I.G., Saharanpur about the present case and she also informed her maternal uncle and requested him to

take her away from this place. She was examined in the hospital by Dr. Alka Dixit, P.W.3 on 13.08.2007 at 1.40 p.m. On the examination Dr. Alka Dixit opined that since hymen was torn, therefore, there is possibility of rape being committed upon her.

52. In the case of Mritunjoy Biswas vs. Pranab alias Kuti Biswas and another (2013) 12 Supreme Court Cases 796 the Hon'ble Supreme Court has held that "28.....it is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence."

53. In the case in hand, the evidence of prosecutrix stands fully corroborated with the medical evidence and the testimony of Dr. Alka Dixit, P.W.3. In the present case evidence of prosecution witnesses are fully trustworthy and there is no reason to doubt genuineness thereof. The prosecutrix was unmarried girl at the time when the incident took place. She was raped by her own father. It is very difficult a girl to falsely implicate her own father in such heinous crime i.e. rape. Having analysed the facts and circumstances of the case in hand, it is proved that the appellant had committed sexual assault with the prosecutrix which was corroborated by the statement of prosecutrix and medical evidences are also in consonance with the prosecution version. The prosecution has sufficiently proved the case beyond all reasonable doubts. The nature of the offence in the present case is covered under Section 376 (2) of I.P.C., when repeatedly rape is committed with a prosecutrix.

54. The prosecution case, when judged on the touchstone of totality of the facts and circumstances, does not generate the unqualified and unreserved satisfaction indispensably required to enter a finding of guilt against the appellant. Having regard to the evidence on record as a whole, it is possible for this Court to unhesitatingly hold that the charges levelled against the appellant have been proved beyond reasonable doubt. In our estimate, the view taken by the trial court is correct.

55. Now the question arises that whether sentence of life imprisonment of the appellant awarded by the court below is excessive?

Section 376 (2) I.P.C. prescribes ten years minimum punishment and the maximum punishment is life imprisonment. It is not necessary for the trial court to award maximum punishment in each and every case, specially in the present facts and circumstances when the case does not fall in the category of rarest of rare case. As per the Hon'ble Supreme Court, in the several judgments observed that there is a person convicted for rape can be awarded a short term sentence provided the courts find (adequate and specific) reasons for showing such leniency. But in the present case there is no extenuating and mitigating material available on record on the basis of which the quantum of

punishment can be reduced less then minimum sentence as provided in the statute. It has been held by the Hon'ble Supreme Court that indication of any leniency in a case of such a heinous nature would amount to travesty of justice and the plea of leniency would be wholly unjustified. Learned counsel for the appellant lastly submitted that the present case does not fall in the rare of rarest case and the appellant is very poor person and suffering from paralyses. The entire family comprising of eight persons were residing in two rooms. They did not have any separate bathroom. After conviction of the appellant his second wife Salma along with daughter had to go 'Nari Niketan' as they were at the verge of vagrancy and destitution. Therefore, entire family is depend upon the appellant as he is the sole bread earner of the family. Now the prosecutrix is happily married woman and the incident is of the year 2007 and the appellant is in jail since 05.09.2009. In these circumstances, this Court may award the minimum sentences as provided under the statute.

56. The Hon'ble Supreme Court in the case of Ankush Maruti Shinde and others vs. State of Maharashtra AIR 2009 SC 2609 has held that protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be.

57. In view of the above discussion, there is no scope to interfere in judgment and order dated 05.09.2009 passed by the Additional Sessions Judge, court no.4, Saharanpur in Sessions Trial No.105 of 2008, whereby the appellant was found guilty of the offence punishable under Sections 376 and 506 I.P.C.. After considering the health condition of the appellant and pathetic financial condition of the family, the sentence of life imprisonment awarded by the trial court be reduced to the term of ten years R.I. as minimum sentence prescribed in the statute.

58. For the reasons stated above, the judgment and order dated 09.05.2009 passed by the Additional Sessions Judge, court no.4, Saharanpur in Sessions Trial No.105 of 2008 is upheld with modification that sentence awarded by the trial court is reduced from life imprisonment to ten years R.I. Fine of Rs.5000/- awarded by the court below is upheld, in default of the payment of the fine, he will further undergo six months. Impugned judgement/order stands modified to the above extent.

59. Accordingly, present criminal appeal is partly allowed.

60. It is directed to authority concerned to release the accused/appellant after completion of the conviction of ten years R.I. if he is not required in any other criminal case.

61. Let a copy of this judgment/ order be certified to the court concerned for necessary information and follow up action.

Order Date:- 30th May, 2018

Asha

(Chandra Dhari Singh,J.) (Naheed Ara Moonis,J.)