Delhi High Court
Atender Yadav vs State Govt Of Nct Of Delhi on 29 October, 2013
Author: Kailash Gambhir

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 29.10.2013

\+ CRL.A. 1340/2010

ATENDER YADAV ..... Appellant
Through: Mr. K. Singhal, Advocate Appellant produced from custody

versus

STATE GOVT OF NCT OF DELHI ..... Respondent
Through: Ms. Richa Kapoor, Additional Public Prosecutor for the State

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR
HON'BLE MS. JUSTICE INDERMEET KAUR

JUDGMENT

KAILASH GAMBHIR, J.

1. By this appeal filed under Section 374 of the Code of Criminal Procedure 1973 (hereinafter referred to as Cr.P.C) the appellant seeks to challenge the judgment and order dated 20.09.2010 and 23.09.2010 respectively passed by the Court of Ld. Additional Sessions Judge, West Distt., Delhi, thereby convicting the appellant for committing an offence under Section 376(2) (f) of India Penal Code, 1860 (hereinafter referred to as IPC) and sentenced him to undergo imprisonment for life together with fine of Rs. 2,000/- and in default thereof to undergo further simple imprisonment for a period of three months.

2. The case of the prosecution in the brief is that:

> "On 30.05.2007, on receipt of DD No.24, ASI Harpal Singh reached PS Pashchim Vihar, where HC Ranjeet Singh Ct. Satish Kumar PP Madipur met him. ASI Joginder Singh produced Prosecutrix aged 11 years, the daughter of the accused. ASI Harpal Singh made inquiries from Prosecutrix who stated that the accused had raped her in November and December 2006. Prosecutrix along with her mother Geeta Anand were taken to Sanjay Gandhi Memorial Hospital (hereinafter „SGM Hospital) where she was medically examined. The IO recorded the statement of Prosecutrix. The case was registered and after due investigation challan was filed under sections 376 (2) (f) / 506 IPC against the accused."

3. After supplying the copies of the charge sheet to the accused as per law, case was committed to the Court of Sessions. Arguments on the point of charge were heard and charges under sections 376 (2) (f) / 506 IPC were framed against the accused, to which he pleaded not guilty and claimed trial. Prosecution tendered 17 witnesses in support of their case. The statement of the accused under section 313 Cr.P.C was recorded wherein he denied the incriminating evidences produced by the prosecution against him. In his defense accused had examined 18 witnesses.

4. Addressing arguments on behalf of the appellant, Mr. K. Singhal, Advocate contended that mother of the accused, PW-1 and father of the accused PW-2 had did not support the case of the prosecution. He further contended that the accused and PW2 did not have cordial relationship due to which PW2 even disowned accused by publishing a notice in the newspaper in the year 1999. Counsel also pointed out that PW-2 in his cross-examination categorically stated that he had handed over the children to their mother on the very next day of taking the prosecutrix on superdari.

5. Dealing with various statements made by the prosecutrix who had entered into witness box as PW-3, counsel for the appellant pointed out that her version that her father used to commit rape upon her regularly, is contrary to in the MLC report of the of the Prosecutrix (Ex.PW5/A), wherein the gyne doctor who examined the prosecutrix had opined that introituses admits two fingers with difficulty.

6. Counsel further pointed out that, in the MLC report, the doctor has not given any opinion as to whether the hymen was torn afresh or the same was an old one. The counsel further contended that in the said MLC it is not clear as to whether the rape was committed on the prosecutrix in the recent past or not and such a doubt goes in favour of the accused. Counsel also argued that as per the MLC report there were no injuries on the private part of the prosecutrix and the absence of such injuries would again prove the innocence of the appellant as had the prosecutrix been raped by the appellant during the period of November-December, 2006, certainly the prosecutrix must have suffered some injuries on her private parts.

7. Placing reliance on Modi s Medical Jurisprudence, counsel for the appellant had drawn the attention of this Court to pages 503 and 504 of the same wherein it has been observed as under:-

> Page 503:
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> "In nubile virgins, the hymen, as a result of complete sexual intercourse, is usually ruptured, having one or move radiate tears."- Having in the present case, the girl who is only 11 years- hymen is only torn and the same is not lacerated and not having more radiate tears.
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> "Frequent sexual intercourse and parturition completely destroy the hymen, which is represented by several small tags of tissue, which are called carunculae hymenealis or myrtiformes."
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> Page 504:

> "In small children, the hymen is not usually ruptured, but may become red and congested with the inflammation and bruishing of the labia. If considerable force is used, there is often laceration of fourchette and perinaeum." - In the present case, no injury either healed or having any old scar marks etc. was present either on fourchette or on perinaeum."

8. Counsel for the appellant also placed reliance on a piece of an article referred to as "The Journal of the Forum for Medical Ethics Society since 1993" wherein the author of the article had dealt with the subject "Moving from evidence to care; ethical responsibility of health professionals in responding to sexual assault". In the said article, the author has contended as under:-

> "In the standard medico-legal examination, the size of the vaginal opening is determined through the „two finger test to ascertain past sexual activity and remarks are made about whether or not the survivor is „habituated to sexual intercourse. Despite court judgments and changed in the Evidence Act stating that past sexual history has no bearing on the current episode of sexual assault, the past sexual conduct of the survivor continues to form an important part of a doctor s conclusion (8). These are still used during court trials to raise doubts about the survivor s character and thus question the veracity of her statements."

9. Counsel also referred to Paras 10 and 11 of Chapter 11 of Justice Verma Committee s reports wherein it was observed as under:-

> "10. It is crucial to underscore that the size of the vaginal introituses has no bearing on a case of sexual assault, and therefore a test to ascertain the laxity of the vaginal muscles which is commonly referred to as the two-finger test must not be conducted. On the basis of this test observations/ conclusions such as 'habituated to sexual intercourse' should not be made and this is forbidden by law.
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> 11. Routinely, there is a lot of attention given to the status of hymen. The "finger test" is also conducted to note the dispensability of the hymen. However it is largely irrelevant because the hymen can be torn due to several reasons. An intact hymen does not rule out sexual assault, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual assault. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, oedema etc.) are to be documented."

10. Counsel for the appellant also dealt with many other contradictions and serious inconsistencies in various statements of the prosecutrix especially like in her court deposition wherein she deposed that as far as she remembers she had told this fact to her mother in the month of January, 2007 whereas in her statement made before the Magistrate under section 164 Cr.P.C she stated that she told this fact to her mother on 29.05.2007; similarly she stated that she did not remember the month when she had made a complaint to the police whereas in her statement made before the

Police under section 161 Cr.P.C she stated that my mother made a complaint to the Police on 30th May 2007; further she states that her statement was recorded several times although prior to court deposition there were only two statements, i.e., one rukka and other under Section 164 Cr.P.C.; and also that she used to visit her school only 3-4 days in a month whereas her school documents show to the contrary.

11. Counsel for the appellant had also drawn the attention of this Court to various circumstances in support of his argument that the accused had the best relationship with the prosecutrix and there could not have been any chance of a father committing rape of his own daughter. Counsel also argued that the prosecutrix has falsely implicated the appellant with such serious allegations of rape at the instance of her mother (hereinafter referred to as PW-4) who made her a tool in order to not only take revenge from the appellant but also to take back the custody of both the children which otherwise she failed to claim from the accused in view of the terms and conditions agreed between both the accused and PW-4 in mutual divorce petition.

12. Counsel for the appellant also argued that prosecutrix was totally under the influence of her mother and due to this reason she had acted at the dictate and tutoring of her mother and has lodged the said false complaint. Citing one such instance counsel pointed out that the prosecutrix in her court deposition admitted the fact that on one night her mother asked her as to whether she loves her more or loves her father more and in reply she told her mother that she loves her more. Counsel also pointed out that PW4 was accompanying the prosecutrix even at the time of recording of her statement under Section 164 Cr.P.C. and this again showed that the prosecutrix was under the influence of PW4 even at the time of recording the statement under Section 164 Cr.P.C. Counsel also pointed out that the prosecutrix was attending her school regularly and as per daily attendance sheet proved on record as Exs. DW-1/D, DW- 1/A & DW-1/B, the prosecutrix had attended the school with the attendance of 44 out of 48 in the month of November and 38 out of 38 in the month of December. The contention raised by the counsel for the appellant was that had there been rape of the prosecutrix in the months of November-December, she could not have been able to attend her school regularly because such a girl would suffer great physical and mental trauma. Counsel also pointed out that there was visible improvement in the academic performance of Prosecutrix, as she had secured 26.7% in the 1st Term Examination whereas in her 2nd Term Examination, which was held in the month of December, she had secured 41.5%, which again showed that the prosecutrix was absolutely normal and under no trauma of any kind. Counsel also pointed out that the appellant was taking due care of the prosecutrix as his second wife Ms. Poonam used to give tuition to her and in the process the appellant wanted the prosecutrix to come closer with her new mother for better understanding and strengthening of their relationship. Counsel also pointed out that the appellant got the prosecutrix admitted in a day boarding school and he himself used to drop her at the school and then pick her up and this again showed dedication and devotion of a father towards his child.

13. With regard to the testimony of PW-4 Geeta Anand, counsel for the appellant argued that her testimony is full of concoctions, falsehood and contradictions with material improvements from her previous statements and therefore, the same cannot inspire confidence to nail the accused. Counsel also argued that in her deposition PW-4 deposed that the accused used to watch blue movies in the house and on one occasion, when she came back from her paternal house, her daughter told her that

the accused was watching blue movies and one lady came to the house and at that time some friends of the accused also came in the house and they were doing some obscene activities. The contention raised by the counsel for the appellant was that with such kind of character of the accused, the mother could not have given the custody of the children to a person of such a low character. Counsel also pointed out that such deposition of PW-4 is false on the face of it as no such allegation has been levelled by the prosecutrix in her various statements. Counsel further pointed out that from the deposition of PW-4 it also becomes apparent that she was in regular touch with the father of the accused. Counsel also pointed out to the deposition of PW-4 wherein she stated that her father-in-law (PW-2) used to tell her that the accused did not allow them to meet with the children and this testimony clearly showed that the relationship between PW-2 and accused was not cordial. Counsel also pointed out that in her deposition PW-4 deposed that she went to Korea on Scholarship in the month of May, 2006 for higher studies and she came back in September and thereafter had gone to meet her children in school, where she was shocked to see her daughter being dark, fatty and grown up during the past period of six months and with such statement PW-4 tried to give indication that because of rape and consequent starting of menarche she found her daughter in such a condition. The contention raised by the counsel for the appellant was that PW-4 was not even sure as to when wrong act has taken place with her daughter and such deposition of PW-4 also goes contrary to the MLC report of the prosecutrix wherein the starting time of menarche is given as one year back meaning thereby sometime in April-May, 2006. Counsel also pointed out to the testimony of PW-4 where she said that the accused telephoned her and asked her not to meet the children since he was married and the step mother of the children does not approve her meeting with the children. Referring to this part of testimony of PW-4, counsel for the appellant submitted that firstly as per the evidence on record, the accused had married to Ms. Poonam on 14th February, 2007 and thus claim of the witnesses that she found the prosecutrix dark, fatty etc. in September, 2006 loses its basis and secondly if the accused was already married, then his wife would have been living with him in the house and the alleged commission of rape would have taken place in the presence of the second wife of the accused but that is not a case set up by the prosecutrix. Counsel also pointed out that PW-4 in her deposition candidly admitted that she was told by her daughter that second wife of her husband used to treat her well. Another contradiction pointed out by the counsel for the appellant was that PW-4 was told by her daughter that she started having menarche only after the accused had intercourse with her and this is contrary to her own testimony where she said that when she came back from Korea and met with the children then she discussed about the condition of prosecutrix with the accused and also asked accused to take special care of Prosecutrix during her menstruation period. Counsel further pointed out that this discussion took place in the month of September, 2006, which shows that PW-4 was already aware about the menstruation of the prosecutrix but yet she made a false statement before the Court that the menstruation period of the prosecutrix started after rape.

14. Counsel also argued that PW-4 made material improvements in her court deposition wherein she deposed that her daughter started revealing the facts slowly and slowly and told her that her father used to have sexual intercourse with her and also from her back side and due to that she could not sit in latrine for some days. Counsel also argued that no such fact was revealed by the prosecutrix in any of her statements. Further even in the MLC of the prosecutrix no such fact has been stated. Even PW5 being brother of the prosecutrix did not state any such fact in his court

deposition.

15. Counsel also argued that PW-4 in her deposition stated that she started giving slaps to prosecutrix after she admitted the fact that she had been raped by her father but in the MLC no abrasions were found on the cheeks of the prosecutrix. Counsel also pointed out that in her cross-examination PW-4 failed to disclose the date when the prosecutrix had informed her about the incident and this fact again put the witness in dark as she did not even remember such a crucial date, when her daughter disclosed her about the various acts of rape committed upon her by her father. Counsel also pointed out that PW4 clearly admitted that she had lodged a complaint against the accused and her in-laws under Section 498A IPC, as they used to demand the children from her. The contention raised by the counsel for the appellant was that PW-4 wanted to take revenge from the accused as her sole objective was to take back the lawful custody of the children from the accused. To crack the credibility of the witness, counsel also submitted that she had concealed material facts from the Passport Authority and on the complaint lodged by the accused her Passport was impounded and cancelled by the Passport Authority vide order dated 16th November, 2006. Counsel also pointed out that PW-4 admitted that she had met the children alone once in the year 2006 when she returned back from Korea and at that time nothing of this sort was disclosed to her by the prosecutrix.

16. Counsel also argued that PW-4 in her deposition admitted the fact that the prosecutrix used to drive cycle when she was around 4-5 years and she used to do swimming also. The contention raised by the counsel for the appellant was that in the MLC of the prosecutrix the hymen was found torn and PW-8, Dr. Deepti Goel, in her cross-examination clearly stated that hymen can be torn on account of many reasons like injuries during cycling or sports and in the background of sports activities, tearing of the hymen of the prosecutrix could be as a result of the same and not necessarily on account of alleged rape. Counsel also submitted that PW- 4 has twice gone to meet the accused in jail with a view to blackmail him otherwise in the background of such a treacherous conduct of the accused, how she could pay visit to the jail to meet him. Counsel also pointed out that PW-4 in her cross-examination admitted that she also met the accused in the court and had assured him to give necessary help which again shows that PW-4 was fully conscious of the falseness of the present case.

17. Dealing with the evidence of PW-5 Yash Yadav who is the brother of the prosecutrix, counsel for the appellant pointed out that in his deposition PW-5 clearly admitted that whenever he and his sister had to go out, the accused allowed them and this fact would clearly show that the prosecutrix was free to roam around without any restriction from the side of the father. Counsel also pointed out that, during his cross- examination PW-5 clearly stated that his sister did not tell about the wrong act. Counsel also pointed out that PW-5 in his testimony also admitted that there were other children in tuition classes which shows that the prosecutrix had ample opportunity to interact with other children. Counsel also argued that PW-7 Ms. Mahinder Pal Kaur, Principal, Shiv Modern School in her cross-examination deposed that the appellant had moved an application dated 21st April, 2007 with the instructions that the prosecutrix may not be allowed to meet or go with her mother and her custody may not be given to the mother or anybody else on her behalf. The contention raised by the counsel for the appellant was that this act of the accused also instigated his

ex-wife PW4 to falsely implicate him in the present case. Counsel also referred to the cross-examination of PW- 11 ASI Joginder Singh wherein he categorically admitted the fact that the prosecutrix did not make any statement before him regarding rape but she stated that a wrongful act has been committed with her by her father. The contention of the appellant was that at that time PW-4, Geeta did not make up her mind and due to this reason alone the said police officer was informed about some wrong act committed by the accused with the prosecutrix. Counsel also submitted that the appellant himself has been examined as DW-18 and his testimony is at par with the victim in terms of Section 315 Cr.P.C. but yet the learned Trial Court failed to give any weightage whatsoever to his testimony.

18. Counsel for the appellant also referred to the evidence adduced by the defence witnesses, who, as per counsel for the appellant, succeeded in proving the innocence of the appellant and his false implication by his ex- wife Geeta in collusion with her parents-in-law.

19. Based on the above submissions, counsel for the appellant with all vehemence urged that the appellant was falsely implicated in the present case at the instance of his ex-wife Geeta and his hostile parents and to achieve their sinister designs, they succeeded in making their own daughter, as a tool to take revenge. Counsel also urged that the appellant always took due care of his children and this fact could alone be established by the fact that he was always insisting for the custody of his children which ultimately was agreed upon by his ex-wife in the joint petition for mutual divorce. Counsel also urged that the learned Trial court also failed to appreciate that since the time of the birth of the appellant, his father Om Prakash has not accepted him as a son and because of this fact the appellant was raised by his grandparents, uncle (chacha) and aunty (bhua). Counsel also submitted that due to this fact the grandfather of the appellant had bequeathed the property bearing No.E-650, Madipur, Delhi in favour of the appellant under a Will. Counsel thus submitted that his father was quite inimical and jealous of him because of the said property coming in his hands which in normal course would have gone to him and due to this reason the father had joined Geeta in getting the said false case registered against him.

20. In support of his arguments learned counsel for the appellant placed reliance on the following judgments:-

1. State vs. Rahul, , reported in 2013IV AD (Delhi) 745

2. Pappu vs. State of Delhi, reported in 2010 (1) Cri.LJ 580 Delhi

3. Lillu @ Rajesh and Anr. vs. State of Haryana, reported in AIR2013SC1784

4. State of Karnataka vs. Shantappa Madivalappa Galapuji and ors., , reported in JT 2009 (5) SC 660

5. Virender vs. State of NCT of Delhi, , reported in 2010 III AD (DELHI) 342

6. Shaikh Sheru vs. State of Maharashtra criminal appeal no.

406 of 2012.

21. Repudiating the submissions of the counsel for the appellant, Ms. Richa Kapoor, APP for the state, strenuously contended that the learned Trial Court has passed well reasoned judgment on conviction and sentenced the appellant for life imprisonment after having carefully evaluating the entire material on record. Learned APP further argued that the appellant has committed most sinful act of raping his own daughter of 11 years of age and he cannot hide his sin under the facade of alleged minor discrepancies and contradictions in the testimonies of material witnesses. Learned APP also argued that the counsel for the appellant has made a futile attempt to find fault in the testimonies of PW-3, PW-4 and PW-5 but the truth remains that their testimonies remained unrebutted and uncontroverted on material facts leaving no room to disbelieve them. Learned APP also argued that the medical evidence proved on record through the MLC of the appellant and the MLC of the prosecutrix further corroborates and strengthens the oral testimonies of the prosecutrix and other material witnesses. Learned APP also argued that as per the settled legal position even an uncorroborated testimony of prosecutrix is sufficient to inculpate the offender of the crime but in the present case the testimony of the prosecutrix has been duly corroborated by her mother PW-4 and her brother PW5. Learned APP also argued that such a small child would not falsely implicate her father and that too in a crime of such a nature as serious as rape. Counsel also argued that the testimony of the prosecutrix was supported by her younger brother PW-5 who in his deposition stated that he was told by his sister that the appellant used to commit wrong acts with her. He also deposed that the appellant used to take his sister downstairs during the night after bolting the room from outside. Learned APP also argued that the parents of the accused although has turned hostile but they remained consistent in their stand that on 29th May, 2007 mother of the children Geeta PW-4 was present at their house and also that the prosecutrix was also present in that house on the same day. Learned APP also pointed out that the case was reported to the police vide DD No.8A proved on record as Ex.PW-9/A from the telephone Nos. 65108074 and 9313653793 and father of the accused was the subscriber of the said phone nos.. Learned APP further argued that the learned Trial Court has rightly ignored a portion of the testimony of PW- 3 where she had deposed having told her mother about rape in January, 2007, as a mere slip of tongue. The contention raised by the learned APP for the State was that the statement of the prosecutrix is to be read as a whole and not piecemeal. In her same statement, the prosecutrix deposed that she did not remember the month of her making complaint to the police and yet further in her same deposition she stated that "I have stated to the police that I did not remember the exact date but the incident took place about six months back." Learned APP thus submitted that the said six months period if calculated in reverse from the date of complaint lodged on 30th May, 2007 it will be November-December, 2006 and this is the period which the prosecutrix had stated in her complaint as well as in her statement under Section 164 Cr.P.C. and in her court deposition. Learned APP thus submitted that the testimonies of the prosecutrix as a whole are totally believable, truthful, clear, cogent and convincing. Learned APP also submitted that the prosecutrix could not inform her mother PW-4 about the said shameful acts of her father as he did not allow PW-4 to meet the children. Learned APP also submitted that prior to the meeting of 29th May, 2007 PW-4 lastly met the prosecutrix in the month of September, 2006.

22. Learned APP also submitted that the appellant was a sex maniac and without bothering the presence of his small children especially female, he used to watch blue movies at the residence in the

company of his friends. Learned APP also submitted that no convincing reasons have been given by the appellant as to why his daughter should falsely implicate her own father and why in that process she did not even hesitate going to the extent of putting her own honour and prestige at stake besides jeopardizing her marriage prospectus? Learned APP also argued that no girl would like to undergo trauma of subjecting herself to ordeal of visiting the police station and then of court proceedings without the girl having actually suffered trauma of being raped by her own father.

23. Learned APP also argued that the testimony of the accused who entered into witness box as DW-18 is totally unreliable and he failed to advance any convincing reason for his implication by his own daughter and his parents that too in a crime of such a serious nature. Learned APP thus submitted that the case in hand is an open and shut case and the learned Trial Court dealt with each and every aspect of the defence raised by the appellant meticulously and based on sound reason.

24. In support of her arguments learned APP for the State placed reliance on the following judgments:-

> i. Bhupinder Sharma vs. State of Himachal Pradesh AIR2003SC4684 ii. Gurudev vs. The State(NCT of Delhi) iii. State of Madhya Pradesh v. Santosh Kumar iv. State vs. Jain Hind 2012(4)JCC2490 v. Pushpanjali Sahu vs. State of Orissa & Anr.
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> AIR2013SC1119 vi. State of Karnataka vs. Shantappa Madivalappa Galapuji and ors., JT 2009 (5) SC 660 vii. Virender vs. State of NCT of Delhi, 2010 III AD (DELHI) 342 viii. Criminal Appeal No.406/2012 titled as Shaikh Sheru vs. The State of Maharashtra, decided on 2nd April ix. Pappu vs. State of Delhi, reported in 2010 (1) Cri.LJ 580 Delhi x. Lillu @ Rajesh and Anr. vs. State of Haryana, reported in AIR2013SC1784 xi. State vs. Rahul, 2013 IV AD (Delhi) 745.

25. We have heard counsel for the parties at great length and gave our conscious consideration to the arguments advanced by them. We have also carefully gone through the Trial Court record.

26. The case in hand has its own peculiarity of facts wherein on the one hand, the serious allegations of rape were levelled by a minor daughter of 11 years of age, against her father supported by deposition of her mother, her three years younger brother and initially even the grandparents of the girl, and on the other hand, as per the accused father, the entire case is an outcome of well planned conspiracy between his ex- wife supported by his hostile parents, who had used her daughter as a tool for settling their scores and for taking back the custody of the children, which was granted in favour of appellant under the mutual settlement arrived at between the parties.

27. Whether the appellant is innocent and has been falsely implicated with such a serious charge of rape by his own daughter at the behest of her mother for wreaking vengeance on the accused, with a view to spite him due to private and personal grudge or the father is such debouch and an evil person, who would not even spare even his minor daughter in satisfying his lust for sex. Truth being the cherished ideal and ethos of India, pursuit of truth is the guiding star of the criminal justice system. For justice to be done truth must prevail. It is truth that must protect the innocent and it is

truth that must be the basis to punish the guilty. Thus the search of truth is the most pious but arduous task entrusted to the courts and this search of truth primarily rests on the evidence adduced by the parties and the other material proved on record during the trial of a case and its dispassionate judicial scrutiny and objective approach of the court. A criminal trial is meant for doing justice to all, the victim, the accused and also the society. The court does not only discharge the function to ensure that no innocent man is punished, but also to ensure that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory, motivated or designedly defective investigation, there the Court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not sub-served. In arriving at the conclusion about the guilt of the accused charged with commission of a crime, the court has to judge the evidence by the yardstick of probability, its intrinsic worth and the animus, if any of witnesses.

28. The prosecutrix here is none else but her own daughter of the appellant. The appellant got married to PW-4 Ms. Geeta on 29th July, 1995 at Delhi according to Hindu rites and ceremonies. This marriage was as a result of love affair between them. As per deposition of the appellant, he got married to PW4 against the wishes of his parents and, therefore, the marriage was not accepted by his parents and immediately after the marriage for few days they had to live at his aunty s place and thereafter on rent in Madipur, Delhi. Out of wedlock of the appellant and PW4, two children were born. The elder one who is the prosecutrix was born on 23rd July, 1996 while the male child was born on 17 th September, 1999. The husband and wife could not pull off together and often they used to fight. Marital discord between them resulted into filing of cris- cross cases by both of them. PW4 filed a complaint with the Crime against Women Cells under Section 498A/506 IPC in which she had also roped the parents of the appellant. The appellant, on the other hand, filed a divorce petition on the ground of cruelty against the respondent. Ms. Geeta also filed a complaint under Section 125 Cr.P.C. against the appellant to seek grant of maintenance. The appellant also filed a petition under Section 12 of the Guardianship Act to claim the custody of the children from his wife. In the criminal case filed by his wife, the appellant got an anticipatory bail for himself and for his parents. The following details of the cases filed by both the parties against each other are as under:-

> "Cases filed by appellant against Geeta Anand (PW4):
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> 1. Divorce Petition seeking divorce on the ground of cruelty which later on converted into Mutual consent.
>
> 2. Kidnapping case by filling a complaint under Section 190 Cr.P.C. before the concerned MM against Geeta Anand and her father, brother and sister.
>
> 3. Petition under Guardianship & Wards Act in the Court of Ms. Anju Bajaj Chandana.
>
> 4. Complaint under Section 138 of the NI Act against the sister of Geeta Anand.

5. Complaint with the Passport Authorities for the material concealment of facts by Geeta Anand.

Cases filed by Ms. Geeta Anand (PW4) against appellant:

1. Complaint under Section 498-A/506 IPC before the CAW Cell which is later on converted into FIR No.279/05, dated 19.07.2005.

2. Present FIR."

29. It will also be necessary here to give a gist of the places where the parties and the children had resided till they finally parted with them in the company of each other.

> "The appellant married PW-4 on 29.07.1995. On 23.07.1996, Prosecutrix (PW-3) was born and on 17.09.1999 Yash (PW5) was born. In may-june 2003, PW-4 left the house along with prosecutrix and PW- 5in July 2003 appellant brought back PW-4 along with PW--3 and PW-5 to his house. In May 2005, PW4again left the home along with prosecutrix and PW5. On 26.12.2005 PW-4 handed over both the children to the accused in the house of accused s father. In April 2006, PW-4 left for South Korea for learning Korean language. In September 2006, PW-4 came back from South Korea. On 3rd February 2007 accused and PW-4 got divorced by mutual consent and custody of both the children remain with the accused and PW-4 had visitation rights as per her convenience."

30. While analysing and evaluating the facts of the present case, we have to keep in our mind the aforesaid background of litigation and embittered relationship between the parties. We may also mention here that the marriage between the parties was dissolved by a consent decree under Section 13(B) (1) & (2) of the Hindu Marriage Act vide judgment and decree dated 3rd February, 2007. It will also be useful to mention here that the present appellant had immediately married to Ms. Poonam on 14.02.2007 with whom he had an affair even before his first marriage was dissolved.

31. As per the case set up by the prosecution, on 29.05.2007 the prosecutrix and her brother were staying with their grandparents at Shiva Enclave, Paschim Vihar where their mother also came to meet them. In her statement under Section 161 Cr.P.C., Ms. Geeta stated that in the presence of her parents-in-law the prosecutrix told her that in November- December, 2006 the appellant had maintained physical relationship with her despite her refusal and he also told the prosecutrix that if she dared to disclose anything, he will physically eliminate her. After learning this, the mother of the prosecutrix immediately reported to the police and ASI Joginder Singh from PS Paschim Vihar rushed to the said residence of the grandparents of the prosecutrix. The police official from PS Madipur also reached there. The prosecutrix along with her mother was taken to Sanjay Gandhi Memorial Hospital, Delhi where the prosecutrix was medically examined. The IO recorded the statement of the prosecutrix and thereafter FIR No. 389/2007 was registered against the appellant under Section 376 (2) (f)/506 IPC. In the MLC of the prosecutrix which was proved on record as Ex. PW-5/A Dr. Deepti Goel (PW8), it was opined that on medical examination of prosecutrix, her

hymen was found to be torn. It was further testified that on vaginal examination introituses allowed two fingers with difficulty. The appellant was also examined by the doctor of the same hospital and as per his MLC report proved on record as Ex.PW- 5/B, the opinion given was that there was nothing to suggest that the accused was not capable of doing sexual intercourse. Believing the testimony of the prosecutrix duly corroborated by the evidence of her mother PW-4 and her brother PW-5 and to a limited extent by the evidence of PW-1 & PW-2 supported by the medical evidence and the FSL report, the learned Trial Court reached at the conclusion that the appellant did commit rape of his own daughter during the said period of November-December, 2006. Various discrepancies, embellishments and contradictions as crept in the prosecution case were held to be minor discrepancies and embellishments not corroding the credibility of testimonies of PW-3, PW-4 and PW-5 and the medical evidence. Learned Trial Court also did not believe the hostility on the part of the parents of the appellant and the revengeful attitude of the wife in settling her scores with the appellant as her entire family was dragged into litigation by the accused and also to claim back the custody of the children. The learned Trial Court also gave no weightage to the fact that the prosecutrix neither suffered any injuries on her private part after alleged repeated sexual acts performed by the appellant nor she had suffered any kind of depression or trauma which could result in absenteeism from the school or affecting her academic performance in exams.

32. The legal position relating to evidence of child witness has been dealt with by the Apex Court in a catena of judgments while interpreting section 118 of the Indian Evidence Act. All persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender age, extreme old age, disease, whether of body or mind, or any other cause of the same nature. No particular age has been specified in Section 118 of the Indian Evidence Act as to at what age a person would be considered of a tender year, as a whole test is whether the witness has sufficient intelligence to depose and in a position to give rational answers to the questions asked.

33. In Suryanarayan Raina v. State of Karnataka reported in 2001 (9) SCC 129, the Apex Court took a view that evidence of a child witness is not to be rejected per se, but the court as a rule of prudence resolved to consider such evidence with close scrutiny and only on being convinced about the quality thereof and its reliability may record conviction based thereon.

34. In Dattu Rama Rao Shakare vs. State of Maharashtra reported in 1997 (5) SCC341, it was held as under:

> "The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness."

35. In State of Karnataka vs. Shantappa Madivalappa Galapuji and ors., reported in JT 2009 (5) SC 660, it was held as under:-

> "This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken 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."

36. In Acharaparambath Pradeepan and Anr. vs. State of Kerala reported in (2006)13SCC643, it was held as under:

> "Pivotal submission of the appellant is regarding acceptability of PW-11's evidence. Age of the witness during examination was taken to be about 10 years. Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States. The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon.
>
> Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses 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 child witnesses."

37. The prosecutrix in the present case was of 11 years of age when she was allegedly raped by her father. She was a student of V standard during that period. She was of 13 years of age when her statement in court was recorded and by that time she got upgraded in 6th standard. If we just look at various statements given by the prosecutrix she has been consistent in saying that she was raped by her father during the period November-December 2006. Her statement also gets support from the corroborative deposition of her mother (PW-4) and her brother (PW-5) to a large extent, but if we look at the surrounding circumstances in which this case was registered, one gets suspicious and doubtful over the truthfulness and veracity of various statements made by the prosecutrix i.e. the statement(rukka) before the police on the basis of which the FIR was registered, her statement under Section 164 of Cr.P.C. before the Magistrate and the statement made by her in the court. We cannot shut our eyes from the fact that the prosecutrix is a child and more often the children can be easily swayed away and are prone to tutoring, therefore the statement of the child witness should

always be scrutinized with great care and caution, more particularly in a case where there is a serious hostility between the husband and wife and there are fair chances for the child to act at the behest of one such party in his/her pursuit of settling scores against the other party. In such cases, not only the court has to search for reliable corroborative evidence either oral or documentary, as a matter of prudence, but must also feel satisfied that such a child is not playing in the hands and dictation of any family member or other person who may be in a better position to have a command and dominance over the child and who has some sinister agenda of settling scores with the other party named as accused in the commission of any crime. This precaution is necessary because child witness is amenable to tutoring and often lives in the world of make-believe. The cases of false implication in rape cases are not uncommon and in some cases parents do persuade gullible or obedient daughter to make false charge of rape either to take revenge or for wreaking vengeance on the accused. We are not here suggesting that in every case the testimony of child witness should be looked upon with suspicion, but before the same is believed as a reliable and truthful statement, due care and caution should be taken looking into all the facts and circumstances of the case especially where the accused happens to be a member of the family and there is another member in a commanding and dominating position to influence and tutor the child in getting the case registered against the other for settling his own scores and vendetta.

38. There is a tremendous increase of rape cases of the children and in many cases astonishingly, the rapist even involved are those who are otherwise revered persons in the society and worst of all a father himself who is instrumental in giving birth to the same very child and then later treat her as an object of his sexual lust and satisfaction.

39. There cannot be more serious crime than a rape of a minor child and such an offence assumes a degree of severity when committed by none else but by the father of the prosecutrix. The father is supposed to protect the dignity and honour of his daughter. This is a fundamental facet of human life. If the protector becomes the violator, the offence assumes a greater degree of vulnerability. The sanctity of father and daughter relationship gets polluted. It becomes unpardonable act. This is a grievous sin which could be committed by any such parent, who in the lust of satisfying momentarily sexual desire, shamelessly pollutes his pious and sanctimonious relationship with his own daughter.

40. To this position as stated above, there can hardly be any other opinion but the converse position is also equally sinful and unpardonable where a father or any member of family is falsely implicated with such a serious allegation of rape when nothing of the same has happened and the prosecutrix becomes a tool in the hands of her own mother and other family members inimical to the accused. Moral values in the society have abysmally gone down where even the most unacceptable thing can also happen.

41. Adverting back to the facts of the present case, what we find is that not only the prosecutrix was under the total influence of her mother but there are various material contradictions, discrepancies and improvements in the testimonies of the prosecution witnesses and also the testimonies of various defence witnesses having gone unrebutted and the medical evidence not fully supporting the case of the prosecution and therefore, we find ourselves not in agreement with the reasoning given by the learned trial court to hold the appellant guilty of committing such a heinous offence of raping

his own daughter.

42. First and foremost circumstances which goes in favour of the appellant is that his parents who entered into the witness box as PW-1 and PW-2 turned hostile and did not support the case of the prosecution. Undeniably, these two witnesses had admitted that prosecutrix was present at their house on the night of 29th May 2007 and also that the mother of the prosecutrix also reached there but at the same time, we cannot lose our sight from the hostile relationship between the appellant and his father. The property bearing No.E-650, Madipur, Delhi was a subject matter of dispute between the appellant and his father PW-1. The appellant had produced a Will which was left by his grandfather bequeathing the said property in his favour thereby divesting the right of PW-1 to have a claim over the said property being one of the legal heirs amongst his brothers. The said Will was proved on record as Ex.DW- 13/A.

43. The prosecutrix in her examination-in-chief also deposed that main cause of dispute between her parents were his grandfather and grandmother and due to this reason her parents had shifted to Madipur, Delhi from Paschim Vihar. It was also proved on record that the marriage of the appellant with Geeta was against the wishes of his parents and due to this reason after the marriage they were not allowed to stay with them and forced to stay with the aunt of the appellant and thereafter in a rented accommodation. Appellant in his un-rebutted deposition in examination- in-chief also stated that right from the date of his birth, for certain unknown reasons, his father Om Prakash Yadav had refused to accept and acknowledge him as his son. He also deposed that due to this reason there were quarrels between his grandfather and father and because of such quarrels, his father had left his house and did not return for a year. He also deposed that he was brought up by his dadaji, dadiji, chachaji, chachiji and bua. He further deposed that his father s behaviour was bad towards him and his grandfather arranged for a separate house for his stay i.e. Property No.E-650, Madipur, Delhi. This is the same property which was later on willed by his grandfather in his favour. It is because of this hostility in the relationship between the father and son, the father of the appellant had connived with the ex wife of the appellant - Geeta in falsely implicating him in the said rape case. The hostility of the relationship between PW-2 and accused was also highlighted by PW-1, Smt. Leela Yadav mother of the appellant who in her cross-examination stated that the appellant and his father did not have cordial relationship and he even disowned the accused by publishing a notice in the newspaper in the year 1999.

44. Also DW-13,Vijay Singh Yadav, who is real uncle of the appellant and real brother of PW-2 in his unrebutted testimony before the court, deposed that he asked PW2 as to why he was letting this happen to his own son and to this, PW2 replied that until he get the possession of Plot No.E-650, Madipur Colony, New Delhi from the accused, he would neither take rest nor he would help him in any manner.

45. Smt. Sharda Yadav (DW-15), who is aunt of the appellant, has also deposed in her unrebutted examination-in-chief to the same effect that her brother, PW2 has demanded the possession of House No.E-650, Madipur, New Delhi from appellant and also told that it is after taking the possession of the said house, he would pressurize Geeta to withdraw the said false case against the appellant. On the other hand, Ms. Geeta (PW-

4) in her cross-examination admitted the fact that she was on visiting terms at the house of PW2 despite the fact that she had lodged a complaint against them under Section 406/498A of IPC.

46. The aforesaid hostility on the part of PW-1 and PW-2 and their continuous relationships with PW4 have not been carefully noticed by the learned trial court and it is due to this hostility, the parents of the appellant had colluded with Ms. Geeta in falsely implicating the appellant in a rape case. It appears that wiser sense devolved upon them when they appeared in court and did not support the prosecution case.

47. Let us now deal with the evidence of Ms. Geeta (PW-4), who as per the appellant is a master mind behind his false implication. The evidence of PW-4 and her alleged involvement in getting present case registered through her own daughter of 11 years of age cannot be properly appreciated without evaluating the other attending circumstances surrounding her. Indisputably, there is a marital discord between the appellant and PW4 and matrimonial relationship between them got strained sometime in the year 2003. PW4 was quite concerned with her career as despite being mother of two small children, in the year 2006, she went to Korea on scholarship for higher Studies. As per the deposition of appellant DW-18, she had also undertaken classes in Korean language and the appellant had not raised any objection to her pursuing the advancement of her career. In the year 2005, because of the strained relationship, PW4 had taken away both the children to Bangalore with her, but there also they had to stay with their aunt (Mausi). From Bangalore, the children were brought back to Delhi at the residence of PW-2 and from the house of PW-2, the children were taken away by the accused alongwith him. In April 2006, Ms. Geeta left for Korea with her teacher Mr. Verma. By that time the appellant had already filed a guardianship case and PW4 had also filed an application under Section 125 of Cr.P.C. and a complaint with Crime against Women Cell under Section 498A/506 of IPC. The appellant had also filed a complaint case under Section 190 of Cr.P.C against Geeta, Geeta s father, her brother and her sister seeking their prosecution under Section 363 IPC. The appellant had also filed another case under Section 138 of Negotiable Instruments Act, 1881 against Ms. Madhvi Sabharwal, sister of Ms. Geeta. The appellant had also separately filed a divorce case to seek dissolution of his marriage on the ground of cruelty. Ms. Geeta, perhaps could not sustain the pressure of the litigation launched by the appellant and ultimately in the month of December 2006 she had agreed for a mutual divorce and also for legally handing over the custody of children in favour of the appellant. PW4 had also agreed to accept the paltry amount of Rs. 1 Lac in full and final settlement of all material claims from the appellant and for withdrawal of all the cases filed by both the parties. It was also agreed between the parties that the appellant would not insist on demanding a sum of Rs. 1 Lac from the sister of Ms. Geeta, which was a subject matter of complaint filed by the appellant under Section 138 of Negotiable Instruments Act, 1881. Both the parties had accordingly filed a joint petition under Section 13B (1) and (2) of the Hindu Marriage Act, 1956 and their marriage was finally dissolved by judgment and decree of divorce dated 3rd February 2007. Both the said children were already under the custody of the appellant for the past one year and their custody got legitimacy by the said judgment and decree dated 3.2.2007. Thereafter the appellant, who was already having an affair with another lady named Ms. Poonam, got immediately re-married on 14th February 2007 i.e. after a gap of 11 days. After 4-5 days of his marriage PW-4 came to see her children at his residence and found that the appellant got re-married and perhaps this remarriage of the appellant within such a short span worked like

adding a fuel to the fire in bolstering the feeling of revenge in Ms. Geeta and such an opportunity Ms. Geeta got when the children had come to their grand-parents for their stay on 29th May 2007.

48. The falseness on the part of Ms.Geeta gets fully exposed from the following:

a) PW-4 in her examination-in-chief stated that on the evening of 29th May 2007, she was told by her daughter that she was now having periods and at such revelation she became perplexed as by that time her daughter was only 9 years old. On her asking, the daughter told her that after the accused had sexual intercourse with her, she had periods after some days. In her cross-examination she completely contradicted herself by stating that when she came back from Korea to admit the children, she had discussed about the condition of prosecutrix with the appellant and even asked the appellant to take special care of prosecutrix during her menstruation period and at that appellant told that he has already consulted with some lady and he is already taking care of prosecutrix. She also stated that this discussion had taken place in the month of September 2006. Thus, her claim that she came to know from the prosecutrix that she started menstruating only after the sexual act committed by accused in November - December 2006 is palpably false. It is also pertinent to state here that as per the MLC report dated 30.05.2007 the prosecutrix was menstruating since one year, meaning thereby, that her menstruation cycle would have begun somewhere around April-May 2006.

b) Another false statement given by PW-4 was when she stated that she went to Korea for scholarship in March 2006 for higher studies and when she came back in September she went to meet her children in school. She was shocked to see her daughter as she appeared dark, fat and grown up during that period of six months. The accused had asked her not to meet the children. Accused further told her that he has now re-married and the step mother of the children does not approve of her meeting with the children. At this PW4 even went to accused and asked him to atleast allow her to talk to her children on phone but the accused did not allowed this.

That falseness of PW-4 is apparent from the fact that in September 2006, the appellant was not married with Ms. Poonam and therefore there was no question of appellant telling his wife that he has now married. Secondly, the marriage between the appellant and Geeta was also not dissolved by that time and therefore there was no question of appellant getting re-married with Ms. Poonam. Thirdly, the falseness in the said deposition of PW-4 gets exposed from the deposition of prosecutrix (PW-3) who in her cross- examination stated that her mother visited her in Madipur in the presence of her father, a number of times and once she came to meet her in the school. She also stated that she cannot tell the date, month and the year when her mother came to meet her in the school, but at that time she was in V standard. It is an admitted case of the prosecution that the children were with the appellant during the time when Ms. Geeta was away to Korea and they continued to stay with appellant even after the appellant had returned back from Korea. During that period, the

prosecutrix was in V standard as per her school records placed on record and therefore PW- 4 must have visited the prosecutrix only after she had returned back from Korea in September 2006 when the prosecutrix was in V standard.

c) Ms. Geeta, PW-4 in her examination-in-chief had stated that her daughter started revealing the fact slowly and slowly that her father used to have sexual intercourse and also from her backside and due to that she could not sit in latrine for some days as she was feeling severe pain and she told this fact to her brother and asked what she should do? All these facts were stated by PW-4 neither in her statement recorded under Section 161 Cr.P.C. nor this was stated by the prosecutrix in her first statement to the police on the basis of which FIR was registered or in her statement recorded under Section 164 of Cr.P.C. before the Magistrate or even in her court deposition. This is also not supported by the MLC of the prosecutrix. The prosecutrix also nowhere stated that she had told any such fact to her brother in any of her statements.

d) In her examination-in-chief PW-4 deposed that accused used to watch blue movies in the house and when she came back to her house after visiting her father she was told by her daughter that accused used to watch blue movies, one lady came in the house and they were doing obscene activities and when confronted with this statement, the accused started fighting her. In her cross-examination when PW4 was asked whether you stated any such allegation in your statement recorded under Section 161 Cr.P.C. to police?, she stated „yes . However, when PW4 was confronted with the statement made to the police under Section 161 Cr.P.C., nothing of this sought was stated by her to the police.

e) PW4 in her deposition stated that on being told by her daughter that the accused had sexual intercourse with her and she had periods thereafter and when asked again to reveal more the daughter started crying. PW4 further deposed that she got aggressive to know this fact and she started giving slaps to her daughter and raised an alarm. This deposition of PW4, does not find any support from the prosecutrix or her parents-in-law, PW1 and PW2 or her son PW5, respectively.

49. From the aforesaid material contradictions and inconsistencies and improvements made by PW4, we are not able to persuade ourselves to believe that her testimony inspires any confidence especially in the background of the facts, which have already been discussed herein above.

50. Let us now deal with the most pivotal evidence of the prosecutrix herself. The prosecutrix in her Court deposition stated that she was raped at night by her father first time when her grandparents came to the residence of the appellant. In her first statement (rukka) PW3 nowhere stated that she was for the first time raped by her father when her grandfather had visited him and so far as her statement under Section 164 Cr.P.C. is concerned her version is different as there she stated that when her grandfather had visited the residence of appellant son somewhere in the month of November, but not knowing the exact date, at that time she was sleeping and her father had teased

her and after her grandfather had left thereafter against her wishes her father had established physical relationship with her for 10-15 times. It would be thus seen that in all the three statements of prosecutrix, she had given different versions. In her first statement (rukka) she nowhere disclosed the visit of her grandfather and in her statement under Section 164 Cr.P.C. she deposed for being teased by her father at the time of visit of her grandfather and in her Court deposition she took entirely different stand of being raped at night when her grandparents had visited the residence of the appellant.

51. Another vital contradiction on the part of the prosecutrix is that in her cross-examination she deposed that she attended the school only 3-4 days in a month and this false deposition on the part of the prosecutrix gets clearly exposed from the daily attendance register proved on record as Exs. DW-1/D, DW-1/A & DW-1/B, respectively, which clearly reveals that prosecutrix had been regularly attending the school i.e. 44 attendance out of 48 in the month of November and 38 attendance out of 38 in the month of December.

52. The prosecutrix in none of her statements endorsed the stand of her mother PW4 that her menstruation started after she was raped by her father. The prosecutrix also did not support the stand of her mother PW4 that her father used to have sex with her from her back side and due to this she could not sit in the latrine for some days and that she was feeling severe pain and she told this fact to her brother also to ask what she should do?.

53. Before we further analyze the entire set of circumstances under which the said complaint had been lodged by the prosecutrix implicating her own father in such a serious offence, let us first refer to the MLC of the prosecutrix which was proved on record as Ex.5/A. As per the MLC report, her mother (PW4) accompanied prosecutrix to Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi on 30th May 2007 at 1.10 PM. The age of the prosecutrix as stated in the MLC as on date of her examination was 11 years. The prosecutrix was also accompanied by HC Ranjit, from Police Station Punjabi Bagh, New Delhi. In the hospital, the prosecutrix was medically examined by Dr. Vinay Kumar to whom the prosecutrix and her mother disclosed the alleged history of sexual assault by her father. The prosecutrix was referred to gyne department and from gyne department the prosecutrix was medically examined by Dr. Monika. On medical examination, the hymen of the prosecutrix was found torn and as per vaginal examination, the doctor opined that „introituses, admits two fingers with difficulty". The said MLC also records status of menarche as one year back. Exact uterus size could not be assessed. Doctor had also collected the vaginal swab samples and undergarments of the prosecutrix, which were sealed and referred for forensic opinion. The gyne opinion given by Dr. Monika in the said MLC report Ex.5/A was proved in the testimony of Dr. Deepti Goel (PW-8), Medical Officer, Sanjay Gandhi Memorial Hospital. PW-8 in her deposition stated that Dr. Monica had left the hospital and her whereabouts are not known and since she has seen Dr. Monica signing and writing, therefore she was in a position to identify her signatures at the said MLC report and was competent to depose about the said MLC report. In her cross-examination, she stated as under:-

> "The hymen can be torn on account of many reasons like injury during cycling or sports and sexual intercourse. It is possible that prosecutrix aged around 10-11 years

> might receive injuries in her vagina during the course of intercourse by grown up man."

54. In the MLC, there are no external signs of injuries. However, Dr.Deepti Goel (PW8) in her cross-examination stated that if a minor girl is raped there can be or cannot be injury marks.

55. It is by far well recognised position that the condition of hymen being torn of the prosecutrix may not necessarily lead to infer previous sexual intercourse and conversely being hymen not torn also does not necessarily mean that there was no sexual intercourse. Dealing with the subject of hymen torn and size of vaginal introituses, Justice Verma Committee in their report has given the following observations:-

> "10. It is crucial to underscore that the size of the vaginal introituses has no bearing on a case of sexual assault, and therefore a test to ascertain the laxity of the vaginal muscles which is commonly referred to as the two-finger test must not be conducted. On the basis of this test observations/ conclusions such as 'habituated to sexual intercourse' should not be made and this is forbidden by law.
>
> 11. Routinely, there is a lot of attention given to the status of hymen. The "finger test" is also conducted to note the dispensability of the hymen. However it is largely irrelevant because the hymen can be torn due to several reasons. An intact hymen does not rule out sexual assault, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual assault. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, oedema etc.) are to be documented."

56. Modi's Medical Jurisprudence, 11th Edition, Chapter XVII, page 475 has dealt with this subject in the following orders:-

> Page 503:
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> "In nubile virgins, the hymen, as a result of complete sexual intercourse, is usually ruptured, having one or move radiate tears "Frequent sexual intercourse and parturition completely destroy the hymen, which is represented by several small tags of tissue, which are called carunculae hymenealis or myrtiformes."
>
> Page 504:
>
> "In small children, the hymen is not usually ruptured, but may become red and congested with the inflammation and bruishing of the labia. If considerable force is used, there is often laceration of fourchette and perinaeum." - In the present case, no injury either healed or having any old scar marks etc. was present either on fourchette or on perinaeum."

57. In the Journal of the Forum of Medical Ethics Society since 1993 in the editorial "Moving from evidence the care: ethical responsibility of health in responding to sexual assault", it has been opined as under:-

"this is a contrary scientific evidence that the presence of an intact hymen does not rule out sexual assault, and the fact of a torn hymen does not prove previous sexual intercourse, as the hymen can be torn due to many other activities like cycling, horse-riding, masturbation etc."

58. The Division Bench of this court in the case of Pappu vs. State of Delhi, reported in 2010 (1) Cri.LJ 580 Delhi was also dealing with similar medical condition of the prosecutrix of six years of age whose hymen was also found torn and her vagina admitted two fingers easily and no injury was found on private part, and the Division bench after placing reliance on the medical jurisprudence (5th Edition by Dr. R.M.

Jhala and B.B. Raju) held as under:-

"The reason is obvious. medical jurisprudence evidences that in adolescent girls the hymen is situated relatively more posteriorly and for said reason there is a possibility of rape being committed without the hymen being torn; the converse whereof would be that if the hymen of an adolescent girl is torn due to rape, the penetration has to be a deep penetration. The medical jurisprudence guides that the labia majora are the first to be encountered by the male organ and they are subjected to blunt forceful blows, depending on the vigour and the force used by the accused and counteracted by the victim. The narrowness of the vaginal canal makes it inevitable for the male organ to inflict blunt, forceful blows on the labia and such blows lead to contusion because of looseness and vascularity. The feature of such contusion is revealed against the pink background of the mucous membrane dark red contusion being evident to the naked eye."

59. The above judgment of the Division Bench was also dealing with the case of false implication of the accused by the father of the prosecutrix who believed that the accused had an illicit relationship with his wife.

60. It would also be useful to refer here the following extracts taken out from the Medical Jurisprudence & Toxicology (Law practice and procedure) authored by Dr. K.S. Narayan Reddy where the author has observed as under:-

"As the age and size of the infant increases, the pattern of injury will become less marked but the circumferential tears of the vestibular m mucosa ucoas are found up to the age of six years or more. Full penile penetration produces bruising of the vaginal walls and frequently tears of the anterior and posterior vaginal walls. Anterior tears can involve the bladder and the posterior tears the anorectal canal. Vaginal vault may rupture, and there may be vaginal herniation of abdominal viscera. The

> hymen may be entirely destroyed or may show lacerations. Blood may be oozing from the injured parts or clots of blood may be found in the vagina. There may be mucopurulent discharge from the vagina. In digital penetration of the infant vagina, there is frequently some scratching or bruising of the labia and vestibule, but the circumferential tears are absent. The hymen shows a linear tear in the posterior or posterolateral quadrant, which may extend into the posterior vaginal wall and on to the skin of the perineum and may involve the perineal body. Ano-rectal canal is rarely involved. Bruising in the margins of tear and of anterior vaginal wall are common, but vaginal vault injury is rare. Any attempt to separate the thighs for examination causes great pain, because of the local inflammation. The child walks with difficulty due to pain. The absence of marks of violence on the genitals of the child, when an early examination is made is strong evidence that rape has not been committed."

61. The prosecutrix in the facts of the present case, has alleged her being repeatedly raped by her father during the period of November - December 2006 and complaint to this effect was lodged with the police on the morning of 30th May 2007 i.e. after a gap of 6 months. With such a wide gap, there could not have been any fresh evidence of commission of the rape through medical examination of both the prosecutrix and the accused as well as through other evidences including undergarments of both of them and therefore, the only evidence available is the said MLC of the prosecutrix (Ex.5/A) and MLC of the appellant (Ex.5/B). In the MLC of the prosecutrix, no injuries on the private part or any kind of inflammation were found. As per the Modi s jurisprudence, frequent intercourse and parturition completely destroy the hymen, which is represented by several small tags of tissues, which are called carunculae hymenealis or myrtiformes. However no such small tags were detected even on a gynaecological examination of the prosecutrix.

62. We are completely at loss and rather anguish to find that the prosecutrix who has alleged repeated sexual intercourse by her father at no stage had complained about her suffering any injury in her private part, any kind of bleeding, or any vaginal discharge or suffering any kind of pain, which could have call for urgent medical attention or in upsetting her regular schooling. Nothing of this sort has surfaced and this creates doubt in our mind to suspect the prosecution case set up at the instance of prosecutrix backed by her mother. We cannot lose our attention from the fact that the father of the prosecutrix is after all a grown up and physically able bodied man and if such a man commits sexual intercourse with a small child of 11 years, then there is every likelihood that prosecutrix will suffer some injury on her private part or there may occur some kind of tear in the vaginal canal which is usually quite narrow in the case of minor child or at least suffering of a severe pain by such a minor child, but nothing of this kind had happened to the prosecutrix. The PW-4 in her cross-examination admitted the fact that her daughter „P was around 4-5 years when she started cycling and she used to do swimming as well. PW-8 Dr. Deepti Goel on her cross-examination also stated that the hymen can be torn on account of many reasons like injuries from cycling or sports and if we look at the entire set of circumstances discussed above, possibility cannot be ruled out that the hymen of the prosecutrix may have been torn on account of activities like cycling and swimming and not because of the alleged sexual assault by her father. So far as the opinion of the doctor in the MLC i.e. „introituses with two fingers with difficulty is concerned in a recent judgment of the Apex Court in Lillu @ Rajesh and Anr. vs. State of Haryana, reported in

AIR2013SC1784 the view taken was that the fact of admission of two fingers and hymen rupture does not give a clear indication that the prosecutrix was habitual to sexual intercourse. Relevant paragraph of the said judgment is reproduced as under:-

> "Fact of admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habitual to sexual intercourse. The doctor has to opine as to whether the hymen stood ruptured much earlier or carried an old tear. The factum of admission of two fingers could not be held adverse to the prosecutrix, as it would also depend upon the size of the fingers inserted. The doctor must give his clear opinion as to whether it was painful and bleeding on touch, for the reason that such conditions obviously relate to the hymen."

63. In the light of the above discussion, we are not persuaded to agree with the finding of the learned trial court that the appellant had raped his own daughter during the period of November - December 2006.

64. So far as the deposition of PW-5, Yash Yadav is concerned, his testimony stating that his father used to take his sister downstairs after locking the room from outside and his sister once told him that his father has done wrong act with her, does not even find support from the deposition of prosecutrix as in her court deposition, she has not taken any such stand that her father used to lock the door from outside and then used to take her downstairs and she did not even depose that she had told her brother that her father used to do wrong act with her. Rather it appears from the cross-examination of PW5 that his father was too caring as he used to drop both the children to school and himself pick them up daily. His father used to drop both of them to tuition centre and then personally used to pick them up and whenever he was not available for any reason, he used to send someone for picking up the children. He has also deposed that his sister used to visit all their relatives, who live nearby and his friends also used to come to their house. The cross-examination of PW-5, gives a clear indication that there was no restriction on the children and had there been any sexual assault upon the daughter by the father then she had ample opportunities to have disclose this fact to her mother, grandparents or near relatives.

65. We are also at loss to find that the learned trial court has not given any weightage and credence to the unrebutted testimonies of Mr. Dharampal DW-12, DW-13 (Uncle), DW-15 (Bua) and DW-18 (Appellant/Accused). DW-12 who is husband of friend of PW-4 in his examination-in-chief stated that he was also threatened by PW4 to be implicated in a false rape case when he had visited her parental house to demand his money back. This testimony of DW-12 remain unrebutted and the said unrebutted testimony of this witness shows that the mother of the prosecutrix had gone to the extent of threatening him to falsely implicate him in a rape case just when he had gone to demand for the return of his own money.

66. DW-13 Vijay Singh is the uncle of the appellant who in his examination-in-chief deposed that he met Smt. Geeta (PW-4) and inquired her as to why she had falsely implicated the accused and in response, she told him that she had got nothing from the appellant while he had got custody of the children and divorce with the order of the court as well as he got re-married and is leading a

comfortable life. He further deposed that PW-4 had told him that she would take revenge by taking recourse to law and she also demanded Rs. 5 lacs and custody of the children for withdrawing the said complaint. This testimony of DW-13 also remained unrebutted.

67. Ms. Sharda Yadav, DW-15 is the aunt of appellant and she also deposed on the same lines as per the deposition of DW-13, i.e. of PW-4 Geeta demanding Rs. 5 lacs and her showing complete frustration because of the appellant getting custody of the children and having divorced her.

68. DW-18, the appellant himself has given a detailed account as to how he had married Ms. Geeta and why his father was inimical towards him and also the detailed reasons for his false implication by Geeta by tutoring and instigating her own daughter and making her an instrument to take revenge from him and to get the legal custody of the children and also to demand an amount of Rs.5 lac. The examination-in-chief of DW- 18 on material aspects also remained unrebutted.

69. The deposition of DW-18 stated that in September 2006, Geeta came back from South Korea and thereafter she met the children 3-4 times in school and also that both the children on the weekends used to stay in his father s house and his father used to make them speak on phone to Geeta and also that Geeta came to meet my children in my house in my presence about 5 times after his re-marriage and before filing of this case, remained unrebutted.

70. There is also no cross-examination of DW-18 testifying that on 14th February 2007, he got married with Ms. Poonam and 4-5 days after the marriage, Geeta came to meet the children and after seeing that the accused got re-married with Poonam, she became angry and created a scene and started crying. Besides all, DW-18 stated that in September 2007, PW2 and PW4 came to jail to meet him alongwith his aunt (bua) and told him to comply with their condition for settlement to which he had refused and again in February 2008, PW4 came with an agreement suggesting that the legal custody of both the children would remain with Geeta and the accused will have to pay Rs.5 lacs as one-time payment with no visitation rights.

71. The evidence lead by the defence is not less important than the evidence of the prosecution and therefore the defence evidence must also receive due consideration wherever it succeeds in disproving the case of the prosecution with cogent and convincing and credible evidence. Learned trial court perhaps has overlooked the unrebutted testimonies of the said witnesses who have proved on record many germane aspects to create a doubt and dent in the prosecution case.

72. It is true that in a case of rape, the evidence of the prosecutrix must be given pre-dominant consideration and in certain cases even without any corroboration, testimony of the prosecutrix should be given due credence and weight age as in all the rape cases the prosecutrix suffer a great stress, trauma, humiliation and due to this factor alone many cases of rape are not even reported by the victims. However, at the same time, it cannot be denied that false allegation of rape can cause equal damage, humiliation, embarrassment, harassment, disgrace and agony to the accused as well.

73. We have already discussed above the various facets of the present case which indulge in disbelieving of prosecution story of prosecutrix being repeatedly raped by her father during the

period November - December 2006 and the wife of the accused joined by his parents having made the prosecutrix a tool in their hands to settle their own scores and the main target being to grab the custody of children and also the alleged property of the accused. In arriving at such a conclusion, we will also draw support from the following factors:

a) PW4 having met the appellant twice while appellant was in jail, in the present case. This fact has been admitted by Geeta in her cross-examination and the reason given by her to meet the appellant in jail was that she had gone to see the condition of the accused as she had come to know that the accused was beaten in the jail. This reason given by Geeta does not appear to us, to have any basis, had the accused been real perpetrator of such a serious crime of committing rape of his daughter. The visit of the Geeta to jail rather proves the defence version that she was trying to create pressure on accused to pay a sum of Rs.5 lacs and to agree for restoring back the legal custody of the children.

b) In the cross-examination of PW4, she had admitted that she had met the accused in the court and assured him of help. Again, she told that she had shown sympathy to him as on one side is her daughter and on the other side is her husband. I still regard accused as my husband. This deposition of the prosecutrix in her cross-examination is also not fathomable as to how she could regard the accused as her husband after being divorced and after he was allegedly found involved in committing rape of her own daughter of 11 years of age.

c) The appellant was already having an affair with Poonam in October-November 2006 and in fact he got married with Poonam immediately after his divorce, i.e., on 14th February 2007. In this background, where the accused was also in relation with another female to whom he was to marry, it was highly improbable for such a person to indulge into sex with his own daughter, as normally only sex deprived persons satisfy the urge for sex unmindful of their relationship with the victim of sex.

d) Comfort level of Ms. Poonam with the children as deposed by PW4 was fine and she being a teacher was also taking due care of the studies of the children and in fact, the academic performance of the prosecutrix had improved in her second term exams held in November - December 2006.

e) On 29.12.2006, during winter vacations, the appellant with both the children and Poonam went on a trip to Bombay and Shirdi. The photographs proved on record as Ex.DW-18/A1 to DW18/A18 show them in a happy and joyful mood. There is a separate photograph of the prosecutrix with the appellant and had the father been involved in this sturdy act of raping her then the prosecutrix could not have been in such a comfort zone with the father as appears from the photographs.

f) The repeated attempt of the father of the accused (PW-2) to dispossess Ms. Poonam from the said Madipur Property and lodging of the complaint of Ms.

Poonam vide FIR No. 351/2008 under Section 354 of IPC.

g) Further in her complaint vide FIR No.279/05, dated 19.07.2005, PW4 levelled the allegations against the accused that he is a womanizer, accustomed to watch blue movies in the company of his friends. However, even after putting such allegation she gave the custody of her minor children to her husband.

74. The desire to take revenge is an evolved outgrowth of our human sense of unsatisfied reciprocity. We can trace innumerable instances of revenge in the history and also in our Hindu mythology. The feeling of revenge destroys the rationale and a common sense even in an otherwise wisest person. At times the feeling of revenge is so strong that the avenger himself also fails to realise the impact of his deeds and easily get swayed by his emotions to wreck vengeance. In order to take revenge he does not even mind doing gravest of act. An avenger may use various means to take revenge. One such means can be process of law i.e. by false implication of the aggressor.

75. The present case is based on somewhat similar facts. In this case the mother of the Prosecutrix, driven by the feeling of revenge, has gone to the extent of falsely implicating her husband for the rape of their daughter, being completely ignorant of the shame she has brought to her entire family including herself, her daughter and her husband by her such derogatory, disgraceful, intolerable and unacceptable conduct. At the first blush of this case, it appeared to us that the father has really committed such a heinous offence with his own daughter, however a deep scrutiny of all the evidences taken together gives an altogether different picture. Although such cases of false implication in offences especially like rape are rare but they are not uncommon. In the matter of Radhu vs. State of Madhya Pradesh reported in 2007CriLJ4704, the Hon ble Apex Court took a view that a false charges of rape are rare and there have been also rare instances where the parents have persuaded a colourable and obedient daughter to make a false charge of rape either to take revenge or extort money or to get rid of financial liability. Relevant paragraph of the judgment is reproduced herein below:-

"The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

76. In the matter of Rajoo and Ors. vs. State of Madhya Pradesh reported in AIR2009SC858 the Hon ble Apex Court held as under:

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved."

77. In the matter of Tameezuddin @ Tammu vs. State of (NCT) of Delhi reported in (2009)15SCC566 the Hon ble Apex Court held as under:

> "It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable."

78. It is true that barbarity of the offence of rape cannot be overemphasized, especially when we have witnessed the most gruesome and horrific instances of the same nature in the recent past. The indifference that was created towards feral men with the quotidian reporting of rape was followed by a furore bringing the heinousness and depravity of the offence once again into the forefront, awakening the yet hitherto dormant attitude of the society. However, this particular case before us has set forth a contrarian maze which has compelled this court to look away, momentarily, at the offence and look upon the impunity with which it has been trivialised by none else but the own mother of the victim. It is unfortunate, that to seek revenge from her own husband, she went to the extent of using her minor daughter as a tool to implicate him of an offence such as rape. The facts and the circumstance of the case make it amply clear that the grudge nursed by the mother of not being adequately compensated during the divorce coupled with the fact that she made to agree for handing once the legal custody of children in favour of her husband and above all the remarriage of the husband capitulated her into plotting this devious cat. The common belief that no women will fabricate an offence such as rape owing to its social and mental ramification is undoubtedly flawed as is exemplified by the present case. However, the plight of one s charged of the false rape cases, however rare, are also abominable to say the least and understanding it would be an affront to decency. The trauma of a man being falsely accused of raping his own flesh and blood is unspeakable and unfathomable. The court is appalled as how the mother for her personal vendetta compromise the wellbeing of her daughter to let her live for a lifetime with such a stigma and scar of being raped by her own father. The question is best left unanswered in the interest of humanity. Undoubtedly, wallowing in the heartburn drove her to unimaginable lengths, in the lifelong shadow of which the man has to live. In overall perspective cases like these are diluting the authenticity of genuine cases obligating the courts to view every testimony of rape survivor with suspicion rather than a gospel of truth and nevertheless it is nothing but a monumental blow to the larger movement of society against the offence of rape.

79. Taking an overall view of the aforesaid facts of the present case, the judicial conscious of the court impels us to disbelieve and disagree with the finding of the learned trial court holding the appellant guilty of committing rape of his daughter in the month of November - December 2006. The evidence produced by the prosecution and even the medical evidence does not lead us to believe that the appellant had committed a rape of his daughter.

80. In view of the aforesaid discussions, the appeal filed by the appellant is allowed and the judgment passed by the learned trial court is set aside. It is ordered accordingly.

81. The appellant is in custody and he be released forthwith, if not required in any other case.

82. A copy of this order be sent to Jail Superintendant for necessary compliance.

KAILASH GAMBHIR, J INDERMEET KAUR, J OCTOBER 29, 2013 pkb