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

Date of decision: 20th December, 2021

\+ **CRL.A. 37/2020**

KAMAL …. Appellant

Through: Mr. C. K. Chaturvedi, Advocate.

versus

STATE …. Respondent

Through: Mr. Ashish Dutta, APP for the State.

\+ **CRL.A. 140/2020**

'A' …. Appellant

Through: Mr. Chinmoy Pradeep Sharma, Senior Advocate with Ms. Rakhi Dubey and Mr. Himanshu Gera, Advocates.

versus

STATE …. Respondent

Through: Mr. Ashish Dutta, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

The present two appeals arise from a common judgment and sentencing order and are therefore being taken-up for consideration and disposal together. Since this matter concerns sexual offences against a 'minor', the names of the prosecutrix, of one of the convicts and some key witnesses have been anonymised in keeping with the verdict of the Hon'ble

Supreme Court in ***Nipun Saxena and Anr. vs. Union of India & Ors.***[1] and ***Sakshi vs. Union of India & Ors.***[2] and section 228(A) of the Indian Penal Code, 1860 ('IPC') and section 327(2) of the Criminal Procedure Code, 1973 ('CrPC').

2. By way of the present appeals, the appellants have impugned judgment dated 09.10.2019 whereby they stand convicted by the learned trial court for offences under sections 376(2)(g) and 377 read with section 34 IPC. The appellants have also challenged sentencing order dated 18.10.2019, whereby the appellants have been sentenced to imprisonment for life along with fine of Rs. 10,000/- for the offence under section 376(2)(g) IPC; and to imprisonment for life along with fine of Rs. 10,000/- for the offence under section 377/34 IPC. Furthermore, the appellants have also been sentenced to simple imprisonment of 06 months in default of payment of fine. The benefit of section 428 CrPC has been afforded to the appellants.

3. The matter arises from an allegation by the prosecutrix that her father (A1) and his friend Kamal (A2) committed upon her offences as defined under sections 376(2)(g) and 377 IPC during the period 13.05.2012 to 22.07.2012. The case came to be registered upon a complaint made by the prosecutrix, which came to be registered as FIR No. 286/2012 dated 25.07.2012 at P.S.: Sunlight Colony, New Delhi.

4. The case of the prosecution before the learned trial court was that the prosecutrix used to ordinarily stay in the care and custody of her *bua,* who subsequently appeared as PW-9 at the trial; and that on the

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[1] (2019) 2 SCC 703; para 25, 45, 53

[2] (2004) 5 SCC 518; para 32, 34

commencement of the prosecutrix's summer holidays in 2012, her father took her from the care and custody of her *bua* to the house of one Manorama Begum *alias* Rahima (also referred to as Manora Begum by the prosecutrix), where A1 and A2 *inter alia* committed gang-rape and sodomy upon the prosecutrix. The last such sexual assault is alleged to have been committed on 22.07.2012, whereupon on 25.07.2012 the prosecutrix informed her teacher, who is associated with the NGO, Agha Khan Foundation, in Jangpura, New Delhi, and also teaches English at the prosecutrix's school, namely the MCD School at Hazrat Nizamuddin, Delhi. This teacher also happens to be the daughter of the prosecutrix's *bua* and appeared as PW-1 at the trial. The prosecutrix also informed the counsellor/coordinator working in the said NGO about the offences committed upon her.

5. The prosecution alleged that following this disclosure by the prosecutrix, a Senior Program Officer at the NGO approached P.S.: Nizamuddin Basti along with the counsellor/coordinator; whereupon they were referred to the jurisdictional Police Station, being P.S.: Sunlight Colony, where FIR No. 286/2012 was then registered under sections 376(g) and 377 IPC.

6. Upon registration of the FIR, the prosecutrix was taken to the All India Institute of Medical Sciences (AIIMS), New Delhi, for medical examination. Subsequently, A1 was arrested by Investigating Officer, PW-15 : W/S.I. Kamini Gupta, P.S.: Sunlight Colony on the intervening night of 25.07.2012 and 26.07.2012; and A2 was arrested on 26.07.2012.

7. The prosecutrix's statement under section 164 CrPC was recorded by the learned Metropolitan Magistrate (South Delhi) on 26.07.2012.

8. Upon completion of the trial, A1 and A2 were convicted essentially based on the following evidence :

   (a) The depositions of the prosecution witnesses, in particular the victim's own testimony; and

   (b) The medical evidence brought on record.

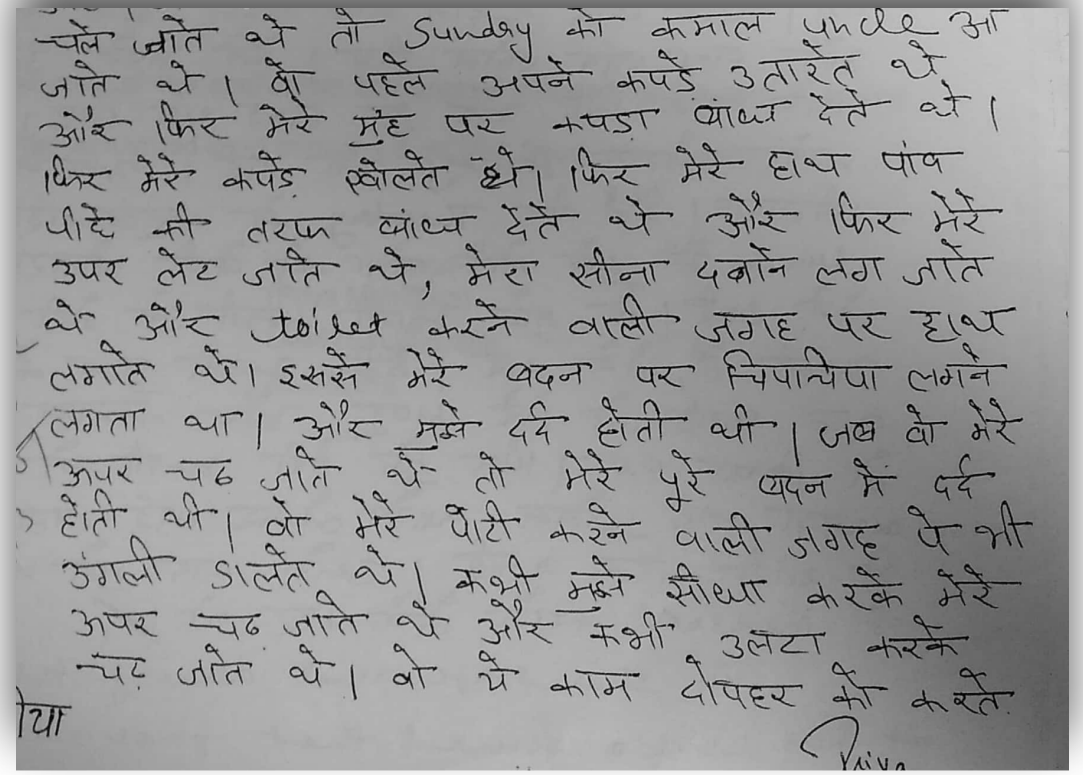
9. In the course of trial, the prosecution cited 17 witnesses; while the appellants led no defence evidence.

10. We have heard Mr. Chinmoy Pradeep Sharma, Senior Advocate and Ms. Rakhi Dubey, learned counsel who have represented A1 and Mr. C. K. Chaturvedi, learned counsel who has appeared for A2. We have also heard Mr. Ashish Dutta, learned Additional Public Prosecutor for the State. We have carefully perused the impugned judgment, the sentencing order and considered the entire evidence on record.

11. Upon an assessment of the merits and demerits of the evidence marshalled by the prosecution as well as the defence sought to be raised assailing such evidence, in our view, the decision of the matter turns on the aspects as discussed hereinafter.

Deposition of Prosecution Witnesses

12. The statement of the prosecutrix PW-3, as recorded by the learned Metropolitan Magistrate under section 164 CrPC on 26.07.2012 is both graphic and telling. The relevant extract of it reads as under :



चले जाते थे तो Sunday को कमाल फजीह आ
जाते थे। वो पहले अपने कपड़े उतारते थे
और फिर मेरे मुंह पर कपड़ा बांध देते थे।
फिर मेरे कपड़े खोलते थे। फिर मेरे हाथ पांव
पीछे की तरफ बांध देते थे और फिर मेरे
उपर लेट जाते थे, मेरा सीना दबाने लग जाते
थे और toilet करने वाली जगह पर हाथ
लगाते थे। इससे मेरे बदन पर चिपचिपा लगने
लगता था। और मुझे दर्द होती थी। जब वो मेरे
अपर चढ जाते थे तो मेरे पूरे बदन में दर्द
होती थी। वो मेरे पोटी करने वाली जगह पे भी
उंगली डालते थे। कभी मुझे सीधा करके मेरे
अपर चढ जाते थे और कभी उलटा करके
चढ जाते थे। वो ये काम दोपहर को करते
थे।

Prosecutrix's statement dtd. 26.07.2012 under section 164 CrPC

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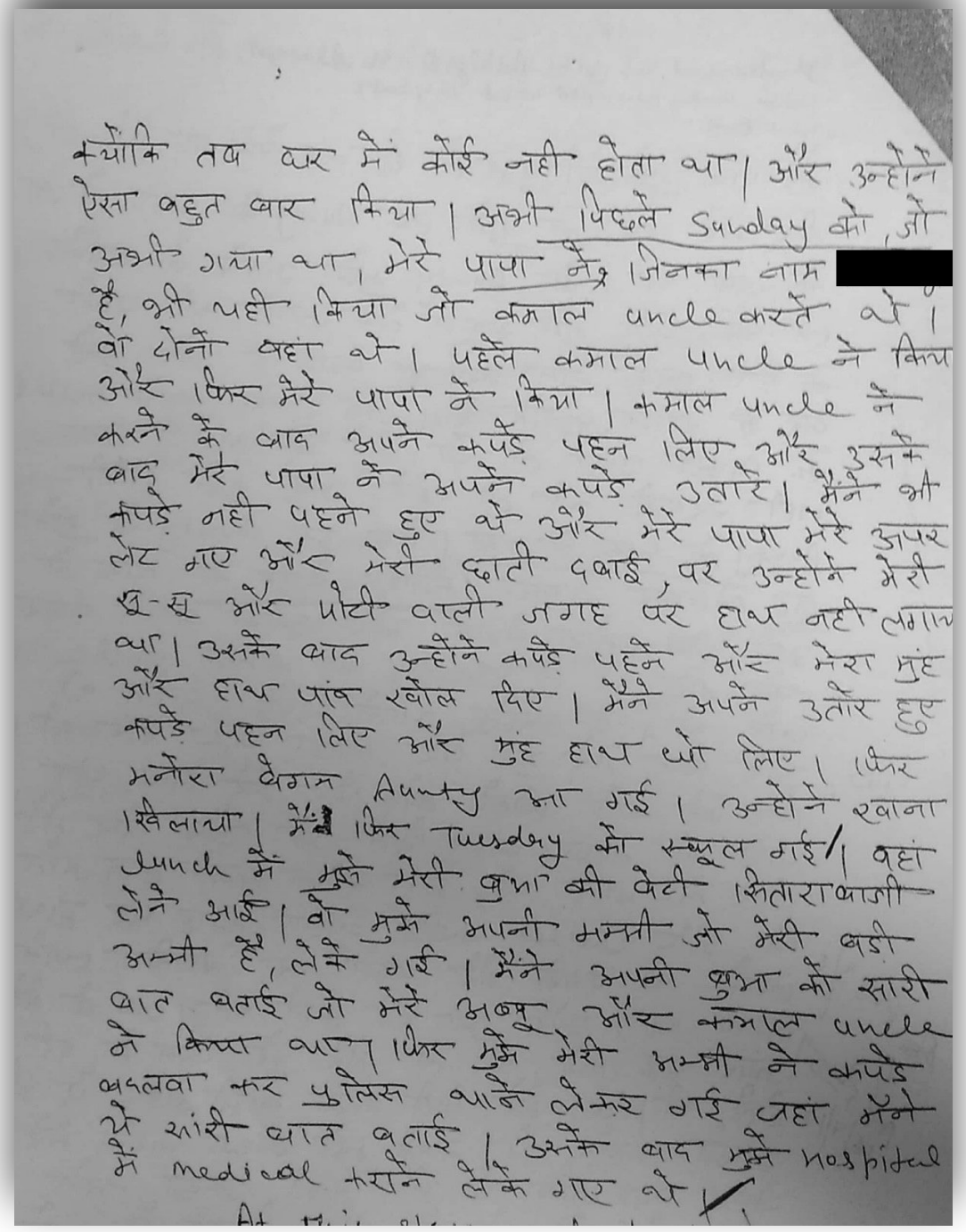

क्योंकि तब घर में कोई नहीं होता था। और उन्होंने ऐसा बहुत बार किया। अभी पिछले Sunday को, जो अभी गया था, मेरे पापा ने, जिनका नाम [redacted] है, भी यही किया जो कमाल uncle करते थे। वो दोनों वहां थे। पहले कमाल uncle ने किया और फिर मेरे पापा ने किया। कमाल uncle ने करने के बाद अपने कपड़े पहन लिए और उसके बाद मेरे पापा ने अपने कपड़े उतारे। मैंने भी कपड़े नहीं पहने हुए थे और मेरे पापा मेरे ऊपर लेट गए और मेरी छाती दबाई, पर उन्होंने मेरी सू-सू और पोटी वाली जगह पर हाथ नहीं लगाया था। उसके बाद उन्होंने कपड़े पहने और मेरा मुंह और हाथ पांव खोल दिए। मैंने अपने उतरे हुए कपड़े पहन लिए और मुंह हाथ धो लिए। फिर मनोरा वेगन Aunty आ गई। उन्होंने खाना खिलाया। मैं फिर Tuesday को स्कूल गई। वहां Lunch में मुझे मेरी बुआ की बेटी सितारा बाजी लेने आई। वो मुझे अपनी मम्मी जो मेरी बड़ी अम्मी है, लेने गई। मैंने अपनी बुआ को सारी बात बताई जो मेरे अब्बू और कमाल uncle ने किया था। फिर मुझे मेरी अम्मी ने कपड़े बदलवा कर पुलिस थाने लेकर गई जहां मैंने सारी बात बताई। उसके बाद मुझे Hospital में medical कराने लेके गए थे।

Prosecutrix's Statement dtd. 26.07.2012 under section 164 CrPC (father's name redacted)

13. In her examination-in-chief recorded in court on 20.02.2013, the prosecutrix further said :

> PW-3
>
> *"Earlier I was staying with my Bua Nargis. Thereafter, I came to stay with my father [A1][3]. I was studying in IIIrd class at that time. My father was beating me a lot My father has taken me to my second mother who has also now left. I want my Abida Baji to remain present with me.*
>
> *Further examination in chief is deferred as the witness is under Trauma and is very afraid of the accused persons whom she wanted to go out of the court. Despite the sending of the accused persons out of the court, the witness is not in a position to depose about the incident due to the trauma. Her further examination is deferred till the next date hearing when the other witnesses i.e. Smt. Nargis and Smt. Abida Baji be also called for their statements."*
>
> (examination-in-chief dtd. 20.02.2013)

14. In her deposition in court, the prosecutrix reiterated the allegations against both appellants in the following words :

> PW-3
>
> *(Court Observation: As the witness is very afraid of the presence of both the accused persons in the court, both the accused are directed to remain outside. After. they left the witness becomes comfortable and started deposing.)*
>
> *"I was studying in IIIrd Standard. My father had taken me to the house of my second mother from the house of my bua. I was usually residing alone at the house.* ***My father was bringing his friend namely Kamal to the house. Thereafter, my father used to do 'batamizi' with me. My father used to tie my mouth. Thereafter, my father used to remove my clothes and his friend also used to remove his clothes. My father used to lie down upon me and***

[3] Name of prosecutrix's father, which is withheld.

thereafter, used to do 'batamizi' with me from front side and back side. My father and his friend used to put his penis against my vagina as well as against my anus. They used to do this for around half an hour. My father as well as his friend used to come on Sundays and commit this act*. I disclosed about the aforesaid acts of my father and his friend to Kamini Aunty, whereafter she made a police complaint"*

(examination-in-chief dtd. 17.04.2013)

(emphasis supplied)

"I had not disclosed about the 'batamizi' committed by my father and his friend to any other person nor to Abida Bazi and Nargis Aunty. (Confronted with the statement Ex.PW3/A where it is recorded that the prosecutrix has disclosed the incident of 22.07.2012 to Abida Bazi.) Again said, I had disclosed some facts to Abida Bazi.

One lady was also residing in the said room where my father and his friend was misbehaving with me however, the said lady used to leave for her work. The inhabitants of nearby rooms usually go to sleep during noon time.

(cross-examination dtd. 17.04.2013)

15. As is evident from the foregoing, the prosecutrix's version in her statement under section 164 CrPC, as also in her examination-in-chief and cross-examination in court, remained consistent and unwavering, in all material respects.

16. Although the statement of a victim under section 164 CrPC and before court is, in and of itself, sufficient evidence for what is stated therein unless discredited in cross-examination, to add further credence to what the prosecutrix stated in her statement under section 164 CrPC and in her deposition in court, the statement of PW-4 : Ms. Jyotsana Lal, Senior Programme Officer, Agha Khan Foundation who was present at P.S.: Sunlight Colony at the time the prosecutrix's statement was

recorded by the Investigating Officer under section 161 CrPC, which statement PW-4 herself heard since it was made in her presence, also confirms in all material respects, that the prosecutrix indeed made the allegations cited against the appellants.

17. The relevant portion of PW-4's deposition in this behalf is as follows :

> PW-4
>
> *"... In police station Sunlight Colony, [prosecutrix][4] was taken to a separate room where she made a statement in the presence of Aklima, me and Sub-Inspector Kamini Gupta. [prosecutrix] made a statement in my presence that* ***when the summer vacation started her father had taken her to Sarai Kale Khan by force****. When the school opened, [prosecutrix] was missing. On 27.07.2012, she came to school and went to her aunt's house. Again said, the date was 25.07.2012 and not 27.07.2012. [prosecutrix] reported that* ***her father's friend would take her to a room, closed the door and take his own clothes off and take her clothes off, made her lie on the floor and puts his organ on her vagina****. She did not know the words so she said "wo apne susu ki jagah per lagate the, phir kuch naak jaisa chipka-chipka nikalta tha, uske baad wo mujhe ulta kar dete the aur meri poti ki jagah par apni ungali se kuch karte the, phir kapade pahan ke chale jaate the. Agle Sunday ko papa aur unke dost aaye aur* ***phir se yahi kiya dono ne"****. After the statement the police was able to catch both the accused on the same night. I took the child to AIIMS for Medico-Legal Examination ..."*
>
> *(examination-in-chief dtd. 10.07.2013)*

Counsel appearing for the appellants were unable to elicit any contradictions, to discredit PW-4's examination-in-chief.

18. It may be mentioned for completeness that, in our view, the examination-in-chief of the Investigating Officer, PW-15, elicited

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[4] *Name of the prosecutrix has been withheld*

nothing that materially impacts the evidence that has come on record, either for or against the appellants.

19. In considering both the statement made by the prosecutrix under section 164 CrPC as well her deposition in court, we may briefly allude to the well-settled principles of law, that a court must not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not fatal, to throw-out an otherwise reliable prosecution case. Where the evidence of the prosecutrix inspires confidence, it must be relied upon, *without seeking corroboration* of her statement in material particulars. In so holding, we are supported by the view taken by the Hon'ble Supreme Court in ***State of Himachal Pradesh vs. Raghubir Singh***[5], where, explaining the point very lucidly the Hon'ble Supreme Court said as under :

> *"5. ...The High Court appears to have embarked upon a course to find some minor contradictions in the oral evidence with a view to disbelieve the prosecution version. In the opinion of the High Court, conviction on the basis of uncorroborated testimony of the prosecutrix was not safe. We cannot agree.* ***There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction****. Evidence has to be weighed and not counted.* ***Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity****. In the present case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be looked for, though enough was available on the record. The medical evidence provided sufficient corroboration ...."*
>
> (emphasis supplied)

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[5] (1993) 2 SCC 622

Then again, in ***State of Punjab vs. Gurmit Singh & Ors***[6], the Hon'ble Supreme Court had this to say on the issue :

> *"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.* ***The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. 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, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."*
>
> (emphasis supplied)

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[6] (1996) 2 SCC 384

Both *Raghubir Singh* (supra) and *Gurmit Singh* (supra) have been relied upon and quoted in a recent decision of Hon'ble Supreme Court in ***Ganesan vs. State***[7].

20. In light of the evidence brought forth in the present case and the legal position, as explained by the Hon'ble Supreme Court as to how the testimony of a prosecutrix is to be appreciated, we are inclined to accept the statement made by the prosecutrix section 164 CrPC and her deposition in this case, as being credible and trustworthy.

Medical Evidence

21. The other aspect which, in our opinion, is required to be considered is the medical evidence marshalled by the prosecution during trial.

22. While the date/s on which the offences are alleged to have been committed is/are not proved on record, from a collective reading of the depositions it can be gathered that the offences were committed over a period of time with the last incident being on 22.07.2012.

23. In this backdrop, the prosecutrix was medically examined at the All India Institute of Medical Sciences (AIIMS), New Delhi on 25.07.2012 by PW-17 : Dr. Sujata Rawat and MLC dated 25.07.2012 has been proved on record as Ex.PW3/B. The significant observations in the MLC are the following :

> *"Advice:*
> *Ref to Gyn on call for Gynecological examination*
> *• Called for gynac examination at AIIMS casualty*
> *• M/H- Menarche not attained*
> *• No signs of any external injury marks on Chest, Back, thighs, legs*

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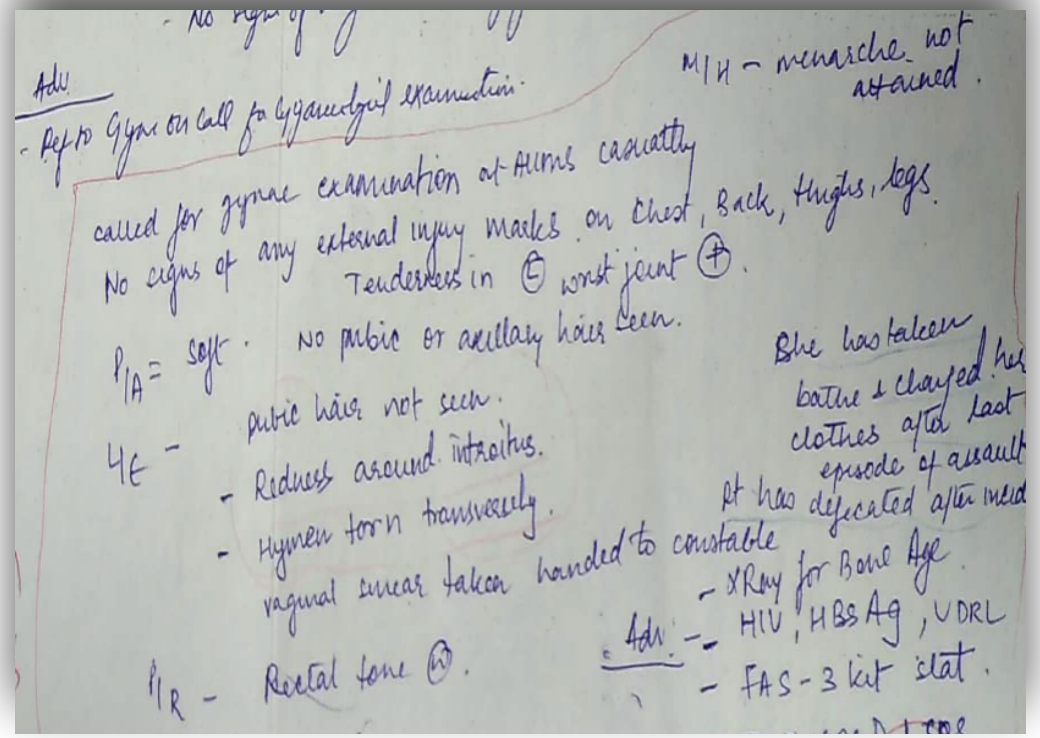
[7] (2020) 10 SCC 573

- *Tenderness in L wrist joint*

- *P/A= soft. No pubic or axillary hair seen.*
- *L/E-*
  - *Pubic hair not seen.*
  - *Redness around introitus*
  - *Hymen torn transversely vaginal smear taken handed to constable*
- *P/R- Rectal Torn"*

A snapshot of the MLC itself, from which the above is extracted, may also be seen :



MLC dtd. 25.07.2012 ; Ex. PW-3/B

24. The doctor who prepared the MLC, PW-17 : Dr. Sujata Rawat, had this to say in her examination-in-chief :

> PW-17
>
> *"...The MLC is already Ex.PW3/B which also bears my signatures at point C. During internal examination,* ***there was redness around vaginal opening and hymen was also torn****."*
>
> (examination-in-chief dtd. 22.05.2017)

In her cross-examination, PW-17 was questioned as to whether the tear of the hymen was fresh or old, to which she gave the following answer :

> PW-17
>
> *"...It is correct that there is no mention in the MLC whether the hymen torn was fresh or old. There was a junior doctor assisting me in the medical examination. I was called in pediatric emergency. It is wrong to suggest that I had not personally conducted the examination of prosecutrix."*
>
> (cross-examination dtd. 22.05.2017)

Apart therefrom, there is nothing significant in the deposition of PW-17, muchless anything to cast any shadow of doubt on the MLC and the observations recorded therein.

25. What may therefore be safely gathered from the MLC, without any doubt, is that the hymen of the prosecutrix who was only about 10 years of age, was found torn; there was redness around her vaginal introitus (opening of the vagina); and there was redness in the vaginal area. Although the doctor also notes tenderness in the left wrist joint, no further material is available on record to draw any conclusive inferences therefrom, except that we notice that in her statements

recorded at various points of time, the prosecutrix has said that the appellants had tied her hands and legs before committing the offences alleged.

26. Again, for the sake of completeness, it may be noticed, that the two appellants were put through a medical examination at AIIMS. MLC dated 25.07.2012 of appellant A1 was exhibited as Ex.PW6/A; and MLC dated 26.07.2012 of appellant A2 was exhibited as Ex.PW5/A; and it was opined that there was nothing to suggest that either of them was incapable of performing sexual intercourse under normal circumstances, nor was any other abnormality noticed that would in any manner preclude the commission of the offence by either of the appellants.

27. Upon a conspectus of the depositions extracted above and the medical evidence that has come on record, we are satisfied that the following conclusions can safely be drawn, without any shadow of reasonable doubt :

    (a) It can be concluded that the prosecutrix's statement recorded under section 164 CrPC and her deposition in court, in which she says that appellant A2 committed upon her the carnal acts as described in her own wording, are cogent, credible and trustworthy. Furthermore, the prosecutrix's statement, as recorded under section 164 CrPC as also in her deposition in court, in relation to what her father appellant A1 did to her is also cogent, credible and trustworthy.

    (b) Besides, we are not depending solely on the prosecutrix's statement under section 164 CrPC or on her deposition in court,

but are also supported in our inferences by the medical evidence that has come on record, by way of the MLC of the prosecutrix, which confirms a torn hymen, redness in the genitals, as also tenderness in one of the wrist joints. This makes the allegations against the appellant all the more plausible, absent any other explanation; and in fact no explanation or evidence has been brought forth by the defence in this behalf; and

(c) *Ex abundanti cautela* we have also explored any possible reason for false implication of either of the appellants; and we find nothing credible on the record to suggest that.

28. Accordingly, we find nothing erroneous or amiss in the conclusions arrived at by the learned trial court, that both appellants are guilty of the acts alleged against them.

29. However, a question still needs to be addressed, which is : basis the evidence on record, *what offences* are made-out and *stand proved* against the appellants.

30. The appellants were charged with offences punishable under section 376(2)(g) and section 377 read with section 34 IPC. It is important to note here that the offences are alleged to have been committed on various dates on or before 22.07.2012, by reason of which they would be covered by the IPC as it existed prior to its amendment by the Criminal Law (Amendment) Act, 2013 (Act 13 of 2013) with retrospective effect from 03.02.2013. Accordingly, section 376(2)(g) as it existed prior to amendment by Act 13 of 2013 needs to be considered in light of the definition of "rape" as contained in the unamended section 375 of the IPC.

31. Section 375 IPC prior to the amendment read as under :

> *"375. Rape.—A man is said to commit "rape" who, except in the case hereinafter excepted, has* ***sexual intercourse with a woman*** *under circumstances falling under any of the six following descriptions :—*
> *First.— Against her will.*
> *Secondly.— Without her consent.*
> *Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.*
> *Fourthly.— With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*
> *Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*
> ***Sixthly.— With or without her consent, when she is under sixteen years of age.***
> ***Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.***
> *Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape"*

32. Section 376(2)(g) IPC, prior to the amendment read as under :

> *"376. Punishment for rape.—(1) * * **
> *(2) Whoever,—*
> *.....*
> *(g) commits gang rape,*
> *shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:*

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than 10 years.

Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section

* * * "

33. Evidently therefore, the gravamen of the offence of rape, prior to its amendment as aforesaid, was '*sexual intercourse with a woman*'; and the Explanation to section 375 laid down that '*penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape*'. The requirement of penetration has been held to be necessary to constitute the offence of rape *inter alia* in the decision of the Hon'ble Supreme Court in ***Aman Kumar vs. State of Haryana***[8]. For our purposes in the present case, we need only observe that the expanded definition of rape as contained in amended section 375 with retrospective effect from 03.02.2013, *did not exist* on the statute book at the time of commission of the offence by the appellants *i.e.* on or before 22.07.2012; and there is neither any allegation nor has anything come forth in evidence to show that the appellants committed any *penetrative* sexual intercourse with the prosecutrix. Accordingly, in our view, *the finding of the learned trial court that the appellants are guilty of the offence under section 376(2)(g) is untenable; and is accordingly set-aside*.

34. Additionally, the learned trial court has also convicted both appellants for the offence under section 377 read with section 34 IPC, without

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[8] (2004) 4 SCC 379 ; para 7

however discussing as to how that offence is made-out. As the Appellate Court, we would dilate on this aspect at some length.

35. At the outset, it must be noticed that while amending sections 375 and 376(2)(g) by the amending Act 13 of 2013, the Legislature has not made any amendment to section 377 IPC, which continues to read as under :

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

It is important to note that while the unamended section 375 referred to '*sexual intercourse with a woman*', section 377 refers to '*carnal intercourse against the order of nature*' inter-alia with a *woman*. The use of two different phrases, namely 'sexual intercourse' in section 375 and 'carnal intercourse' in section 377 is not without reason.

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

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

"OF UNNATURAL OFFENCES.

361. Whoever, intending to gratify unnatural lust, touches, for that purpose, any person, or any animal, or is by his own consent touched by any person, for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

362. Whoever, intending to gratify unnatural lust, touches for that purpose any person without that person's free and intelligent consent, shall be punished with imprisonment of either description for a term which may extend to life and must not be less than seven years, and shall also be liable to fine."

* * * * *

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

(emphasis supplied)

38. Our research on the jurisprudence of section 377 as it has evolved since, does not reveal any attempt to give any comprehensive definition in any judicial decision, as to *what is,* or *what is not,* or *why* an act amounts to - 'carnal intercourse against the order of nature'.

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

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

i) P. Ramanatha Aiyar's 'Major Law Lexicon' 4th Edition (2010) defines "intercourse", in its widest connotation, as 'social communication between individuals'. Black's Law Dictionary 11th Edition defines "intercourse" as "physical sexual contact, *especially* involving the penetration of the vagina by the penis";

ii) In the heterosexual context, the judicial connotation given to "sexual intercourse" is penile-vaginal penetration. This connotation is found in *Sakshi* (supra);

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

41. While interpreting the definition of 'rape' in section 375 IPC, the phrase 'sexual intercourse' has been discussed by the Hon'ble Supreme Court in *Sakshi* (supra) to say :

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

6-10-1860. The Penal Code has undergone very few changes in the last more than 140 years. Except for clause sixthly of Section 375 regarding the age of the woman (which in view of Section 10 denotes a female human being of any age) no major amendment has been made in the said provision. Sub-section (2) of Section 376 and Sections 376-A to 376-D were inserted by the Criminal Law (Amendment) Act, 1983 but sub-section (2) of Section 376 merely deals with special types of situations and provides for a minimum sentence of 10 years. It does not in any manner alter the definition of "rape" as given in Section 375 IPC. Similarly, Section 354 which deals with assault or criminal force to woman with an intent to outrage her modesty and Section 377 which deals with unnatural offences have not undergone any major amendment."

* * * * *

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

(emphasis supplied)

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

43. Though the restrictive meaning of the phrase 'sexual intercourse' will not deter the court from interpreting the phrase 'carnal intercourse' in its fullest ambit, we must be guided by the legal interpretation given by the Hon'ble Supreme Court to the phrase 'sexual intercourse' in *Sakshi* (supra), which is *heterosexual intercourse involving penetration of the vagina by the penis*. This interpretation turns *inter-alia* on the explanation appended to section 375, which points to the requirement of 'penetration', for an act to amount to sexual intercourse. A similar explanation appearing in section 377 makes 'penetration' a necessary ingredient of the offence of 'carnal intercourse' as well. The offence under section 377 would therefore arise when there is 'penetrative intercourse' which is 'against the order of nature'.

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

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

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

    iii. *it must involve penetration other than penile-vaginal penetration,* since by the very nature, intent and purpose of section 377, it must

refer to an unnatural act, such as 'penile-anal penetration', 'digital penetration' or 'object penetration'.

45. Subject to the requirement of the above ingredients, we however completely agree that attempting to define the phrase 'carnal intercourse against the order of nature' with exactitude is neither possible, and perhaps not even desirable. Accordingly, though we hesitate to give the phrase 'carnal intercourse against the order of nature' any *exhaustive* meaning, we hold, that as a matter of law, ***any physical act answering to all the above ingredients****, committed* ***upon a minor*** *is per-se 'carnal intercourse against the order of nature'.*

46. In the present case, the prosecutrix's testimony is clear, cogent and unwavering insofar as it concerns the allegation against appellant A2, that he committed digital penetration of the prosecutrix's anus. As extracted above, in her statement under section 164 CrPC and in her deposition in court, the prosecutrix has stated that appellant A2 would gag her mouth with cloth, bind her limbs and then do '*batamizi*' (*badtamizi)* with her. On further elaboration, she has said that appellant A2 would remove her clothes and then lie on top of her and touch her chest, vagina and anus. He would then put his penis against her vagina and anus and also insert his finger into her anus. She has deposed that the whole ordeal would last about half-an-hour. The prosecutrix alleges that after appellant A2 was finished, her father appellant A1, would commit *all the aforesaid acts* upon her *other than* the act of digital penetration.

47. In light of the above allegations, it requires no further analysis that the offences under section 377 read with section 34 IPC are made-out against appellant A2.

48. We must however, now decide what offence, if any, is made-out against the prosecutrix's father, appellant A1. Though the prosecutrix says that her father, appellant A1, committed upon her all acts that appellant A2 did, *save and except* digital penetration; however, the prosecutrix unequivocally says that it is her father who had picked her up from her *bua's* place and took her to the place where appellant A2 would subject her to the offences she narrates. What is evident therefore, is that appellant A1, consciously and intentionally, gave to appellant A2, access to the prosecutrix. She also says in clear terms that, short of digital penetration, appellant A1 also committed upon her the same acts as did appellant A2. This, in our view, is sufficient to bring the actions of the father within section 34 IPC, namely the acts done by him in furtherance of a common intention to commit the offence, and would make him liable for *all acts* committed by appellant A2 in the same manner as if the acts were done by appellant A1 himself. We would be loathe to entering upon any fancy discussion as to what exact act was committed upon the prosecutrix by which of the appellants. In holding so, we are fortified by the judgments of Hon'ble Supreme Court in ***Suresh & Anr vs. State of UP*** [9] and ***Abdul Sayeed vs. State of Madhya Pradesh***[10].

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[9] (2001) 3 SCC 673; para 24

[10] (2010) 10 SCC 259; para 49, 50

49. Accordingly, we are satisfied that the conclusion arrived at by the learned trial court, namely that appellant A1 and appellant A2 are both guilty of the offence under section 377 read with section 34 IPC, is correct; though the conclusion as regards the offence under section 376(2)(g) IPC is flawed.

50. We accordingly uphold the judgment of conviction dated 09.10.2019 to the extent that appellant A1 and appellant A2 are both guilty of the offence under section 377 read with section 34 IPC.

51. Furthermore, considering the depravity of the acts committed against the prosecutrix by a so-called uncle, with the connivance of her own father, we are also of the view that the offending acts go way beyond the physical element of sexual assault but would have severely damaged the mind and psyche of the victim, which trauma may linger for very long. We do not hesitate to repeat, to sexually violate an innocent child is in any case an abhorrent act; but, when that happens within the filial father-daughter relationship, of which purity of affection is a *sine-qua-non,* the act descends to a different depth of depravity. Without at all appearing to be Biblical, crime in society is one thing; but crime within the closest confines of the family, adds to it the element of sin. Such acts must be dealt, with the requisite level of severity.

52. We accordingly also uphold the sentencing order dated 18.10.2019 to the extent that the learned trial court has sentenced the appellants to imprisonment for life for the offence under section 377 read with

section 34 IPC alongwith fine of Rs.10,000/- each, with simple imprisonment of 06 months in default of payment of fine; and also granting the benefit of section 428 CrPC.

53. In view of the above, we modify the judgment of conviction dated 09.10.2019 and sentencing order dated 18.10.2019 but *only* to the extent indicated above. Subject to that, the appeals stand dismissed.

54. There shall be no order as to costs.

55. A copy of the judgment be given to learned counsel for the parties and be uploaded on the website of this court *expeditiously.*

SIDDHARTH MRIDUL, J

ANUP JAIRAM BHAMBHANI, J

December 20, 2021
Ne/*ds*/*uj*