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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 31st October, 2018
Pronounced on: 19th December, 2018

\+ CRL. A. 704/2001

KAPIL KUMAR BERI ..... Appellant
Through: Mr. D. Hasija Advocate with
Mr. Anirudh Tyagi, Advocate

versus

THE STATE OF DELHI (N.C.T. OF DELHI) ..... Respondent
Through: Mr. Sanjeev Sabharwal, APP for the State with SI Ajay Misra, Police Station Delhi Cantt.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

J U D G M E N T

1. This appeal was instituted in September, 2001 to assail the judgment dated 10.08.2001 of the Additional Sessions Judge (ASJ) in Sessions Case No.257/1996 and the order on sentence dated 31.08.2001 passed in its wake whereby the appellant was held guilty and convicted on the charge for the offence punishable under Section 376 of the Indian Penal Code, 1860 (IPC), he having been awarded rigorous imprisonment for ten years with fine of Rs.5,000/- - in default further simple imprisonment for three months, with benefit of set off under Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

2. The appeal has come up for final adjudication before this court seventeen long years after it was presented. During the interregnum, the appellant died (on 16.02.2018). On her application (Crl.M.A.33211/2018) his widow Anita Beri was permitted, by order dated 28.09.2018, to prosecute the appeal further in terms of proviso to sub-Section (2) of Section 394 Cr.P.C.

3. The record of the appeal shows that the trial court record was requisitioned and placed before the court. The appeal, however, was admitted and put in the list of *'Regulars'* the sentence having been suspended by order dated 26.11.2001. The appeal came up for hearing before the court thereafter only on 22.09.2010. By this time, the trial court record was lost by the registry. Pursuant to the directions which appear to have been issued on the administrative side, efforts were made to retrace the missing record, but to no avail. Pursuant to further administrative instructions, the trial court has reconstructed the record, with the assistance of both sides, to the extent possible. The same has been presented and placed before the court. The arguments of both sides have been heard on the basis of available record.

4. The Sessions case against the appellant had arisen from the report (charge sheet) under Section 173 Cr.P.C. which had been submitted by the police on the basis of evidence gathered during investigation of first information report (FIR) No.25/1996 of Police Station Delhi Cantt, the said FIR, it may be noted, itself having been registered on 13.01.1996 on the basis of statement (Ex.PW-2/A) of the prosecutrix, described to be a girl then aged 16 years, Sub-Inspector

Durga Lal (PW-11), posted in the Police Station on the relevant date having made the endorsement (Ex.PW-11/A), leading to such action at 4:00 p.m. for getting the case registered, the prosecutrix having been brought to the Police Station by Ms. Cicily Francis (PW-1), a person connected to a non-governmental organization (NGO) styled as Women Action for Development (WAFD) having their office in Vikas Puri, New Delhi. The prosecutrix, it must be mentioned here, is the daughter of the appellant, he, during the relevant period, having been employed in government service as an electrician and posted earlier in the organization of Garrison Engineer (Air Force) at Udhampur (Jammu & Kashmir) and later transferred to the office of Garrison Engineer (West) at Delhi Cantt. On the date of the registration of the FIR which led to the Sessions trial, and for a quite long period prior thereto the family was living in a house described as 139, Panchwati, Delhi Cantt.

5. The FIR (Ex.PW-4/A) itself showed, it being revealed in the statement of prosecutrix forming the contents thereof that she was pregnant with a foetus of about three months duration at that point of time, the evidence also disclosing that she delivered a girl child in due course. It also may be noted here itself that prior to the registration of this FIR (Ex.PW-4/A), the prosecutrix had been missing from her house, this having been reported to the police by her father, *i.e.* the appellant, FIR No.480/1995 having been registered in the same Police Station (Delhi Cantt) at 22:45 hours on 21.12.1995 at the instance of the appellant, allegations having been made about commission of an offence under Section 363 IPC, the first informant (the appellant)

having expressed suspicion about involvement of a boy named Bhushan having seduced and kidnapped her, she not having returned home after leaving for a training centre for sewing sometime around 9:00 a.m. in the morning. It has been conceded by PW-11 (the investigation officer) that the police action on the said FIR No.480/1995 under Section 363 IPC, registered on the complaint of the appellant suspecting involvement of the young person named Bhushan was concluded with the report *"untraced"*, close on the heels of the registration of the present FIR.

6. According to the case for the prosecution, founded essentially on the version of the prosecutrix as indicated by her statement (Ex.PW-2/A) on which FIR was registered, and also her statement during investigation under Section 164 Cr.P.C. (Ex.PW-10/A), that the sexual assaults by the appellant commenced in 1991 when the family was living in Udhampur, her maternal uncle *i.e.*, husband of her mother's sister *(mausa)* had died in Indore and consequently her mother had to leave town for about a week. She alleged that she and her sister and younger brother were sleeping together in a room when her father (the appellant) woke her up around mid-night and made her accompany him to his room. She stated that after making her lie down with him on the double bed, the appellant had removed her lower garments and thereafter committed rape against her wishes. She alleged that thereafter whenever he would find her alone he would routinely commit such act. She stated that when she had become pregnant, and the father had learnt about this, her menstruation having stopped, he had brought some medicine which he would make her

consume ascertaining repeatedly if the menstruation cycle had recommenced or not. She alleged that, on 18.12.1995, her father had called her to his office and made her write on a paper, copying from a pre-prepared text written in some diary, the contents whereof were to indicate that she had been raped by Bhushan and that she did not want to live any longer. She alleged that, on 19.12.2015, the appellant had again asked her about her menstruation and, on the next day, *i.e.*, 20.12.1995 he told her that if she wanted to protect her self-respect, she should commit suicide on railway line. She stated that she had assured her father that she would not return home the next day and instead commit suicide. On 21.12.1995, she went to the sewing centre where she told PW-1 about the incident, she having been taken to a place called Mother Teresa Home where she was accommodated before she was brought to the Police Station on 13.01.1996, the matter being within the knowledge of two other women named Manju and Munni Yadav who were activists of the said Women Organization.

7. There is ample evidence to show that the prosecutrix was a minor (born on 09.03.1979) on the date of registration of the FIR (13.01.1996). There is ample proof that she was pregnant on the said date, the age of the pregnancy described then as about three months, the condition being reflected in her medico-legal report (MLC) (Ex.PW-9/A). During her own testimony, it came out that she delivered a female child on 01.08.1996, this indicating the date on which she would have conceived the said child to be sometime in the end of October, 1995, she possibly being pregnant for about (or less than) two months on the date 21.12.1995 when she left home. But,

curiously, as per her MLC (Ex.PW-9/A) she had indicated to the examining medical officer her last menstruation period (LMP) to be relatable to 28.11.1995, which would be a little over three weeks prior to she having left home on 21.12.1995.

8. The trial was held on the charge for the offence under Section 376 IPC, the gravamen being that the appellant had repeatedly subjected the prosecutrix to forcible sexual intercourse during the period 1991 to 12.01.1996 at Udhampur and Delhi Cantt. The prosecution examined twelve witnesses. They would include Ms. Cicily Francis (PW-1), an activist of the NGO; the prosecutrix (PW-2); Smt. Manju (PW-3), a volunteer of the said NGO; Head Constable Prakash Singh (PW-4), the duty officer who registered the FIR (Ex.PW-4/A) of the case; Constable Ramesh Kumari (PW-5) who had accompanied the prosecutrix to Safdarjung Hospital for medical examination; Constable Krishan Singh (PW-6) who was with the investigating officer at the time of the appellant being arrested after personal search (Ex.PW-6/A), immediately after registration of the FIR on 13.01.1996, he (the appellant) concededly having come to the Police Station himself; Dr. Sandeep Agnihotri (PW-7), who had medically examined the appellant in Safdarjung Hospital and having given report (Ex.PW-7/A) confirming his physical capacity to engage in sexual intercourse; Dr. N.K. Mittal (PW-8), the radiologist of Safdarjung hospital (Ex.PW-8/A) about radiological age of the prosecutrix confirming it to be less than eighteen years; Dr. Rachna Yadav (PW-9) of Safdarjung hospital, who proved the MLC (Ex.PW-9/A) based on the medical examination of prosecutrix by another

medical officer Dr. Ruchi; the Metropolitan Magistrate (PW-10) who recorded the statement (Ex.PW-10/A) of the prosecutrix under Section 164 Cr.P.C.; the investigating officer (PW-11) SI Durga Lal; and Constable Brij Mohan (PW-12), who had accompanied the appellant for his medical examination to Safdarjung hospital.

9. The appellant was examined under Section 313 Cr.P.C. to elicit his explanation for the incriminating evidence wherein he admitted the evidence that during 1991 he was posted in Udhampur (Jammu & Kashmir). He would state that he had a government accommodation (residential), but, he himself was deputed in field area (Zindrah). He admitted the evidence that his wife had gone away to Indore on account of death of her brother-in-law when the family was stationed in Udhampur.

10. The evidence has brought out that the prosecutrix was not good in studies and, thus, had discontinued formal schooling. It also brought out that she had started going to the vocational training centre run by the NGO of PW-1 in their branch in Raj Nagar, Palam area wherein she would learn sewing. Admitting this part of the evidence to be correct, the appellant denied that using the absence of his wife as an opportunity he had indulged in sexual intercourse at any stage with the prosecutrix, terming the version to this effect to be false and concocted leveled at the instigation of PW-1. He referred to the missing report lodged by him with the police on 21.12.1995.

11. The appellant submitted a detailed typed statement accompanied by four handwritten pages (along with certain other

material) praying that the same may be read as part of his statement. In the said handwritten note dated 12.05.1998 he explained that the prosecutrix had failed twice in fifth standard and thrice in the sixth standard and used to show odd behavior for which reason her formal schooling had been stopped and she had been sent to the sewing centre. He stated that on account of immaturity shown by the prosecutrix he would often receive complaints. He stated that on one day while returning from the school the boy named Bhushan had indulged in teasing her on which account the brother of the prosecutrix had beaten him up and in that context the matter had even reached Police Station where both sides were pacified, no formal case having been registered. He referred to FIR No.480/1995 lodged by him with suspicion that Bhushan was behind her kidnapping, but the police would not co-operate, his efforts to trace her out having not been successful. On 01.01.1996, his father had died which pre-occupied him with the death rites. He stated that he had discovered the *"suicide note"* which indicated that Bhushan had violated her modesty on which account she did not want to live. He stated that he had handed over the said *"suicide note"* to the investigating officer of the case lodged by him but for twenty-three days the girl could not be located. On 13.01.1996, he learnt that his daughter had been found and was in Police Station Chanakya Puri. He stated that he had accompanied his wife to the Police Station but he was not allowed to return home and instead arrested in the false case. He made certain assertions about certain women connected to the NGO suspecting them to be behind the design to have him falsely implicated. He requested the

examination of the prosecutrix by a psychiatrist and the DNA test of the child delivered by the prosecutrix, as also the scrutiny of the *"suicide note"* copy whereof was also placed by him before the trial Judge. He stated that the husband of his wife's sister (*mausa* of the prosecutrix) had died in Indore on 04.01.1991. Referring to the allegations of first rape around that period, he explained that during those days he was *"on duty"* in field station at Zindrah, 15 FOD and was not allowed leave (of absence) to come home at Udhampur.

12. The appellant led defence evidence. The reconstructed record and the trial court judgment read together would show that the appellant examined his wife Anita Beri (DW-1); his other daughter Jaya Beri (DW-2); his mother-in-law Raj Kumari (DW-10); his sister-in-law Sheetal (DW-11), and his son Gaurav Kumar (DW-12) to bring home facts for discrediting the version of the prosecutrix. He also examined Ram Chander Dharam Dasai (DW-4), Principal and Mr. S.S. Dhingra (DW-6), Office Superintendent of the Kendriya Vidyalaya, Udhampur and Delhi respectively, where the prosecutrix was a student during 19.11.1986 to 11.07.1991 and from 06.08.1991 onwards respectively primarily to bring home the fact that her academic performance was very poor. He further examined official witnesses from the department of Garrison Engineer - Mr. P.P. Mehta (DW-3), Mr. S.K. Sharma (DW-5) and Mr. Chakradhar (DW-8) - to prove that he was on duty in the field area and had not been allowed leave so as to be able to come home during the period the mother of the prosecutrix was away from Udhampur, she having gone to Indore.

13. The appellant also examined Sub Inspector B.L. Sharma (DW-7), who was the investigating officer of FIR No.480/1995 under Section 363 IPC, the witness confirming that the document described as *"suicide note"* was handed over to him by the appellant but he had not sent the same for comparison of the writing to forensic laboratory.

14. The trial court accepted the evidence of the prosecutrix and held that it had proved its case beyond all doubts thus holding the appellant guilty, as charged, rejecting the defence evidence, observing that there was no reason for false implication.

15. During the court testimony, the prosecutrix (PW-2) narrated the sequence of events on the same lines as set out in the FIR, from the time when the family was in Udhampur, her *mausa* having expired in Indore in 1991, on which account her mother was away and in her absence the appellant having committed rape for the first time on a particular night and right through the period till 21.12.1995 when she left home to resurface thereafter on 13.01.1996 when this FIR was registered.

16. As noted earlier, the prosecutrix was born on 09.03.1979. The date of death of her *mausa* in Indore has come on record as 04.01.1991. This would mean she was less than twelve years in age on the relevant date. Her MLC (Ex.PW-9/A) would show the age of menarche to be fourteen years. This would mean she was at pre-pubertal age when she was allegedly first subjected to sexual intercourse. The MLC does indicate torn hymen which is one possible factor of confirmation of sexual intercourse. But, it also shows that she

was pregnant on the date of medical examination on 13.01.1996 in which circumstance, it is inherent that she had been subjected to sexual intercourse. But, crucially, neither in the MLC nor in any other part of the evidence the age of the foetus as on 13.01.1996 is clearly indicated, there perhaps never having been any such probe.

17. The prosecutrix would speak of a series of events during which she was raped by the appellant, whenever there was opportunity on account of absence of her mother from home. This, according to her, had continued even after the appellant had been transferred from Udhampur to Delhi and the family, having shifted here, initially living with her paternal grandfather in Janakpuri and later moving to Panchwati in Palam area.

18. The prosecution heavily relied on the evidence of PW-1 she being a program officer in the NGO, in the Sewing Centre of which the prosecutrix had been attending classes for vocational training after having given up studies through formal school education. PW-1 would state that the prosecutrix was found to be in a sad disposition on 21.12.1995 and upon being asked, she had shared what had happened with her at the hands of her father (the appellant) since 1991. She would also state that the prosecutrix was pregnant at that point of time. She deposed that since she had left for Calcutta on the same day, and made arrangements for the prosecutrix to be accommodated in Prem Dham at Mehrauli, an institution described as Mother Teresa Home. She stated that she had instructed all concerned that no one was to disclose the whereabouts of the prosecutrix during her absence. She

returned to Delhi on 11.01.1996 and then made inquiries learning that the appellant (the father of the prosecutrix) had lodged a missing report along with which he had produced a letter left behind by her. She stated that she had got in touch with the Deputy Commissioner of Police and thereafter took the prosecutrix to Police Station Delhi Cantt where, on her statement, the police proceedings were recorded, the custody of the prosecutrix having been entrusted to her after medical examination.

19. In sharp contrast to the above version, the defence evidence primarily led through the accounts of Anita Beri (DW-1), Jaya Beri (DW-2) and Govind Kumar (DW-12), the mother, sister and brother of the prosecutrix brings out facts which project the version of the prosecutrix as improbable, there being no occasion or opportunity for the appellant to molest his own daughter to exploit her sexually. DW-1 pointedly testified that the allegations made by her daughter (the prosecutrix) were *"totally false"* he being posted at the relevant point of time in Zindrah, a remote field post about forty kilometers away from Udhampur where the family would reside. The service record produced by the official witnesses called from the department of Garrison Engineer does show that the appellant was not granted any leave of absence during the said period. But, even if it were to be assumed that he might have visited the family at Udhampur one way or the other, particularly when his wife was away to Indore, the defence evidence brought in through the testimonies of the other daughter (DW-2) and the son (DW-12) bring out that the children would sleep together under the care of a lady in the neighborhood,

there being no occasion for the father to stealthily take away the prosecutrix to another portion of his house so as to molest her during the night. Similar are the circumstances narrated by these witnesses in defence with regard to the life of the family after the appellant was transferred to Delhi.

20. It is true that in a case involving charge of the commission of the offence of rape, the solitary evidence of the prosecutrix may be sufficient to bring home the guilt. But, for this, the same must inspire confidence and found to be absolutely trustworthy, unblemished and of sterling quality. [*Krishan Kumar Malik vs. State of Haryana, (2011) 7 SCC 130;* and *Atender Yadav vs. State Govt. of NCT of Delhi, 2013(4) JCC 2962]*. Generally speaking, the evidence of the prosecutrix is given pre-dominant consideration. But, if the testimony of the prosecutrix suffers from lacunae or if her version, upon scrutiny, against the backdrop of evidence read in entirety, is found to be improbable it cannot become the basis of conviction. An inference of guilt can be drawn only if the facts proved are wholly consistent with the guilt of the accused and in case of conclusions to the contrary, the court being duty bond to reject the charge. After all, there is no presumption that the statement of the prosecutrix is always correct or liable to be accepted even though it suffers from embellishments or exaggerations.

21. In *Sudama Pandey & Ors. vs. State of Bihar (2002) 1 SCC 679,* the Supreme Court cautioned that the court has to be watchful and must avoid the danger of allowing suspicion to take the place of legal

proof, there being a long mental distance between *"may be true"* and *"must be true",* the same distinguishing *"conjectures from sure conclusions".*

22. In *Narender Kumar vs. State (NCT of Delhi) (2012) 7 SCC 171,* the Supreme Court held that the accused must also be protected against possibility of false implication, it observing thus:-

> *"29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt."*

23. In cases of this nature, the issue of delay in reporting is of great import. The court is duty bound to examine, if there has been inordinate delay, to find if there is any justifiable explanation for the same, absence of such explanation not only causing prejudice to the defence but also rendering the testimony of the prosecutrix *"unnatural and improbable" [Rajesh Patel vs. State of Jharkhand, (2013) 3 SCC 791].*

24. The case of *Atender Yadav (supra)* was decided by a division bench of this court. The circumstances in the case were similar in that the victim of the offence of rape was alleged to be daughter of the accused. The trial court had returned finding of guilty. This court accepted the appeal setting aside the judgment and conviction, *inter alia*, observing thus:-

> *"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 called 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. …"*

25. In the considered view of this court, there are many a fact and circumstance which have unfortunately been glossed over by the trial court but which render the account given by the prosecutrix to be wholly improbable and unreliable. Additionally, this court is of the view that neither the investigating agency nor the trial court were fair to the appellant at any stage of the process, this also vitiating the result

of the probe and the trial. It appears easy solutions were picked out, the need for deeper probe, as was being demanded by the appellant from the beginning, given a go-bye, without any accountability. The defence evidence, particularly of the close members of the family was discarded in the teeth of the settled law that *"the evidence led 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."* [*Atender Yadav (supra)*].

26. While it is true that the evidence of the prosecutrix deserves to be given weight and in certain circumstances can be acted upon without any corroboration, in cases of incest, there is always a need for greater and more acute scrutiny, inasmuch as such allegations against persons related by blood (own biological father, for example) smack of bestial instinct and total absence of basic human values and discretion. It is sad to note that the trial Judge blindly accepted the prosecution story without going into the aspects which render it highly improbable, virtually impossible. The erroneous approach of the trial court has led to serious miscarriage of justice in the present case unreasonably holding the biological father of raping his own daughter in the teeth of loaded circumstances showing her to be of wayward ways and possibly in liaison with a male acquaintance.

27. As noted earlier, the prosecutrix was not even twelve years old when she is alleged to have been raped by the father. Given the age

difference between the two and also the fact that he was a full bodied grown up male, such episode could not have occurred, in 1991, without leaving the consequences that were bound to come to the notice of the family in general, and the mother, in particular. After all, the mother was not a party to the alleged design of the father. She was away only for some time. A girl of such age, put in such circumstance, would ordinarily confide in the mother, if not also in her siblings. The sexual act by such grown up man with a girl of such tender years was bound to cause some tear to the vaginal canal that would lead to complications and undoubtedly excruciating pain. The MLC would not show any sign of the girl being habituated to sexual intercourse, particularly of forcible nature, over prolonged period of five years. It is for these reasons that the family would not believe this story to be correct. Their impressions are significant and of great import inasmuch as they would have watched over the conduct of the prosecutrix throughout.

28. The defence evidence clearly shows that there had been issues coming up on account of conduct of the boy named Bhushan. DW-1 (wife of the appellant) deposed, and her evidence is corroborated by her other members of the family, that the prosecutrix had revealed on 01.12.1995 that she had been molested by the said Bhushan. This finds echo in the circumstances surrounding 21.12.1995 when the appellant reported his daughter to be missing, he raising suspicion about involvement of the said Bhushan, having reported the matter to police which had registered the FIR under Section 363 IPC. The father also shared with the police the handwritten note left behind by the

prosecutrix, it also pointing out towards involvement of Bhushan as the reason for turmoil she was then suffering from. The said letter admittedly came in the hands of the police. The investigating officer, in the course of his testimony has confirmed this to be a fact but there was no probe made as to the authenticity of the handwritten note. It may be that there was no need for sending the said handwritten note for confirmation of the handwriting. After all, the prosecutrix having surfaced again on 13.01.1996 herself referred to it, though attempting to give it a new twist. But, the fact remains that the name of Bhushan had figured even in the said note.

29. The least that was required to be done was to interrogate Bhushan and make probe as to possibility of his involvement. The investigating officer (PW-11) justified inaction, in a very dismissive way, that he had not found Bhushan *"having any connection with the matter"*. What was the basis of his assumption has been left to imagination.

30. The prosecutrix has referred to a diary in the *almirah* in the office of her father (the appellant) where the draft of the handwritten note was prepared she having been made to copy the same. It was not such a big draft that it required such preparation. It is inconceivable that a person in such circumstances would prepare such a draft, that too in a diary. Be that as it may, there has been no effort to trace the said diary. In absence of any endeavour to trace it out, it cannot be assumed that such diary even existed.

31. As observed earlier, going by the evidence that the prosecutrix delivered a child on 01.08.1996, the possibility of she having conceived sometime around the end of October, 1995 may be assumed. But, for this one will also have to assume that the said child took birth after full term of pregnancy which, generally speaking, is considered to be 280 days. There is no evidence gathered or brought on record to show the relevant facts concerning the said child. In contrast, the MLC (Ex.PW-9/A) shows that, when questioned by the medical officer, she had indicated her last menstruation period to have begun on 28.11.1995. This would rule out any pregnancy prior to 28.11.1995. This would also mean that she would have conceived sometime after 28.11.1995. In her entire testimony, she has not spoken about any sexual intercourse indulged in by the appellant during that particular period. In this context, the evidence of her mother (DW-1) that on 01.12.1995 the allegations of she having been thrown into bushes and molested by the boy named Bhushan assume great significance. The possibility of physical intimacy between Bhushan and the prosecutrix during that period required deeper probe. Unfortunately, there has been none.

32. The evidence clearly shows that the prosecutrix had no interest in formal education. She had been failing in one class or the other due to poor performance. The evidence also shows that she was of wayward ways and the family would often receive complaints about her behavior outside the home. It was against this backdrop that she was sent for vocational training. This gave her access to the outside world. She had grown into a girl about sixteen years in age. If the

facts narrated by her were indeed true, there was no inhibition left for her to report the matter. What had commenced or had happened in 1991 had continued to be cause for her ordeal. Nothing stopped her from bringing it out. The delay is indeed inordinate and there are no justifiable reasons for failure to lodge protest, if not to the authorities, at least to elders in the family that included an elder sister, brother, mother and grandparents. The conduct is undoubtedly unnatural and highly improbable.

33. The delay also renders the version of PW-1 suspect. If she had learnt all the facts on 21.12.1995 there was no reason for her to secretly keep the prosecutrix in her custody till 13.01.1996. She was bound to take her immediately to the authorities to bring the facts to their knowledge. The story about she was constrained to go to Calcutta is not supported by any material indicating urgency of such journey or the need to keep the matter under wraps till her return. There is something more to it than meets the eye.

34. That the prosecutrix is prone to telling lies comes out vividly in the context of questions as to the knowledge of her pregnancy. PW-1, the activist of the NGO is on record to state that there was awareness even on 21.12.1995 that prosecutrix was pregnant. The prosecutrix in her statement forming the basis of FIR had also indicated that she knew that she was pregnant she, in fact, claiming it was of three months duration which cannot be true given the conclusions reached earlier. The MLC (Ex.PW-9/A) would be prepared later during the course of investigation, after registration of the FIR. The medical

examination only confirmed the pregnancy. It is not that it would reveal it for the first time. But, this is how the prosecutrix would project during her deposition in the court, feigning ignorance about pregnancy till medical examination. This, in fact, shows her version about the appellant arranging medicines for triggering menstruation in poor light.

35. The appellant had been crying foul from day one. He had demanded, even during investigation, DNA test to be carried out. This required biological samples even of the boy named Bhushan to be collected. After all, the DNA testing only with the biological samples of the appellant and the prosecutrix and the foetus carried by her would be meaningless. He being the biological father of the prosecutrix, his DNA in any case would have travelled into the foetus in her womb. The police would not listen. He made formal request to the trial court. No directions were passed. He made yet another endeavour at the stage of his statement under Section 313 Cr.P.C. No one would pay heed. The investigating agency, and the prosecution, seem to have taken the stand that there was no need because, from their perspective, it was an open and shut case, there being no reason why the daughter would accuse the father of such acts. This was neither a fair probe nor a fair trial. Bhushan was never brought in for DNA testing. The FIR lodged by the appellant alleging offence under Section 363 IPC by Bhushan was closed without any probe, only because a counter version in the form of statement of the prosecution had come to the fore. The investigation was clearly one-sided. At this

distance in time, this court can only deplore the inaction on the part of all concerned.

36. On the foregoing facts, and in the circumstances, this court is not convinced by the conclusions reached by the trial court. The approach of the trial Judge having been wholly mis-directed and erroneous, the judgment of conviction cannot be allowed to stand.

37. In the result, the appeal is allowed. The impugned judgment dated 10.08.2001, and order on sentence dated 31.08.2001, are hereby set aside. The appellant would stand acquitted of the charge.

R.K.GAUBA, J.

DECEMBER 19, 2018
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