NEUTRAL CITATION NO: 2023/DHC/000051

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

Reserved on : 26.04.2022
% Pronounced on : 05.01.2023

\+ **CRL.A. 481/2019 and CRL.M.A. 1845/2022 (For benefit under Section 428 Cr.P.C.)**

KAMLESH .....Appellant

Through : Mr. S.K. Sethi, Advocate.

versus

STATE ..... Respondent

Through : Mr. Ashish Dutta, APP for the State with SI Dinesh, P.S.: Mundka.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

JUDGMENT

RAJNISH BHATNAGAR, J.

1. By way of this Judgment, we shall dispose of the present appeal U/s 374(2) of the Code of Criminal Procedure which has been filed against the Judgment of Conviction dated 31.10.2018 and Order on Sentence dated 19.12.2018 passed by the Addl. Sessions Judge-01, West, Special Court under the POCSO Act, Tis Hazari Courts, Delhi vide which appellant Kamlesh has been convicted U/s 376 IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 50,000/- U/s 376 IPC and in default of payment of fine, simple imprisonment for a period of one year.

Benefit of section 428 Cr.P.C., remission, suspension or reduction has not been given to the convict.

2. In brief, the case of the prosecution is that on 07.10.2012 in between 10:00 p.m. to 11:00 p.m. at the house of Mr. Suresh near Government Hospital, Tikri Kalan, Delhi, appellant Kamlesh had committed rape upon Ms. X, the minor prosecutrix aged about 02 years.

3. After the completion of the investigation, challan was filed before the court of Metropolitan Magistrate, who after completing all the formalities committed the case to the Court of Sessions for trial.

4. Vide order dated 05.02.2013, charge for the offence U/s 376 IPC was framed against the appellant to which he pleaded not guilty and claimed trial. In order to prove its case, the prosecution examined 12 witnesses.

5. We have heard the Ld. counsel for the appellant, Ld. APP for the State and have also gone through the records of this case.

6. It is submitted by the Ld. counsel for the appellant that the Ld. Trial Court has passed the impugned judgment on surmises and conjectures and has failed to appreciate the evidence led by the prosecution in its right earnest and has also failed to observe that there are glaring lacunas in the case of the prosecution. It is further submitted by the Ld. counsel for the appellant that the Ld. Trial Court has failed to appreciate that PW 2 who is the mother of the victim is an unreliable witness and has made contradictory statements. It is further submitted that the investigation is faulty as the IO of the case never tried to find out about the presence of PW 2 on the fateful

day and no enquiries were made from one Suman who was allegedly with PW 2 on the date of the incident. It is further submitted that there is a delay in lodging the FIR which has not been explained by the prosecution. It is further submitted that the IO has not enquired about the whereabouts of the father of the victim and as to why he was not in the house. The story of the prosecution that PW 2 has locked her minor children aged about 6 years and 2 years in the house seems highly unbelievable and such conduct of PW 2 is immensely irresponsible. It is further submitted that call details of the father of the victim have not been obtained by the IO in order to corroborate the statement of PW 2. It is further submitted that the conduct of PW 6 doctor Furkan Ali who had attended the victim is highly questionable as he has neither advised PW 2 to go to the police nor he himself called the PCR. It is further argued that the investigating officer has not taken any expert opinion as to whether the victim was subjected to rape or not and the Ld. Trial Court has entirely based the conviction by placing reliance on the MLC of the victim. It is further submitted that no DNA report has been obtained by the IO and this was the only material evidence against the appellant as in this case hymen was not torn. It is further argued that the statement of the brother of the victim who was around six years of age was also not recorded by the IO which creates doubt in the case of the prosecution. It is further submitted that the Ld. Trial Court has wrongly placed reliance on the testimony of PW 7 as PW 7 has only identified the signatures of the examining doctor and has personally neither seen the victim nor her medical condition on the date of the medical examination of

the victim. It is further submitted that no independent witness was examined at any stage of the case.

7. Ld. Counsel for the appellant has relied upon ***Krishan Kumar Malik Vs. State of Haryana*** [**(2011) 7 Supreme Court Cases 130]**, ***State of Haryana Vs. Shamsher Singh*** [**(2006) (3) RCR (Criminal) 345]**, ***State Vs. Rahul*** [**2011 (2) JCC 701]**, ***Sunil Kumar Vs. State*** [**181 (2011) DLT 528]**, ***State of Uttar Pradesh Vs. Ram Veer Singh & Ors*** [**AIR 2007 Supreme Court 3075]**, ***Sharad Birdhi Chand Sarda Vs. State of Maharashtra*** **[1984 SCC (4) 116],** ***Swaran Singh Ratan Singh Vs. State of Punjab*** [**AIR 1957 SC 637]**, ***State of Rajasthan Vs. Kamla*** **[AIR 1991 SC 967]**, ***Inderjit Singh Vs. State of Punjab*** [**1991 Cr. LJ 2191 (SC)],** ***Ramesh Babulal Doshi Vs. State of Gujrat***, [**AIR 1996 SC 2035]** *and* ***Netram Vs. State of UP*** [**(1989) 1 Crimes 42]** to contend that it is for the prosecution to stand on its own legs and prove the case against the accused beyond reasonable doubt and in case two views are possible then the view favouring the accused should be opted.

8. On the other hand, it is submitted by the Ld. APP for the state that there is no infirmity in the impugned judgment and the Ld. Trial Court has considered the evidence brought on record and proved by the prosecution in its right earnest. It is further submitted by the Ld. APP that the victim in this case is a minor girl aged around 2 years and the mother of the victim who has been examined as PW 2 has totally supported the case of the prosecution. It is further submitted by the Ld. APP that even if the doctor who has prepared the MLC has not been examined, the MLC cannot be

discarded and he relied upon ***Laddan V. State (Govt. of NCT of Delhi),* 2013 SCC OnLine Del 4951** and ***Bhagwan Singh and Suresh Vs. State,* Crl. A. No. 354 of 1999 decided by this Court on February 26, 2007**. It is further submitted by the Ld. APP that rupture of hymen is not necessary in each and every case and in small children, the hymen is not usually ruptured and he placed reliance upon ***Chand Bibi Vs. State***, **[(2019) 256 DLT 593]** and ***Jagdish Vs. State of Madhya Pradesh***, **2017 SCC OnLine MP 886**. It is further submitted by the Ld. APP that the appellant has not denied in his statement U/s 313 Cr.P.C. that he was with the victim on the date and time of the incident. It is further submitted that the appellant in his defence has examined himself as DW 1 and he is not a trustworthy witness as he has made contradictory statements and no reliance can be placed on his testimony.

9. In the instant case, age of the victim and the identity of the appellant are not in dispute. The mother of the victim has appeared as PW 2 and has deposed that the victim was only 2 years old at the time of the commission of the offence to which there is no challenge and this testimony has gone unrebutted and unchallenged. As far as the identity of the appellant is concerned, he has been identified by PW 2 who is the mother of the victim. The appellant has also been identified by PW 3 Ct. Vishram, PW 4 Ct. Subhash, PW-9 SI Dinesh Kumar and PW 10 SI Koyal and it is not disputed that the appellant was known to the mother of the victim before the commission of the offence as they were neighbours. Even in his statement U/s 313 Cr.P.C, the appellant has not disputed his identity and also the fact

that the mother of the victim has left the victim with him while she was going out.

10. The victim was medically examined in SGM Hospital Mangol Puri, Delhi and her MLC is Ex. PW 7/A. The perusal of the MLC shows that the victim has:

(a) Abrasions at hymenal area with min bleeding

(b) Small abrasion on right labia majora

(c) Perineum intact

(d) No anal region injuries.

The MLC further goes on to record that "Otherwise hymen not frankly ruptured. No other injury was seen anywhere on body."

11. The appellant was examined in regard to his capability of performing sexual intercourse and the MLC of the appellant which is Ex. PW 5/A clearly states that the appellant was capable of performing sexual intercourse. The contention of the Ld. counsel for the appellant that PW 7 Dr. Monika Chopra has never seen the victim or her status on the date of her examination, so the reliance by the Ld. Trial Court on her testimony is misplaced. This contention has no force for the reasons mentioned below.

12. While appearing in the Court as PW 7 Dr. Monika Chopra categorically stated that she is working in the hospital since 2012 and has been deputed by the Medical Superintendent to depose on behalf of Dr. Rajender, who left the services of the hospital in the year 2014 and his whereabouts were not available in the hospital records. She has further

deposed that she can identify the handwriting and signatures of Dr. Rajender as she had seen him writing and signing during the course of her duties. She has proved the MLC of the victim as Ex. PW 7/A and she further deposed that the MLC is in the handwriting of Dr. Rajender and also bears his signatures. In her cross examination PW 7 has denied that she cannot recognize the handwriting and signatures of Dr. Rajender. She has further stated in her cross examination that it may or may not be necessary that there would be injury, if there is forcible intercourse and generally the injury only depends on the force.

13. The contention of the Ld. counsel for the appellant that in the absence of examination of Dr. Rajender, who has examined the victim and prepared the MLC, the MLC cannot be admitted in evidence is fallacious and has no force in it. Although Dr. Rajender was not examined but PW 7 Dr Monika Chopra was examined who stated that she has seen the MLC Ex. PW 7/A which was prepared by Dr. Rajender. She has also identified the signatures on the MLC Ex. PW 7/A to be that of Dr. Rajender. PW 7 has stated that Dr. Rajender has left the hospital and his whereabouts were not known.

14. The MLC is an authenticated record of injuries which is prepared in regular course of business by the doctor and can be relied upon by the Courts, even when the doctor who prepared the MLC is not examined in the Court and record is proved by any of the other doctor. It cannot be expected from the hospital to keep track of the doctor after he leaves the hospital. Neither the doctor is expected to keep the hospital informed about his /her whereabouts. Merely because the doctor who prepared the MLC is

not personally examined, the MLC cannot be disbelieved. Proving of MLC by a colleague doctor who identifies the handwriting and signatures of the doctor who examined the patient or by an administrative staff of the hospital who identifies the signatures of the doctor is sufficient and good proof and MLC cannot be doubted.

15. In the instant case, it is not the case of the appellant that there is tampering with the MLC and no bias has been alleged against the hospital authority or the IO by the appellant. Therefore, the Ld. Trial Court was fully justified on relying upon the MLC Ex. PW 7/A.

16. PW 6 Dr. Furkan Ali is also a material witness of this case. According to this witness victim was medically examined by him on 07.10.2012 at about 11 p.m. when the mother of the victim had brought the victim aged around 2 years with the complaint of passing of blood in the urine of her child. He further deposed that he gave tetanus injection to the child and advised her to take the child to S.G.M. Hospital for further examination and management as according to him he felt that some wrong act has been committed with the child.

17. This witness has not been cross examined and his testimony has gone unrebutted and unchallenged.

18. The mother of the victim then took the victim to S.G.M. Hospital where the MLC Ex. PW 7/A of the victim was prepared. The perusal of this document shows that the victim has abrasions at hymenal area with min bleeding, small abrasion on right labia majora, perineum intact, no anal

region injuries. Otherwise hymen not frankly ruptured. No other injury was seen anywhere on body.

19. The present case is the one with the allegations of rape/sexual offence and in these circumstances, ingredients of the offence must be considered. Reference can be made to Medical Jurisprudence and Toxicology (Twenty First Edition) by Modi at page 369 which reads as follows :

> *"Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one"*

20. In ***Madan Gopal Kakkad v. Naval Dubey*** **[1992] 2 SCR 921]** it has been observed as follows :-

> *"38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:*
>
> > *Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with*

> *or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.*

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

> *...even slight penetration is sufficient and emission is unnecessary.*
>
> *Therefore, absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed."*

21. In **AIR 1923 Lah 536 *Regina vs. Ferrol; Natha,*** the court had ruled that to constitute an offence under section 375 IPC, there must be evidence of penetration, which may occur and the hymen may remain intact. Vulval penetration is sufficient to constitute rape in India without actual seminal emission.

22. In the instant case, after going through the testimonies of PW 2, PW 6, PW 7 and the MLC of the Victim Ex. PW-7/A on the basis of which the Ld. Trial Court has arrived at the conclusion that the victim has been raped due to which there was bleeding, though the hymen was not ruptured cannot be faulted with and we have no reason to arrive at a different conclusion.

23. It has also been argued that there was a delay in the lodging of the FIR which is fatal to the case of the prosecution as according to the counsel for the appellant, the delay in lodging of the report raises considerable doubts regarding the veracity of the evidence of the prosecution and therefore, it is not safe to pass any conviction in a case where there is a delay in lodging the FIR.

24. No doubt, delay in lodging the FIR raises considerable doubts in the case of the prosecution, however, the same depends upon the facts of each case and every delay in the registration of the FIR cannot be said to be fatal to the case of the prosecution and if the delay is sufficiently explained, the case of the prosecution would not suffer.

25. The Ld. Trial Court while examining this aspect of the case in the impugned judgment has observed as follows:

> "46. In the case reported as ***State of Rajasthan v. Om Prakash*** **(2002) 5 SCC 745**, the Hon'ble Supreme Court has held that in case where delay is explained by the prosecution in registering the case, the same could be condoned moreover when the evidence of the victim is reliable and trustworthy.
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> 47. Similar view was taken in ***Tulshidas Kanolkar v. The State of Goa*** **(2003) 8 SCC 590**, wherein it was held by the Supreme Court as follows:
>
> > ***"The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance s for the accused when accusation of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there s possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so the mere delay in lodging of first information report does not in any way render prosecution version brittle."***

48. In the judgment reported as ***Devanand v. State (NCT of Delhi)*** **2003 Crl.L.J. 242**, the Hon'ble High Court of Delhi has observed as follows:

> ***"The above said statement clearly show that at the earliest opportunity the prosecutrix had not made any complaint to her mother in this regard. Reading of the examination-inchief reveals that first time she was raped as per her own version after about 30-36 days of coming of the appellant but in any case she admits that she has been raped many a times and she only complained to her mother few days after he had left. The appellant stayed in the house of the prosecutrix for more than year."***

49. Further, the Hon'ble High Court of Rajasthan in the judgment reported as ***Babu Lal and Anr v. State of Rajasthan*****, Cri.L.J. 2282**, has held as under:

> ***"No doubt delay in lodging the FIR in sexual assault cannot normally damage the version of the prosecutrix as held the Hon'ble Supreme Court in various judgements but husband of the prosecutrix is there and report is lodged after one and half months, such type of delay would certainly be regarded as fatal to the prosecution case"***

50. The Hon'ble High Court of Madhya Pradesh in the judgment reported as ***Banti alias Balvinder Singh v. State of Madya Pradesh*****, 1992 Cr.L.J. 715**, has held as under:

> ***"in conclusion, having regard to the conduct of the prosecutrix in not making any kind of complaint about the alleged incident to anybody for five days coupled with late recording of report by her after five days with false explanation for the delay, in the context also of the Lax Morals of the Prosecutrix, it is very unsafe to pin faith on her mere word that sexual intercourse was committed with her by five accused persons or any of them. It is also difficult to believe her version regarding the alleged abduction in jeep. In the circumstances it must be held that the prosecutrix story was not satisfactorily established"***

> 51. The alleged incident occurred on 07.10.2012 between 10.00 pm to 11:00 pm, as per the complaint **(Ex.PW2/A)**. DD No.13 A dated 08.10.2012 **(Ex.PW1/D)** was registered at 09:20 am when the police was informed about the incident. The FIR **(Ex.PW1/A)** has been registered on 08.10.2012 at 12:15 hours (12:15 pm).
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> 52. The delay has been logically explained by the prosecution in the evidence of the mother of the prosecutrix **(PW2)** that when her husband returned at 06:00 am, he was told about the incident and next morning, they took the prosecutrix to the hospital and the police was called. The explanation appears to be justified and plausible as the mother of the prosecutrix, instead of informing anyone including neighbours, preferred to wait till the return of her husband as neither she nor her neighbours had the mobile number of her husband and on his return and visit to hospital, the police was informed on the next day.
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> 53. The mother of the prosecutrix and the prosecution have been able to justify the delay and why the mother of the prosecutrix did not report the matter immediately or earlier. Nothing is shown by the accused which could indicate that the possibility of the complaint being motivated or manipulated and the version of the mother of the prosecutrix being untrue exists.
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> 54. It cannot be said that the FIR was lodged after due deliberation and consultation or that there is any delay in its registration."

26. Having considered the observations made by the Ld. Trial Court on the aspect of delay in lodging the FIR, we are of the opinion that the findings of the Ld. Trial Court holding that the delay has been satisfactorily explained by the mother of the victim as well as the prosecution cannot be faulted with. Therefore, no benefit can be given to the appellant in this regard.

27. Ld. counsel for the appellant has also argued that the testimony of the mother of the victim (PW-2) is not reliable and she has made contradictory statements.

28. Ms. Y, mother of the prosecutrix has been examined as (PW-2) and in her examination- in- chief she has deposed as follows:

> ***"Kamlesh accused present in Court today (correctly identified) was living near our adjacent room as a tenant in the house of Suresh. It was Sunday I do not remember the date. The incident is about 5-6 months old. At about 10 p.m. I had gone with one of my neighbour Suman to see some of her relatives. I left my children sleeping in our room. I had bolted the door from outside. When I leaving I saw accused standing near my room under influence of liquor. After about one hour I returned to my room. I found accused having my daughter Ms.X (name deposed and withheld to protect the identity of the minor prosecutrix) in his lap and daughter was crying a lot. I took my daughter from accused. On my consoling my daughter she pointed out the accused that he hit her. When I saw blood on the private part of my daughter and I enquired from accused on which the accused said that he had committed mistake (MUJH SE GALTI HO GAI) and accused left from there. The accused had committed balatkar (rape) with my daughter. My hushand came at about 6 am in the morning and I narrated all the incident to my husband and we took our daughter to SGM Hospital where my daughter was treated then we lodged a report to the police station Mundka."***

29. PW 2 has also made a police complaint to the police which is Ex. PW 2/A in which she has given elaborate narration in regard to the role of the appellant. To appreciate the arguments of the counsel for the appellant and to arrive on any conclusion as to whether the testimony of PW 2 is unreliable or suffers from contradictions, her examination-in-chief and cross examination have to be read together and any inference in this regard cannot be drawn by taking one line from here and one line from there. The evidence has to be read in full including the examination-in-chief and the cross-examination in order to arrive at a conclusion with regard to the trustworthiness of a witness.

30. PW-2 in her cross examination has stated as follows:

> ***"... When I left, my both the children was sleeping. I bolted the door from outside. I had stated to the police that I had bolted the room from outside (confronted with Ex.PW2/A wherein it is not so recorded). I had stated to the police in my statement that when I was leaving I saw accused standing near my room (confronted with Ex.PW2/A wherein it is not so recorded). It is wrong to say that I had not seen the accused standing near my room when I left...."***

31. Basing on these answers given by the mother of the victim, it has been argued by the Ld. counsel for the appellant that PW-2 is not a reliable witness. No doubt, there are contradictions in the complaint Ex. PW 2/A and the examination-in-chief of Ms. Y mother of the victim who has been examined as PW 2. Now the question is as to whether the contradictions mentioned hereinabove are sufficient to discard the entire testimony of PW-2. One cannot lose sight of the fact that even the testimony of a hostile witness is not to be discarded in toto. The court has enough power to sift the chaff from the grain. In the instant case, one cannot ignore the fact that PW-2 is the mother of a 2 year old minor child who has been violated by the appellant who was seen by PW-2 holding the victim child in his lap and then apologizing for his wrong act. Therefore, in such a situation the mother of the minor child would be tormented and traumatized and then some contradictions are bound to occur in her testimony. The contradictions which can shake the testimony of a witness are of such a nature which goes to strike at the root of the prosecution's case. The contradictions as pointed out by the Ld. counsel for the appellant in our opinion, are not sufficient to discard the entire testimony of PW-2 who is the mother of the victim.

32. The statement of the appellant was recorded U/s 313 Cr.P.C. The answer given by the appellant to question No. 29 assumes much importance. The appellant in answer to this question has stated that ***"The mother of the victim was a tenant in the same property where I too was a tenant. She had left her minor daughter with me saying that she is going to her relative for the night. Nothing as alleged happened. In the morning I was told that she has levelled allegations against me. The same are wrong. The child was crying and I had only taken her in my lap."***

33. To arrive at the guilt of the appellant, the Ld. Trial Court has made the following observations:

> "62. The accused had also admitted his fault before the mother of the prosecutrix by stating ***"MUJH SE GALTI HO GAI"***. Ms.Y, mother of the prosecutrix had seen the prosecutrix in the lap of the accused and she was crying a lot. When Ms.Y took Ms.X from accused and consoled her, Ms.X pointed out the accused that he hit her. Ms. Y saw blood on the private part of Ms.X and when she enquired from the accused, he admitted that he had committed mistake. The accused has failed to cross examine Ms. Y, mother of the prosecutrix **(PW2)** regarding her deposition of seeing him with the prosecutrix in his lap and of the prosecutrix bleeding as well as of the accused apologizing for his mistake. Although, he has given some suggestions to her about his innocence (which are denied by Ms.Y) but as the same are unsubstantiated, the accused had failed to shatter the veracity of the testimony of Ms.Y, mother of the prosecutrix (PW2)."

34. The Ld. Trial Court has observed that the evidence of PW-2 does not suffer from any material variations or contradictions from her earlier statement/complaint Ex. PW 2/A and placed complete reliance on her testimony. In view of the discussions hereinabove, we find no reason to not rely upon the testimony of PW 2 mother of the victim and the reliance

placed by the Ld. Trial Court on the testimony of PW 2 while arriving at a conclusion that the appellant has committed the offence against the minor child as narrated by PW-2 cannot be faulted with.

35. The appellant has examined himself as DW-1 and he deposed as follows:

> ***"I had a dispute and fight with the father of accused over drinking of over liquor. We were neighbours. I have not committed any offence against the prosecutrix. I have been falsely implicated in this case due to enmity. I was not even present at the spot of incident at the time and date of the alleged incident. I am depressed due to this case as I am in custody for about 05 years. I am innocent and have been falsely implicated in this case."***

36. This witness was cross examined by the Ld. APP and in his cross examination he has stated:

> "that he cannot produce any witness to prove his defence of alibi that he was not present at the spot on the date and time of alleged offence. He has not made any complaint or filed any application before any authority that he has been falsely implicated in this case. He has admitted to be correct that on the date of incident, he had consumed liquor. However, he was not under the influence of liquor and he was not in a condition to know what he was doing. He was in his senses. He has further deposed that ***"There are four rooms in the premises and one of those room I used to reside at the time of incident. I went to the room of Mr. Lallan situated in the adjacent building at the time of incident. I went to the room of Lallan at about 09:30 pm and stayed there for about half an hour. Thereafter, I returned to my room. It is correct that the room of Lallan is situated in the same premises, where I was I used to reside. It is correct that in one of the room, Suman was residing, in the other room, complainant used to reside. The other two rooms were occupied by Lallan and myself. I used to drink liquor at my work place and not in my room. I do not know any person with the name of Mr.Z (the name of the father of prosecutrix, as***

mentioned as the husband of the mother of prosecutrix at sr. no. 1 in the list of prosecution witnesses, has been told to the witness and is withheld to protect the identity of prosecutrix). I again say on questioning again that I do not know any man by the name of Mr.Z. It is wrong to suggest that there was no dispute/fight between myself with the father of prosecutrix and I am deposing falsely in this regard. It is wrong to suggest that I had committed rape upon the prosecutrix and for this I have been arrested in this case. It is wrong to suggest that I am deposing falsely."

37. The reading of the examination-in-chief and cross examination of the appellant (DW-1) reveals that he was present in the premises where the offence has taken place. The answer to question No. 29 in his statement U/s 313 Cr.P.C. also goes against him, wherein he admits that the victim was with him and was left by the mother of the victim.

38. The appellant has pleaded alibi but has failed to prove the same as he has himself admitted his presence in the premises with the victim. The appellant has failed to examine Lallan in his defence to substantiate that he was with Lallan because according to him he was in the room of Lallan which was situated in the same premises where he was residing. The appellant is not telling the truth is also evident from his testimony because on the one hand he has stated that he does not even know **Mr. Z** who is the father of the victim and on the other hand he has claimed that he had dispute with the father of the victim who is his neighbor over drinking of liquor and he does not know any man by the name of **Mr. Z**. Therefore, when the appellant does not even know the father of the victim then how he can have any dispute with him. It further goes to show untruthfulness of the appellant.

39. It has also been argued by the Ld. counsel for the appellant that the IO has not conducted fair enquiry as he has not inquired about the whereabouts of the father of the victim and has also not obtained the call details of the father of the victim so as to corroborate the testimony of PW 2 and he has also not obtained any DNA.

40. We have already observed that the testimony of PW 2 mother of the victim cannot be faulted with and her testimony finds support from the MLC of the victim Ex. PW 7/A. Merely because the IO has not examined 6 years old brother of the victim or the father of the victim, the same cannot be termed as faulty investigation on the part of the IO. It is the quality of the evidence and not the quantity which matters. No bias or enmity has been alleged against the IO by the appellant.

41. The record reveals that the father of the victim had come much later at the spot, therefore, at the best his evidence could be hearsay evidence. Moreover, it is pertinent to mention here that the documents prepared during the course of investigation has been admitted on behalf of the appellant U/s 294 of the Cr.P.C. and also proved by the IO during the course of the trial. The appellant has not been able to prove that the testimonies of the prosecution witnesses are false and not reliable.

42. Therefore, keeping in view the testimonies of PW-2, PW-6, PW-7 and the MLC of the victim/prosecutrix Ex. PW 7/A, we are of the opinion that the prosecution has successfully proved that in between 10:00 p.m to 11:00 p.m. on 07.10.2012 at the house of Mr. Suresh near Government Hospital Tikri Kalan, Delhi, the appellant had committed rape upon **Ms. X**,

the minor victim/prosecutrix aged about 2 years. Therefore, we find no infirmity in the impugned judgment by virtue of which the appellant has been convicted U/s 376 IPC.

43. As far as, the arguments advanced by learned counsel for the appellant with regard to the grant of benefit under Section 428 Code of Criminal Procedure, 1973 is concerned, the Hon'ble Supreme Court in '***Bhagirath Vs. Delhi Administration'*, (1985) 2 SCC 580** has considered the applicability of Section 428 Code of Criminal Procedure, 1973 and observed as follows:-

> *"13. We have considered with great care the reasoning upon which the decision in Kartar Singh proceeds. With respect , we are unable to agree with the decision. We have already discussed why 'imprisonment for life is imprisonment for a term , within the meaning of section 428. We would like to add that we find it difficult to agree that the expressions 'imprisonment for life' and imprisonment for a term' are used either in the Penal Code or in the Criminal Procedure Code in contradistinction with each other. Sections 304 , 305 , 307 and 394 of the penal Code undoubtedly provide that persons guilty of the respective offences shall be punished with imprisonment for life or with imprisonment for a term not exceeding a certain number of years. But , that is the only manner in which the Legislature could have expressed its intention that persons who are guilty of those offences shall be punished with either of the sentences mentioned in the respective sections. The circumstance on which the learned judges have placed reliance in Kartar Singh , do not afford any evidence , intrinsic or otherwise' of the use of the two expressions in contradistinction with each other. Two or more expressions are often used in the same section in order to exhaust the alternatives which are available to the Legislature. That does not mean that there is , necessarily , an antithesis between those expressions.*
>
> ……
>
> *15. We have also already answered the last of the reasons given in Kartar Singh that the question is not whether the beneficent provision contained in section 428 should be extended to life convicts on equitable considerations. We enter a most respectful caveat. Equity sustains law and the twain must*

meet. They cannot run in parallel streams. Equitable considerations must have an important place in the construction of beneficent provisions, particularly in the field of criminal law. To exclude such considerations is to denude law's benevolence Or its true and lasting content. Lastly , the view expressed by the Joint Committee in its Report does not yield to the inference that the "mischief sought to be remedied has no relevance where gravity of offence requires the imposition of imprisonment for life". As we have indicated earlier , graver the crime , longer the sentence and , longer the sentence , greater the need for set-offs and remissions. Punishments are no longer retributory. They are reformative.

……

17. For these reasons, we allow the appeal and the writ petition and direct that, the period of detention undergone by the two accused before us as undertrial prisoners, shall be set off against the sentence of life imprisonment imposed upon them, subject to the provision contained in section 433-A and, provided that order have been passed by the appropriate authority under section 432 or section 433 of the Code of Criminal procedure."

44. Further the Division Bench of Madras High Court in the case of ***The Home Secretary (Prison-IV) and others Vs. A. Palaniswamy @ Palaniappan*** **(M/46) [W.A. No. 667 of 2020, CMP No. 9331 of 2020 & HCP No. 959 of 2020 decided on 05.07.2021]** relied on ***Bhagirath Vs. Delhi Administration*** **[(1985) 2 SCC 580]** and ***Kumar vs. State of Tamil Nadu*** **[Manu/TN/3212/2014]**, while dealing with the same issue whether a person who is convicted for the life imprisonment is entitled or not for the benefits of Set-Off under Section 428 Cr.P.C. was of the view that 'Set-Off' is permissible even for a life convict.

45. Moreover, the Division Bench of this Court in **'*Harpreet Singh vs State of Delhi*' in CRL.A. 755/2009 decided on 23.08.2012** has also granted the benefits of Section 428 Cr.P.C. to the accused who was

convicted for the offence under Section 376 (2) (g) punishable with imprisonment for life.

46. In view of the judgments mentioned hereinabove, we are in consonance with the arguments put forward by learned counsel for the appellant and, accordingly, grant the benefits of Set-Off under Section 428 Cr.P.C. to the appellant.

47. In view of the discussions mentioned hereinabove, the impugned Judgment dated 31.10.2018 passed by the Ld. Trial Court is upheld, consequently, the appeal is dismissed. However, the impugned Order on Sentence dated 19.12.2018 passed by the Ld. Trial Court is modified only to the extent that the benefits of Set-Off under Section 428 Cr.P.C. be given to the appellant. Remaining part of the impugned Order on Sentence dated 19.12.2018 shall remain the same. All pending applications (if any) are disposed of.

48. Trial Court Record be sent back forthwith alongwith a certified copy of this judgment.

RAJNISH BHATNAGAR, J

SIDDHARTH MRIDUL, J

January 05, 2023
Sumant