

Delhi High Court

Khem Chand vs State Of Delhi on 5 July, 2008

Author: Manmohan Sarin

*

HIGH COURT OF DELHI

%

Date of decision: July 7th, 2008

+

Crl.A.No. 5/2000

Khem Chand

..Appellant

through

Mr. Vijay Kumar Sharma, Advocate

Versus

State of Delhi

..Respondent

through

Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

2.

Crl.A.No. 740/2001

Om Prakash

..Appellant

through

Mr. Anurag Jain, Advocate

Versus

State

..Respondent

through

Mr.Sunil Sharma, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

3.

Crl.A.No. 813/2001

Sant Ram @ Dada

..Appellant

through

Mr. K.B. Andley, Sr. Advocate with
Mr.M.L. Yadav, Advocate

Versus

State

..Respondent

through

Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

4. Crl.A.No. 719/2002
Sadhu Ram ..Appellant
through
Mr. Sumit Verma, Advocate

Versus

State ..Respondent

Crl.(A) No. 5 of 2000 & connected matters Page No.1 of 56
through
Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

5. Crl.A.No. 816/2002
Ram Din ..Appellant
through
Mr. Anurag Jain, Advocate

Versus

State ..Respondent
through
Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

6. Crl.A.No. 673/2002
Ram Chander ..Appellant
through
Mr. Rajesh Mahajan, Advocate

Versus

State ..Respondent
through
Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

7. Crl.A.No. 126/2003
Kewal Singh ..Appellant
through
Mr. V.K. Raina, Advocate

Versus

State

..Respondent

through
Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

8.

Crl.A.No. 541/2003

Bishamber

..Appellant

through
Ms. Anu Narula, Advocate

Versus

Crl.(A) No. 5 of 2000 & connected matters
State

Page No.2 of 56

..Respondent

through
Mr.Sunil Sharma, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

9.

Crl.A.No. 765/2003

Lal Mohd.

..Appellant

through
Mr. Sumit Verma, Advocate

Versus

State

..Respondent

through
Mr.Sunil Sharma, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

10.

Crl.A.No. 173/2004

Ram Avadh

..Appellant

through
Mr. V.K. Raina, Advocate

Versus

State

..Respondent

through

Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

11.

Crl.A.No. 89/2006

Santosh Kumar

..Appellant

through
Mr. V.K. Raina, Advocate

Versus

State

..Respondent

through
Mr.Ravinder Chadha, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

12.

Crl.A.No. 141/2006

Rattan Pal @ Monu

..Appellant

through
Mr. R.K. Srivastava, Advocate

Crl.(A) No. 5 of 2000 & connected matters

Page No.3 of 56

Versus

State

..Respondent

through
Mr.Sunil Sharma, Advocate

Mr. Siddharth Luthra, Sr.Adv.Amicus Curiae
with Ms. Rajni Gupta, Advocate

Coram :

* Hon'ble Mr.Justice Manmohan Sarin
Hon'ble Mr.Justice S.L. Bhayana

- | | |
|--------------------------------------------------------------------------|-----|
| (1) Whether reporters of local paper may be allowed to see the judgment? | Yes |
| (2) To be referred to the reporter or not? | Yes |
| (3) Whether the judgment should be reported in the Digest ? | Yes |

Manmohan Sarin, J.

1. By this common judgment, abovementioned twelve criminal appeals are being decided since a common question regarding the grant of reprieve, if any, in the sentence of life imprisonment for conviction for child rape arises in these appeals. This is apart from the substantive challenge to the conviction on merits in the appeals which has been dealt with individually in each appeal. The claim for reprieve in sentence is either based on plea of the case meriting a lesser sentence than life, or reprieve based on post conviction conduct.

2. An act of child rape is a gruesome and abhorring act. It leaves a permanent scar on the personality of the child, inhibiting growth and development. It instils a feeling of fear, insecurity and a brooding sense of shame and guilt for no fault of the child victim. An author has aptly narrated the inner turmoil of victims and repeat victims of sex abuse or child rape in the following words:-

"Lost Innocence"

Looking back on a time and place
Seeing a child's innocent face
Knowing that things aren't as they appear
Crl.(A) No. 5 of 2000 & connected matters Page No.4 of 56
For inside she cries silent tears
Deep inside she is filled with pain
She feels dirty and full of shame
Innocence lost at a very young age
Locked this child in a pain filled cage
There is no freedom or escape
From the fact this child was raped
While the guilty man is roaming free
This child is sentenced to eternity
Eternity locked away with all this shame
She can't help but feel that she was to blame
Even though common sense says it was not her fault
She can't seem to help from having these thoughts
What if's keep running through her mind
She keeps going back to those moments in time
If there isn't something different she could have done
Why didn't she scream or at least try to run
Fear kept her frozen to the spot
While this grown man did what he should have not
Shame and fear made her keep the silence
Kept her telling anyone about the violence
The thing that is shocking beyond belief
Is that this child could not get any relief
The same thing happened again and again
The first one was just how it began
More than one man did his worst
None of them caring about the child they hurt
After the first time was it easy to tell
Was it her pain and shame they could smell
With every touch a part of her died
Now she is in a prison that has no gate
Every one of them sealing her fate

3. The penological goal and purpose of sentence is not only deterrent but also correctional and reformatory. The determination and awarding of adequate sentence commensurate with the gravity of the offence is a judicial obligation. Cases of rape especially child rape have to be dealt with a measure of sensitivity minimizing the trauma of child post incident and during the trial, effective counseling and reassurance is required.

The sentencing policy and the approach to be adopted by the Courts, therefore, aims to bring an element of certainty and predictability to the extent possible in matters of sentencing, while recognizing that there cannot be a straitjacket formula.

4. For the rape of a minor, i.e. less than 12 years of age, the statute provides for sentence up to life imprisonment with minimum sentence of 10 Crl.(A) No. 5 of 2000 & connected matters Page No.5 of 56 years. It is also reckoned that imprisonment for life is not 14 years or 20 years but remainder of natural life as held by the Supreme Court in "Mohammed Munna Vs. UOI" reported at 2005 (7)

SCC 417.

The exercise of judicial discretion in the choice of sentence between life imprisonment and minimum sentence of 10 years is based on several factors.

5. There is judicial recognition now to take into account the post conviction conduct of the accused in jail, while considering the case for reprieve in the sentence awarded. Reference may be made to "Tapas Kumar Dutta Vs. State of Bihar" reported at 1997 (10) SCC 382 and "T. Gurumurthy Vs. State" reported at 2005 (10) SCC 208. Conduct in jail whether the convict has gone in for higher education or not, participates and performs duties assigned, adapts to practice of Vipasna or Meditation, are among other factors suggestive of penitence and reformation. The above coupled with good conduct in jail, which does not disclose any propensity towards crime or violence are factors which may be considered for possible reprieve in sentence, even if conviction is upheld in appeal.

6. Learned Amicus Curiae has brought to our attention the recent trends and developments in other jurisdictions, namely, USA, UK and Canada on sentencing policy and rehabilitation of sexual offenders. We find that the said studies and research work does provide an interesting insight into sentencing, recidivism and rehabilitation of sexual offenders. However, in the absence of institutional infrastructure and well monitored and controlled rehabilitation programmes by established institutions, the said models cannot be adapted in our ground realities, where reformation/rehabilitation has to come from acceptance within the family or small knit Biradari i.e., the extended family. We have also examined the aspect of directions that can be issued to a convict receiving reprieve in sentence and the restrictions that can be imposed on the convict even after release for the protection of CrI.(A) No. 5 of 2000 & connected matters Page No.6 of 56 the victim of rape, with or without the consent of the offender.

7. Before proceeding with the evaluation of the 12 appeals on merits, the principles and factors emerging from judicial pronouncements, which are relevant in the matter of choice of sentence or reprieve in the sentence awarded are enumerated below for facility of reference. These are the factors which are, or may be taken into account by the Court while assessing as to what could be an appropriate sentence in a given case.

i. Criminal and the crime are both important for the purposes of sentence. Bachan Singh Vs. State of Punjab (1980) 2 SCC 684. ii. Manner of commission of the crime being with meticulous planning or one on the spur of the moment;

iii. Violence, if any, accompanying the crime whether injuries suffered were serious and required extensive treatment or have caused any permanent damage to the child bearing capacity or otherwise iv. Whether the offender or accused was in a position of fiduciary trust or exploited a social or family relationship; v. State of the victim, impact of the crime on the victim,. vi. The antecedents of the accused, his age, whether a first time offender or repeat offender, possibility of recidivism. vii. Social backwardness or offender being a poor, illiterate labourer not found to be adequate reason by Courts. (State of M.P Vs Munna Choubey & anr 2005(2)SCC 710 and State of

M.P Vs. Babbu Barkare @ Dalap Singh (2005) 5 SCC 413.

viii. Passage of time since offence committed by itself considered inadequate reasons for reprieve. (Urmila (minor) Vs Raju & Anr., (2005) 12 SCC 366.

ix. Rape victim's marriage or rehabilitation may be considered as a mitigating factor.

x. The Supreme Court in a number of decisions Dinesh @ Buddha Crl.(A) No. 5 of 2000 & connected matters Page No.7 of 56 Vs State of Rajasthan (2006) 3 SCC 771, State of Karnataka Vs Krishnappa (2000) 4 SCC 75, Bantu @ Naresh Giri Vs State of M.P (2001) 9 SCC 615 and State of M.P Vs Santosh Kumar (2006) 6 SCC 1 where the victims were below the age of 12 years and rape had also been committed with some injuries, has chosen to uphold the award of minimum sentence.

8. One of us (Manmohan Sarin, J.) in Sheikh Falsar Vs. State (Crl.A.154/2005) reduced the sentence from life imprisonment to 10 years though the victim had suffered tear of the hymen, second degree perennial tear resulting in stitches being required for vagina, following the judgment of the Supreme Court in the State of Karnataka Vs. Krishnappa (supra) and considering that accused was a first time offender and this was a solitary offence, pleas of intoxication or the accused belonging to the weaker section of the society were not accepted. The Supreme Court in State of Karnataka Vs. Krishnappa (supra) also noted the rationale propounded by Kautilya of „just punishment . Kautilya's philosophy was "whoever imposes severe punishment becomes repulsive to people while he who awards mild punishment becomes contemptible. The ruler just with the rod is honoured. When deserved punishment is given, it endows the subjects with spiritual good, material well being and pleasures of the senses." This philosophy is woven into our statute and our jurisprudence and it is the duty of those who administer the law to bear this in mind.

9. Accordingly, while determining the sentence in appeals under consideration, we have considered the aspects as noted above and in particular whether the accused was a first time offender or a repeat offender, whether offence was accompanied or committed with violence, nature of injuries sustained, whether any permanent physical damage caused, did it involve betrayal of trust, possibility of recidivism i.e repeat offending or there was possibility of rehabilitation/ readjustment within the community, post conviction conduct of the accused displaying penitence or Crl.(A) No. 5 of 2000 & connected matters Page No.8 of 56 propensity to crime are few of the factors which have been considered. Cases where rape was committed more than once or over sustained periods or cases where there was no possibility of rehabilitation or amalgamation or adjustment in society, have not merited a reprieve in sentence.

The brief facts of each case are as under:

1. Crl.A. 5/2000 (Khem Chand Vs. State) Appellant Khem Chand was convicted vide judgment dated 26th November, 1999 for rape of his daughter „M aged about 11 years. Vide orders dated 4th December, 1999, he was sentenced to life imprisonment. He was convicted and sentenced to undergo RI for 10 years and a fine of Rs.2000/- for offence under section 377 IPC committed on his daughter's friend `D again a minor of 11 to 12 years of age and a student of class 5. In default of

payment of fine, he was to undergo RI for one year. He was sentenced to RI for two years for offence under section 354 IPC.

The unfortunate minor girl 'M' is the eldest child of the convict. She lost her mother some time in the year 1997. She became the victim of the sexual perversion and exploitation of her father, the appellant, immediately following the demise of her mother. Protests invited physical beatings and she bore the agony for months together. The matter came to light when the appellant sought to sexually exploit the friend of his daughter 'D', who disclosed it to her mother. The appellant pleads not guilty. The defence set up by the appellant is that Laksha Nand, Triveni and Sharda Devi, residing in the neighbourhood, wanted to grab his property and had conspired and induced the prosecutrix 'M' to make false statement. It is stated that he had protested to the visits of Gollu, brother-in-law of Laksha Nand to their house and latter also joined the conspiracy to falsely implicate him. Appellant also urged that 'M' and 'D' were not reliable witnesses. The defence that prosecutrix 'M' appellant's own daughter would conspire with neighbours to falsely implicate him in the offence to further the alleged CrI.(A) No. 5 of 2000 & connected matters Page No.9 of 56 grabbing of his property does not inspire any confidence.

The Trial Judge found the evidence of 'M' to be reliable and credit worthy. It has come in her evidence that the appellant had been raping her from the 6th day of the death of her mother. Certain discrepancies regarding the number of times, the appellant had forced sex, are sought to be urged. These are normally errors of memory and observation, due to passage of time and are not of any material consequence. The medical evidence duly corroborated the version of 'M'. Her hymen was found to be ruptured. Doctor reported history of physical violence and the fact that the girl had not reached the stage of menarche. The prosecutrix 'M' deposed that the appellant had also outraged the modesty of her friend 'D' and had oral sex with the latter. Prosecution had set up the case of 'D' being raped but in the statement before the Court, it was a commission of unnatural offence against her person and oral sex. In these circumstances, the learned Sessions Judge invoking the provisions of Section 421 and 464 of Cr.PC, convicted the appellant under Section 354 and 377 IPC.

Mr. Sumit Verma, learned counsel for the appellant, urged that the conviction under Section 377 of the IPC was illegal and not maintainable in the prosecution under section 376 IPC. The offence as well as defence under section 377 IPC would be distinct. Besides the factum of oral sex would not constitute an offence within the ambit of Section 377 of IPC. He submitted that in these circumstances sub-Section (2) of Section 464 Cr.PC could not be invoked since Sections 376 and 377 IPC were distinct offences. Learned counsel for the appellant relied on "Shamnsaheb M. Multani Vs. State of Karnataka" reported at AIR 2001 SC 921. He submitted that conviction under Section 377 IPC was not supported by any evidence. Learned Amicus Curiae also supported the appellant on the aspect of conviction under Section 377 IPC not being maintainable. Learned counsel for the appellant very candidly and fairly submitted that there was overwhelming evidence as regards the charge under Section 376 IPC was CrI.(A) No. 5 of 2000 & connected matters Page No.10 of 56 concerned. He submitted that the appellant, no doubt, was accused of a ghastly offence, yet penitence and repentance ought to be part of our ethos. Considering that the appellant had already undergone about 10 years of imprisonment, he deserves some reprieve. He submitted that appellant and his family had suffered a lot. Further considering report from Jail regarding good conduct and

behaviour and not exhibiting any propensity towards crime and taking up Vipasna and Yoga lessons, the Court may consider reduction of sentence in his term.

There is merit in the contention of the appellant that the charge framed against the appellant was under Section 376 IPC for raping 'D' while the conviction has been made under Section 377 and 354 IPC. It is correct that the ingredients of the offence under Section 377 IPC are not even satisfied assuming the evidence as led against the appellant is to be accepted. In these circumstances, we maintain the conviction of the appellant in respect of the offence under Section 376 IPC for raping 'M'. We also hold that the charge of raping 'D', friend of 'M' is not established. Neither in these circumstances can the conviction be made by invoking provision of sub-Section (2) of Section 464 Cr.P.C as these operate in different fields. The conviction of the appellant under Section 377 IPC in relation to offences against 'D' is set aside while maintaining the conviction under Section 354 IPC.

The conviction of the appellant has put the entire family into disarray. 'M' and her younger sister were sent to the Remand Homes, while her brother Sonu, who had been put in an Adult Care Home, ran away from the said Home and was found working in Bagpat in U.P. From time to time in the Criminal Appeal, directions were given to ensure the well being and education of the victim and her sister. Pursuant to the directions from the court, the Government of NCT sanctioned and deposited Rs.30,000/- in the form of FDR with 50% of the interest accruing monthly being available for the upkeep and day to day expenses of the two sisters. Crl.(A) No. 5 of 2000 & connected matters Page No.11 of 56 The appellant in jail has been carrying on various works in langar and carpentry work in the kitchen of the Jail. The post-conviction report is stated to be satisfactory and he has shown no propensity towards crime. He is participating in Yoga, Vipasna and meditation.

Mr.Sunil Sharma, learned counsel for the State, on the other hand, vehemently opposes the plea of leniency or reprieve in sentence. He submits that considering the depravity and circumstances of the offence, the sentence prescribed even in the Statute was less. He submits that the appellant committed the offence on his helpless daughter on the 6th day of the demise of his wife. It shows a devilish and depraved mind. His sexual urge was not satisfied despite repeated sex with his daughter and he sought to exploit her friend. This was hardly a case where reformation ought to be tried.

We find merit in the submission of learned counsel for the State that the appellant does not deserve any clemency or reprieve in sentence. Appellant was a matured man. He sexually exploited his daughter and committed rape on her immediately on the sixth day following the demise of his wife. It was not a solitary incident but he continued with his depravity repeatedly. His sexual urge was not satisfied with his daughter and he sought to exploit her friend. Appellant, in these circumstances, despite his good conduct in jail following the conviction does not deserve any reprieve. We cannot lose sight of the fact that as a result of this ghastly act, not only the life of the rape victim was ruined but also the entire family was put in disarray and the son went away from home, while the younger daughter was put in remand home. As a result of directions given by this court, Government of NCT of Delhi has deposited Rs.30,000/- which have been kept in a fixed deposit. From this interest income, part of the expenses of the two sisters, who are now sought to be supported by their maternal grand parents are met. There is still considerable resentment and understandably so between 'M' and the appellant and she does not Crl.(A) No. 5 of 2000 & connected matters Page

No.12 of 56 want to see the face of the appellant.

In view of the foregoing discussion, we maintain the conviction and dismiss the appeal

2. Crl.A. 740/2001 (Om Prakash Vs. State) Appellant Om Prakash, a Constable of Delhi Police, was convicted vide judgment dated 11.9.2001 for the rape and outraging the modesty of a 3½ years old girl 'V'. He was sentenced to undergo life imprisonment for the offence under Section 376 IPC. Additionally, a fine of Rs.50,000/- was to be paid to the victim as compensation, failing which the appellant was to undergo further RI for nine months. He was also sentenced to six months' RI for the offence under Section 354 IPC. Both the sentences to run concurrently.

As per the prosecution, on 11.12.1995, the appellant took the victim on the pretext of leaving her to school. He took her near a tube well in village Shikarpur and raped her. The victim had bled. He also inserted his penis into the mouth of the victim. The Judge has recorded the obstructive and obtrusive behaviour of the accused resulting in the victim coming to the Court several times and returning without giving evidence. PW-1 to PW-21 were examined. Appellant denied the entire incident. In fact, he got himself admitted to a hospital for about 10 days. He was identified by the victim on his return. Appellant, apart from denying the incident, claimed that he was falsely implicated on account of enmity in relation to the property illegally possessed by the complainant. The Trial Judge after analyzing the evidence, reached the conclusion that the appellant was not on duty and the time of commission of the offence i.e between 8.30 a.m. and 9.15 a.m. Further, he was taken to the hospital at about 9.30 a.m. or 10.00 a.m. The factum of rape on the 3½ old girl is established by medical examination. There was heavy bleeding from vagina. There was a second Crl.(A) No. 5 of 2000 & connected matters Page No.13 of 56 degree perennial tear in posterior vaginal wall. Hymen was totally torn. Vagina was allowing/admitting three fingers. Half unit blood was arranged for transfusion. Stitches were required under general anaesthesia. MLC recorded that it was suggestive of sexual intercourse by a grown up person. The prosecutrix remained hospitalized for 11 days. The suggestion by the defence of receiving injuries as a result of a fall are preposterous to say the least. It is the prosecution's case that the appellant did not permit the recording of evidence of his younger brother, who was likely to depose against him during his life time. The prosecutrix has clearly deposed that the accused lifted her and covered her with a 'Khes' and thereafter, he took her to a tube well. The Trial Court has reproduced in vernacular, the act as perpetrated by the appellant on her. She has stated that he put firstly his penis into her mouth and then in her vagina and she started weeping and got the sensation of going for the call of nature. She also started bleeding and felt giddy. The statement is clear, explicit. It leaves no manner of doubt. It is not necessary for us to delve on the merits of the appeal as Mr. Anurag Jain, learned counsel for the appellant, appearing for Mr. Sandeep Sethi, Senior Advocate, submits that he has instructions to press for clemency for appellant rather than pressing the appeal on merits. The appellant is stated to be 46 years old. He has been in incarceration since December, 1995, i.e., for nearly 11 years & 9 months. He got married in 1983 and has two children from the wedlock, a son, aged 21 years and a daughter who has since been married. His wife remains unwell. His conduct in Jail has been satisfactory. He was suffering from hernia at the time of the incident. He has been working in the Jail in the tailoring section and has collected about Rs.3,000/-. He is a matriculate but did not advance his education in Jail. He is presently undergoing Vipasana. Nothing adverse has been

recorded against him in Jail. The victim 'V' is stated to be now 15 years of age and studying in Class 10th in a school in Meerut with her maternal aunt. She is reluctant to come back to her house at the native CrI.(A) No. 5 of 2000 & connected matters Page No.14 of 56 place, i.e. the village Shikarpur due to apprehended humiliation and taunting by villagers. The house of the victim and the appellant are within the same street. The father of the victim is a driver in DTC. Her brother is also studying in Class 12th and the mother is a housewife. She plans to study in Meerut further.

During the course of hearing of this appeal, the appellant had indicated that he was willing to make the payment of Rs.50,000/- as fine and prayed for life sentence to be reduced. Mr. Sunil Sharma, counsel for the State, points out that the offence had been committed by the appellant, who was a member of the law enforcing agency, i.e., a constable in Delhi Police. It was done in a brutal manner which necessitated hospitalization of 3½ years old child for 11 days. He further submitted that if the appellant was to be set free, the victim would suffer nightmare as the house of the appellant and the victim is in the same village. Learned counsel for the appellant submits that the appellant himself would shift out from the village as they did not themselves wish to face the ordeal of the villagers. Om Prakash, the appellant, had filed in Court an affidavit dated 19.4.2007 firstly stating that he is ready and willing to deposit the fine of Rs.50,000/- imposed by the Trial Court and he has no objection to its release in favour of the complainant as compensation. Further appellant would shift his residence to property No.10-A, admeasuring 189 sq. yds. situated in revenue estate of Village Hastal, Sai Enclave, Vikas Nagar, New Delhi- 110059, which is owned by the appellant's father. Further, after his release, the deponent shall not reside or visit Village Shikarpur and will shift to the aforesaid address along with his family members. He has also undertaken not to contact or influence the victim or her family members in any manner whatsoever.

Statement of the appellant on oath, undertaking to the court to abide by the contents of the affidavit, has been recorded. On a consideration of the aggravating as well as mitigating factors, it would be CrI.(A) No. 5 of 2000 & connected matters Page No.15 of 56 seen that appellant who was a member of the Police Force i.e Law Enforcing Agency has himself been the perpetrator of a ghastly crime committed in a brutal manner on a helpless innocent child of three and half years. Rape was committed with violence leaving the child with vaginal tears and admitting three fingers which necessitated repair of the tears under general anaesthesia and hospitalization for 11 days. The conduct of the appellant during trial was also obtrusive, blatantly defiant subjecting the child to grueling cross-examination and prolonged presence during trial. As noted earlier, appellant has now, not pressed the appeal on merits and prayed for clemency. Appellant is around 46 years of age and is a family man having a wife, married daughter and a son. His father and brothers are also alive. His family members have indicated their willingness to absorb him in the family fold. Appellant is a first time offender and this was his first brush with law. Appellant's conduct in jail has been satisfactory. He has been taking lessons in Vipasana and working in Tailoring section and has also collected a sum of Rs.3000/- . He has been abiding the jail discipline. Appellant has also deposited Rs.50,000/- imposed as fine and has no objection to the said amount being released to the victim.

One of the concerns and apprehensions expressed by the counsel for the State was with regard to the possible humiliation and embarrassment to be faced by the victim in case of release of the appellant

if he resides in the same village. Appellant has undertaken to the court to shift along with his family members to his family house and reside where his family resides and not to reside in their house in Village Shikarpur or its vicinity thereof. He has also undertaken not to contact or influence the victim or her family members in any manner. He has undertaken to further abide by such terms and conditions as may be imposed by the court while granting him reprieve in sentence.

We are also of the view that victim also cannot be made to stay forever in Meerut with maternal aunt. She is presently in Class 10th and Crl.(A) No. 5 of 2000 & connected matters Page No.16 of 56 would be completing her schooling. It would be desirable and conducive for her growth that she may return to her parents and her home without having any fear or inhibition of any harassment from the appellant or his family.

We, accordingly, accept the undertaking as given by the appellant and direct that appellant shall be bound by the contents of the affidavit and will not reside in village Shikarpur. In view of the foregoing undertaking and the factors as noted by us hereinbefore, we are of the opinion that ends of justice would be met if the appellant's sentence is reduced to 12 years RI exclusive of any period of remission i.e net term of 12 years. The amount of Rs.50,000/- deposited by the appellant be also kept in a fixed deposit for a period of three years drawn in favour of the victim at UCO Bank, Delhi High Court Branch, New Delhi and the FDR be handed over to the victim.

We, accordingly, uphold the conviction but reduce the sentence to a net term of 12 years of RI exclusive of remissions.

3. Crl.A. 813/2001 (Sant Ram @ Dada Vs. State) Appellant Sant Ram alias Dada vide judgment dated 11th October, 2001 was convicted for the offence under Section 376 IPC and vide orders dated 15th October, 2001 was sentenced to undergo rigorous imprisonment for life and a fine of Rs.5,000/- and in default, to further undergo rigorous imprisonment for one year.

The prosecution case is that Sant Ram, a peon, working in PGDAV College, was living in the jhuggis behind the college. Another employee of the college Ram Saran, who was also the friend of the appellant, used to live in the jhuggi nearby. Ram Saran's wife and children had gone to the village and considering the staggered duty time, Ram Saran used to leave his eight year old daughter 'M' with Sant Ram, the appellant, Crl.(A) No. 5 of 2000 & connected matters Page No.17 of 56 till he returns from duty. On 5th or 6th November, as Ram Saran was to go to the Railway Station, he left his daughter at the jhuggi of the appellant with the latter. Sant Ram in whom paternal trust and faith was reposed and who had the protective custody, became the perpetrator of the crime and defiled the minor girl 'M' allowing his lustful ploy. 'M' did not disclose the crime to her father that night but on the next day, she disclosed about her ordeal. It is also a part of record that Sant Ram inflicted injuries on himself for which he was separately tried for attempting suicide but acquitted as informed by appellant's counsel. On medical examination, Sant Ram was found capable of sexual intercourse. The prosecutrix 'M' also disclosed of rape by Sant Ram on an earlier occasion. Medical examination of 'M' duly supports the prosecution version. The MLC records her age as eight years, being brought with history of sexual assault by her neighbour, whom she called 'Dada'. The external examination of genitals showed inflammation and raw area on inner surface of right labia,

hyperemisia and tenderness on private parts, vaginal opening was inflamed. The victim had also complained of anal intercourse. The examination of anus showed two fissures at 12 o'clock and 7 o'clock position. The anus was found inflamed and tender. The underwear seized from the Appellant had semen and blood stains of human origin. Semen stains were also found on frock and underwear of „M . The medical examination confirmed vaginal and anal intercourse. The prosecutrix duly identified the appellant and had even named him before the Doctor as the rapist.

The appellant, of course, claims to have been falsely implicated on account of the loan of Rs.10,000 (Rs. Ten thousand) that he had given to Ram Saran for one month, which the latter had failed to return. On asking for return of the loan, Ram Saran gave threats that he would have appellant sent to jail.

Appellant thus claims to have been falsely implicated. The defence of the appellant was found to be false. The appellant's bank Crl.(A) No. 5 of 2000 & connected matters Page No.18 of 56 account showed that he had at no point of time, withdrawn any amount more than Rs.5,000/- and had small balances in his account. Therefore, the story of giving loan of Rs.10,000/- does not appear to be credible. Learned counsel for the appellant points out that the finding by the Sessions Judge that the medical examination of the prosecutrix made it abundantly clear that she was subjected to anal intercourse as well as vaginal intercourse by the appellant, does not advance the matter further. The Judge has found him guilty of the charge only under Section 376 IPC. Even though the evidence adverse to the appellant had been put to him under Section 313 Cr.PC including the evidence relating to the fissures being found in the anus at 12 o'clock and 7 o'clock position, the charge itself has been framed only under Section 376 IPC and was not amended. Learned senior counsel Mr. K.B. Andley submits, in these circumstances, that the Court cannot exercise jurisdiction under Section 221 Cr.PC or under Section 364 Cr.PC as it is hardly a case of being remanded for fresh trial when the appellant had already undergone nearly eight years of sentence. Moreover, since the appellant having not been charged under Section 377 IPC or convicted thereunder, the findings or evidence in respect thereof cannot be taken note of.

As regards the appellant's defence of being falsely implicated on account of the failure of father of the prosecutrix to return the loan of Rs.10,000/-, as noticed earlier, the bank account and the pass book of the appellant do not corroborate to having given loan of Rs.10,000/-. There is no documentation or receipt produced in support of the same. It was only the appellant's statement under Section 313 Cr.P.C. Learned counsel for the appellant Mr. Yadav also sought to urge that the evidence of the prosecutrix was highly unreliable inasmuch as she claims that when the appellant earlier made an abortive attempt to rape her, she did not wake up her father and tell him about the incident.

We are in agreement with the analysis and findings of guilt of Crl.(A) No. 5 of 2000 & connected matters Page No.19 of 56 the appellant under section 376 IPC reached by the learned trial court. The said conclusion is inescapable based on the statement of the prosecutrix duly supported by the medical evidence on record as noted above. We have, therefore, no hesitation in confirming the conviction of the appellant. Apart from the plea of the appellant being falsely implicated as part of the vendetta for non return of the loan, there is no other ground which has been urged by the

appellant. As noted above, this plea is devoid of substance.

Let us consider the appellant's plea for clemency and reprieve in sentence. It is urged that appellant is a family man and has four daughters and one son. All of them are married. Although three daughters were married prior to conviction. He has been working as a gardener in jail.

Appellant has been in incarceration for a period of nine years and 8 months. He is around 62 years of age. Appellant had undoubtedly betrayed the trust reposed in him by his friend and neighbour and raped the 8 years old victim. The medical examination indicated two fissures. Since no charge was framed under section 377 IPC, appellant was not convicted for the same.

Considering that appellant is a first time offender and has been a family man especially taking into account his post conviction conduct in jail wherein he has joined various reformatory and rehabilitation programmes such as Art of Living, Yoga etc, he has been working in jail langar and has maintained discipline in jail, appellant's case may be considered for reprieve in sentence. Another factor which supports consideration of reprieve in sentence from life is that appellant is already about 62 years of age. His family is willing to take him into the family fold. There is strong case of rehabilitation/reformation based on his post- conviction conduct and family circumstances.

We are, accordingly, of the view that sentence of the appellant CrI.(A) No. 5 of 2000 & connected matters Page No.20 of 56 may be reduced to 10 years of actual sentence without remission, with fine of Rs.5000/-. In case, fine is not paid, he shall further undergo SI for one year. Fine on realization be paid to the victim.

Delhi Police shall ensure that appellant does not cause any disturbance or nuisance to the victim or any member of her immediate family. A report in this regard will be filed by the concerned SHO once in six months. In case, appellant is found to be causing disturbance or nuisance to the peaceful living of the victim, police shall be free to proceed for externment of the appellant from the locality or from the vicinity of the victim's residence under the Delhi Police Act and/or as permissible at Law.

4. CrI.A.No. 719/2002 (Sadhu Ram Vs. State) Appellant has been sentenced to life imprisonment with a fine of Rs.10,000/- for the offence under section 376 IPC and in default, further SI of one year. As per the prosecution's case on 5th January, 2000, prosecutrix 'X' a minor girl of around 8 years went out to ease herself. When she had not returned for sometime, her mother became uneasy and went to look out for her. On reaching near DDA park, she heard cries of a girl from the park behind Durga Mandir. On reaching there, she found that appellant had closed the mouth of her daughter and removed her underwear and was committing rape on her. She pushed the appellant away and raised alarm. Police reached the spot and recorded statement of prosecutrix's mother and arrested the appellant on the spot. Medical examination of the prosecutrix was conducted. Appellant was also medically examined and was found capable of sexual intercourse. Medical report of the prosecutrix showed discharge of blood from her private parts and fresh second degree perineal tear and a tear in the posterior part of the hymen. She was advised stitches on the hymen under local anesthesia. Appellant had been detained on the spot by a person from public, one Arun. Appellant

was CrI.(A) No. 5 of 2000 & connected matters Page No.21 of 56 duly identified by the prosecutrix 'X' and her mother. Apart from prosecutrix 'X' and her mother, other public witnesses corroborated the case against the appellant.

Appellant in his statement under Section 313 Cr.P.C claimed that he had deposited Rs.40,000/- with the father of the prosecutrix 'X' Khem Chand and when he had gone to demand money from Khem Chand, Khemchand, offered a cup of tea and after taking tea, he became unconscious and did not know what happened thereafter. The above story was not suggested to either Khem Chand, Jasoda or even to the prosecutrix. The case against the appellant stood duly proved.

We, accordingly, find the appeal to be devoid of merit and maintain the conviction. At this stage, learned counsel for the appellant Mr.Sumit Verma prays for clemency for the appellant. He submits that appellant is a first time offender and has already been in incarceration for about eight and half years. There is some ambiguity with regard to the age of the appellant. Nominal roll on record in the file suggest his age to be over 62 years while the judgment of the trial court mentions the age as 45 years. Considering the post conviction conduct of the appellant in jail wherein he has not displayed any propensity towards crime or violence and his having been abiding by the jail discipline, are factors which commend a reprieve in sentence of the appellant. Appellant has already suffered tragedies in the death of his wife in 1997 and his son in 1999. Appellant was a vegetable vendor by profession. He has been working in jail workshop and engaged in the manufacture of files. However, there is absence of family, which could have helped in rehabilitation and readjustment.

Considering all the above factors and Appellant's age and being a first time offender, we are of the view that ends of justice would be met in case appellant is granted reprieve in sentence and reduce the sentence to 10 years without remission with fine of Rs.10,000/- and in case, he fails to make the payment of fine, he would undergo SI for one year. Ordered CrI.(A) No. 5 of 2000 & connected matters Page No.22 of 56 accordingly.

Appellant shall also not make any contact with the victim or any immediate member of her family and in case, appellant violates the above condition, it shall be open to the authorities to take action for his externment from the locality of the victim or its vicinity in accordance with law.

5. CrI.A.No. 816/2002 (Ram Din Vs State) Appellant Ram Din was convicted for the offence under section 376 IPC vide judgment dated 27th February, 2002 and vide order of the same date, he was sentenced to life imprisonment with a fine of Rs.10,000/- and in default, to undergo simple imprisonment for one year. Appellant, a beldar by profession, has been found guilty of raping minor daughter of his contractor hereinafter referred to as Prosecutrix 'L'. He is around 47 years of age and a widower since 1977. Appellant was living in a hutment bearing number P-2/257, Sultan Puri, Delhi while prosecutrix 'L' was living in hutment bearing no.P-2/255, Sultan Puri. Appellant asked 'L' to bring some vegetable for him. She replied that none had been cooked. Thereupon, he dragged her inside and removed her underwear and raped her. She bled from the vagina and was crying. He gave cloth to wipe it and she returned to her house and informed her mother of what had transpired. Father and mother of Prosecutrix 'L' reached the appellant's hut and raised hue and cry. Police was called. Appellant and Prosecutrix 'L' were sent for medical examination. Underwears of Prosecutrix

`L' and the appellant were seized. Lungi of the appellant with blood stains were also recovered. The date of birth of Prosecutrix `L' was proved as 23rd January, 1991 making her 9 years old at the time of incident. Prosecutrix `L' clearly in her statement identified and implicated the appellant. The factum of rape stands proved by medical report PW 5/B. Fresh tear was CrI.(A) No. 5 of 2000 & connected matters Page No.23 of 56 seen in the hymen and she was found bleeding from vagina. Underwear of Prosecutrix `L' was found containing blood group `O' and the same blood group was also found on the lungi of the appellant. No explanation came forth from the appellant regarding blood on his lungi. The offence was committed in a violent manner inasmuch as Prosecutrix `L' remained hospitalized for 2-3 days.

Appellant did not lead any evidence in defence. In his statement under section 313 Cr.P.C, he denied incriminating evidence against him and claimed that he was working with the father of the Prosecutrix `L' who had not paid him anything but promised to do so at the time of marriage of his sister and when he demanded money from him, he entered into a fight with him and instead of paying money, he got him implicated in a case falsely. A plea that was sought to be raised in the statement under Section 313 Cr.P.C, was not suggested by the appellant either to Brij Pal, father of the Prosecutrix `L', or to the Prosecutrix `L' or to her mother. It was purely an afterthought. In the instant case, there is no reason for the Prosecutrix `L' and her parents to falsely implicate the appellant. Medical evidence clearly establishes rape. Appellant was apprehended from the spot. Statement of the Prosecutrix `L' coupled with medical evidence on record proved the case under section 376 IPC against the appellant. The mere fact that name of the appellant was not mentioned in the M.L.C could hardly be of any consequence in the overwhelming incriminating evidence available against the appellant. We find the appeal to be without any merit and maintain the conviction.

Mr.Bhupesh Narula, learned counsel for the appellant prays for clemency for the appellant as he is a migrant from Madhya Pradesh, a labourer with his wife having expired in 1974. His conduct in jail has been satisfactory. It was the first offence of the appellant. Counsel further submits that appellant is an illiterate person and he has been practicing yoga, meditation and Vipasana in jail. Mr.Narula also submits that appellant CrI.(A) No. 5 of 2000 & connected matters Page No.24 of 56 does not have the means to make the payment of fine. In these circumstances, Mr.Narula submits that in appellant's case, minimum sentence of 10 years would be adequate.

We are not persuaded by the submission that appellant being a migrant from Madhya Pradesh or illiteracy should be accepted as extenuating factors. It cannot be overlooked that appellant, being a matured man of 47 years and a widower has raped the prosecutrix, a minor girl of 9 years. The offence was committed in a violent manner inasmuch as prosecutrix remained hospitalized for 2-3 days.

Considering the personal circumstances i.e., demise of Appellant's wife, his claim of being a law abiding citizen except for the present incident and the post conviction conduct of the appellant in jail who has been practising Yoga, Meditation and Vipasana and displayed no propensity towards crime, in our view, ends of justice would be met by reducing appellant's sentence to 10 years RI without remission with the fine of Rs.10000/- and in default, SI of one year.

Appellant shall also not make any contact with the victim or any immediate member of her family and in case, appellant violates the above condition, it shall be open to the authorities to take action for his externment from the locality of the victim or its vicinity in accordance with law.

6. CrI.A.No. 673/2002 (Ram Chander Vs. State) Appellant Ram Chander was convicted vide judgment dated 16th August, 2001 for offence punishable under Section 376 IPC for the rape of a minor girl 7-8 years old (hereinafter referred to as Prosecutrix `P') on 31st May, 1998. Vide order dated 23rd August, 2001, appellant was sentenced to life imprisonment and a fine of Rs.30,000/-, if realised to be paid to the Prosecutrix `P' and in default, to further imprisonment of three months. CrI.(A) No. 5 of 2000 & connected matters Page No.25 of 56 Prosecution case is that appellant a shopkeeper offered tea to Prosecutrix `P' who was returning after easing herself. Appellant is alleged to have dragged her inside his shop and then raped her. Prosecutrix `P' felt pain and cried and thereafter, appellant left her and opened the shutter. She returned to her house and narrated the incident to her mother after she found blood at the place of her urination. Prosecutrix `P' accompanied by her mother was sent to Hindu Rao Hospital for examination. Appellant was arrested from the spot. Medical examination of prosecutrix was carried out on 1st June, 1998 with the alleged history of sexual assault by an old man. Vulva was found smeared with blood. Hymen was torn with a small tear on forchette posteriorly. There was no bleeding at that time. Human semen was found on the panty of the Prosecutrix `P' and the underwear of the appellant. The finding of semen stains of `B' blood group which is the blood group of the appellant on the panty of the Prosecutrix `P' are significant. Prosecutrix `P' in her categorical statement clearly described the offending act performed by the appellant. Appellant in his statement under section 313 Cr.P.C denied the allegation of offering tea to Prosecutrix `P' but admitted his arrest from the market. Appellant did not lead any evidence in defence but claimed that he was lying on a takhat at the relevant time in the market. He claimed that he had a tiff with the mother of the appellant for using foul language and hence was falsely implicated.

Mr.Rajesh Mahajan, learned counsel for the appellant in support of the appeal sought to rely on what he termed as several contradictions and inconsistencies. He submits that Prosecutrix `P' in her statement in court deposed that her hand and feet were tied but this was not so recorded in the statement before the police. There is a time gap of over two years in recording of the statement and that explains such inconsistencies. Mr.Mahajan further submits that the Prosecutrix `P' in her statement before the police stated that she did not know the name of the appellant/accused. Subsequently, she deposed that she did not know name of the accused but CrI.(A) No. 5 of 2000 & connected matters Page No.26 of 56 her mother knew the name. Counsel further submits that there were inconsistencies in the statements of P.Ws 1, 2 & 3 who were even otherwise interested persons and thus appellant was entitled to benefit of doubt. The main plank of Mr.Mahajan's submission was the medical examination of the appellant reveals that he did not suffer any injury on his person. Further the presence of smegma on his penis itself negates any sexual intercourse within the last 24 hours. He submits that no stains of semen were found in pubic region. In support of his above submission, he places reliance on Dr.S.P.Kohli Vs. High Court of Punjab and Haryana AIR 1978 SC 1753. He also places reliance on Modi's Medical Jurisprudence & Toxicology and State of Karnataka Vs. Mahabaleshwar Gourya Naik 1993 SCC (CrI.) 180.

While there can be no quarrel with the proposition that presence of smegma is an indicator of absentism from sexual activity in the last 24 hours or so. However, in the present case, there is overwhelming oral evidence of the Prosecutrix `P' supported by other medical evidence that a presumption as is sought to be raised by the appellant, would stand rebutted with the submission not sustainable. In the instant case, semen stains of appellant's blood group were found on the panty of Prosecutrix `P' as well as appellant's own underwear. This is apart from torn hymen and perennial tear and bleeding from vagina of the Prosecutrix `P'. In view of the presence of blood on the undergarments and there being no other explanation of presence of semen stains other than on account of sexual intercourse, it would be idle, in these circumstances, to contend that Prosecutrix `P' could have suffered injuries or hymen could have been ruptured on account of jumping or fall on hard substance. No such suggestion was given to the Prosecutrix `P'. We are, accordingly, of the view that there is no merit in the appeal as against the order of conviction.

Mr. Rajesh Mahajan next sought to urge that appellant is around 66 years of age. His wife has expired. He has three daughters. Appellant claims that one of them is married and other two are of marriageable age. CrI.(A) No. 5 of 2000 & connected matters Page No.27 of 56 He has been feeding ducks and birds in the jail and frequently complains of asthma.

Appellant has already undergone about nine years of sentence. Learned counsel submits that likelihood of appellant committing any offence was not there in view of his advance age and the other attending circumstances. He submits that sentence of the appellant should be reduced to a minimum period of 10 years.

Appellant is stated to be around 67 years of age and has been in incarceration for nearly 10 years. Appellant is a first time offender. The facts do not disclose any premeditation or planning or aggravated violence being used in the commission of the offence. Appellant is a widower with three daughters, one of them is married and two are of marriageable age. The post conviction conduct of the appellant has been satisfactory and there has been no complaint against him. Appellant has been performing the duties allotted to him with devotion and interacting with other inmates and is maintaining discipline and showing respect to the jail staff. He has not shown any propensity towards crime.

Considering the age of the appellant, his post conviction conduct in jail as well as obligation of marrying two daughters, possibility of his now playing foul with law is remote. Considering the aforesaid factors, we are of the view that ends of justice would be met with the appellant sentence reduced to 10 years of actual sentence without remission together with fine of Rs.30,000/- and in default, SI for three months.

Appellant shall also not make any contact with the victim or any immediate member of her family and in case, appellant violates the above condition, it shall be open to the authorities to take action for his externment from the locality of the victim or its vicinity in accordance with law.

7. CrI.A.No. 126/2003 (Kewal Singh Vs. State)

Appellant Kewal Singh has been convicted vide judgment dated 13th December, 2002 under Section 376 IPC. Vide the said judgment, he was acquitted of the charges framed under section 363 and 366 IPC. Vide orders dated 19th December, 2002, he was sentenced to imprisonment for life for the offence punishable under section 376 (2)(f) IPC with a fine of Rs.25,000/- and in default to undergo simple imprisonment for six months. The appellant was prosecuted for offences under sections 363, 366 and 376 IPC in respect of Prosecutrix `G', a minor aged around 14 years. Prosecutrix `G' is a mentally challenged girl who had been an inhabitant of Asha Kiran, a Home for mentally challenged run by Department of Social Welfare, Government of NCT of Delhi. Prosecutrix `G' on 7th September, 1997 had run away from Asha Kiran. As per prosecution's case, appellant on finding her roaming in the streets brought her to his hut holding out the promise of new clothes, chappals etc. He kept her there for two days. During the said period, he kept the Prosecutrix `G' and is stated to have raped her four times. Not only this, this unfortunate mentally challenged girl complains to have been raped by few others when she had left Asha Kiran. She claims to have been raped by someone even in cart when she had taken a lift. Prosecutrix `G' did not remember the name of her village or her father or uncle. She claims that about four persons had taken her to their homes and raped her. She had duly identified the appellant. Prosecutrix `G' was recovered from the hut of the appellant. Her medical examination revealed hymen being torn and vagina admitted one finger. Prosecutrix `G' had run away from Asha Kiran complaining that she was beaten there and was recovered on 12th September, 1997. The Trial Court rightly reached the conclusion that the charges under sections 363 and 366 IPC were not proved as Authorities of Asha Kiran had already lodged a report of having run away and as per her own statement, she had run of her own accord. Hence, there was no enticement or kidnapping. This is an Crl.(A) No. 5 of 2000 & connected matters Page No.29 of 56 abhorring case of exploitation of a mentally challenged girl.

In the grounds of appeal, it has been claimed that prosecution has not proved that Prosecutrix `G' was mentally retarded. It is contended that it was unlikely that appellant could have committed rape four times against her wish as she could have cried or raised hue and cry. The suggestion in the appeal is that Prosecutrix `G' was a consenting party to sexual intercourse. As per Prosecutrix `G' own version, she had been raped by others. Hence medical evidence regarding rupture of hymen could not be attributed to the offending act by the appellant.

Mr.Siddharth Luthra, Sr.Adv. learned Amicus Curiae urged that statement of Prosecutrix `G' was vague, full of contradictions and unreliable. He submitted that sequence of repeated rape in a cart, train and in a house and finally in appellant's jhuggi/hut was illustrative of uncertain behaviour. Regarding her paternity and medical condition, she is unable to remember the name of her father whom she called uncle. Mr.V.K.Raina for the appellant and Mr.Siddharth Luthra submitted that in these circumstances, appellant could be considered for benefit of doubt.

We are not persuaded that appellant is entitled to benefit of doubt. This mentally challenged girl was recovered from the jhuggi of appellant. She was found with new clothes, chappals etc. The appellant had chosen to deny everything in the statement under Section 313 Cr.P.C. The statement of Prosecutrix `G' insofar as appellant is concerned is clear and categorical. It speaks of appellant

pressing her breasts and doing the act and getting her clothes, food and other things. It is also an admitted position that it was only when the neighbour and villagers had complained that a girl was kept confined in a jhuggi that the police raided and found the girl there and rescued her. It is a case of Appellant sexually exploiting a mentally challenged girl by giving her shelter.

In these circumstances, we are satisfied that prosecution has established its case against appellant under section 376 IPC. It is CrI.(A) No. 5 of 2000 & connected matters Page No.30 of 56 appellant's own case that Prosecutrix `G`'s mental faculty was weak inasmuch as she even did not remember the name of her village. In these circumstances, absence of any document showing her to be mentally challenged is of no consequence especially in view of her being admitted for this purpose at Asha Kiran which is a home for mentally challenged. Mr.Luthra also submitted that as Prosecutrix `G` was over 12 years of age, this would not be a case falling under section 376(f) IPC but under Section 376(i) with minimum sentence of seven years which may go up to life and in these circumstances, he prays that life sentence was rather harsh and appellant's sentence deserves to be reduced in appeal.

We may also note at this stage that Mr.V.K.Raina who had also been appearing as the nominated counsel for appellant, sought to urge that Prosecutrix `G` was not a minor but a major. This is an empty plea. No such issue had ever been raised during trial. Mr.Raina further submitted that appellant was a widower and his mother was 85 years of age and appellant was the sole support of her. Mr.Raina further submits that appellant is an illiterate person and is a part of down trodden society. He is a first time offender and his conduct in jail is satisfactory inasmuch as he is attending meditation classes and has done vipasana and is capable of being adjusted in the society.

In our view, this is not a case where the appellant is entitled to benefit of doubt especially so in view of the mentally challenged girl having been kept in his hut for over two to three days. The statement of the prosecutrix clearly implicates the appellant. This is an abhorring case where the mentally challenged girl suffering ill treatment at Asha Kiran, a home for mentally challenged, had run away and was sexually exploited and subjected to physical abuse. Counsel for the appellant without prejudice to submission regarding this being the case for benefit of doubt, has urged that life imprisonment was harsh as the appellant was a first time offender and a 85 years old mother to support. It is claimed that appellant is an CrI.(A) No. 5 of 2000 & connected matters Page No.31 of 56 illiterate person belonging to the down trodden section of the society and, therefore, imprisonment for life, in these circumstances, would be a harsh punishment.

As already noted by us, mere fact that appellant was a first time offender was by itself an inadequate reason for reducing punishment. This is a factor to be reckoned while considering rehabilitation. Similar is the position with regard to alleged illiteracy or belonging to the weaker section or down trodden section of the society. The only mitigating factor which can be taken into account is his post conviction conduct which is reported to be satisfactory and the appellant is stated to be attending meditation classes and Vipasana and has not shown propensity to crime and may be capable of being adjusted in society.

We are of the view that in this case where helpless mentally challenged girl has been raped does not call for any leniency. The helpless mentally challenged girl was allured with promise of clothes & goodies and then exploited. The abhorring act deserves to be put down firmly and in deterrent manner so that consequences for such acts are comprehensible and known. We, therefore, uphold the conviction but in the circumstances reduce the sentence to 13 years RI net exclusive of remissions and a fine of Rs.25,000/-. In default of payment of fine, further SI for 6 months. Fine, if realized, to be disbursed for the benefit of the victim by the Court on receiving report from the Agency looking after the victim.

Appeal stands partly allowed in the above terms.

8. CrI.A.No. 541/2003 (Bishamber Vs. State) Appellant Bishamber was convicted for the offence under sections 363 and 376 IPC vide judgment dated 13th March, 2003. Vide order dated 15th March, 2003, appellant was sentenced to life imprisonment and a fine of Rs.50,000/- and in default, simple imprisonment for one year for the offence under section 376 IPC. Appellant was sentenced to RI for a CrI.(A) No. 5 of 2000 & connected matters Page No.32 of 56 period of five years and a fine of Rs.10,000/- and in default, simple imprisonment for six months for the offence under section 363/376 IPC. Appellant was prosecuted for kidnapping of a four year old girl and raping her in a public park on 2nd April, 2000. Prosecutrix `C' who was residing in Industrial Area, Lodi Road was raped by appellant in public park at about 5 p.m. She had been kidnapped while she was playing outside her house in the afternoon. The parents of the Prosecutrix `C' got anxious when she did not return to the house and started looking for her. They heard the cries of Prosecutrix `C' and found that appellant had removed his trouser and underwear of Prosecutrix `C' and was raping her. As per P.Ws 1, 2 and 3, appellant had raped the child after removing his trouser and her panty and was holding her on his thigh. He was apprehended and beaten by the public. Prosecutrix `C' was bleeding from her vagina. Prosecutrix `C' was taken to Hindu Rao Hospital. Medical examination of Prosecutrix `C' showed that she was bleeding from her vagina and her hymen was ruptured. She was admitted in the hospital and treated for her injuries. P.Ws 1 and 3 are father and uncle of Prosecutrix `C' and P.W 2 Kaushalya was an independent witness who had been running a milk shop. She has corroborated the statement. Appellant had denied all the evidence as incorrect but did not deny his presence in the park and stated that he was watching a magician show in the park when he was caught from behind and accused of rape. We are of the view that appellant has failed to show any motive for the parents of the Prosecutrix `C' to implicate him especially for an independent witness like Kaushalya to implicate him. Appellant received injuries when he was beaten. The appellant did not give any suggestion to the witnesses who had deposed that he was not at the spot and was watching magician show.

Ms.Anu Narula sought to assail the conviction by pointing out what she termed as discrepancies and inconsistencies. She submits that it was not clear whether girl was alone or with her friends in the park. CrI.(A) No. 5 of 2000 & connected matters Page No.33 of 56 Considering that it was a public park, she could not be playing alone. A public park at 5 p.m or so, is reasonably crowded. It was unlikely that anyone would attempt to commit rape there. Appellant is alleged to be pressing her mouth while committing rape, if that being so, her screams could not be heard. Besides, it was urged that child had become unconscious. A reading of evidence would show that appellant is alleged to be

pressing her mouth and not gagging it and hence screams could be heard. Prosecutrix `C' was found unconscious in the hospital and not in the park. Learned counsel next submitted that CFSL report did not show any stains of semen. Prosecutrix `C' is alleged to have been found in the park. Photographs show that her underwear was found on the road.

Mr.Sunil Sharma, learned counsel for respondent-State in opposition, submits that this was an unusual case of rape where even eye witness was available who had seen the gory incident of rape. PW-3 Kaushalya Devi and uncle and father of the Prosecutrix `C' had actually seen her being subjected to ordeal before rescuing her. In view of overwhelming ocular evidence which does not seem to be tainted by any ulterior consideration coupled with the injuries suffered by the child and the appellant having been caught red handed, inconsistencies and discrepancies sought to be raised by appellant's counsel are trivial and of no consequence.

We, therefore, find the appeal to be devoid of merit and maintain the conviction.

On the question of sentence, Ms.Anu Narula seeks a reprieve in sentence. She urges that appellant is a young man of 30 years, unmarried and has an old mother to support. He has already been in incarceration for nearly 8 years. His post conviction conduct has been satisfactory and he has not displayed any propensity towards violence or crime. Appellant has cordial relations with fellow jail inmates. He has been participating in Satsang programmes. Counsel submits that appellant deserves to be given an opportunity for penitence and reformation. Ms.Narula submits CrI.(A) No. 5 of 2000 & connected matters Page No.34 of 56 that this is a fit case where the court ought to reduce the sentence by recording reasons as no exceptional violence was used and the post conviction conduct of the appellant shows his penitence and attempts to reformation.

Mr.Sharma opposes the plea for any relief in sentence. Mr.Sharma submits that this is a clear case where a four year old girl was raped by the appellant by first kidnapping her and then taken to a public park. The girl had suffered a rupture in hymen and was bleeding and had suffered other injuries entailing hospitalization for two to three days.

Family of a person who commits such a crime, of necessity, has to suffer disruption, hardship in life, and even ostracization. This by itself are not factors calling for reduction in sentence. However, in this case, considering the post conviction conduct which has been satisfactory and appellant showing penitence by participating in satsangs and other activities and there being nothing on record to indicate possibility of recidivism, we are of the view that sentence for the offence under section 376 IPC may be reduced to minimum of 10 years imprisonment net exclusive of remissions with fine of Rs.50,000/- as compensation and in default, SI for one year. The compensation amount on realization be kept in an FDR for the benefit of minor victim till she attains majority. The punishment and order of sentence with regard to the offence under section 363 IPC i.e., RI for a period of 5 years with a fine of Rs.10,000/- and in default, SI for six months, shall remain. The fine, on realization, be also paid to the victim.

Appellant shall also not make any contact with the victim or any immediate member of her family and in case, appellant violates the above condition, it shall be open to the authorities to take action

for his externment from the locality of the victim or its vicinity in accordance with law.

Appeal stands partly allowed in the above terms.

Crl.(A) No. 5 of 2000 & connected matters Page No.35 of 56

9. Crl.A.No. 765/2003 (Lal Mohd. Vs. State) Appellant Lal Mohammed has been convicted for the offence punishable under section 376 IPC vide judgment dated 23rd September, 2002 by the Addl. Sessions Judge. Vide order dated 24th September, 2002, appellant Lal Mohammad @ Lala has been sentenced to imprisonment for life and a fine of Rs.20,000/- for the offence punishable under Section 376(2)(f) IPC and in default, to undergo simple imprisonment for one year.

Appellant Lal Mohammed was at the relevant time 18 years of age and working in a Cycle Shop as a daily wager. He was a tenant of Smt. Urmila Devi, the complainant. Prosecution case is that prosecutrix `C', a young girl aged about 7 years complained to her mother Urmila Devi that she was having difficulty in urination. She was scared to tell anything more. On persuasion, she told that on 6th June, 2000, when she had gone to the roof, appellant Lal Mohammed had pulled her into the room and raped her. She identified Lal Mohd who had committed rape. She was taken to Lady Hardinge Hospital for medical examination. Appellant was arrested. Clothes of prosecutrix and lungi of Lal Mohd. were also seized. Statement under Section 164 of CRPC of the prosecutrix `C' was recorded. In the medical examination, appellant has been found to be fit and capable of having sexual intercourse. The appellant in his statement under Section 313 Cr.P.C admitted that he was a tenant but denied all other incriminating evidence. No defence evidence was led. Appellant claims to have been falsely implicated.

The medical examination of prosecutrix `C' on 09.06.2000 found bruises around the perinium. Hymen was torn and there was a fresh tear. There was redness all around the introitus. Medical report was proved as Exhibit PW1/C. Prosecutrix denied the suggestion that her hymen was torn while playing. Doctor also denied the suggestion that it could be torn only Crl.(A) No. 5 of 2000 & connected matters Page No.36 of 56 when injury is received during play. No such suggestion was given by counsel for the appellant to prosecutrix `C' that she received injuries while she was playing and that no rape had been committed upon her. The medical evidence fully corroborates the testimony of prosecutrix `C' who complained rape by the appellant. It is significant that even after three days of rape, Doctor found redness and bruises. Evidence of prosecutrix `C' is clear and categorical. There has been nothing to dispel the same in cross examination. There was no motive to implicate the appellant falsely. The suggestion that the appellant's implication was there because Urmila Devi had wanted him to vacate premises was denied. There was nothing to suggest that Urmila Devi had wanted him to vacate the house. No previous incident or effort on her part to seek eviction has been brought on record.

Mr.Sumit Verma, learned counsel for the appellant urges that there was discrepancy with regard to the date of commission of alleged offence. The complainant Urmila Devi had stated in her cross-examination that she had reported the matter to the police on the date of the incident itself. The date on which she had gone to the police station was 9th June, 2000 when she was asked to

bring her daughter for medical examination in the morning. She, therefore, took prosecutrix 'C' for medical examination on 10th June, 2000 which would conflict prosecution version of rape being committed three days earlier i.e on 6th June, 2000. Secondly, he submits that complainant denied the lodging of complaint three days of the incident and claimed that report was lodged on the same day. Complainant Urmila Devi also stated that prosecutrix 'C' was taken in the same clothes which she was wearing. She took a spare set of clothes because she was informed that her shorts would be taken by the Doctor and therefore she kept a spare set of clothes. As per the complainant's version, she was taken to the police station on the day of rape itself, when she was found wearing the same clothes which were seized and sent to CFSL. In short, complainant denies that report was lodged on the same day. Mr.Verma CrI.(A) No. 5 of 2000 & connected matters Page No.37 of 56 submits that this doubt about the date of incident itself was sufficient to give benefit of doubt to the appellant.

The second aspect urged by Mr.Verma is that as per prosecutrix's version, when she went to the room, she was accompanied by her sister's daughter Anjali. Non examination of Anjali, who was an eye witness, according to Mr.Verma should be fatal to the case.

No semen has been found on the clothes of prosecutrix or accused. He submits that in view of complainant's contradictory statements to the police and the Court which shows that she was lying to either one of them, raise sufficient doubts so as to entitle the appellant to the benefit of doubt.

Mr.Sunil Sharma, learned counsel for the respondent-State in opposition submits that there was a ring of truth in complainant's version that she had gone to report to the police on date of incident itself. She cannot be held responsible if the FIR for the same was registered on 9th June, 2000. Mr.Sharma submits that in view of categorical statement of the prosecutrix 'C' implicating the appellant duly supported by medical examination and the absence of any motive on the part of prosecutrix 'C' and her family to implicate the appellant, these minor inconsistencies cannot raise a doubt on the statement of prosecutrix 'C' which has remained unshaken in cross-examination. Mr.Sharma further submitted that there are judicial pronouncements wherein the delay in lodging FIR in similar cases has been condoned, duly explained and the FIR refilled and acted upon.

In view of the foregoing discussion, as noted by us, there is no ground made out for assailing the order of conviction. Appeal is, accordingly, liable to be dismissed against the order of conviction and is so dismissed.

Coming to the question of reprieve in sentence, Mr.Sumit Verma, learned counsel for the appellant submitted that appellant is a young man who has a whole life before him. He has been a law abiding citizen and this CrI.(A) No. 5 of 2000 & connected matters Page No.38 of 56 was his first brush with Law. He deserves to be given a chance for reformation and penitence. It is stated that appellant has already undergone about 8 years of sentence. His post conviction conduct in jail is reported to be good. He has been working in the Weaving section of the jail factory. He is an ardent follower of Vipasana and has not violated the jail discipline and nothing adverse has been recorded against him. Mr.Verma, therefore, painstakingly urged that in this case, appellant could either be given benefit of doubt and minimum sentence of less than 10 years deserves to be imposed on him based on the aforesaid reasons. Considering the age of the appellant, his being the first time offender and having

not displayed any tendency of recidivism, his good post conviction conduct, we are of the view that in this case, ends of justice would be met, if the sentence of the appellant under section 376 (2)(f) IPC is reduced to 10 years RI net exclusive of remissions with a fine of Rs.20,000/- and in default, SI for one year. Fine, if realized, be given to the victim. In case, victim is minor, amount be kept in a fixed deposit with UCO Bank, Delhi High Court Branch till she attains majority.

Appellant shall also not make any contact with the victim or any immediate member of her family and in case, appellant violates the above condition, it shall be open to the authorities to take action for his externment from the locality of the victim or its vicinity in accordance with law.

Appeal stands partly allowed in the above terms.

10. Crl.A.173/2004 (Ram Avadh Vs. State) Appellant Ram Avadh has been convicted vide judgment dated 29th January, 2003 for the offence punishable under Section 366 & 376 IPC. Vide order of sentence dated 30th January, 2003, appellant was sentenced to undergo life imprisonment and to pay a fine of Rs.1000/- and in default Crl.(A) No. 5 of 2000 & connected matters Page No.39 of 56 to undergo simple imprisonment for three months for the offence under section 376 IPC. For the offence under section 366 IPC, appellant was sentenced to undergo RI for three years and to pay a fine of Rs.500/- and in default to undergo Simple imprisonment for a period of one month.

This is a case of prosecutrix `R' aged about 5 years who had gone out to purchase bidi for her father at night. When she did not return for sometime, her mother complainant herein went out to search for her. Inquiries from the neighbours revealed that she had been taken by Ram Avadh @ Ramu towards his jhuggi. On reaching near the jhuggi of Ramu, she heard the screams of her daughter for help from inside. She called the neighbours and raised hue and cry. Ramu, the appellant managed to escape from behind the jhuggi. Prosecutrix `R' was removed to LNJP hospital where her medical was got done and she was declared unfit for statement. Appellant was arrested. MLC of the Prosecutrix `R' was collected. Appellant was also medically examined. The statement of Prosecutrix `R' was recorded under Section 164 of Cr.P.C. FIR was registered under Section 363, 342, 323, 376 IPC. The case was committed to Sessions for offences punishable under Section 363, 366 and 376 IPC. However, charges were framed under Section 366 and 376 IPC. 17 witnesses were examined. The gynaecological report as proved by PW13 Dr.Shakun Tyagi, is Ex.PW 13/A which shows her Prosecutrix `R' having sustained injuries, her inability to walk and legs keeping apart during walking as also swelling of cheeks, bruises, lacerations. Blood stains on external genitalia. Hymen was having fresh tears. Superficial lacerations were present on posterior vaginal wall. Vaginal smear was taken. Slides were prepared. Findings were suggestive of sexual intercourse.

Appellant in his statement under section 313 Cr.P.C., admitted his residence in a jhuggi nearby but denied all other allegations. Appellant's jhuggi was ten jhuggis away from the jhuggi of the prosecutrix. Complainant had called out to her daughter. She heard her daughter s Crl.(A) No. 5 of 2000 & connected matters Page No.40 of 56 voice saying "mummy mujhe bachao". She called the neighbours. As the jhuggi's door was bolted from inside, the same was got broken. Prosecutrix `R' was lying unconscious in the jhuggi and appellant managed to escape from the back door. Complainant as noted earlier took her to the hospital and got medical done. Complaint was lodged

as Ex.PW1/1.

This is a case of gory violence while committing rape. Blood was oozing from the private parts of prosecutrix `R'. She had burn marks of biri on her neck and bite marks on her cheeks. Prosecutrix `R' remained unconscious and regained consciousness only at about 4 am after being admitted in the hospital. Her statement was recorded and she was discharged from the hospital after four days of indoor treatment. Complainant also denied the suggestion that appellant has been falsely implicated because of construction of jhuggi by the appellant which the complainant protested. PW 3 Vinay corroborated the version of complainant by saying that in his presence prosecutrix `R' was taken out from the jhuggi of the appellant. Pradeep Kumar, another independent witness, also supported and corroborated the statement of complainant while deposing that he informed complainant that cries of her daughter were being heard from the jhuggi of appellant. Prosecutrix `R' had deposed that the accused was known to her and had taken her to his jhuggi when she came out to purchase biri for her father. He removed her underwear and did "ganda kam" with her. Appellant was wearing underwear and baniyan. He removed his underwear. He had put burning matchsticks on her neck. Her mother came there. Appellant ran away from the back door. Her mother took her to the hospital. She also admitted her statement recorded U/s.164 Cr.P.C. The Trial court in its judgment rejected the plea of the appellant that he had been falsely implicated or that there was a delay in the lodging of the report. The complaint had been lodged at the earliest opportunity. The MLC also revealed that the child had been raped. Though, the name of the appellant was not recorded in the MLC, but other CrI.(A) No. 5 of 2000 & connected matters Page No.41 of 56 particulars have been mentioned. The court rejected the plea or motive over the construction of jhuggi as set-up by the appellant. The court also upheld the plea of kidnapping in as much as the child was taken away from the constructive custody of her parents.

In view of the foregoing discussion, we do not find any ground to interfere with the order of conviction passed by the learned Addl. Sessions Judge and uphold the same. As regards the sentence, learned counsel for the appellant seeks reprieve and reduction in sentence from life imprisonment to 10 years for the offence under section 376 IPC. He submits that appellant Ram Avadh @ Ramu is stated to be 50 years old. His wife expired in the year 1993. He was rearing goats. He has three sons who are 23, 20 and 18 years of age. He does not know the whereabouts of his sons. The appellant relies upon the judgments of this court for lesser sentence being imposed i.e in the case of Sheikh Falsar S/o. Sheikh Kuwaad, Rakesh @ Kakey Vs. Govt of NCT (CrI.A.No.154/2005). He also relies on the judgments in "Mohd. Alam Vs. State of NCT of Delhi" reported at 2006(3) JCC 1812 and "State of Karnataka Vs. Krishnappa" reported at 2000 (3) SC 516 wherein imposition of minimum sentence in cases of rape of minors was upheld.

Mr.V.K.Raina, learned counsel for the appellant, in these circumstances, urges that appellant was a first time offender and his life is otherwise unblemished. His post conviction conduct has been satisfactory and there has been no complaint. He is an illiterate person and has been participating in meditation, vipasana. He has worked in jail kitchen and also as a sevadar in the wards.

As submitted by Mr.Siddharth Luthra, Sr.Adv.Learned Amicus Curiae, this is not a case of child rape simplicitor. It is accompanied with violence as is evident from the burn marks sustained by the

prosecutrix. The child was also of a tender age of 5-6 years where it could not be said that it was a case of approaching adolescence. Mr. Luthra points out, as is evident CrI.(A) No. 5 of 2000 & connected matters Page No.42 of 56 from the statement of the appellant, that he has lost touch with his family and whereabouts of his sons are not known and hence, there would be no rehabilitation in society but being adjusted with the family. Hence, he could again be exposed to the same tendencies. His conduct in jail has been satisfactory and this would only be a positive factor for him. Mr.Luthra, Sr. Adv, therefore, submits that the offence was committed in complete disregard to the fact that his own family were at the jhuggi at a lower level while he was watching TV on a higher level in the jhuggi. He, however, submits that grant of sentence to the appellant is left to the judgment of the court. Considering the aforesaid factors and the difficulties in readjustment in society, with the family, as noted above, the possibility of recidivism cannot be ruled out.

Considering the violent manner of crime resulting in grave and serious injuries to the child of 5 years resulting in her hospitalization for four days accompanied with burn and bite marks on the child demonstrate the sadistic tendencies of the appellant. Appellant was a grown up man of 52 years having grownup children and yet he perpetrated this heinous crime on an innocent minor. Considering the manner and the violence which accompanied the crime, we are of the view that this is not a case where the appellant's sentence deserves to be reduced to the minimum admissible in law i.e 10 years. However, considering his post conviction conduct in jail, we reduce the sentence of life imprisonment for the offence under section 376 IPC to 13 years RI net exclusive of remissions with fine of Rs.1000/- and in default, to undergo, SI for three months. Conviction as regards offence under section 366 IPC i.e., RI for three years and a fine of Rs.500/- and in default, to undergo SI for a period of one month, remains.

Appellant shall also not make any contact with the victim or any immediate member of her family and in case, appellant violates the above condition, it shall be open to the authorities to take action for his externment from the locality of the victim or its vicinity in accordance with CrI.(A) No. 5 of 2000 & connected matters Page No.43 of 56 law.

Appeal stands partly allowed in the above terms.

11. CrI.A.No. 89/2006 (Santosh Kumar Vs State) The appellant Santosh Kumar was convicted under section 376 IPC vide judgment dated 28th May, 2005 and vide order of the same date, he was sentenced to life imprisonment with a fine of Rs.5000/- and in default, to undergo RI for six months.

The case of the prosecution is that on 21st February, 2002, appellant had called prosecutrix `J' aged about 8 years and took her into his premises. Appellant was stated to be familiar with prosecutrix `J' being residing in the same street. As per prosecutrix `J', he removed her kachchha and his kachchha and in her words forcibly put his place of urinating in her place of urinating. She started weeping as blood started oozing. At the relevant time, prosecutrix `J's brother was admitted in the hospital and her mother was with him and her father was on duty and she was taken to the hospital by some neighbour. She did not tell the neighbour how she received injuries but told her mother as well as to the Doctor that appellant had done ganda kam with her and blood oozed. Prosecutrix `J' was

examined at Sanjay Gandhi Memorial Hospital and had been examined by Dr.Manju Goel who has since left service. As per the M.L.C, abdomen showed no external marks of injury, sex characters were not developed. External genitalia was not well developed. Blood clots were present around the perineum. Child was examined under anesthesia. Vagina was full of blood clots. Tear was present on posterior vaginal wall, tear was also present on right lateral vaginal wall extending high up in vagina, tear was present on left lateral vaginal wall, hymen was absent, no hymenal tag, tear was present on posterior fourchette extending upto anus, anus sphincter intact. All tears were stitched. Prosecutrix `J' had admitted of sexual assault by someone in the vicinity. Dr.Punita Mahajan, CrI.(A) No. 5 of 2000 & connected matters Page No.44 of 56 HOD on being asked if the prosecutrix `J' was still capable of bearing child, she had deposed that it cannot be said since the victim was so small and it could not be ascertained how much damage was caused to the vaginal passage. The complainant PW-4, i.e father of prosecutrix `J' had deposed that his son was admitted in Sanjay Gandhi Memorial Hospital and after finishing his duty, he had gone to the hospital and when he returned home, he came to know that his daughter had fallen and someone in neighbourhood had removed her to the hospital and thus he went back to the hospital. At the hospital, he learnt that his daughter had not received injuries due to fall and had received injuries because she was subjected to sexual assault. According to the complainant, when his daughter regained consciousness, she said that this act was committed by Anita's Chacha i.e appellant who was residing near their house.

Learned counsel for the appellant Mr.V.K.Raina submitted that there were several contradictions in the version of the prosecution which had been ignored. Complainant in his complaint and in examination-in chief had claimed that prosecutrix `J' was unconscious when he met her in hospital but in cross-examination he admitted that his daughter was conscious and he had some conversation with his daughter who told him that she had received injuries after falling. Appellant's counsel also sought to question the testimony of Dr.Punita Mahajan on the ground that she was not the person who had examined the prosecutrix `J' and her testimony should be of no avail. Appellant also sought to suggest that all the witnesses were interested witnesses and no independent witnesses had been examined. Counsel submitted that complainant's own case was that his daughter i.e prosecutrix `J' had received injuries by falling while skipping rope. Prosecution version that prosecutrix `J' was watching barat when she was lured by the appellant but participation in the barat had not been supported by any of the other witnesses.

On a perusal of the trial court judgment, we find that trial court has CrI.(A) No. 5 of 2000 & connected matters Page No.45 of 56 comprehensively dealt with all aspects and pleas raised in defence. Learned Trial Judge has observed that it was quite natural that prosecutrix `J' who was of tender age, had not disclosed her ordeal especially when her parents were not at home and told that she had sustained injuries on falling. She would have similar hesitation in disclosing her ordeal to her father. However, this plea would hardly be of any avail in view of the clear statement of prosecutrix `J' and her identifying the appellant as the person who had taken her to his house. Medical evidence has fully corroborated and established rape of the young innocent girl. In fact, we find that girl's testimony in this case is clear, descriptive, cogent and elaborative and leaves no manner of doubt.

In these circumstances, the absence of semen cannot dislodge the categorical testimony of prosecutrix to urge that offence under section 376 IPC was not committed.

In view of the foregoing discussion, we find no ground to interfere with the order passed by the learned Addl. Sessions Judge convicting the appellant for the offence under section 376 IPC and maintain the conviction.

At this stage, learned counsel for the appellant made a plea for clemency for the appellant in the matter of sentence. He urges that appellant was a young man of 23 years of age and has full life before him and could be reformed. This was the first offence. He is the only support of his old parents and his sentence should be reduced from life to minimum sentence as admissible at law. A report from the jail had been called for. The post conviction conduct of the appellant has been satisfactory and there is no complaint against him. There has not been no propensity or susceptibility towards crime. However, he continues to protest his innocence. He had enrolled twice for 10 days' vipasana classes and completed the same. He has been working in jail kitchen (langar) and also as a sevdar in the wards. He has studied upto 9th class. His elder brothers have been working as labourers. He himself was a labourer. His CrI.(A) No. 5 of 2000 & connected matters Page No.46 of 56 father is 58 years of age and is an agriculturist having 15 bighas of land at Sultanpuri, U.P.

We may, however, note that medical record shows that offence was committed with such force on a tender child which resulted in extensive blood clotting in the vagina, tear on left lateral vaginal wall, absence of hymen and tear on posterior fourchette extending upto anus so much so, Dr.Punita Mahajan, HOD had opined that it could not be said as to how much damage was caused to the vaginal passage. However, offence appears to have been committed without any prior planning and on the spur of moment, taking advantage of the child watching barat and alluring her away.

Considering the force used and the injuries suffered, this is a case where more than minimum sentence ought to be imposed. We are, therefore, of the view that ends of justice would be met by modifying the sentence imposed from life imprisonment to one of RI for 12 years net exclusive of remissions with a fine of Rs.5000/- and in default, to undergo SI for six months with such remissions as the appellant may be entitled to.

Appellant shall also not make any contact with the victim or any immediate member of her family and in case, appellant violates the above condition, it shall be open to the authorities to take action for his externment from the locality of the victim or its vicinity in accordance with law.

Appeal stands partly allowed in the above terms.

12. CrI.A.141/2006 (Rattan Pal @ Monu Vs. State) Vide judgment dated 9.12.2005, learned Additional Sessions Judge convicted the appellant under Section 376(2)(f) IPC. Vide an order of the same date, he sentenced the appellant to undergo life imprisonment and also pay a fine of Rs.5,000/- and in default, to undergo simple imprisonment for a period of two years.

Crl.(A) No. 5 of 2000 & connected matters Page No.47 of 56 The case of the prosecution is that the appellant Rattan Pal @ Monu, on 25.4.2004 at about 5.00 p.m., called the prosecutrix „B , aged about 8 years, who was his neighbour, and took her along with him. Prosecutrix „B returned after one hour crying and upon her mother Sangeeta, the complainant, asking her the reason, she did not respond. Complainant, who is a maid, has four children, two daughters and two sons. On 26.4.2004, prosecutrix told her mother that she was feeling pain in her private parts and on the complainant sternly enquiring from her, she told that the appellant had taken her to his room, removed her underwear, raped her and also threatened her not to narrate these facts to anyone. Police report was lodged. Statement of the complainant was recorded. The prosecutrix was got medically examined. Her hymen was found torn and other minor injuries on her person were found. The appellant was arrested from Ramlila ground on the pointing out of the prosecutrix, whose statement was also recorded under Section 164 Cr.PC. The appellant s statement under Section 313 Cr.PC was recorded. He claimed that the complainant was on inimical terms with the appellant s family and he was falsely implicated.

As per the medical examination, the following injuries were also found on the prosecutrix :

(i) Abrasion 2 x 0.5 cm. present on the sternal region;

(ii) Abrasion 4 x 2 cm. present on the right cheek;

(iii) Abrasion 0.5 x 0.5 cm. present on right knee.

The MLC Exhibit PW-7A was also proved, which showed hymen torn and admitting one finger. CFSL report was negative for semen. Blood was found in one of the undergarments. The injuries mentioned earlier were also found present. Learned Trial Judge has also noticed counseling report of the prosecutrix, which records aggressive and stern attitude of her mother, the complainant, and the trauma of the child following the incident. Crl.(A) No. 5 of 2000 & connected matters Page No.48 of 56 Before the trial Court, the appellant had submitted that the silence of the prosecutrix for one day was pernicious and fatal as a child of eight years would instantaneously inform the parents of the rape. It was urged that corroboration of the statement of the child was missing. Besides, her statement simply said that appellant had done „gandi baat' with her, which did not make out a case of rape. Appellant also claimed that his father was a drunkard and the complainant wanted to grab their plot of land and for this purpose, he has been falsely implicated. Certain contradictions regarding the prosecutrix pointing out the accused at the Ramleela Ground and the missing signatures on Jama Talashi etc. were sought to be raised. Learned trial Judge has comprehensively and extensively dealt with each of the submissions made in the well reasoned judgment reaching the conclusion with regard to the guilt of the appellant.

The judgment of the trial Court is assailed on the ground that as per the statement of the prosecutrix, the appellant left on raising the alarm and arrival of her father. In these circumstances, it is urged that prosecutrix and complainant remaining mum for one day was unexplainable.

Learned counsel for the appellant Mr. R.K. Srivastava urged that at best, it could have been a case under Section 354 IPC and not under Section 376 IPC. He next urged that there was motive for the complainant and the prosecutrix to falsely implicate the appellant, as they wanted to grab the premises, portion of which was in possession of appellant and his family and where the prosecutrix also resided with family.

Learned counsel for the appellant further submitted that the possibility of prosecutrix accompanying the appellant was remote since there was a quarrel between the families. The prosecutrix and her brothers and sisters had been stopped by their parents from visiting the family of the appellant. A report had also been lodged by the mother of the prosecutrix on account of appellant's father being a drunkard. Mr. R.K. Srivastava CrI.(A) No. 5 of 2000 & connected matters Page No.49 of 56 urged that all the above factors make the case of the prosecution doubtful and the appellant was entitled to the benefit of doubt.

Counsel for the appellant urged that there was also a contradiction inasmuch as while the complainant had claimed that her daughter had been lured at about 5.00 p.m. on 25.4.2004, in the deposition before the Court, PW-1 had stated that her daughter was lured on the pretext of a video game at about 2.30 p.m. and returned at 3.00 p.m. crying and told her that she had been raped. Complainant contradicts herself whether she came to know of the rape on the same day, i.e. 25.4.2004 or on 26.4.2004, i.e., the next day when she lodged the report with the Police. In her statement before the Court, she claimed that she immediately came to know that her daughter had been raped.

Learned counsel for the State Mr. Ravinder Chadha rebuts the submissions of the counsel for the appellant and submits that the prosecutrix had specifically described the incident including the appellant removing her undergarments and lying on top of her. In the examination-in-chief, she has submitted that the appellant had done „gandi baat' with her. The medical evidence about the hymen being torn, vaginal swabs and the injuries support the same. The absence of semen is not determinative or conclusive of the offence not being committed.

We have heard learned counsel for the parties and we are not persuaded with the submissions made by learned counsel for the appellant. The discrepancies sought to be pointed out are such, which are normal and as a result of vicissitudes and on account of passage of time. We do not find anything abnormal in the child not disclosing her ordeal to her mother on the same day in view of the threat extended to her by the appellant and her mother's overbearing attitude. It is only the next day when the pain persisted that the child disclosed it to the mother, who took action. In this case, the complainant had categorically denied the suggestions or any attempt to grab or purchase the plot of the appellant. Except a bald CrI.(A) No. 5 of 2000 & connected matters Page No.50 of 56 statement, no other evidence with regard to the same has been led. The statement of the prosecutrix has a ring of truth in it. The prosecutrix has candidly admitted in her statement that her mother used to beat her. In the cross-examination, the prosecutrix deposed that after removing her underwear, the appellant lay on her. Nothing more was required to be described by her. The medical evidence fully corroborates her ordeal thereafter with a torn hymen.

In the present case as noted in the counseling report itself, the prosecutrix's mother had overbearing and stern attitude. The statement of the prosecutrix is clear, categorical and cogent. The medical evidence and report corroborates the same. Hymen was found torn. Prosecutrix had suffered minor abrasions and other injuries. In these circumstances, the minor inconsistency or discrepancy do not in any manner dilute the case against the appellant/accused.

We, accordingly, find no ground to interfere with the order of conviction as passed and uphold the same.

At this stage, learned counsel for the appellant seeks clemency by saying that the appellant is a young boy of 18 years at the time of the incident. He had one younger brother and two sisters. He had no formal education but could sign. He used to work in a cardboard factory. His father is a cycle repairer and was earning about Rs.50-60/- per day. The appellant, it is stated, used to earn about Rs.1500/- per month. There are no criminal antecedents and it is his first offence. The appellant has been working in the Jail Langar. His post-conviction conduct in Jail has been satisfactory and nothing adverse has been pointed out. The appellant is not stated to be having any propensity to crime. Learned counsel for the appellant submitted that in these circumstances, the appellant, who is a young man, should be given a chance to reform and the minimum sentence as admissible under the statute, should be imposed if the Court reaches a conclusion that the conviction is to be affirmed.

Crl.(A) No. 5 of 2000 & connected matters Page No.51 of 56 The father of the appellant has also filed an affidavit before the court stating that he is desirous that appellant lives as a reformed person. It is further stated that he along with appellant and other members of the family were residing in 1/4th of the premises, that portion he has already sold on 26th March, 2007 and he has purchased a plot at Loni and that at present he was living as a tenant in the premises but he undertakes to vacate the same within a month. Appellant's father and mother have also undertaken to the court and also on behalf of the appellant that they would not reside near the residence of the prosecutrix nor visit the locality. Affidavit to the same effect has also been filed by the appellant.

The only mitigating factors in the present case are the young age of the appellant and this being his first offence. There does not appear to be any planning for the commission of the offence. The possibility of appellant being reformed and rehabilitated exists. He has not shown any propensity to crime while in jail. His post conviction conduct in jail has been satisfactory.

In view of the foregoing, we are, therefore, of the view that in this case, ends of justice would be subserved by modifying the sentence awarded to the appellant from life imprisonment to minimum sentence of 10 years with admissible remissions and subject to payment of fine which is enhanced from Rs.5000/- to Rs.20,000/- and in default, to undergo SI for two years.

The affidavits of the appellant and his father to the effect that they would not reside in the premises where the prosecutrix and her family are residing or in its vicinity are accepted. Appellant and his father shall duly abide by the undertakings given.

The authorities independent of the aforesaid undertakings given, shall be at liberty to proceed in accordance with law for externment of the appellant and/or his family members, if so warranted, in case they violate the above undertakings.

Crl.(A) No. 5 of 2000 & connected matters Page No.52 of 56

13. We have perused the draft of the Scheme proposed by the National Commission for Women for rehabilitation of rape victims. The draft scheme has been produced by the Amicus Curiae. We had enquired from the Standing Counsel (Criminal) Ms.Mukta Gupta as to the current status with regard to its implementation or other welfare measures adopted. We are informed that the scheme is under active consideration of the Central Government. Ms.Mukta Gupta informs that the state does provide help/grant in deserving cases and also counselling through its social workers to the affected persons. We are concerned and are indeed dismayed that as yet no concrete steps or scheme for rehabilitation of victims of rape or child rape victims has been put in operation. Even though considerable time has elapsed since the commission of offences and appointing counsellors may not be as effective, we deem it appropriate that every measure be taken even at this belated stage which might be beneficial for the growth and development of victim. In these circumstances, we consider it appropriate and expedient to direct the Secretary, Delhi High Court Legal Services Committee to engage a qualified lady Child Counsellor, to be deputed, to visit the residence of the victims in each of these cases and make discreet enquiries. Counsellor shall assess rehabilitation and adjustment of the child rape victim within the family and community. The assessment with regard to her education and growth as also the development of personality be indicated in the report, to be submitted within three months. Needless to mention that the Counsellor would proceed in a manner so as to win over the confidence of child and members of the family and make recommendations for re-adjustment and ensuring proper growth and a healthy normal life for the victim. The fee of the Counsellor is tentatively fixed at Rs.7500/- each in the 12 cases, to be borne by Delhi High Court Legal Services Committee.

From time to time directions and observations setting out the measures to be taken to minimise the rigours of the trial for victims of rape Crl.(A) No. 5 of 2000 & connected matters Page No.53 of 56 and sexual abuse have been given in a number of judicial pronouncements. These directions have varied from avoidance of eye contact with the accused, provision of a screen, control of offensive, vexatious and obtrusive questions in cross-examination of the victim etc. These are intended to reduce and minimise the trauma of the victim of the offence and rigour of the trial and to prevent the erosion and loss of self confidence of the victim. There is a dire need for effective measures to be taken from the initial stage of commission of offence itself to ensure adjustment and rehabilitation, healthy and normal growth of the victim as member of the community. For achieving this, it is necessary to sensitize all those who are involved in the investigation, prosecution and trial of the offence and the role each one of them can play to mitigate the rigour of the trial and prevent the erosion and loss of confidence of the victim. Towards this end, following directions are being given:-

(i) The concerned S.H.O shall inform the Delhi Legal Services Authority immediately of the commission of the offence of rape. The D.L.S.A shall depute a Social Worker/Para Legal Worker to establish contact latest within a week of the commission of offence with the victim and her family.

The Social Worker/Para Legal Worker shall work towards gaining the confidence of the victim and provide necessary moral and legal support and advice as may be required to face the ordeal. The Social/Para Legal Worker shall operate under the overall guidance and supervision of the Child Counsellor/Psychologist nominated by the Delhi Legal Services Authority. The Child Counsellor /Psychologist shall personally step in and give assistance to the Social/Para Legal Worker or herself handle the case, wherever required, to ensure adjustment and rehabilitation of the victim. The Child Counsellor/Psychologist will also ensure that education of the CrI.(A) No. 5 of 2000 & connected matters Page No.54 of 56 victim is not disrupted and normal life is restored as soon as possible. A report would be submitted to the Delhi Legal Services Authority in this regard by the Child Counsellor/Psychologist.

(ii) Delhi Judicial Academy has been organizing seminars/workshops for sensitization of Judicial Officers in the conduct of cases of rape, sexual abuse. The Commissioner of Police and Director of Prosecution shall either themselves or through Delhi Judicial Academy organize seminars/workshops for the police personnel and personnel of the prosecuting agencies for their sensitization in cases of rape and sexual offence so that they are receptive to the difficulties, suffering, pain and trauma of the victim and her family.

(iii) The Secretary, Department of Health, Government of NCT of Delhi as also the Director General, Health Services, Government of India would either themselves or through Delhi Judicial Academy organize seminars/ workshops/courses for the Doctors and medical personnel involved in the examination and treatment of victim of rape and sexual offence to ensure a humane approach in dealing with them and also to familiarize them in the reporting requirements of medical and clinical examination for trial purposes.

Appeals stand disposed of in above terms with the above directions and observations.

We record our appreciation for the assistance given by the Amicus Curiae Mr. Siddharth Luthra, Sr. Advocate and his associate Ms. Rajni Gupta and the counsel appearing for the appellants as well as the State, CrI.(A) No. 5 of 2000 & connected matters Page No.55 of 56 who have adopted a very constructive approach in their submissions and assisted us in reaching our conclusions.

Manmohan Sarin, J.

July 7th, 2008
Ssb

S.L. Bhayana, J.