HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR

DB : Justice Vivek Agarwal
&
Justice G.S. Ahluwalia

Criminal Appeal No. 653/2006
Aftab Khan
Vs.
State of Madhya Pradesh

Shri A.K. Jain, counsel for the appellant from Legal Aid.
Shri B.K. Sharma, Public Prosecutor for the respondent/State.

Date of hearing : 24.03.2018
Date of order : 28.03.2018
Whether approved for reporting : Yes

J U D G M E N T

(Passed on 28/03/2018)

Per Justice G.S. Ahluwalia

This criminal appeal under Section 374(2) of Cr.P.C. has been filed against the judgment dated 26.08.2006 passed by 4th Additional Sessions Judge (Fast Track), Shivpuri in Sessions Trial No. 127/2006, by which the appellant has been convicted for an offence under Section 376 of IPC and has been sentenced to undergo the life imprisonment.

(2) The necessary facts for the disposal of the present appeal, in short, are that on 11.03.2006 at about 05:30 PM, a report was lodged by the complainant Kamal Singh (PW-1) to the effect that his cousin brother Rajesh had called him at about 05:30 PM and informed that the prosecutrix is lying in a pool of blood near Luharpura culvert. The complainant went to the place of incident along with his cousin brother Rajesh and found that the prosecutrix was lying in a pool of blood and had

multiple injuries on her body and bleeding was going on from her private part. Some unknown persons had committed rape on her. The police on the basis of statement of the witnesses as well as the Test Identification Parade of the appellant filed the charge-sheet for an offence under Section 376 of IPC.

(3) The Trial Court by order dated 10.06.2006 framed charge under Section 376 of IPC. The appellant abjured his guilt and pleaded not guilty.

(4) The prosecution, in order to prove its case, examined Kamal Singh (PW-1), Ayodhya Prasad (PW-2), Geeta (PW-3), Prosecutrix (PW-4), Rishabh Vijay (PW-5), H.M. Karnwal (PW-6), Dr. B.C. Goyal (PW-7), Kaushal Chand Jain (PW-8), K.D. Sharma (PW-9), Nirmal Kumar Dubey (PW-10), Dr. Sunita Jain (PW-11), M.L. Sharma (PW-12) and M.M. Malviya (PW-13). The appellant examined Naushad Khan in his defence as DW-1.

(5) The Trial Court, after hearing both the parties, convicted the appellant for an offence under Section 376 of IPC and sentenced him to undergo the life imprisonment by judgment dated 26.08.2006 passed in Sessions Trial No. 127/2006.

(6) Challenging the judgment and sentence passed by the Trial Court, it is submitted by counsel for the appellant that the prosecution has failed to prove that the witnesses have duly identified the appellant. The identification conducted by the police during investigation is not reliable. The dock identification of the appellant cannot be relied upon. The appellant is innocent person and has been falsely implicated.

(7) *Per contra*, it is submitted by the counsel for the State that not only the witnesses had duly identified the appellant in the Test Identification Parade conducted by the police but they and the prosecutrix have identified the appellant in the Court also. Under these circumstances, it is clear that it is the

appellant, who had committed rape on the prosecutrix who is a minor girl aged about 6 years. The ocular evidence is fully corroborated by the medical evidence.

(8) Heard the learned counsel for the parties.

(9) First of all, it would be necessary to find out that whether the prosecution has succeeded in establishing that the prosecutrix was subjected to rape or not ? Dr. Sunita Jain (PW-11) had medically examined the prosecutrix and on medical examination, she had found blood stains over her private part. Hymen was found ruptured at 6 O' Clock position. Posterior vaginal wall was found teared, however, no active bleeding was found. Two vaginal slides were prepared and discharge was taken from vagina. Blood stains were also found on the frock of the prosecutrix and specific opinion was given that “there is a possibility of sexual assault done within the duration of 24 hours”. The MLC report of the prosecutrix is Ex. P-12. This witness was cross-examined and only two questions were put to her and it was replied by this witness that it is incorrect to say that as the prosecutrix was minor, therefore, the vaginal slides could not have been prepared and this witness further denied that no rape was committed on the prosecutrix. Thus, from the MLC report of the prosecutrix, it is proved that she was subjected to rape as hymen was found ruptured and the vaginal wall was found teared.

(10) The next moot question for determination is that whether it is the appellant, who has committed the offence or not ?

(11) Ayodhya Prasad (PW-2) has stated that at about 03:00-03:30 PM, one person had come along with a minor girl and had taken a toffee from a shop and, thereafter, he went away along with the girl. About 5-10 minutes thereafter, he came to know that the girl has been raped. However, he did not go to see the prosecutrix but he can identify the person, who had

come along with the girl for purchasing the toffee. This witness was asked that whether the person, who is present in the Court, is the same person, who had come to the shop or not ? This witness immediately identified the appellant, who is present in the Dock. It was further stated by this witness that he had also gone to Shivpuri jail to identify the person, where he had identified the person, who had come to his shop and the identification parade memo is Ex. P-3. This witness was cross-examined in short. It is stated by this witness that the accused/appellant is not wearing the same clothes, which he was wearing on the date of incident. At the time of the incident, the appellant had beard but today he is clean saven. The person, who had come to purchase toffee, had not misbehaved with the baby child in his presence. This witness has further stated that the appellant was not previously known to him. 5-6 persons were mixed, when he had gone to jail for identifying the appellant. The entire body of the appellant and other persons were covered by blanket and only their faces were visible. He has further stated that at the time of identification, no police personnel was inside the jail. He further denied the suggestion that the appellant was already shown by the police before identification. He further denied that the person, who is present in the dock, was not the same person, who was identified by him in the jail.

(12) The prosecutrix (PW-4) is aged about 6 years. She had stated that about few days ago, one person had given her a chocolate and money and thereafter he took her towards public toilet. A note has been appended by the Trial Court that the prosecutrix was initially hesitating to look at the appellant but with great difficulty, he looked at the appellant and immediately identified him. The prosecutrix, by pointing towards the appellant specifically said that the appellant, who is standing in

the dock, had given her chocolate and money. It is further stated by this witness that thereafter the appellant took the prosecutrix towards the public toilet, where he took off her clothes and after taking out her underwear, the appellant had caused her to bleed. Her mouth was gagged by the appellant. Her maternal uncle had picked her from a place situated near public toilet and, thereafter, he took her to the hospital. When a question was put by the Court with regard to the Test Identification Parade conducted by the police, then she could not understand the question and could not give reply. This witness was cross-examined and it was admitted that one pig had given a bite, however, it was specifically stated that the blood had come out not because of any pig bite but because of the appellant, who is standing in the dock. Again in the cross-examination, she pointed out towards the appellant and stated that it is the same person, who had given her toffee and money. A suggestion was denied by her that the offence was not committed by the appellant but somebody else had committed the offence. This witness once again specifically stated that it is the same person, who had committed the offence. In reply to a specific question, it was stated by the prosecutrix that in fact, she had seen the appellant at the time of incident and it is incorrect to say that she is narrating the incident as she has been tutored by her mother.

(13) Rishabh Vijay (PW-5) has stated that he was playing in playground along with the friends, which is situated in front of Thakur Baba. At that time, one person came out the public toilet and he was wearing underwear and had pant in his hand. It was around 04:00-05:00 PM. There was a blood stain on the side of the shirt of the said person and he had seen that person running away from the spot and he can identify him. This witness identified the appellant in the dock and stated that he is

the same person, who had come out of the public toilet and had run away. It is further stated that thereafter some relatives of the prosecutrix went to the public toilet and shop. This witness was told that one girl is lying in the toilet and is bleeding. The girl who was lying in the toilet was the niece of Kamal Singh. In cross-examination, this witness has admitted that he had not seen the actual offence but clarified that the incident had taken place inside the toilet. (Although this witness had identified the appellant in the Test Identification Parade conducted by police but this witness has not said anything with regard to the holding of Test Identification Parade by the prosecution nor any question was put to him with regard to the Test Identification Parade. It appears that the Public Prosecutor was not vigilant at the time of recording of evidence.)

(14) H.N. Karnwal (PW-6) is the Nayab Tahsildar, who had conducted the Test Identification Parade. This witness has stated that on 25.05.2006 at about 11:45 AM, he had conducted the Test Identification Parade and Rishabh S/o Vijay Shankar had identified the appellant and the Test Identification Parade memo is Ex. P-4. At the time of identification parade, no police personnel was present.

(15) K.D. Sharma (PW-9) was working as Tahsildar and he has stated that on 24.04.2006, he had conducted the Test Identification Parade of the appellant and Ayodhya Prasad had identify the appellant and the Test Identification Parade is Ex. P-3. Both the witnesses were cross-examined. They have specifically stated that the police was not present at the time of Test Identification Parade. Nothing could be elucidated from the evidence of these two witnesses, which may make their evidence doubtful. Thus, it is clear that Ayodhya Prasad (PW-2) and Rishabh Vijay (PW-5) had identifed the appellant. Although Rishabh Vijay (PW-5) has not stated in his evidence with

regard to the identification of the appellant in the Test identification Parade conducted by the police but it is well established principle of law that the Test Identification Parade conducted by the police, at the best, can be treated as corroborative piece of evidence but the substantive piece of evidence is identification of the appellant in the dock.

(16) The Supreme Court in the case of **Mukesh and another Vs. State (NCT of Delhi) and others** reported in **(2017) 6 SCC 1**, has held as under:-

> "143. In *Santokh Singh v. Izhar Hussain*, it has been observed that the identification can only be used as corroborative of the statement in court.
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> 144. In *Malkhansingh v. State of M.P.*, it has been held thus:
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> > "7. … The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. …"
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> And again:
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> > "16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. …"
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> 145. In this context, reference to a passage from *Visveswaran v. State represented by S.D.M.*

would be apt. It is as follows:

> "11. …The identification of the accused either in test identification parade or in Court is not a *sine qua* non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. …"
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> 146. In *Manu Sharma v. State (NCT of Delhi)*, the Court, after referring to *Munshi Singh Gautam v. State of M.P.*, *Harbhajan Singh v. State of J&K* and *Malkhansingh* (supra), came to hold that the proposition of law is quite clear that even if there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive.
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> 147. In the case at hand, the informant, apart from identifying the accused who had made themselves available in the TIP, has also identified all of them in Court. On a careful scrutiny of the evidence on record, we are of the convinced opinion that it deserves acceptance. Therefore, we hold that TIP is not dented."

(17) It is further submitted by counsel for the appellant that the prosecutrix could not identify the appellant in the Test Identification Parade conducted by the police, therefore, it is clear that the appellant was not the person, who had committed rape. So far as the inability of the prosecutrix to identify the appellant in the Test Identification Parade conducted by the police is concerned, it is clear from the Test Identification Parade Ex. P-3, that a note was appended by the Tahsildar to the effect that the prosecutrix is minor and she is frightened and, therefore, she could not identify. When the evidence of the prosecutrix was being recorded by the Trial Court, it was noticed by the Trial Court that the prosecutrix looked at the appellant after great persuasion.

(18) The Supreme Court in the case of **Prakash Vs. State of**

Karnataka reported in **(2014) 12 SCC 133**, has held as under:-

> “13.2. Secondly, why is it that no Test Identification Parade was held to determine whether Prakash was actually the person who was seen by PW-6 Gangamma and by Ammajamma?
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> 14. Two types of pre-trial identification evidence are possible and they have been succinctly expressed in *Marcoulx v. R.* [1976] 1 SCR 763, by the Supreme Court of Canada in the following words:
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> > "An important pre-trial step in many criminal prosecutions is the identification of the accused by the alleged victim. Apart from identification with the aid of a photograph or photographs, the identification procedure adopted by the police officers will normally be one of two types: (i) the showup-of a single suspect; (ii) the line-up-presentation of the suspect as part of a group."
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> 14.1. With reference to the first type of identification evidence, the Court quotes Professor Glanville Williams from an eminently readable and instructive article in which he says:
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> > "... if the suspect objects [to an identification parade] the police will merely have him "identified" by showing him to the witness and asking the witness whether he is the man. Since this is obviously far more dangerous to the accused than taking part in a parade, the choice of a parade is almost always accepted."
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> 14.2 With reference to the second type of identification evidence, Professor Glanville Williams says:
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> > "Since identification in the dock is patently unsatisfactory, the police have developed the practice of holding identification parades before the trial as a means of fortifying a positive identification…... The main purpose of such a parade from the point of view of the police is to provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual

> prosecution. The advantage of identification parades from the point of view of the trial is that, by giving the witness a number of persons from among whom to choose, the prosecution seems to dispose once and for all the question whether the defendant in the dock is in fact the man seen and referred to by the witness."

14.3. A similar view was expressed by the Canadian Supreme Court in *Mezzo v. R.* [1986] 1 SCR 802.

15. An identification parade is not mandatory, [*Ravi Kapur V/s. State of Rajasthan, (2012) 9 SCC 284]*, nor can it be claimed by the suspect as a matter of right. [*R. Shaji v. State of Kerala, (2013) 14 SCC 266]*. The purpose of pre-trial identification evidence is to assure the investigating agency that the investigation is going on in the right direction and to provide corroboration of the evidence to be given by the witness or victim later in court at the trial. [*Rameshwar Singh v. State of J&K, (1971) 2 SCC 715]*. If the suspect is a complete stranger to the witness or victim, then an identification parade is desirable, [*Mulla v. State of U.P., (2010) 3 SCC 508]*, [*Kishore Chand v. State of H.P., (1991) 1 SCC 286]*, unless the suspect has been seen by the witness or victim for some length of time. [*State of U.P. v. Boota Singh, (1979) 1 SCC 31]*. In *Malkhan Singh v. State of M.P., (2003) 5 SCC 746*, it was held:-

> "7.....The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact."

16. However, if the suspect is known to

the witness or victim, *[Jadunath Singh v. State of U.P., (1970) 3 SCC 518]*, or they have been shown a photograph of the suspect or the suspect has been exposed to the public by the media, *R. Shaji (supra)*, no identification evidence is necessary. Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In *Visveswaran v. State, (2003) 6 SCC 73*, it was held:

> "11.....The identification of the accused either in a test identification parade or in Court is not a *sine qua non* in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence."

17. What happened in the present case? Both PW-6 Gangamma and by Ammajamma saw Prakash for the first time on the afternoon of 5th November, 1990 and they had seen him, if at all, briefly if not fleetingly. It is true that these witnesses had identified Prakash when he was produced before them on his apprehension about five or six days after the incident and also while he was in the dock in court, but the circumstances under which the dock identification took place are not quite satisfactory inasmuch as both the witnesses entered the witness box almost 4 ½ years after they are said to have first seen Prakash only briefly and without any identification parade having been conducted.

18. Given the law laid down by this Court, it would have been more appropriate for the Investigating Officer to have conducted an identification parade so that it becomes an effective "circumstance corroborative of the identification of the accused in court" *R. Shaji (supra)*. However, that was not done. The Trial Court was of the view that the evidence on record did not inspire confidence as far as fixing the identity of the suspect as Prakash is concerned. The Trial Court took into account the long lapse of time between the incident and the identification of Prakash in court, the absence of any distinguishing features of Prakash, the brief time

> for which the witnesses saw him and the fact that he was a total stranger to the witnesses. The High Court was satisfied that Prakash was suitably identified but completely overlooked the fact that even if the Trial Court had come to an erroneous conclusion, at best, it placed Prakash at the place of occurrence at 1.00 p.m. and not later. We are of the opinion that given the facts of the case, it would have been more appropriate for an identification parade to have been conducted, but its absence in this case is not necessarily fatal, there being other reasons also for not accepting the case set up by the prosecution. However, the absence of an identification parade certainly casts a doubt about Prakash's presence at Gangamma's house on 5th November, 1990."

(19) The Supreme Court in the case of **Sheo Shankar Singh Vs. State of Jharkhand and another** reported in **(2011) 3 SCC 654,** has held as under:-

> "46. It is fairly well-settled that identification of the accused in the Court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation.
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> 47. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the Court. As to what should be the weight attached to such an identification is a matter which the Court will determine in the peculiar facts and circumstances of each case. In appropriate cases the Court may accept the

evidence of identification in the Court even without insisting on corroboration.

48. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in Malkhansingh and Ors. v. State of M.P. (2003) 5 SCC 746 :

> "7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the

evidence of identification even without insisting on corroboration. (See Kanta Prashad v. Delhi Admn. AIR 1958 SC 350, Vaikuntam Chandrappa v. State of A.P. AIR 1960 SC 1340, Budhsen v. State of U.P. (1970) 2 SCC 128 and Rameshwar Singh v. State of J&K. (1971) 2 SCC 715)"

49. We may also refer to the decision of this Court in Pramod Mandal v. State of Bihar (2004) 13 SCC 150 where this Court observed:

"20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification."

(20) The Supreme Court in the case of **Mulla and another Vs. State of U.P.** reported in **(2010) 3 SCC 508** has held as under:-

“55. The identification parades are not primarily meant for the Court. They are meant for

> investigation purposes. The object of conducting a test identification parade is two-fold. *First* is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. *Second* is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Therefore, the following principles regarding identification parade emerge:
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> *(1)* an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses;
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> *(2)* this condition can be revoked if proper explanation justifying the delay is provided; and,
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> *(3)* the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses."

(21) Thus, from the facts and circumstances of the case, it is clear that the prosecutrix is a minor girl aged about 6 years. She was raped by the appellant and, therefore, her conduct in not looking at the appellant is natural. Her mental condition can be imagined, where a girl was forced to face the harsh realities of the life at the very early stage of her life. If the girl, who is aged about 6 years, is not expected to know anything except to enjoy her childhood and when she is physically and sexually violated by a fully grown man, then under these circumstances, because of a fear, if she was not looking at the appellant, then the conduct of the prosecutrix cannot be treated to be unnatural or doubtful. On the contrary, when after great persuasion by the Court, the prosecutrix looked at the appellant, then she immediately identified him as the person, who has committed rape on her. The identification of the appellant by the prosecutrix and the other witness is proved beyond reasonable doubt.

(22) Kamal Singh (PW-1) is the father of the prosecutrix, who

has stated that his cousin brother Rajesh came to his shop and informed that the prosecutrix is lying in a public toilet in a pool of blood and he immediately along with his cousin brother, went to the public toilet, where he found that the prosecutrix was lying in a pool of blood and the bleeding was going on from her private part. He brought the prosecutrix back to his house, thereafter, went to the Police Station Kotwali, where the FIR was lodged, which is Ex. P-1. The prosecutrix was sent for medical examination. The spot map Ex. P-2 was prepared. The prosecutrix had told that the person, who had committed rape on her, had given a toffee and he had removed her clothes and had done indecent act with her. This witness was cross-examined in short and has stated that in the FIR, he had not named the assailant and the allegation and the statement made in the examination-in-chief is based on the information given by the prosecutrix. Geeta (PW-3) is the mother of the prosecutrix, whose evidence is also to the same effect. Dr. B.C. Goyal (PW-7) had medically examined the appellant and he had found the appellant to be potent. Kaushal Chand Jain (PW-8) has stated that he had seen that one boy had de-boarded from a auto along with a minor girl and took her to the culvert. However, this witness could not identify the appellant in the dock and he was declared hostile. M.L. Sharma (PW-12) is the Investigating Officer, who had recorded the statements of the witnesses and had arrested the appellant. M.M. Malviya (PW-13) is the ASI, who had recorded the FIR Ex. P-1. He had also recorded the statements of some of the witnesses namely Kamal Singh, Ayodhya Prasad and Rishabh Vijay.

(23) Naushad Khan has been examined by the appellant as DW-1 to prove his alibi, who has stated that he is running a shop and the appellant was working as his employee. In cross-examination, this witness has admitted that he does not keep

any documentary evidence / register in his shop. Thus, it is clear that this witness cannot be relied upon to hold that the appellant was in the shop of this witness on the date of incident.

(24) Considering the evidence, which has come on record, this Court is of the considered view that the evidence of Ayodhya Prasad (PW-2), Prosecutrix (PW-4) and Rishabh Vijay (PW-5) is trustworthy. The ocular evidence is supported by the medical evidence of Dr. Sunita Jain (PW-11) as well as the MLC report Ex. P-12 of the prosecutrix, which clearly shows that the prosecutrix was raped and her hymen was found ruptured and the vaginal wall was found teared and the appellant was duly identified by Ayodhya Prasad (PW-2), Prosecutrix (PW-4) and Rishabh Vijay (PW-5) in the Dock, whereas Ayodhya Prasad (PW-2) and Rishabh Vijay (PW-5) had identified the appellant in the Test Identification Parade conducted by the police also.

(25) Thus, this Court is of the considered opinion that the prosecution has succeeded in establishing the guilt of the appellant beyond reasonable doubt and, accordingly, it is held that the appellant is guilty of committing the offence under Section 376 of IPC by committing rape on the prosecutrix, who is aged about 6 years.

(26) Heard on the question of sentence.

(27) It is submitted by the counsel for the appellant that although the appellant is alleged to have committed rape on the prosecutrix aged about 6 years but he is in jail for the last more than eleven and half years. The minimum sentence provided under Section 376 of IPC for committing rape of a woman below the age of 16 years is 10 years. The appellant has already undergone the actual sentence for more than eleven and half years and life imprisonment awarded by the Trial Court is on higher side.

(28) If the facts of the present case, along with the impact of the incident on the mind of the prosecutrix as well as on the Society, are considered, then it leaves no iota of doubt in the mind of the Court, that the act committed by the appellant was the most gruesome one. When the Test Identification Parade of the appellant was conducted by the police, the prosecutrix, who is aged about 6 years, could not dare to look at the appellant, therefore, it was mentioned by the Executive Magistrate, that the prosecutrix is minor and too young and because of fear, is moving from one place to another and is not able to identify the accused. Similarly, when the prosecutrix appeared before the Trial Court, to get her evidence recorded, it was mentioned by the Trial Court, that only after great persuasion, the prosecutrix looked at the appellant, who is standing in the dock, and immediately identified him. Thus, this conduct of the prosecutrix, after the incident, at the time of Test Identification Parade and at the time of recording of evidence, clearly shows the impact of the incident in her mind. Unfortunately, the prosecutrix at the age of 6 years, has learnt the harsh realities of gender discrimination and gender insecurity. The parents of the small children, are not expected to keep them inside the house, so that they are not sexually violated. Every child, be a boy or girl, has a fundamental and human right to live his/her childhood with all freedoms. The incident has left so much of adverse impact on the mind of the prosecutrix, that she was even afraid of looking at the appellant. This Court can only imagine the horrifying experience of the prosecutrix and its impact on her young, innocent mind. We cannot allow the humanity to die. The effect and aftermath of rape may include both physical and psychological trauma. The possibility of development of post-traumatic stress disorder in the rape victim cannot be ruled out. The subsequent conduct of the prosecutrix

clearly indicates that she was afraid of the appellant with horrible memories of the incident. The effects of trauma may be short term or long term after the sexual assault or rape. The common emotional effects of sexual assault may be loss of trust in others, shock, fear, sense of insecurity, hopelessness etc. and if a minor girl aged about 6 years is compelled to undergo such mental trauma apart from the physical trauma, then even the time may not heal the injury sustained by the prosecutrix. Under these circumstances, one can imagine that the prosecutrix was not only shattered physically but also mentally with no healing ointment. Under these circumstances, any leniency shown to the appellant would be nothing but adding insult to the injury sustained by the prosecutrix. Deterrence is one of the essential ingredient of sentencing policy. The principle of proportionality between an offence committed and the penalty imposed are to be kept in mind, therefore, the Court must try to visualize the impact of the offence on the society as a whole as well as on the victim.

(29) The Supreme Court in the case of **Shyam Narain Vs. State (NCT of Delhi)** reported in **(2013) 7 SCC 77,** has held as under :

> **"14.** Primarily, it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions,

opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

15. In this context, we may refer with profit to the pronouncement in *Jameel* v. *State of U.P.*, wherein this Court, speaking about the concept of sentence, has laid down that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.

16. In *Shailesh Jasvantbhai* v. *State of Gujarat* the Court has observed thus: (SCC p. 362, para 7)

> "*7.* … Friedman in his *Law in Changing Society* stated that: 'State of criminal law continues to be—as it should be—a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration."

17. In *State of M.P.* v. *Babulal*, two learned Judges, while delineating about the adequacy of sentence, have expressed thus: (SCC pp. 241-42, paras 23-24)

> "*23.* Punishment is the sanction imposed on the offender for the infringement of law committed by him. Once a person is tried for commission of an offence and found guilty by a competent court, it is the duty of the court to impose on him such sentence as is prescribed by law. The award of sentence is consequential on and incidental to conviction. The law does not envisage a person being convicted for an offence without a sentence being imposed therefor.
>
> *24.* The object of punishment has been succinctly stated in *Halsbury's Laws of England* (4th Edn., Vol. 11, Para 482), thus:
>
> '482. *Object of punishment*.—The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. *The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary*

> *consideration when sentences are being decided*.'"
>
> (emphasis in original)
>
> **18.** In *Gopal Singh* v. *State of Uttarakhand*, while dealing with the philosophy of just punishment which is the collective cry of the society, a two-Judge Bench has stated that just punishment would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors.
>
> **19.** The aforesaid authorities deal with sentencing in general. As is seen, various concepts, namely, gravity of the offence, manner of its execution, impact on the society, repercussions on the victim and proportionality of punishment have been emphasised upon. In the case at hand, we are concerned with the justification of life imprisonment in a case of rape committed on an eight year old girl, helpless and vulnerable and, in a way, hapless. The victim was both physically and psychologically vulnerable. It is worthy to note that any kind of sexual assault has always been viewed with seriousness and sensitivity by this Court.

(30) The Supreme Court in the case of **Raj Bala Vs. State of Haryana** reported in **(2016) 1 SCC 463** has held as under :

> "4. We have commenced the judgment with the aforesaid pronouncements, and our anguished observations, for the present case, in essentiality, depicts an exercise of judicial discretion to be completely moving away from the objective parameters of law which

clearly postulate that the prime objective of criminal law is the imposition of adequate, just and proportionate punishment which is commensurate with the gravity, nature of the crime and manner in which the offence is committed keeping in mind the social interest and the conscience of the society, as has been laid down in *State of M.P.* v. *Bablu*, *State of M.P.* v. *Surendra Singh* and *State of Punjab* v. *Bawa Singh*.

16. A court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature in its wisdom has conferred discretion on the court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the “finest part of fortitude” is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective.”

(31) Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the Life Sentence awarded by the Trial Court is just and proper, and does not call for any interference. Accordingly, the judgment and sentence 26.08.2006 passed by 4th Additional Sessions Judge (Fast Track), Shivpuri in Sessions Trial No. 127/2006 is affirmed.

The appeal fails and is hereby **dismissed.**

(Vivek Agrawal)
Judge

(G.S. Ahluwalia)
Judge

Abhi