***IN THE HIGH COURT OF DELHI**

+Crl.A.No. 121/2008

Judgment reserved on : 18th September, 2009
% Date of decision: 29th September, 2009

Virender ... Appellant
through: Mr. S.B. Dandapani, Advocate

VERSUS

The State of NCT of Delhi ....Respondent
through: Mr. Manoj Ohri, APP for the state

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers 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

GITA MITTAL, J

1. The present appeal lays a challenge to a judgment dated 17th August, 2007 passed by the learned Additional Sessions Judge returning a finding of guilt against the appellant for commission of an offence under the provisions of Section 376 of the IPC in the case arising out of FIR No. 234/04 registered by the police station Gokul Puri on 29th April 2005. The appellant also assails the order dated 21st August, 2007 sentencing him to undergo rigorous imprisonment for the period of seven years and imposing fine of Rs.1,000. In default of payment of the fine, he was sentenced to undergo simple imprisonment of 10 days. The court further directed benefit under section 428 of the CrPC to be

given to the appellant.

2. Briefly stated, the case of the prosecution against the appellant was that on 28th April, 2005 at 10.30 a.m., in a house in front of the house of one Bhule Ram Choudhary, Gali No. 2, Sadat Pur, Delhi, he had committed rape upon the prosecutrix by committing sexual intercourse with her without her consent. The appellant pleaded not guilty and had claimed trial. A total of 13 witnesses were examined by the prosecution in support of its case. The conviction rests primarily o the evidence of the prosecutrix who was examined as PW1; PW-7 her father Raju Austin; PW10 Dr. Manisha who proved her MLC and PW 11 Ms. Poonam Chaudhary, the Metropolitan Magistrate who recorded the statement under section 164 of the CrPC of the prosecutrix.

3. Mr. S.B. Dandapnai, learned counsel for the appellant has strongly contested the finding of guilt returned by the learned trial court contending that there are contradictions in all material particulars in the three statements given by the prosecutrix; the first being the statement recorded under section 161 of the CrPC; the second, being the statement recorded by the learned Metropolitan Magistrate under section 164 of the CrPC and the third, being her deposition in court. The first plank of challenge is based on the plea that even if the contradictions in matters of detail were ignored, however the prosecutrix has contradicted herself in her statements with regard to the very place of occurrence. Learned counsel has submitted at some length that

this is a major contradiction. The second major contradiction relied upon by learned counsel for the appellant relates to the manner in which she was allegedly saved from the clutches of the appellant. The submission is that in view thereof the prosecution has failed to establish the case laid against the appellant.

4. It is also contended on behalf of the appellant that the prosecution deserves to be disbelieved for its failure to produce a material witness named in the statement of the prosecutrix and that the same nails the falsity in the case set up against the appellant. The further submission is that PW 4 Neelam who was set up by the prosecution as being the person who arrived at the scene of occurrence and saved the prosecutrix, has turned completely hostile and has denied any such occurrence.

5. Mr. Dandapani has painstakingly urged that even if the allegations made by the prosecutrix are taken as true, still they are insufficient to bring home the charge of rape against the appellant. The submission is that the medical evidence led by the prosecution also does not support any finding or conclusion of rape. Learned counsel further urges that the learned trial court has erred in completely ignoring the explanation given by the accused in his statement recorded under section 313 of the CrPC as to the motive for his implication in the false case set up against him.

6. PW 9 Dr. Gopesh, the Radiologist who conducted the examination of the prosecutrix on 29th April, 2005 and proved his

report on record as Exh. PW9/A. According to PW 9, the prosecutrix was aged between 12-13 years. The MLC (Exh. PW 10/A) recorded on 28th April, 2005 mentions her age at 11 years.

7. So far as the occurrence is concerned, in the statement recorded by the police under section 161 of the CrPC on 28th April, 2005 which was proved on record as Ex PW1/A, the prosecutrix had stated that she was a student of class 3; that at about 10.30 a.m. on 28th April, 2005, she was standing outside her house; that the appellant who resides in front of her house had called her and handed over a twenty rupee note to purchase a bottle of a cold drink for him; that she went to the nearby shop and brought the cold drink. When she went with the cold drink and the balance money to his house, the appellant grabbed her and put her on the ground. The prosecutrix wanted to raise a hue and cry when the accused covered her mouth with his hand and forcibly removed her clothes. He removed his own clothes as well and thereafter did 'galat kaam' with her. He threatened the prosecutrix not to disclose the same to anybody and left her. The prosecutrix has stated that thereafter she returned to her house and when her father returned after few hours, she disclosed the entire incident to him. Her father brought her to the police who sent her to the GTB Hospital for the medical check up.

8. The prosecutrix was produced before the learned Metropolitan Magistrate on 3rd May, 2005 when her statement was recorded without an oath by the learned judge under Section

164 of the Criminal Procedure Code which has been exhibited on record as Ex PW1/B. In this deposition, the appellant stated that on 28th April, 2005, the appellant herein had come to her house and told her to get a cold drink for which he had given her the money. She had got the cold drink. The prosecutrix stated before the magistrate that at that time, other than the prosecutrix there was no one in her house and that Virender had forced her to lie on the bed; forcibly removed their clothes and then he did 'gandi harkatein'. She stated that hearing her screams, one of her aunts arrived whereupon Virender left her.

It is noteworthy that when questioned by the learned magistrate, the prosecutrix had stated that she does not understand the meaning of the oath.

9. In the deposition in court as PW 1, the prosecutrix stated that she knows the appellant very well for the reason that he was residing at the same place for 3-4 years. She made a statement similar to the one given by her under section 161 of the CrPC so far as the place of occurrence was concerned. In her statement, at one place she stated that the appellant had misbehaved with her and that he did 'galat kaam' with her. The witness explained galat kaam to mean as to what 'a husband does with his wife in the night'. Certain additions in this statement so far as what happened there after are pointed out. For the first time the prosecutrix states that when she had shouted for help, one aunty (who she now named as Neelam) asked another lady who was

passing by to ascertain as to where the cries were coming from on which that lady, whose name she did not know, opened the door on which the appellant left the house while she then put on her clothes and returned to her house. In the evening, when her father returned, she narrated the incident to him. She was taken by her father to the police station and her statement was recorded thereupon. She identified the underwear which had been seized by the police as the one worn by her at the time of incident. The statement given by her to the police and the one under section 164 of the CrPC before the Metropolitan Magistrate were proved on record as Exh PW 1/A and Exh PW 1/B respectively.

10. The prosecutrix had denied the suggestion put on behalf of the appellant to the effect that her father had taken a loan of Rs.4,000/- from the appellant three months prior to the registration of the case with the promise to return the amount within one month. It was further suggested to the prosecutrix that her father had only returned Rs.1,000/- in three months and that the appellant had come to her house at about 7 a.m. on 28th April, 2005 to seek the balance money from her father for the reason that he was leaving for his native village and needed the same. The prosecutrix also denied the suggestion that when the accused again demanded the money in the evening, her father refused to return the money and for this reason the prosecutrix had been tutored to make the statement against the accused

person and he has been falsely implicated.

These very suggestions were also put to Shri Raju Austin father of the prosecutrix, who testified as PW 7. He too denied the same.

11. The entire foundation to bring home the charge of rape on the appellant rests on the attribution of 'galat kaam' to him by the prosecutrix in Exh PW 1/A (statement under section 161 of the CrPC) as well as the statement made in court. The prosecutrix has referred to his acts as 'gandi harkatein' in Exh. PW1/B recorded by the learned magistrate.

12. It needs no elaboration that a conviction can be based on the uncorroborated evidence of a prosecutrix if the same inspires complete confidence.

13. It would be useful to refer to certain observations of the Apex Court in the pronouncement reported at ***2007 Crl.L.J. 4704 Radhu vs. State of Madhya Pradesh*** which succinctly laid down the applicable principles thus:-

> “5. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well

settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

15. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned Counsel for the respondent submitted that defence had failed to prove that Mangilal, father of prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix, of the suggestion made on behalf of the defence, that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money, they had made the false charge of rape, to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication, does not have much relevance, as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the Trial Court and High Court erred in returning a finding of guilt."

14. Inasmuch as the present case is concerned with allegations

of rape, a sexual offence, the ingredients of the offence must be considered. In this behalf, reference deserves to be made to Medical Jurisprudence and Toxicology (Twenty First Edition) by Modi at page 369 which reads thus :

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

15. The necessary ingredients which are to be satisfied to bring home the charge under section 376 of the IPC have been stated in the pronouncement of the Apex Court in ***MANU/SC/844/2006 Santosh Kumar vs. State of U.P***. The court placed reliance in para 7 on the texts on medical jurisprudence by Modi (considered above). Parikh and the Encyclopadia of Crime & Justice which were cited in paras 38 to 39 of ***Madan Gopal Kakkad v. Naval Dubey MANU/SC/0509/1992 : [1992]2SCR921*** as follows :-

> "38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.
>
> 39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:
>
> ...even slight penetration is sufficient and emission is unnecessary.
>
> Therefore, absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed."

16. The essentials of the offence have been described in ***2009 CriLJ 396 State of Punjab vs. Rakesh Kumar*** thus :-

> "Rape" or "Raptus" is what a man hath carnal knowledge of a woman by force and against her will (Co. Litt.123-b); or as expressed more fully, 'rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will' (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape; 1 Hon.6, 1a, 9 Edw. 4, 26a (Hale PC 628). In the crime of rape, 'carnal knowledge' means the penetration to any the slightest degree of he organ alleged tohave been carnally known by the male organ of generation (Stephen's "Criminal Law" 9th Ed. p. 262). In 'Encyclopodia of Crime and Justice' (Volume 4, page 1356) it is stated ".....even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation

> with violence of the private person of a woman-an-outrage by all means. By the very nature of the offence it is an obnoxiuos act of the highest order."

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

This was reiterated in ***(1992) 3 SCC 204 Madan Gopal Kakkad vs. Naval Dubey*** wherein the Apex Court held that it is not essential that hymen should be ruptured, provided it is clear that there was penetration even if partial.

18. In this case, the Apex Court had expression concern that all sexual assaults on female children are not reported and do not come to light, there is an alarming and shocking increase of such cases. Children were ignorant of the act of rape and are not able to offer resistance and become easy pray by lusty brutes who display the unscrupulous, deceitful and insidiuos art of luring female children and young girls. Therefore, such offenders who are menace to the citilized society should be mercilessly and inexorably punished in the severest terms.

19. Thus in order for the offence of rape to be complete, it is essential to establish even slightest penetration. (Ref : ***MANU/SC/0080/1978 : 1978 CriLJ 1804 Dr. S.P. Kohli, Civil***

Surgeon, Ferozpur vs. High Court of Punjab & Haryana through Registrar.)

20. In ***MANU/SC/7825/2008 Moti Lal vs. State of M.P.***, the Apex Court had observed that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault -- it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

The evidence of PW 1 is to be tested on these touchstones.

21. In the light of the applicable law, the testimony of a prosecutrix deserves to be recorded with utmost sensitivity and care. Regard must be had to the trauma which the victim is undergoing as well as the unwarranted feeling of shame the victims of such offence feel. At the same time, the trial courts must discharge the onerous task of ensuring that the complete truth is brought on record so as to facilitate adjudication and the basic question that is complicity of the accused in the

commission of the offence is correctly answered. The trial court must be satisfied that the prosecutrix has understood the essence of the acts which were committed by the accused which must be borne out from the recorded testimony. These must be sensitively brought out and recorded in the testimony of the victim.

22. It is to be noted that the embarrassment, and reservations of those concerned with the proceedings including the prosecutrix, witnesses, counsel may result in a camouflage of the trauma of the victim's experience. The judge has to be conscious of these factors and rise above any such reservations to ensure that they do not cloud the real facts and the actions which are attributable to the accused persons. The trial courts must be alive to the onerous responsibility which rests on their shoulders and be sensitive in cases involving sexual abuse.

23. It is, therefore, necessary and incumbent on the court to sensitively examine a prosecutrix in a trial relating to commission of an offence under section 376 of the IPC to ensure that the prosecutrix understands and brings out in her deposition as to what has transpired. This requires a matured and sensitive handling by the court.

24. The testimony of the prosecutrix as has been recorded brings the acts attributed to the appellant into sphere of conjecture and speculation. Therefore, it is essential to examine the medical evidence which was led by the prosecution.

25. The prosecutrix was medically examined at 10.50 a.m. on 28th April, 2009 by Dr. Anjali. This doctor was not produced in the witness box. The MLC which was recorded has been proved by her colleague Dr. Mamta who was examined as PW 10 who proved her writing and signatures thereon. The doctor had recorded that there were no marks of injury on the body of the prosecution. On the vaginal examination, the doctor has noted that a old healed tear was present in the hymen and that the vagina admitted tip of only one finger.

26. Her vaginal smear was sent for forensic testing. The report of the Forensic Science Laboratory dated 28th April, 2005 Exh. PW 13/F-1 states that no semen was detected on exhibit PW1/A, 1/B and 1/2 i.e. two microslides sent to the laboratory and one dirty underwear. It is noteworthy that the prosecution has made no effort to connect the two underwears which were sent to the Forensic Science Laboratory with the one worn by the prosecutrix and which one was worn by the appellant. It is to be kept in mind that the medical examination was conducted late in the night while the occurrence took place in the morning.

27. In the given facts, one essential fact also deserves to be noticed. The MLC (Exh PW 10/A) which was prepared on the medical examination of the prosecutrix has been proved on record. This document however fails to record any opinion on the examination which was conducted by the doctor. It fails to give any opinion as to whether the prosecutrix had been sexually

assaulted. The doctor who conducted the medical examination was not available to the prosecution and was not produced in the witness box.

28. Mr. Ohri, learned APP for the prosecution has drawn my attention to the Medical Jurisprudence and Toxicology (Law Practice & Procedure) authored by Dr. K.S. Narayan Reddy wherein at page 439 in the portion dealing with examination on the issue of 'Rape on Children', the author has observed thus:-

> "....As the age and size of the infant increases, the pattern of injury will become less marked but the circumferential tears of the vestibular mucoas are found up to the age of six years or more. Full penile penetration produces bruising of the vaginal walls and frequently tears of the anterior and posterior vaginal walls. Anterior tears can involve the blader and the posterior tears the anorectal canal. Vaginal vault may rupture, and there may be vaginal herniation of abdominal viscera. The hymen may be entirely destroyed or may show lacerations. Blood may be oozing from the injured parts, or clots of blood may be found in the vagina. There may be mucopurulent discharge from the vagina. In digital penetration of the infant vagina, there is frequently some scratching or bruising of the labia and vestibule, but the circumferential tears are absent. The hymen shows a linear tear in the posterior or posterolateral quadrant, which may extend into the posterior vaginal wall and on to the skin of the perineum and may involve the perineal body. Ano-rectal canal is rarely involved. Bruising in the margins of tear and of anterior vaginal wall are common, but vaginal vault injury is rare. Any attempt to separate the thighs for examination causes great pain, because of the local inflammation. The child walks with difficulty due to pain. The absence of marks of violence on the genitals of the child, when an early examination is made is strong evidence that rape has not been committed."

There is no opinion available of the doctor who conducted

the examination. The MLC when examined in the context of the medical jurisprudence, does not appear to assist the prosecution.

29. So far as reliance on medical jurisprudence is concerned, it was observed by Fazal Ali, J in ***MANU/SC/0120/1977 : 1977 CriLJ 817 Pratap Misra vs. State of Orissa*** that medical jurisprudence is not an exact science and it is difficult for any doctor to say with precision and exactitude as to when a particular injury was caused as to the exact time when the appellants may have had sexual intercourse with the prosecutrix.

30. In ***R vs. Ahmed Ali 11 WR Cr. 25*** Nariman, J had made observations on medical evidence. It was stated by the learned Judge that the evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion.

Even opinion with regard to rupture of a hymen has been held to be inclusive so far as commission of an offence of rape is concerned.

31. It is trite that medical evidence would at best be a matter of mere opinion. In the instant case certainly from the medical evidence brought on record, no conclusive finding with regard to the charge against the appellant can be returned.

32. As pointed out by learned counsel for the appellant, the

prosecutrix has also vacilated on the issue as to the place of occurrence. In the deposition given by her to the Magistrate, she has stated that the incident occurred in her house. Her explanation in court that there was a hearing error on the part of the Magistrate is controverted by the statement to the Magistrate itself as she further clarified that other than the prosecutrix, there was no one in her house at that time.

33. So far as the contradiction in the place of occurrence in the statement recorded by the learned Magistrate is concerned Mr. Manoj Ohri, learned APP has placed reliance on the explanation given by PW 1. In her deposition in court, the prosecutrix has stated that the incident had occurred at the house of the accused and sought to explain the contradictions in Ex PW 1/B as inadvertence in the hearing process on the part of the learned Magistrate.

It is to be noted that the learned Metropolitan Magistrate appeared in the witness box as PW 11. Exhibit PW 1/B contains a certificate by the learned Magistrate to the effect that the statement was a “true, full and correct” account of the statement of the prosecutrix recorded by her in her chamber. It also certified that the same had been read over to the prosecutrix and admitted by her to be correct. This statement was sent under sealed cover to the court concerned.

34. In the factual narration noted above, the statement of the prosecutrix with regard to the manner in which she escaped from

the clutches of the appellant also assumes importance. While nothing was said in her statement under section 161, she has drastically improved on the same in the statement made by her under section 164 of the CrPC. Her deposition in court improved even further on it and for the first time discloses the name of the aunty as Neelam. She further stated that Neelam had sent yet another lady into the premises.

35. It is noteworthy that Raju Austin appearing as PW7 had stated that Neelam was a neighbour and disclosed the name of the second lady as Kela. PW7 had deposed that he had informed the police about her identity.

No effort has been made to produce the lady who would have been a material witness in support of the prosecution.

36. Neelam was examined as PW 4 before the court who stated that she did not know anyting about the case as nothing had happened in her presence and she had not seen anything. She denied any acquaintance with the appellant and also stated that she did not know who was the prosecutrix. The witness was declared hostile and she had denied the contents of the statements attributed to her as recorded by the police. She also denied the specific suggestion that on 28th April, 2005, the prosecutrix had told her that the appellant had committed rape upon her.

37. Learned counsel for the appellant has painstakingly pointed out that there are contradictions even with regard to the time at

which and the contents of the information which was given by the prosecutrix to her father. In this behalf, the testimony of PW 7 father of the prosecutrix has been pointed out. According to the prosecutrix, she told her father about the occurrence between 1 and 1.15 p.m. whereas her father who was examined as PW 7 stated that she told him about the incident only after 5 p.m. The police is stated to have recorded FIR No. 434/05 at about 12.30 a.m. On 29th April, 2005. PW 7 has also denied having taken loan from the appellant and the rest of the suggestions.

38. At this stage, learned counsel for both parties have drawn my attention to the examination of the appellant under section 313 of the CrPC. The appellant had stated that he was residing in the house opposite to the prosecutrix who had denied any acquaintance with her. In the answer to the last question put by the court, the appellant had stated that the case against him was false and fabricated and that prosecutrix's father has implicated him for the reason that PW 7 owed an amount to appellant of Rs.4,000/- who was asking for return of his money.

The trial court has not touched upon this issue at all.

39. The principles which are required to and weigh with the courts in the administration of the criminal law and the justice delivery system have been laid down in ***AIR 2002 SC 3206 : MANU/SC/0757/202 Ashish Batham vs. State of Madhya Pradesh***, the Apex Court had observed thus :-

"Realities or truth apart, the fundamental and

> basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise……..”

40. The evaluation or assessment of evidence which is brought on record by the prosecution would be guided by well settled principles best stated in the words of Justice V.R. Krishna Iyer in ***(1978) 4 SCC 161 (page 162 para 2) : MANU/SC/0093/1978 Inder Singh & Anr. vs. The State (Delhi Administration)*** thus :-

> “2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many, guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up ? Because the court asks for manufacture to make truth look true ? No, we must be realistic.”

41. An examination of the statement made by the prosecutrix would have to be examined in the context of the social milieu from which a victim may hail. A person who has grown up with the family surviving in a single room dwelling may carry different impressions and knowledge of intimacies. An understanding of a child as to what has been done to her would depend on her maturity, education and knowledge which could be sourced from several factors including education, exposure, environment; upbringing and media. In the Indian context, society and societal relationships still follow conservative patterns. There are large pockets even in Delhi, many communities and social groups where covering of heads and the purdah system in the presence of males is still prevalent. Physical display of affection between persons of opposite sexes in the form of even holding of hands is unacceptable, and a hug is absolutely taboo. By and large there is no physical display of affection, intimacy or closeness and gestures as hugging or kissing invite public censure even amongst the progressive and modern. The conventional Indian namaskar manifests the traditional reserve of the nation.

42. Commission of an offence under section 376 certainly requires some evidence with regard to the acts which were committed by an accused person to establish the ingredients of the offence. The statement which has been recorded in court does not at all enable any conclusion to be derived as to what was the comprehension of the prosecutrix as to what are the

relations between a husband and wife. In any traditional and conservative Indian family, any act from mere touch to the ultimate intimacy of sexual intercourse between persons not married to each other would, in common parlance, would be covered within the gamut of acts which could be labelled as “galat kaam” or “gandi harkatein”. This range would also cover the intimacies shared by a married couple. Such understanding of even the learned trial judge is manifested from the proceedings in that while putting the evidence to the appellant under section 313 of the CrPC, as question 4, it has been put to the appellant that he had “misbehaved” with the prosecutrix.

43. The prosecutrix has explained 'galat kaam' to mean 'something that the husband and wife do in the night'. No questions to ascertain the size of the house; background; whether the prosecutrix has any siblings or any other relatives who were cohabiting have been put. The record does not indicate as to what is the comprehension or understanding level of this child. The testimony of the prosecutrix does not reflect as to what is her understanding of the physical intimacy which a married couple shares.

44. In the present case, the evidence does not disclose as to the nature of the environment in which the prosecutrix was growing up. In the testimony of her father Raju Austin who appeared as PW7 and the prosecutrix as PW 1, her mother had left the house on account of quarrel with her father over his drinking habit

where was the occasion to witness intimacies between spouces. PW 1 has stated that her father earned about Rs.400-500 per week as a cleaner of private vehicles. The proseuctrix was a mere child and a student of class III years at the time of the incident.

45. In her statement before the learned magistrate on the 3rd of May, 2005, PW 1 used a less strong expression. She attributed “gandi harkatein” to the accused. The prosecutrix had stated that she did not understand the meaning of oath. Thus both statements leave the conclusion to be arrived at by the judge to be based on supposition and conjecture.

46. Having regard to the well settled principles laid down by the courts and in several judicial pronouncements of the Apex Court, the acts alleged by the prosecutrix would not by themsleves be sufficient to invite a finding of guilt for commission of an offence under section 376 of Indian Penal Code. This is not to say that such conduct is permissible or acceptable. However we are concerned with a finding of guilt for a serious charge of rape in the instant case.

47. Learned APP has placed a pronouncement of this court wherein a prosecutrix has used the same expression. In the judgment of this court reported at ***MANU/SC/2043/2009*** entitled ***Maruti vs. State***. The prosecutrix had used the same very expression to describe the offence of rape. In this case however the mother of the prosecutrix had reached the scene of

occurrence while the appellant was in the act and had corroborated the deposition of the prosecutrix.

It is noteworthy that the prosecutrix was a married lady and the report of the Forensic Science Laboratory had supported the deposition of the prosecutrix.

It is not so in the instant case.

In another judgment reported at ***MANU/SC/7825/2008 : JT 2008 8 SCC 271 Moti Lal vs. State of U.P.***, the Apex Court had reiterated the well settled principle that the victim of a sexual assault is not to be treated as an accomplice and as such her evidence does not require corroboration from any other evidence including the evidence of the doctor. It was further held that in a given case even if the doctor who examined the victim does not find any sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix if it inspires confidence.

It was further held that it is only if the court finds it difficult to place implicit reliance on her testimony which may lend assurance of her testimony, amount of corroboration require in the case of an accomplice.

48. It needs no elaboration and has been repeatedly held that whatever be the nature of evidence oral or documentary, direct or circumstantial, it is essential for the prosecution to prove the necessary ingredients of the offence. In view of the above discussion, it may not be proper to return a finding of guilt against the appellant for the commission of an offence under

section 376 based on the deposition of the prosecutrix, oral evidence or the medical evidence which has been led by the prosecution.

49. Before parting with this case, it is necessary to consider an important issue relating to the examination of a child witness as well as a one, who is the victim in the offence. There are examinations of a victim by the investigating agency; or in court (A doctor performs a medical examination). Several areas are covered by existing legislation and others by directions and guidelines in binding pronouncements of the Apex Court and this court. Jurisdiction and power conferred by the legislature is not exercised and directions in precedents not followed, having disastrous consequences upon the criminal justice dispensation system. Having regard to the importance of these issues, learned counsels appearing in the case have facilitated examination of the statutory provisions and the judicial precedents noticed hereafter.

50. The court rooms in the court building are normally crowded places. The occupants include hardened criminals as well. The court room environment is unfamiliar and would definitely be unfriendly to a child who is require to testify as a witness. The trauma if the child witness is a victim as well is only further aggravated. An already apprehensive child in an unfriendly atmosphere is in difficulty even in recounting his or her experience. Such nervous testimony is then exposed to be torn

to shards by a skillful defence lawyer.

51. The treatment of victims of sexual assault or child witnesses in such cases in court during their testimony has come up for repeated criticism. The defence strategy of repetitive questioning of the prosecutrix as to the details of the occurrence under the pretence of testing her statement for inconsistency in an attempt to secure varying interpretations of the occurrence given by her so as to make them appear inconsistent with her allegations has come up for criticism repeatedly. Faced with the frequency of crimes against women, the Parliament enacted the Criminal Law (Amendment Act) 1883 which was a statutory recognition of the need to make the law of rape more realistic. Sections 375 and 376 were amended and more penal provisions were incorporated for benefiting such custodians who molest a woman in custody and care. Section 114(a) was also added in the Evidence Act for drawing a presumption in certain prosecutions for rape involving such custodians.

52. Chapter 9 of the Indian Evidence Act, 1872 deals with 'witnesses'. As per Section 118, all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. An explanation has been incorporated by the legislature to clarify that a lunatic is not incompetent to testify, unless he is

prevented by his lunacy from understanding the questions put to him and giving rational answers. Thus so far as the competency to appear as a witness, the legislature has underlined the basic requirement of a person's understanding of the obligation to speak the truth and to give an accurate impression and possession of the mental capacity at the time of the occurrence concerning which he has to testify and to receive an accurate impression of it. This would be more so in case the witness is a child of tender years. An assessment by the court of the competency of a child who is to appear as the witness on these issues is essential. It is also necessary to ascertain as to whether the witness had a memory sufficient to retain an independent recollection of the occurrence; capacity to understanding simple questions about it and the capacity to express his/her memory of the occurrence. (Ref : ***State vs. Allen, 70 Wn,2d 690, 424 P.2d 1021 (1967***)

53. So far as the competency of a child to testify as a witness is concerned, the courts in India have relied on the proposition formulated by Justice Brewer in ***Wheeler vs. United States 159 US 523 (1895)*** who had opined that the evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convicted about the quality thereof and reliability can record conviction, based thereon.....

54. The reservation expressed with regard to evaluating the

testimony of a witness is based on apprehensions that children may be vulnerable and susceptible to be swayed by what others tell and the child witness is an easy pray to tutoring and therefore their evidence must be evaluated carefully and with greater circumspection. (Ref : ***Panchhi vs. State of U.P. MANU/SC/0530/1998 : 1998 CriLJ 4044.***)

55. It is equally well settled that if satisfied that the testimony of the child witness is a voluntary expression of what transpired and is an accurate impression of the same, no corroboration of the testimony is required. The Supreme Court has repeatedly ruled that there is no rule of practice that the evidence of a child witness needs corroboration and stated that conviction can be based on it. It is only as a rule of caution and prudence that the court may require that it would be desirable to have corroboration from other dependable evidence. (Ref : ***Dattu Ramrao Sakhare & Ors. vs. State of Maharashtra MANU/SC/1185/1997 : (1997) 5 SCC 341; Suryanarayana vs. State of Karnataka MANU/SC/0001/2001 : 2001 CriLJ 705***)

56. The manner in which evidence is required to be assessed by the courts has been laid down in a catena of decisions from ***MANU/SC/0037/1952 : AIR 1952 SC 353 Hanumant vs. The State of Madhya Pradesh***.

57. In ***Rameshwar vs. State of Rajasthan AIR 1952 SC 54*** the Apex Court was concerned with the conviction of the accused

for the rape of a 18 year old girl. The Additional Sessions Judge concerned with the appeal has certified that she did not understanding the sanctity of the oath. The evidence of the witness in court was recorded without administering any oath to her. On appeal, the sessions court held that the evidence was sufficient enough to form the basis of a moral conviction but was legally insufficient. This was overruled by the High Court which granted leave to appeal to the Apex Court.

The Apex Court observed that the omission to administer an oath goes to the credibility of the witness and not his competency. Section 118 of the Indian Evidence Act makes it clear that there is always competency in effect unless the court considers otherwise and since there was nothing to suggest incompetence, therefore section 118 would prevail.

58. It was observed that despite the certification that the witness did not understanding the nature of the oath, the court continued to take her evidence which manifested satisfaction of the witness understanding the duty to speak the truth. The accused had also never raised any objection to the same.

In this case, the Apex Court had observed that it is desirable that the judge or magistrate should always record their opinion as to whether the child understands his duty to speak the truth and also to state that why they think that otherwise the credibility of the witness would be seriously effected, so much so that in some cases it may be necessary to reject the evidence

altogether.

59. So far as power of a judge to put questions to a witness is concerned, the same is statutorily founded in section 165 of the Indian Evidence Act, 1872 which enables the judge to do so 'in order to discover or to obtain proper or relevant facts'. The statutory provision reads thus:-

> "**165. Judge's power to put questions or order production –** The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:
>
> Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:
>
> Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer, or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

60. The Delhi High Court Rules in Part E prescribe the "Practice in the Trial of Criminal Cases" and lay down therein the manner in which the record of evidence in criminal cases shall be made. Rule 1 mandates that only relevant evidence should be recorded.

Rule 2 sets out the duty of the court in the following terms :-

> "2. **Duty of Court to elucidate facts –** Magistrates should endeavour to elucidate the facts and record the evidence in a clear and intelligible manner. As pointed out in 23 P.R. 1917 a Judge in a criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence, but it is his duty to elucidate points left in obscurity by either side, intentionally or unintentionally, to come to a clear understanding of the actual events that occurred and to remove obscurities as far as possible. The vide powers given to the Court by Section 165 of the Indian Evidence Act and Section 540 of the Code of Criminal Procedure should be judiciously utilised for this purpose when necessary."
>
> (Emphasis supplied)

These rules bind the conduct of trials by the courts in Delhi.

61. Certain provisions of the Code of Criminal Procedure which deal with the recording of evidence in inquiries and trials require to be considered. Section 273 to 277 in this behalf are noteworthy. Section 280 of the Code enables a court to record remarks regarding the demeanour of the witness.

62. From the above, it is evident that there is statutory recognition of the necessity for a judge to ask certain questions to discover or obtain proper proof of the relevant facts. This assumes significance in the context of examination of a child witness where the court is first require to satisfy itself about the competency of the child to testify and thereafter to ensure that the complete testimony is brought out on record.

63. The Supreme Court has the criticised silence of the trial judges who have permitted trials to develop into a contest

between the prosecution and the defence resulting in contradictions entered into the trial. In this behalf, the observations of Chinnappa Reddy, J in the case reported at ***1981 CriLJ 609 : MANU/SC/0206/1981 Ram Chander vs. State of Haryana*** reads thus :-

> "The adversary system of trial being what is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."
>
> (Emphasis supplied)

64. The Apex Court has emphasised the wide powers of the trial court under section 165 of the Evidence Act in the case reported at ***AIR 1997 SC 1023 : (1997) 6 SCC 162 State of Rajasthan vs. Ani alias Hanif & Ors***. which observations read thus :-

> "11. We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial Court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant " in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial Court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond

the contours of powers of the Court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.

12. Reticence may be good in many circumstances, but a judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be about or combat between two rival sides with the judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised."

(Underlining supplied)

It is noteworthy that in this case the court had put questions to PW 3 with regard to certain contradictions in his cross examination. This was objected to by learned counsel for the respondent/accused.

65. The role of the court is best described in the words of the Supreme Court in the pronouncement reported at ***AIR 2004 SC 346 : (2004) 4 SCC 158 Zahira Habibulla H. Sheikh & Anr.***

vs. State of Gujarat & Ors. and there can be no better exposition of the principles than in the words of the Apex Court when it stated as follows :-

> “43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.
>
> 44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India (1991 Supp (1) SCC 271)* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out

that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to upheld the truth.

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46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer any party any right to examine, cross-examine and re-examine any witness. This is a power given to the Court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by Courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a justice decision in the case."

(Emphasis supplied)

In view of the above, the courts are bound to act in exercise

of powers under section 165 of the Evidence Act and undertake a participatory role in a trial. They are expected to act fairly especially in a trial involving possibility of a witness being bashful or embarrassed with regard to the occurrence about which she or he is require to depose, and it is the duty of the court to ensure that the complete truth is brought out is even more stringent.

66. In ***Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.*** the purpose of a trial has been stated by the court in paras 38, 39 and 40 thus :-

> "38. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.
>
> 39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.
>
> 40. The fair trial for a criminal offence consists not only in technical observance of the frame and

> forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

67. So far as witnesses are concerned, in para 41 of the judgment, the Apex Court has quoted Bentham who described witnesses as the eyes and ears of justice. The Apex Court observed the importance and primacy of the quality of the trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their bench men and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and trifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed

would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression, and injustice resulting in complete breakdown and collapse of the efifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has definite role to play in protecting the witnesses to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense

of making the proceedings before Courts mere mock trials as are usually seen in movies.

68. Despite the several pronouncements of the Apex Court as well as the High Courts, it is to be noted that the trial courts have failed to comply with the same. The present case throws an imperative issue with regard to the duty of the court so far as recording of the statement of the child witness is concerned. The statement under section 164 of the CrPC was recorded by a magistrate during the course of investigation. It would appear that individual sensibilities clouded the proceedings resulting in a camouflage of the evidence so much so that complete truth has not been brought out. This in fact defeats the statutory mandate and would be a failure to comply with the binding directions noticed herein. This aspect has a direct and immediate impact on society. For decades, the Apex Court has expressed concerns on the rate at which sexual crime is increasing especially in the context of children.

69. It was on a consideration of the sensitivities of the child that courts acted on a complaint received by it and laid down guidelines with regard to the investigation, medical examination and recording of a statement by the magistrate as well as appearance before the trial court which have been reported at ***(2007) 4 JCC 2680 Court on Its own Motion vs. State & Anr***.

70. A very sensitive pronouncement on some of the issues noticed herein is found in the judgment reported at ***62 (1996)***

DLT 563 : 1998 CriLJ 2428 Sudesh Jhaku vs. K.C.J. & Ors. when the court observed that it was high time when a fresh look was taken and principles evolved which, while protecting the child, do no harm to the defence. This statement by itself emphasises the careful balance which is to be drawn by the court and the solemn duty cast on it to ensure that while emphasising the value of the childs feelings, it is necessary to ensure that the rights of the defence are not obscured. In this case, the main argument was made to expand the definition of rape to mean sexual penetration of any bodily orifice. Certain observations by the court in para 38 on the care which is required to be taken by the judge recording testimony of a child are relevant for the purposes of the issue being considered and read thus :-

> "38. I hope that while the child is in the witness box every effort will be made by the learned trial Judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. The Prosecutor in his zeal might undervalue the child's feelings. There is need to keep a check on it. The defense counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and harassment of the witness. If the court notices any departure from this course of conduct, it should rise to the occasion promptly and effectively. Chief sexual abuse being one of the most serious and damaging criminal offences, the trial Judge shall handle the proceedings with considerable sensitivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the prosecution

establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may be of the court room itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of trial Judge to notice it. One thing more before I draw the curtain. It relates to child support persons in the court room. On that Mr. Jaitely had drawn my attention to the Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada Reaching for Solutions, 1991. In fact that the guidelines delineated above have drawn inspiration from the said Report and as regards the child support this is what it states :

"There are situations in which it is desirable to have a social worker or other friendly but "neutral" adult visible to the child, or even sitting beside a young child who is testifying. While some judges have permitted this, others have not. There have been cases where the Judge has ordered supportive persons to leave the court room, along with other members of "the public."

I am leaving the matter to the good sense of the learned trial Judge. However, one thing is certain. The proceedings have to be in camera."

(Underlining supplied)

71. The judgment of this court was assailed before the Apex Court and was heard alongwith a writ petition filed by Sakshi, an NGO. The pronouncement of the Apex Court is reported at ***AIR 2004 SC 3566 : (2004) 5 SCC 518 Sakshi vs. UOI & Ors***. On the issue being considered, the court has noticed a judgment of the Canadian Supreme Court in Her Majesty, The Queen, Appellant vs. D.O.L., Respondent and the Attorney General of Canada, etc. (1993) 4 SCR 419 wherein the Supreme Court took

note of some glaring features in cases of sexual abuse which included the innate power imbalance which exists between the abuser and the abused child; a failure to recognise that the occurrence of child sexual abuse is one intertwined with the sexual abuse of all women, regardless of age; and that the court cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions without the criminal justice system which holds stereotypical and biased views about the victimisation of women. It was observed that “system induced trauma: often ultimately serves to re-victimise the young complainant”. These observations were made in the context of Section 715.1 of the Criminal Code of Canada which permitted video taping made within a reasonable time after the alleged offence in which the complainant describes the act complained of, to be admissible in evidence, if the complainant, while testifying, adopts the contents of the video tape.

The Canadian Supreme Court observed that this provision acts to remove the pressure placed on the child victim of assault when the attainment of truth depends entirely on her ability to control her fear, her shame and the horror of being face to face with the accused when she must describe her abuse in a compelling and coherent manner. It was also observed that rules of evidence have not been constitutionalised into unaltered principles of fundamental justice. Neither they should be

interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. Rules of evidence, as much as the law itself, are not cast in stone and will evolve with time.

72. In ***Sakshi vs. UOI*** (supra) the Supreme Court though did not accept the prayer for expanding the definition of rape, however made many valuable observations especially with regard to the proceedings in the trial court in which a child victim has to testify. These observations deserve to be considered in extenso and reads thus :-

> "31. The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-a-vis Section 273 Cr.P.C. has been held to be permissible in a recent decision of this Court in State of Maharashtra v. Dr. Praful B Desai MANU/SC/0268/2003 : 2003CriLJ2033 . There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.
>
> 32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in

> miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of Sub-section (2) of Section 327 Cr.P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC."
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> (Emphasis supplied)

73. In ***Sakshi vs. UOI*** (supra), the Apex Court had observed that these legislature had failed to take note of the offences and had omitted to mention section 354 and 377 of the Indian Penal Code which are also embarrassing to recount in section 327 (2) and (3) of the Criminal Procedure Code.

74. In ***AIR 1996 SC 1383 : (1996) 2 SCC 384 State of Punjab vs. Gurmit Singh & Ors***., the Apex Court had observed that these two provisions are in the nature of exception to the general rule of an open trial. It was observed that the provisions are mandatory and cast a duty on the court to conduct the trial of rape cases etc invariably 'in camera'. The courts are obliged to act in furtherance of the functions expressed by the legislature and not to ignore its mandate and must invariably take recourse

of these provisions and hold trial of rape cases in camera. The Apex Court observed that this would would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be an open court, under gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood.

75. In the case of ***State of Punjab vs. Gurmit Singh & Ors.***(supra), the Apex Court had stated that wherever possible it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the Courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. Some activists have suggested that in addition, as far as possible, the staff in a court room who is concerned with such cases, should as far as possible be of the same gender. This is not to denigrate or make any observation on the sensivity of male judges and staff but only a consideration

towards the embarrassment and the natural reticence which is faced by a victim of sexual assault to recall such a traumatic occurrence fuelled by the feeling of guilt and humiliation which is felt by the victim by what has happened to her in the presence of strangers and gender of the judge may put the victim at ease.

76. The present case illustrates the extent of divergence in the perceptions and approach of two learned judges, one being the magistrate who recorded the section 164 statement and the other being the judge who recorded the testimony of the child witness in court. While the magistrate has put a couple of questions in an attempt to ascertain the understanding level of the prosecutrix, the testimony in court does not say so. It is well settled that the trial court is required to be satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. She clearly stated in her statement under section 164 of the CrPC that she did not understand the oath. This is not to be found in her court deposition.

77. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to

express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence. There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court. There is no such material on the record. The order sheet does not indicate that the proceedings were in camera. The name of the prosecutrix is clearly mentioned on the record even, in the charge framed and the evidence recorded.

78. Children who are victims of sexual assaults and rape carry a huge burden of unwarranted guilt and violations for which they are not responsible. The humiliation, shame and embarrassment which cloud their emotions because of the worst kind of violation they have suffered which get aggravated when required to recount the same to strangers in formal surroundings. The trauma of a child victim is only multiplied as he or she is required to repeatedly recapitulate her ordeal to the investigating agencies, prosecutors and then in court.

79. In the instant case, the evidence recorded by the learned Metropolitan Magistrate under section 164 of the CrPC and by the court appears to suggest embarrassment of the court to put questions of any kind to the prosecutrix and witness so as to elucidate the complete truth from her resulting in, not contradictory but incoherent testimony of the child victim who has concealed the essential ingredients of the offence. Use of

appropriate language would enable the necessary decency to be maintained in the proceedings and the record.

A judge is require to be mindful that the edifice on which the entire structure of the evidence of the prosecution stands is the trustworthiness of the testimony of the witness. Therefore, the manner and the language in which the evidence is recorded is of extreme importance.

80. India is a country where several languages are spoken. The Constitution recognises several of these while the number of dialects which are prevalent and in use in different parts of the country run into hundreds. Delhi is home to people from every corner of the country and the world. In this background, a communication with the child witness has added dimensions so far as this city is concerned. The court has to ascertain not only the comprehension of the child witness but also the extent of the child's vocabulary before proceeding to record a deposition. This assumes even more importance inasmuch as the same word may have different connotations and meanings in different languages and regions. The child is also being called upon to make a deposition with regard to events which may be way beyond her/his knowledge and comprehension.

81. The above discussion in no uncertain terms reiterates a hard reality that the requisite care and caution which investigation, examination and trial into sexual offences involving

child victim and child witnesses may not receive the necessary attention from the trial courts and the other concerned agencies.

82. Certain guidelines were laid down by R.C. Chopra, J in a judgment reported at ***115 (2004) DLT 174 : MANU/DE/1088/2004 Sh. Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.*** with regard to investigation and trial of cases involving commission of offences of murder under section 302; culpable homicide not amounting to murder under section 304; death of a woman under suspicious circumstances within seven years of marriage under section 304B; rape under section 376 and decoity with murder punishable under section 396 IPC were laid down. The court observed that radical improvements are required with a view to nail the real culprits and save victimisation of innocents so that the faith of general public in the criminal investigation system is not eroded. In para 9 of the judgment, the learned Judge observed that criminal investigation and trial is a journey to discover the truth. The conviction of an innocent or acquittal of a guilty is an inexcusable shame to the system. These salutary guidelines deserves to be implemented and followed to the letter.

83. It therefore needs no further elaboration that the care which is required, whether the child is victim of the offence or is one who has witnessed the occurrence would remain the same. It is also evident that on different aspects of investigation, medical examination and trial relating to commission of offences

including sexual offences wherein either the victim is a child or a child is required to appear as a witness in support of the prosecution, directions have been made and guidelines have been laid down in different judgments which have not received the attention they deserve. It would be in the interests of justice to therefore compile the same to facilitate their implementation. Upon hearing learned counsel for the parties in the present case and on a consideration of the several judgments placed by Mr. Manoj Ohri, learned APP for the state, certain additional requirements have been also noticed and set out in the preceding paragraphs. For the sake of convenience, the directions and guidelines laid down by the Apex Court and this court so far as case involving a child victim or child witness which are required to be mandatorily and urgently implemented are culled out as follows:-

I. <u>POLICE</u>

(i). On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately.(Ref: Court On Its Own Motion vs. State & Anr.)

(ii). Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(iii). The investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.(Ref: Court On Its Own Motion vs. State & Anr.)

(iv). The statement of the victim shall be recorded verbatim.(Ref: Court On Its Own Motion vs. State & Anr.)

(v). The officer recording the statement of the child victim should not be in police uniform.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi). The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear.(Ref: Court On Its Own Motion vs. State & Anr.)

(vii). The statement should be recorded promptly without any loss of time.(Ref: Court On Its Own Motion vs. State & Anr.)

(viii). The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.(Ref: Court On Its Own Motion vs. State & Anr.)

(ix). The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.(Ref: Court On Its Own Motion vs. State & Anr.)

(x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.(Ref: Court On Its Own Motion vs. State & Anr.)

(xi). The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.(Ref: Court On Its Own Motion vs. State &

Anr.)

(xii). In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.(Ref: Court On Its Own Motion vs. State & Anr.)

(xiii). The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A Cr.P.C) at the nearest government hospital or hospital recognized by the government.(Ref: Court On Its Own Motion vs. State & Anr.)

(xiv). The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.(Ref: Court On Its Own Motion vs. State & Anr.)

(xv). The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.(Ref: Court On Its Own Motion vs. State & Anr.)

(xvi). The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.(Ref: Court On Its Own Motion vs. State & Anr.)

(xvii). The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.(Ref: Court On Its Own Motion vs. State & Anr.)

(xviii). To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O., for investigations on any

particular aspect of the matter, the same shall be adverted to by the I.O. Proper entries shall be made by I.O. in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xix). Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xx). The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xxi). The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xxii). Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

II RECORDING OF STATEMENT BEFORE MAGISTRATE

(i). The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.(Ref: Court On Its Own Motion vs. State & Anr.)

(ii). In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.(Ref: Court On Its Own Motion vs. State & Anr.)

(iii). To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

(iv). The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref: Court On Its Own Motion vs. State & Anr.)

(v). Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi). No Court shall detain a child in an institution meant for adults.(Ref: Court On Its Own Motion vs. State & Anr.)

III MEDICAL EXAMINATION

(i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(ii). While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

(iii). In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.(Ref: Court On Its Own Motion vs.

State & Anr.)

(iv). In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.(Ref: Court On Its Own Motion vs. State & Anr.)

(v). The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi). In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.(Ref: Court On Its Own Motion vs. State & Anr.)

(vii). The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.(Ref: Court On Its Own Motion vs. State & Anr.)

(viii). Emergency medical treatment wherever necessary should be provided to the child victim.(Ref: Court On Its Own Motion vs. State & Anr.)

(ix). The child victim shall be afforded prophylactic medical treatment against STDs.(Ref: Court On Its Own Motion vs. State & Anr.)

(x). In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.(Ref: Court On Its Own Motion vs. State & Anr.)

IV COURT

(i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child

victim can be recorded.(Ref : Court On Its Own Motion vs. State & Anr)

(ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.

(iii) The trials into allegations of commission of rape must invariably be “in camera” . No request in this behalf is necessary. (Ref : State of Punjab vs. Gurmit Singh)

(iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: (2007 (4) JCC 2680 Court On Its Own Motion vs. State & Anr.)

(v). The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.

(vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref : Sakshi vs UOI).

(vii) Competency of the child witness should be evaluated and order be recorded thereon.

(viii) The trial court is required to be also satisfied and ought to record its satisfaction

that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence.

There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

(ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.

(x) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi)

(xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her.

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and

enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim.

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure;

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu vs. K.C.J. & Ors).

This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony.

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing.

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref : Sakshi vs UOI).

(xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref : Sakshi vs. UOI)

(xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to

harass or intimidate the child witness.

(xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref : Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.)

(xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for , to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref: AIR 1997 SC 1023 (para 12) State of Rajasthan vs. Ani alias Hanif & Ors.)

(xxii) The court should ensure that the embarrassment and reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on

account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance “gandi harkatein” or “batamezein” have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

(xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref : Sakshi vs. UOI)

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab vs. Gurmit Singh)

To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced,

humane and ensure protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child.

V GENERAL

(i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.

(ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

(iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness.

This would create and inspire a feeling of confidence and trust in the child.

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi)

(v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out.

(vi) No court shall detain a child in an institution meant for adults.(Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi). This would apply to investigating agencies as well.

(vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted.

84. The issue with regard to teaching of offences regarding sexual assault and rape itself has been a source of much discussion. I am informed that there are instances of even legal educators being bashful and embarrassed about teaching such subjects. Judges and counsels are products of the legal education. The multi-faceted problem and concerns noticed

above are not confined to ensuring gender justice in courts alone. In this background, it is absolutely imperative that these areas of law and the issues which have been raised herein are taken up with all seriousness. Perhaps the programme of continuing legal education needs to take a look on these questions.

85. As noted above, the directions laid down in the aforenoticed judgments do not appear to be strictly followed. Some of the trial courts are either not conscious of their powers and duties as conferred by the Code of Criminal Procedure and recognised by the Indian Evidence Act or hesitant to exercise them. These issues cannot be ignored any further.

86. The Delhi Legal Services Authority and the Delhi High Court Legal Services Committee are taking several initiatives so far as access to and dispensation of justice is concerned. The directions of the courts as culled out above are intended to ensure justice to both the victim and the accused.

87. For all the reasons set down above, the finding of guilt of the appellant for commission of the offence under section 376 of the Indian Penal Code is not sustainable. The appellant is stated to be in custody since 29th of April, 2005 and has spent a period of four years and five months in incarceration.

In view of the above discussion, the judgment dated 17th of August, 2007 is, therefore, set aside and quashed. As a result, the order of sentence dated 17th of August, 2007 also cannot stand and is also hereby set aside.

This appeal is allowed in the above terms.

Copy of the operative part i.e. the directions and guidelines be sent to the District Judge who may circulate the same and ensure that the same are complied with.

88. It is further directed that a copy of this judgment be sent to the Secretary, Delhi Legal Services Authority and Secretary, Delhi High Court Legal Services Committee for further action so as to ensure the implementation of the directions and guidelines laid down in para 83.

Copy of this judgment be also sent to the Director, Delhi Judicial Academy so that the several issues raised may be also addressed.

89. This court records its deep appreciation for the thorough research and able assistance rendered by Mr. S.B. Dandapani, Advocate for the appellant and Mr. Manoj Ohri, learned APP for the state in this case.

Needless to say in case of any difficulty in respect of any of the directions, it is open to any person or party concerned to make appropriate application for consideration.

This matter is disposed of in the above terms.

GITA MITTAL
(JUDGE)

September 29, 2009
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