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State Vs. Sujeet Kumar

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SooperKanoon Citation : sooperkanoon.com/1169936

Court : Delhi

Decided On : Oct-13-2014

Judge : Pradeep Nandrajog

Appellant : State

Respondent : Sujeet Kumar

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment Reserved on: September 23, 2014 Judgment Delivered on: October 13, 2014 + CRL.A. 1190/2014 STATE Represented by: ..... Appellant Ms.Aashaa Tiwari, APP SI Birmati, PS Naraina Mr.Gautam Khazanchi, Advocate with Mr.Utkarsh Saxena, Advocate for the complainant versus SUJEET KUMAR Represented by: ..... Respondent Mr.R.S.Mishra, Advocate with Mr.K.K.Sharma, Advocate CORAM: HON'BLE MR. JUSTICE PRADEEP NANDRAJOG HON'BLE MS. JUSTICE MUKTA GUPTA PRADEEP NANDRAJOG, J.

1. Criminal law was set into motion when at around 05.54 P.M. on October 06, 2012, an entry was made in the PCR form Ex.PW-2/A by Lady Ct.Anita PW-2, to the effect that a call has been received from the mobile number 8627122482 informing that a wrong act has been committed with a four years old girl near Kendriya Vidyalaya, Naraina. Lady Ct.Anita immediately transmitted the aforesaid information to Police Station Naraina where Ramji Pandey PW-3, recorded DD No.25A, Ex.PW-3/A, noting the aforesaid information.

2. Being handed over a copy of DD No.25A, accompanied by ASI Manju Dhyani PW-22 and Ct.Dinesh PW-15, SI Dhara Mishra PW-24, proceeded to Kendriya Vidyalaya, Naraina and found a crowd gathered there. On making enquiries, the police officials learnt that a four years old girl has been sexually assaulted and that the said girl has been removed to Safdarjung Hospital by a PCR van. Simultaneously, Ct.Laxmi Kant PW-17, who also received information recorded in DD No.25A reached the spot. The girl who was sexually assaulted was named N aged about two and half years.

3. Leaving Ct.Laxmi Kant PW-17, at the spot, SI Dhara Mishra PW-24, ASI Manju Dhyani PW-22 and Ct.Dinesh PW-15, proceeded to Safdarjung Hospital where they learnt that N has been admitted in the Gynecological Ward of the hospital and is not fit to make a statement as recorded in the MLC Ex.PW-1/A of N. We note that following was recorded on the MLC Ex.PW-1/A of N:

Patient N 3 yr old female child came in GRR at 6:30 pm on 6/10/12 along with PCR police constable name Virender (Belt No 7685) and with (illegible) mother and uncle Sonu. According to PCR police and uncle, patient is victim of rape. Police brought patient from road, Near Kendriya Vidyalaya W3, Ring Road, Naraina in naked body. Perennial tear involving vagina, perennial body and rectum. Bruises mark on patient neck & cheek mud present on patient body & face near lip.

4. Thereafter the aforesaid three police officials returned to the spot and made inquiries about the person who had sexually assaulted N but got no information in said regard. While making enquiries, SI Dhara Mishra met one Shahid Khan PW-5, who informed her that he had seen one boy aged about 21-22 years taking N to the jungle near Kendriya Vidyalaya, Naraina earlier in the day on October 06, 2012. SI Dhara Mishra recorded the statement of Shahid Khan under Section 161 Cr.P.C.

5. SI Dhara Mishra PW-24, made an endorsement Ex.PW-3/C beneath the copy of DD No.25A and sent the same through Ct.Dinesh PW-15, to the Police Station for registration of an FIR. Ct.Dinesh PW-15, took the endorsement Ex.PW-3/C to the police station where Ramji Pandey PW-3, registered FIR No.158/2012, Ex.PW-

3/B, under Section 376 IPC.

6. SI Dhara Mishra PW-24, again went to Safdarjung Hospital where Dr.Anita Yadav PW-1, handed over vaginal secretion, blood sample and rectal swab of N and secretion found between the fingers of N to her i.e. SI Dhara Mishra who seized the same vide memo Ex.PW-22/A. The aforesaid articles were deposited in the Malkhana on the same day i.e. October 06, 2012.

7. On the next day i.e. October 07, 2012, SI Dhara Mishra PW-24, went to the place of occurrence where she found the skirt, vest and underwear worn by N at the time of incident and a leaf stained with blood. SI Dhara Mishra seized the aforesaid articles vide memos Ex.PW-3/A and Ex.PW-3/C.

8. On October 10, 2012 ASI Manju Dhyani PW-22 and Ct.Moti Lal PW- 19, took aforesaid (sealed) articles (vaginal secretion, blood sample and rectal swab of N and secretion found between the fingers of N, clothes worn by prosecutrix at the time of incident and blood stained leaf found from the place of occurrence) to AIIMS, New Delhi and deposited the same with Dr.Anupama Raina, Senior Scientist, Department of Forensic Medicine and Toxicology, AIIMS for the purposes of DNA profiling.

9. On October 20, 2012 at about 11.00 P.M. Sujeet Kumar (hereinafter referred to as the Accused) was brought to PS Naraina by one HC Rakesh and some public persons. The public persons informed ASI Manju Dhyani PW-22, who was present in the police station, that they had apprehended the accused while he was trying to entice a minor girl aged one and half years in order to sexually assault her. An FIR No.168/2012 under Sections 363/366 IPC was registered in said regard and thereafter the accused was formally arrested by ASI Manju Dhyani.

10. On being interrogated by ASI Manju Dhyani PW-22, in the presence of SI Ram Niwas PW-11, the accused made a disclosure statement Ex.PW-22/B wherein he disclosed that ten-fifteen days ago he had raped a minor girl near Kendriya Vidyalaya, Naraina and that he is wearing same underwear which was worn by him at the time when he had raped the minor girl. ASI Manju Dhyani PW-22, seized the underwear worn by the accused vide memo Ex.PW-22/C and deposited

the same in the Malkhana on October 20, 2012.

11. Since the disclosure statement Ex.PW-22/B was pointing towards the involvement of crime of rape of N, SI Dhara Mishra PW-24 (investigating officer in the present case) arrested the accused in the present case at about 09.30 A.M. on October 21, 2012.

12. On the same day i.e. October 21, 2012 SI Dhara Mishra PW-24, moved an application Ex.PW-23/A before Manu Goyal Kharab PW-23, Metropolitan Magistrate, Dwarka Courts, Delhi seeking police custody of the accused for a period of two days. While dealing with said application, the Magistrate enquired from the accused regarding conduct of his TIP and the accused refused to participate in the same as recorded/endorsed by the Magistrate in the application Ex.PW-23/A.

13. On the next day i.e. October 22, 2012 SI Dhara Mishra PW-24, took accused to Safdarjung Hospital for conduct of his potency test. Dr.Mohit Gupta PW-21, conducted the potency test of the accused and concluded vide his report Ex.PW-21/A that there is nothing to suggest that the accused is not capable of performing sexual intercourse.

14. After the medical examination of accused, Dr.Mohit Gupta PW-21, 24, who seized the same vide memo Ex.PW-13/A. Thereafter SI Dhara Mishra proceeded to AIIMS hospital and deposited the blood sample of the accused with Dr.Anupama Raina for the purposes of DNA profiling.

15. On October 30, 2012 SI Dhara Mishra PW-24, again went to AIIMS hospital and deposited the underwear of the accused (seized and deposited by ASI Manju Dhyani PW-22, on October 20, 2012) with Dr.Anupama Raina for the purposes of DNA profiling.

16. On November 26, 2012 N was produced before Swati Katiyar, Metropolitan Magistrate, Dwarka Courts, Delhi for recording her statement under Section 164 Cr.P.C. Being relevant, we note the extract of the proceedings conducted by the Magistrate on November 26, 2012 for the purposes of recording of statement of N:

Statement u/s 164 Cr.P.C. An application for recording the statement of prosecutrix u/s 164 Cr.P.C. has been moved before the concerned MM. The same has been marked to me by Ld. ACMM. IO has produced the prosecutrix N and has identified her. Statement of IO W/SI Nitesh Belt No.D-5272, PS Naraina. I identify the prosecutrix N. RO & AC IO has now been asked to wait ouside the chamber. Only the prosecutrix and myself are in the chamber. Prosecutrix states that her name is N and that she is six years old. Prosecutrix states that name of her mother is Tuniya and that of her father is Munna. Prosecutrix has been asked about the school in which she is studying to which she has stated in a language which is not comprehensible. Accordingly in view of decision of Honble Delhi High Court in State v/s Jai Hind, decided on 13.7.12, mother of prosecutrix Smt. Tuniya has been called into chamber and has been asked to interpret the replies given by the prosecutrix. Smt.Tuniya has been asked to take oath and to interpret truthfully, the replies given by the prosecutrix. Statement of Smt.Tuniya aged about 23 years R/o Brar Square Jhuggi, Naraina. On Oath I shall interpret the replies given by the prosecutrix truthfully. RO & AC Now, the prosecutrix has been again asked about the school in which she is studying to which prosecutrix has replied (interpreted by Tuniya) school in which children study. Prosecutrix has been asked about the name of the school but the prosecutrix is not able to tell the name. Prosecutrix is also not able to tell the standard in which she is studying. Prosecutrix is unable to tell the meaning of the word truth nor is she able to distinguish between truth and lie. From the replies given by the prosecutrix I am satisfied that prosecution is not in a position to make her statement out of her own free will. Due to her tender age, the prosecutrix is not able to understand the questions and give replies. Therefore, her statement cannot be recorded u/s 164 Cr PC. The proceedings be accordingly sealed and sent to the concerned Court in a sealed cover.

(Emphasis Suppplied) 17. The seized articles deposited in AIIMS viz. vaginal secretion, blood sample and rectal swab of N, secretion found between the fingers of N, underwear of the accused, clothes worn by prosecutrix at the time of incident and blood stained leaf found at the place of occurrence were examined by Dr.Anupama Raina, Senior Scientist, Department of Forensic Medicine and Toxicology, AIIMS. A small stain was detected on the underwear of the accused as recorded in the report Ex.PA. Vide report Ex.PA it was opined that DNA profile

was obtained from vaginal secretion and blood sample of N, blood sample of accused, underwear of accused and blood detected on leaf seized from the place of occurrence; DNA profile of blood sample and vaginal secretion of N, blood detected on leaf seized from the place of occurrence and underwear of accused belong to same person N when all alleles are examined; no mixture of profiles was observed in the five exhibits profiles whereof were obtained except one allele i.e. allele 15 was not observed at loci D3S1358 in underwear of accused which could be due to less amount of DNA and no DNA profile was obtained from rectal swab of N and secretion which was found between the fingers of N.

18. Armed with the aforesaid material(s), the police filed a challan against the accused accusing him of committing rape upon N. Charges were framed against the accused for having committed offences punishable under Sections 376 and 377 IPC.

19. At the trial, the prosecution examined 27 witnesses. We proceed to note the testimonies of such prosecution witnesses as would be necessary for adjudicating the present appeal. We also need not note in detail the testimonies of the witnesses associated with the investigation of the present case for they have deposed on the liens, of factual narratives, noted by us in the foregoing paragraphs, but would be highlighting such testimonies or other witnesses which needs to be brought out for adjudication of the present appeal.

20. Dr.Anita Yadav PW-1, deposed that she had prepared the MLC Ex.PW-1/A of N. After the medical examination of N, she had handed over vaginal secretion, blood sample and rectal swab of N and secretion found between the fingers of N to SI Dhara Mishra in sealed condition. Be it noted here that the witness was not cross-examined by the accused.

21. On April 12, 2013 prosecutrix N stepped into the witness box as PW- 1A. Being relevant, we note the entire testimony of N and her crossexamination by accused which is as follows:

Q. : What is your name?. Ans. : My name is N. Q. : What is your fathers name?. Ans. : Munna. Q. : What is your mothers name?. Ans. : Tunia. Q. : What is your

brothers name?. Ans. : Noor-e-Nabi. Q. : Do you go to school?. Ans. : No.Q. : How do you spend your day?. Ans. : I play with my brother during the day. Q. : Does your brother go to school?. Ans. : No.He also does not go to school. (From the answers given by the witness to the aforesaid questions, it is apparent that she understands the nature of questions put to her and is able to give proper answers. Therefore let her testimony be recorded.) I do not know when the incident took place. On that day I was playing with my brother and he had run away. I chased him and in the meanwhile, a boy came and took me to a nearby jungle. I started weeping. Thereafter he took off my clothes and also took off his clothes and put his Haddi into my Susu. I felt pain and wept. Then I returned home while weeping. My mummy and papa were not present in the home at that time. When my mummy came home, I narrated the incident to her. Then my mummy and some police officials took me to the hospital. I can identify that person, who had committed this act with me. He is present in court today (the witness points towards the accused present in court today saying he is that boy). X X X by Sh. B. Devashekhar, Advocate for the accused. It is wrong to suggest that the accused present in court today was not the person who kidnapped me and committed the illegal act with me. It is wrong to suggest that I have been tutored by my mother and that I am deposing falsely at the instance of my mother.

(Emphasis Supplied) 22. Tunia PW-2A, mother of N, deposed that she resides in a slum dwelling in Brar Square, Naraina with her family. In the evening of October 06, 2012 she had gone to a market to buy vegetables. Her husband who is employed as a labourer had also gone to his job at that time. Before leaving the house, she had made her daughter N aged three years and son Noor-eNabi aged one year to remain in their slum dwelling and closed the door of her dwelling. When she returned from the market she met the head of her village who informed her that he had found her son on the road. She immediately ran to her dwelling and saw that her son was weeping outside the door of their dwelling but her daughter N was nowhere to be seen. She along with her brother-in-law Sonu and some villagers started looking for N. While they were searching for N they heard a person asking loudly about the parents of a girl. Her brother-in-law went to said person and saw that N was standing near said person. Some public persons had also gathered at that spot. The face and head of N were covered with mud and

blood was oozing out from her private parts. N was naked at that time and was carrying her clothes under her armpit. Her brother-in-law made a telephone call to the police upon which the police officials came to the spot. The police officials removed N to Safdarjung Hospital and she accompanied N to the hospital. N was produced before the Magistrate for making a statement but due to fear she was unable to make any statement. N remained hospitalized for a period of ten days. N has been operated twice after the incident and needs to undergo one more operation as the injuries sustained by her in the incident have still not fully healed. After about 20-22 days after the incident she along with N went to PS Naraina to enquire about the investigation conducted by the police. On entering the police station, we (witness and N) saw a prisoner being brought to the police station. N asked her not to go inside the police station as the person who had assaulted her in the jungle is present in the police station and he would assault us (witness and N) again. N became terrorized on seeing that person. She took N in her lap and asked her not to get scared. Thereafter police officials also surrounded them (witness and N) and they all persuaded N to point out the person who had committed ghastly act with her in the jungle. After lot of persuasion N pointed towards the accused as the person who had committed ghastly act with her.

23. Be it noted here that a suggestion was given to Tunia PW-2A in her cross-examination by the accused to the effect that her brother-in-law (Jeth) had kidnapped and ravished N and that the accused has been falsely implicated in the present case at the instance of the police officials.

24. Mohd. Munna PW-3A, father of N, deposed that on October 06, 2012 at about 05.00 P.M. he was returning to his slum dwelling after finishing his work. He saw that a crowd had gathered near a water tank adjacent to Ring Road, Naraina. He saw that his wife, daughter N and brother were present there. His daughter N was in a bad shape at that time and blood was oozing out from her private parts. His brother Sonu made a telephone call to the police upon which the police officials came there and removed N to Safdurjung Hospital.

25. Shahid Khan PW-5, deposed that on October 06, 2012 at about 05.00 - 05.15 P.M. he was returning to his home from his shop at Naraina. On the way he saw a

boy aged about 20-21 years taking a girl aged about 3 years towards the jungle near booster pump in Naraina Cantt. He does not know said boy. At about 07.00 P.M. he received a phone call from his neighbour to the effect that a three year old residing in their slum cluster has been raped in the jungle near booster pump. He went to the booster pump and saw that the girl who was raped i.e. N was same he had earlier seen going with the boy towards the jungle. After about 10-15 days he had gone to the police station to complain about the Army officials who were lifting the coconuts which he used to sell on the pavement. He saw the accused present in the police station at that time. He informed the police officials that the accused appears to be the same boy whom he had seen taking N to the jungle near booster pump few days ago. Being relevant, we note the following portion of the crossexamination of the witness:

On the date of incident I had reached my jhuggi at about 6 pm. I reached the spot immediately on receiving the phone call from my neighbor. At that time the victim girl N was being put in the PCR vehicle. I identified her. I did not see her parents at the spot.

26. Sonu PW-8, uncle of N, deposed that on October 06, 2012 at about 04.00 - 05.00 P.M. the wife of his brother Tunia came to him and informed him that her daughter N has gone missing. He along with Tunia other persons began looking for N. When they reached near booster pump at Ring Road, Naraina they saw N standing there in a nude condition and carrying her clothes under her armpit. Blood was oozing out of her private parts. He immediately made a telephone call to the police pursuant to which PCR officials came there and removed N to Safdarjung hospital. He and Tunia accompanied N to Safdarjung Hospital.

27. Suresh Kumar PW-18, a resident of Rajeev Gandhi Camp near Railway Line, Naraina, Delhi deposed that on October 11, 2012 at about 08.00 P.M. a religious function was being held in front of his house. While he and his family were busy hearing the hymns recited in the religious function he heard a commotion coming from near his house. He and other public persons ran towards the spot from where the sound of commotion was coming and saw that the accused was taking his daughter J aged one and half years towards the jungle surrounding the railway

line. The accused tried to run away from there but they apprehended him and took him to PS Naraina. Be it noted here that the witness was not cross-examined by the accused.

28. ASI Manju Dhyani PW-22, deposed regarding the role played by her in the investigation of the present case as noted by us in the foregoing paragraphs. Pertinently, the witness deposed that she had seized the underwear of the accused on October 20, 2012 and deposited the same in Malkhana on the same day. Being relevant, we note the following portion of the cross-examination of the witness:

I seized the underwear of accused in Safdarjung Hospital in the presence of SI Ram Niwas. It is wrong to suggest that the underwear of the accused was obtained from his residence and has been planted in this case. I did not deposit the underwear of the accused in the FSL as I had handed over the same to SI Dhara Mishra.

29. Manu Goyal Kharab PW-23, deposed that on October 21, 2012 she was posted as Duty Magistrate in Dwarka Courts, Delhi. On said day, the police officials of PS Naraina had filed an application Ex.PW-23/A before her seeking police custody of the accused for a period of two days. At the time of filing of said application, the accused was produced before her in muffled face. She enquired from the accused regarding the conduct of his TIP but he i.e. accused refused to participate in the same, which fact was recorded by her in the application Ex.PW-23/A. Be it noted here that the witness was not cross-examined by the accused.

30. SI Dhara Mishra PW-24, deposed regarding the role played by her in the investigation of the present case as noted by us in the foregoing paragraphs. Being relevant, we note the following portion of the crossexamination of the witness:

I cannot tell any specific reason why the underwear of the accused was not deposited in the AIIMS before 30.10.2012. It is wrong to suggest that the underwear Ex.P-2 does not belong to the accused and the same has been planted upon him.

31. In his statement under Section 313 Cr.P.C. the accused pleaded innocence and stated that he has been falsely implicated in the present case at the instance of by Karan and Dalip on account of animosity. The accused stated that Karan and Dalip were accompanied by two more persons and that they (Karan, Dalip and their two associates) beat him severely and firstly falsely implicated him in the crime of rape of one minor girl J and thereafter in the present case. Be it noted here that with respect to the question put to him under Section 313 Cr.P.C. regarding his refusal to participate in TIP the accused stated that: It is correct. I did so as I did not know the meaning and importance of TIP. Nobody made to understand me its relevance. 32. From the above conspectus of facts, it is apparent that the prosecution sought to prove the guilt of the accused through following circumstances:I Prosecutrix N had identified accused as the person who had ravished her on October 06, 2012 in her testimony before the Court. II Blood detected on the underwear of the accused was that of N. (Sought to be proved through the FSL report Ex.PA) III Prosecutrix N had identified accused as the person who had ravished her on October 06, 2012 in the police station few days after happening of the incident. (Sought to be proved through the testimony of Tuniya PW-3A, mother of N) IV Shahid Khan PW-5, having seen the accused taking N to a jungle near Naraina few hours before N was found near said jungle after being raped. V Accused refused to participate in the Test Identification Parade.

33. Vide impugned judgment dated February 04, 2014 it has been held by the learned Trial Court that the prosecution has not been successful in establishing that the accused was the person who had ravished N, and as a consequence thereof has acquitted the accused of the charges framed against him.

34. On the aspect of credibility of testimony of N, it has been held by the learned Trial Court that on November 26, 2012, N was produced before a Magistrate for the purposes of recording her statement under Section 164 Cr.P.C. but she did not say anything about the incident of rape or identity of the person who raped her despite the fact that the Magistrate before whom N was produced had tried to make her comfortable. N was under no fear at that time inasmuch as she was accompanied by her mother Tuniya and there is nothing on record to suggest that

the person who had raped N had scolded or threatened nor beaten N before or after the incident. In view of the fact that N did not say anything about the incident of rape or the person who had raped her at the time when she was produced before the Magistrate just about one month and twenty days after the incident gives rise to a doubt of the testimony of N, recorded after about six months of the incident, being tutored. According to the learned Judge, the aforesaid doubt is further deepened by the fact that neither N nor her mother Tuniya have narrated as to in what circumstances N accompanied accused who was a complete stranger to her to the jungle in their respective testimonies.

35. On the aspect of identification of the accused as the person who had ravished her by N in the police station, it has been held by the learned Trial Judge that as per testimony of mother of N, Tunia PW-3, N had identified accused as the person who had raped her in the police station 20-22 days after the incident. Meaning thereby, N had identified the accused in the police station between the period from October 26, 2012 to October 28, 2012. The accused was sent to judicial custody on October 23, 2012 and not remanded to police custody on any date thereafter, thus there was no occasion for the accused to have remained present in the police station on said three days (October 26, 2012 to October 28, 2012). In this view of the matter, the claim made by Tunia PW-3, that N had identified accused in the police station 2022 days after the incident does not inspire confidence.

36. On the aspect of credibility of Shahid Khan PW-5, it has been held by the learned Trial Judge that Shahid Khan appears to be a planted witness for the reasons: - (i) Shahid Khan claimed to have reached the spot where N was raped at about 07.00 P.M. on October 06, 2012 after receiving information from his neighbor about the rape of a girl from their village. The MLC Ex.PW-1/A records that N was admitted in Safdarjung Hospital at about 06.30 P.M. on October 06, 2012, meaning thereby N must have left the spot to go to the hospital at about 06.00 P.M. on October 06, 2012. Thus, there was no occasion for Shahid Khan to have seen N at the spot where she was raped at about 07.00 P.M. on October 06, 2012 and identifying N as the girl whom he had seen going with the accused to the jungle earlier in the day on October 06, 2012; (ii) SI Dhara Mishra PW-24 (Investigating Officer) deposed that on October 06, 2012 when she returned to the

spot from Safdarjung Hospital she met Shahid Khan PW-5, who informed her that he had seen N going to the jungle with the accused earlier in the day on October 06, 2012. N had been removed to the hospital before Shahid Khan had (allegedly) reached the spot. Thus, Shahid Khan PW-5, could not have informed SI Dhara Mishra that he had seen N going to the jungle with the accused earlier in the day on October 06, 2012; (iii) Shahid Khan PW-5, deposed that he had not seen the parents of N at the spot whereas as per the case of the prosecution the parents of N were present at the spot and had accompanied N to the hospital; (iv) the aforesaid fact does not find mention in the rukka prepared by SI Dhara Mishra PW-24, prepared in the present case; (v) SI Dhara Mishra PW-24, stated to have met Shahid Khan PW-5, outside his slum dwelling and recorded his statement there, which deposition belies the claim of Shahid Khan PW-5, that he had gone to the spot where N was raped soon after getting information about the rape of N and (vi) Shahid Khan PW-5, did not clearly identify the accused as the person whom he had seen taking away N to the jungle on October 06, 2012 but merely stated that he had informed the police officials that the accused appears to be the boy he had seen taking away N to the jungle on October 06, 2012.

37. On the aspect of conduct of TIP of accused, it has been held by the learned Trial Judge that no adverse inference can be drawn against the accused for his refusal to participate in TIP for the reason it cannot be accepted that Investigating Officer (SI Dhara Mishra, PW-24) had made a request for conduct of TIP of accused and accused had refused to participate in the same in view of the fact that Investigating Officer had not filed a proper application for conduct of TIP and the Magistrate (before whom application seeking remand of accused was filed) had not sent the accused to the concerned Link Magistrate for TIP.

38. On the aspect of blood of N being detected on the underwear of the accused, it has been held by the learned Trial Judge that the evidence on record is suggestive of the possibility that the blood detected on the underwear of the accused may have been manipulated for the reasons: - (i) underwear of the accused was seized fifteen days after the incident when he was arrested in connection with FIR No.168/2012. (Be it noted here that due to a typographical error it has wrongly been mentioned in the impugned judgment that the underwear of N was seized

fifteen days after the incident). It is highly improbable that the accused would have worn blood stained underwear for more than fifteen days after the incident; (ii) underwear of accused was seized on October 20, 2012 when he was arrested in connection with FIR No.168/2012, the blood sample of accused on a gauze was seized on October 22, 2012 when accused was medically examined and deposited by Investigating Officer (SI Dhara Mishra PW-24) in AIIMS hospital on the same day but the underwear of the accused was deposited in AIIMS hospital only on October 31, 2012. There was no occasion for the Investigating Officer to have deposited the underwear of the accused in AIIMS hospital on October 31, 2012, particularly when she had deposited blood sample on a gauze of the accused in AIIMS hospital on October 22, 2012 itself; (iii) the FSL report Ex.PA records that a small stain was detected on the underwear of the accused however when the said underwear was shown to ASI Manju Dhyani PW-22 and SI Dhara Mishra PW-24, during the course of recording of their testimonies several ink dots of red/magenta colour were found on the front portion of underwear; and (v) semen of accused was not detected on clothes of N worn by her at the time of incident and vaginal and rectal swab of N.

39. Aggrieved by the impugned judgment dated February 04, 2014 passed by the learned Trial Judge the State filed a petition seeking leave to appeal against the impugned judgment and leave being granted, the above captioned appeal was registered.

40. N was aged about three years at the time when her testimony was recorded in the Court on April 12, 2013. The incident in question happened on October 06, 2012. Meaning thereby, that N was aged about two and half years at the time of incident i.e. October 06, 2012.

41. The MLC Ex.PW-1/A of N records that perennial tear involving vagina, perennial body and rectum was found on the person of N at the time when she was examined on October 06, 2012, which is clearly suggestive of the fact that N was raped.

42. We note that the accused has not disputed the factum of N being raped on October 06, 2012 as noted in the impugned judgment dated February 04, 2012

passed by the learned Trial Court. What is in disputed is the identity of the person who had raped N.

43. From the afore-noted conspectus of facts, it is apparent that the main plank of the case set up by the prosecution against the accused is the dock identification of accused by N as the person who had raped her on October 06, 2012.

44. Section 118 of the Evidence Act, 1872 reads as under:

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation - 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 to them.

45. As per the provisions of Section 118 of the Evidence Act, all persons are competent to testify, unless the Court considers that by reason of tender years they are incapable of understanding the questions put to them and of giving rational answers but then it is for the Judge to satisfy himself as regards fulfilment of the requirement of the said provision. Thus, as regards competency of a person 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.

46. The evidence of a child witness cannot be rejected per se, but the court as a rule of prudence is required to consider such evidence with close scrutiny and if it is convinced about the quality thereto and the reliability of the child witness it can

record conviction based on his testimony. If after careful scrutiny of the testimony of child witness the court comes to the conclusion that there is impress of truth in it then there is no reason as to why the court should not accept the evidence of child witness.

47. The position of law relating to evidence of child witness was succinctly stated by the Supreme Court in the decision reported as (1997) 5 SCC341Dattu Ramrao Sakhare vs. State of Maharashtra in the following terms:"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

48. It is trite that the children have been accorded special treatment by the legislature (of various countries) and courts because of their special needs. The environment of a court room is unfamiliar and definitely intimidating to a child who is required to testify as a witness. The trauma faced by a child witness where a

child witness is a victim as well is further aggravated. This important subject has received attention of the United Nations as well which has framed the United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005. The UN guidelines prescribe that the children are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. The UN guidelines further prescribe that female child witness is more vulnerable than the male child witness and may face discrimination at all stages of the justice system. The UN guidelines stresses the importance of ensuring dignity and physical, mental and moral integrity of the child witness; the justice process should be sensitive to childs age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socioeconomic condition as well as special needs of the child including health, ability and capacities.

49. The assessment of competence of a child witness is not an easy task and fraught with various difficulties, some of which are being enumerated herein under: A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child has to testify in the presence of accused person and other strangers including the presiding judicial officer, the counsel of the accused, the prosecutor and court officials. The testimony of child is recorded in an atmosphere which is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom they refuse to say anything are not unknown. The child is required to give evidence in the presence of the accused. The accused will be a few paces from the child, and will invariably be staring at the child while the child gives evidence. This scares the child to no lengths and he often thinks that he would be punished for speaking the truth. In fact, children worry about seeking the accused again. The research shows that this is the most common and intense court-related worry among testifying children. Children worry about not being believed while testifying, especially the children who are victims of

sexual abuse. The research on children who are victims of sexual abuse shows that fear of disbelief is a major impediment to disclosure by children. Children assume that the word of an adult will always be taken over the word of a child. Children worry about people finding about the offence while testifying. A courtroom is a public place and few witnesses relish the public exposure that testifying entails. Children are no different. Children worry about getting yelled at, getting into trouble or being hurt while testifying. Children worry about getting their facts mixed up or forgetting things while testifying. Children may be afraid or embarrassed to say what happened. The content of a childs testimony may involve something the child is reluctant to say out loud, perhaps because it involves body parts, sexual acts or the need to repeat rude words or bad language someone said to them. Children worry about repercussions and retaliation by or against their family while testifying. It is normal for witnesses to worry about retaliation for testifying. Children are no different, except they might feel more vulnerable than an adult would. Since children see the world differently from adults, some details which may appear to be important to adults like time and place may be missing from the recollection of children. Children see adults as authority figures and will therefore accede to what they say to them. Young children can be susceptible under specific conditions. These include: when they are asked about personal events that happened a substantial period of time age, with no refresher interview in the interim; when they are questioned by a biased interviewer who pursues a hypothesis single-mindedly. Very young children (those aged between three and under) have difficulty understanding that scale models can represent real objects and are confused about their bodies that require them to represent touching on anatomical bodies. Children can assign different meanings to words than those generally understood by adults. For example, touch often means only by hand to the children. Private part often means anything under clothing to the children. Children often use words without knowing what they mean or have different understanding from adults as to meaning of a word. For example, a child could use the word glue to mean semen. Some concepts are developmentally difficult for children to understand such as behind, in front of, above, beneath etc. Children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten

the sense of shame and guilt of children as to what happened to them. Children have special difficulty in identifying the source of their beliefs, so if false information is introduced, they will confuse it with the event. It is not only cognitive abilities, memory and social and emotional factors that affect childrens abilities to give detailed and reliable statements that can be used in child abuse prosecutions. Their ability to understand and interpret the questions put to them is also crucial.

50. Over the years, much research has been done into childrens linguistic abilities and understanding, and a number of very important points may be distilled from research, some of which are being enumerated herein under: Young children are very literal in use of language, so it is essential to find out what they mean when they use words and not to assume that they have the same meaning as an adult would give them. It takes children longer to process words, so it is essential to give them time to think and respond to the question; passing during questioning can be very productive. Children will not say they do not understand, whether because they do not realize that they do not understand or because they do not want to show ignorance; they may not be aware that this is an option. Use one question for each idea and start the question with the main idea. For example, ask children did the bell ring when you were eating?. rather than asking when you were eating, did the bell ring?. Avoid jumping from one topic to another while questioning the children. Do not use word any (anything, anyone, anywhere) as these are not specific and will tend to generate the answer no; a very young child will not know what anyone means and if asked did you see anyone will answer no. Instead ask who did you see?. or did you see X?. Avoid using different or the same while questioning children: asking a child was it same as this?. is confusing for the child; by age five or six, children may be able to distinguish between the same toy - meaning the actual one they played with - and a similar one, but it may take several more years to appreciate that things generally similar are regarded by adults as different. The word inside is problematic for children: in sex abuse cases involving suspected penetration, a child may need to be asked if an object was inserted inside an orifice and could also be asked how far; this is fraught with difficulties; it is essential to find out what the child understands by inside. (For example, anything between the legs could be perceived as inside by the child) and the question needs to be asked in an age-appropriate way. Avoid using either/or

questions: adults recognize that neither choice may be accurate; this is difficult for children to do; How/why questions: in relation to why, this is seen by a child as requiring the child to defend herself to justify why something happened; why also requires a child to be able to look at motivations, reasoning from effect back to cause, which children cannot do until about ages 7 to 10. How?. may require memory of concepts; how many times did that happen?. may require ability to recognize intention and flow of events; instead of asking how did he do that?. ask what did he do?. Show me what he did?. Leading questions are confusing for children and result in children giving incorrect responses. Pronouns (he, she, they) confuse children. It is better to name the person being talked about or to ask the child to do so. (The aforesaid points have been compiled from various materials available on the internet regarding interviewing/questioning of a child witness).

51. In this regard, we note an article/paper titled as Child Witness Competency: When Should the Issue be Raised written by Ms.Sherrie Bourg Carter, a renowned Psychologist in U.S.A. The author (Ms.Sherrie Bourg Carter) notes that the Courts should test following parameters while assessing the competence to testify of a child witness:

*Adequate intelligence and memory to store information. * The ability to observe, recall, and communicate information. * An awareness of the difference between truth and a lie. * An appreciation of the meaning of an oath to tell the truth. * An understanding of the potential consequences of not telling the truth.

52. Guidance on the nature of questions which could facilitate a fair evaluation of the childs competency is also found in said article/paper. Some questions which have been suggested by Sherrie Bourg Carter for enabling the judges to determine the competency of the child include the following:

I. For determining Intelligence and Memory-For a young child, questions about family, school, counting, and knowledge of the alphabet and colours can provide sense of the childs intelligence and memory. With older children, more difficult intellectual skills determining their literacy level would provide information about their intelligence and memory. II. Ability to Observe, Recall and Communicate-Examples of recent experiences about which child can be questioned should

include what the child ate or who the child saw that day. An example of the distant past events should include what happened say on the childs birthday or memorable holiday or a field trip or a vacation. Further questioning could be about attended, and what gifts were received. (Of course, these questions are required to be put keeping in view the socioeconomic background and literacy of the child, especially in our country). III. Understanding of Truth and Lie-To assess a childs understanding of these concepts, questions about right and wrong, real and make-believe, truth and lie typically are asked.

It is important to recognize that some types of questions are more developmentally appropriate than others. For example, when assessing childrens understanding of these dichotomies, interviewers routinely ask children if they know the difference between them. However, asking children to explain the difference between two concepts is a more developmentally difficult task than asking what each concept means. In other words, questions such as, "What does it mean to tell the truth?." and "What does it mean to tell a lie?." are more developmentally appropriate for young children than asking, "What is the difference between the truth and a lie?. It also is important to recognize that very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. In one study, researchers found that none of the four-year-olds in their sample were able to define either truth or lie whereas 87.5% of the eight-year-olds were able to define both concepts (Michelle Aldridge & Joanne Wood, Interviewing Children: A Guide for Child Care and Forensic Practitioners, 1998). This does not necessarily mean that four-year-olds do not understand the meaning of truth and lies. It also does not mean that the openended questions should not be asked. Some developmentally advanced children may be able to answer in a narrative form, but if not, there are acceptable alternative questions to help determine if and how much a child understands these concepts. For example, young children usually have an easier time answering multiple-choice questions, such as "If I said my hair is brown, is that the truth or a lie?." In fact, it is quite common for interviewers or legal professionals to ask several of these basic questions. While there is nothing wrong with doing this, such questions really are not sufficient for several reasons. First, although most children can correctly answer these types of basic questions, they do not provide an answer to the real

question of whether the child understands what it means to tell the truth and what it means to tell a lie. While they may be appropriate preliminary questions; the standard "If I said my hair is brown..."

type of questions mostly establishes whether a child knows his or her colours and can provide a correct or incorrect answer. Secondly, such questions do not place children in scenarios similar to what judges are ultimately considering when determining witness competency. The pertinent question is whether a child who is placed in a particular situation (the courtroom) and asked questions about an event they either witnessed or experienced (the alleged incident) can distinguish what is the truth and what is a lie. Therefore, in addition to the relatively simple questions, more situationally relevant questions should be asked when assessing a childs competency to testify, such as: * If I told your mom that you just yelled at me, would that be the truth or a lie?. * If you told your mom that I hit you, would that be the truth or a lie?. * If you told your teacher that something bad happened to you, but it really didn't happen-you were making it up-would you be telling the truth or a lie?. Competent children should be able to consistently provide correct answers to these multiple-choice questions. IV. Meaning of Taking an OathChildren usually are not familiar with the word, oath, but most recognize the word, promise. Because taking an oath and making a promise are similar concepts, it is more developmentally appropriate and more productive to ask children if they know what it means to make a promise. Furthermore, substituting the word, promise, for the word, oath, when swearing in child witnesses has become increasingly more common and accepted throughout the legal system (Task Force on Child Witnesses, American Bar Association Criminal Justice Section, The Child Witness in Legal Cases, 2002). Still, as with other open-ended, definition-type questions, young children may not be able to readily answer the question, "What does it mean to make a promise?. If this is the case, follow-up questions also should be asked to better assess the childs appreciation, such as: * If you promise your mom that you are going to eat your lunch, what should you do?. and Why?. * If you promise to tell the truth today, what should you do?. and Why?. Children also should be asked what might happen, both to the child and the person being lied about, if they said something happened to them and it was not true. Examples of such questions are: * When you get caught telling a lie, what

usually happens to you?. * If you said that your classmate hit you and it was not true-you were making it up-what could happen to you for lying?. * If you said that your sister hit you and it really didn't happen, but your dad believed you, what could happen to your sister?.

53. Reverting to the facts of the instant case, N was produced before the Magistrate on November 26, 2012 for purposes of recording of her statement under Section 164 Cr.P.C. N was aged about two and half years at that time.

54. The first question asked by the Magistrate to N to determine her competency to make a statement was about the school in which N was studying. N was not going to school at that time. (See the testimony of N before the Court noted by us in the foregoing paragraphs). N who was just about two and half years old perhaps got scared that she would be admonished if she were to say that she does not go to school and replied that she goes to the school in which children study. The Magistrate then asked N about the name of the school and class in which she was studying. Since she was not studying in a school N obviously could not tell the Magistrate the name of the school and class in which she was studying.

55. The Magistrate ought to have first ascertained whether N studied in a school before having questioned her i.e. N about the school in which she is studying. The questions regarding the school put to N by the Magistrate completely threw N off-balance. Besides, what surprises us is that the learned Magistrate overlooked the fact that N who was less than 3 years of age would not be obviously studying in any school. The age at which children go to a school is 4 years; of course the rich and those who have money send children to play schools when the children are toilet trained. But not in the slums.

56. Thereafter the Magistrate threw a googly at N by asking her whether she understands the meaning of word truth and what is the difference between truth and lie. How could a two and half year old child explain the meaning of word truth and state difference between truth and lie. It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between truth and lie. What to talk of a two and half year old child.

57. The article/paper titled as Child Witness Competency: When Should the Issue be Raised written by Ms.Sherrie Bourg Carter (extract whereof has been noted by us in the foregoing paragraphs) notes that a research conducted amongst four year old showed that none of four year olds (who were subject of said research) were able to define either truth or law.

58. The Magistrate ought to have asked from N questions suggested in the paper written by Ms.Sherrie Bourg Carter (If I told your mom that you just yelled at me, would that be the truth or a lie?., If you told your mom that I hit you, would that be the truth or a lie?.) to determine whether N understands what is meant by truth and the difference between truth and lie. Instead, the Magistrate chose to ask hard-hitting questions from N that whether she understands the meaning of word truth and what is the difference between truth and lie. Quite obviously, N was unable to answer said questions.

59. With this, the Magistrate closed the proceedings under Section 164 Cr.P.C. by concluding that N is not competent to make a statement under Section 164 Cr.P.C. as she is not able to understand the questions put to her and give their answers.

60. The approach adopted by the Magistrate before whom N was produced for purposes of recording her statement under Section 164 Cr.P.C. to determine competency of N to make a statement was most casual and cavalier.

61. Thereafter, on April 12, 2013 N who was then aged about three years stepped into the witness box as PW-1. In her testimony, N described in sufficient detail the incident of rape which happened with her on October 06, 2012 as also identified the accused as the person who had ravished her.

62. The learned Trial Court has termed the dock identification of accused as the person who had ravished her by N as untrustworthy essentially on two counts that: - (i) N did not state anything about incident of rape or identity of person who had raped her at the time when she was produced before the Magistrate for recording of her statement under Section 164 Cr.P.C. and (ii) neither N nor her mother Tuniya have narrated as to in what circumstances N accompanied accused who

was a complete stranger to her to the jungle in their respective testimonies or statements recorded under Section 164 Cr.P.C.

63. We find that the first reason given by the learned Trial Court to conclude that the dock identification of accused by N was untrustworthy that N did not state anything about incident of rape or identity of person who had raped her at the time when she was produced before the Magistrate for recording of her statement under Section 164 Cr.P.C. is fallacious. It is not the case that the Magistrate before whom N was produced for recording of her statement under Section 164 Cr.P.C. had asked N about the incident of rape and/or identity of person who had ravished her but N had remained silent. N was not given a chance to state anything about the incident of rape and identity of person who had ravished her by the Magistrate before whom she was produced. As already stated by us in the foregoing paragraphs, the Magistrate before whom N was produced for recording of her statement under Section 164 Cr.P.C. did not record the statement of N under Section 164 Cr.P.C. as she had concluded, albeit wrongly, that N was not competent to make a statement under Section 164 Cr.P.C.

64. Concerning the second reason given by the learned Trial Judge to conclude that the dock identification of accused by N was untrustworthy that neither N nor her mother Tuniya have narrated as to in what circumstances N accompanied accused who was a complete stranger to her to the jungle in their respective testimonies or statements recorded under Section 164 Cr.P.C, suffice it to state that it is easy to visualize how N accompanied accused who was complete stranger to her to the jungle. The accused could have easily lured N to accompany him to the jungle by giving her a toffee, ice-cream or some such other thing. After all, N was just about two and half years old at the time of incident. It is possible that N got scared that she would be scolded by her parents for having gone to the jungle with a complete stranger (accused) and thus did not tell her parents (or anyone) as to the circumstances in which she went with the accused to the jungle. It is also possible that the circumstances in which she went with the accused to the jungle did not appear important to N and thus she i.e. N did not disclose the same to anyone. One cannot loss over the fact that N was brutally raped. There was a perennial tear involving vagina. The tear had ruptured even the rectum. Obviously

N had been lured to a secluded spot, hidden from public gaze, where she was raped. The focus of the trial was not how N was enticed to the secluded spot. N was not an adult girl and therefore accountable for her conduct of how she reached a lonely secluded spot.

65. We repeat, that in her testimony in the Court, N described in sufficient detail the incident of rape which happened with her on October 06, 2012 as also identified the accused as the person who had ravished her. Why would N lie?. It is not the case of the accused that family of N was inimical to him and thus had tutored N to identify him as the person who had raped her. There is no worthwhile cross-examination of N by the accused. Only bald suggestions have been given to N in her cross-examination by the accused that N is lying and he i.e. accused is not the person who had raped her.

66. We note that it was suggested to N in her cross-examination by the accused that she is deposing falsely at the instance of her mother. It was suggested to Tunia PW-2A, mother of N, in her cross-examination by the accused that it was uncle of N who had raped her and that she is deposing falsely at the instance of police officials. However, in his statement under Section 313 Cr.P.C. a completely new stand was taken by the accused that he has been falsely implicated in the present case at the instance of two person viz. Karan and Dalip. What connection did said two persons Karan and Dalip had with N and her family due to which N and her family falsely implicated the accused in the present case?. Nothing has been stated by the accused in said regard. It is also worth noting that it was not suggested to N and her family members (father Munna PW-3, mother Tunia PW-2 and uncle Sonu PW-8) in their cross-examination by the accused that they had falsely implicated him i.e. accused in the present case at the instance of Karan and Dalip.

67. Scientific evidence of DNA of Baby N being detected on the underwear worn by the accused has been negated by the learned Trial Judge and the five reasons given by the learned Trial Judge to conclude that the evidence on record is suggestive of the possibility that the blood detected on the underwear of the accused may have been manipulated have been noted by us in paragraph 38

above.

68. ASI Manju Dhyani PW-22, had deposed that on October 20, 2012 she had arrested the accused in connection with FIR No.168/2012 and seized the underwear worn by the accused at the time of his arrest and deposited the same in Malkhana on said day itself. SI Dhara Mishra PW-24, deposed that on October 31, 2012 she had deposited the underwear of the accused in AIIMS for purposes of DNA profiling. Whereas it was suggested to ASI Manju Dhyani PW-22, in her cross-examination by the accused that she had procured the underwear of the accused from his residence it was suggested to SI Dhara Mishra PW-24, in her cross-examination that the underwear in question did not belong to him and was planted upon him. The flip-flop stand taken by the accused regarding his underwear goes a long way in lending credence to the claim of ASI Manju Dhyani PW-22, that on October 20, 2012 she had seized the underwear worn by the accused at the time when she had arrested him in connection with FIR No.168/2012. We further note that ASI Manju Dhyani PW-22 and SI Dhara Mishra PW-24, have been extensively cross-examined by the accused but nothing could be elicited therefrom which would suggest that the underwear on which blood of N was detected was not that of the accused or that blood was planted by the police on the underwear of the accused.

69. As regards the reason given by the learned Trial Court that it is improbable that the accused would have worn blood stained underwear for more than fifteen days after the incident to conclude that blood detected on the underwear of accused may have been manipulated it is possible that the accused did not care much about his personal hygiene and did not change the underwear worn by him at the time of incident for a period of fifteen days. It is also possible that the accused did change the underwear worn by him at the time of incident; by sheer coincidence ended up wearing the same underwear on the day when he was arrested in connection with FIR No.168/2012 and blood was found on said underwear either because the accused did not wash said underwear after removing the same or blood stain remained on the underwear even after it being washed.

70. As regards the reason relating to difference in dates of deposit of blood sample and underwear of accused in AIIMS given by the learned Trial Court to conclude that blood detected on the underwear of accused may have been manipulated we note that the vaginal secretion, blood sample and rectal swab of N and secretion found between the fingers of N, clothes worn by N at the time of incident and blood stained leaf found from the place of occurrence was seized and deposited in Malkhana by SI Dhara Mishra PW-24, on the date of incident of itself i.e. October 06, 2012. On October 10, 2012 ASI Manju Dhayni PW-22 and Ct.Moti Lal PW-19, deposited the aforesaid articles in AIIMS for purposes of DNA profiling. On October 20, 2012 ASI Manju Dhyani PW-22, arrested the accused in connection with FIR No.168/2012. On the same day i.e. October 20, 2012 ASI Manju Dhyani PW22, seized the underwear worn by the accused at the time of his arrest and deposited the same in Malkhana. On October 22, 2012 SI Dhara Mishra PW24, took the accused to Safdarjung Hospital for conducting his potency test. After the conduct of his potency test, the doctor handed over the blood sample of accused on a gauze to SI Dhara Mishra. Due to proximity between Safdarjung and AIIMS hospitals, after collecting the blood sample of accused from the doctor at Safdarjung Hospital SI Dhara Mishra straightway went to AIIMS where she gave the blood sample to Dr.Anupama Raina for purposes of its DNA profiling. The underwear of accused was lying deposited in Malkhana on October 22, 2012 and was subsequently deposited by SI Dhara Mishra PW-24, in AIIMS on October 31, 2012 for DNA profiling. Thus, there is nothing suspicious in deposit of blood sample and underwear of accused in AIIMS on different dates.

71. As regards the presence of ink dots red/magenta colour found on underwear of accused noticed by learned Trial Court at the time when said underwear was shown to ASI Manju Dhyani and SI Dhara Mishra, it is quite possible that said ink dots got formed on the underwear when the chemicals were applied on said underwear to obtain DNA from the blood present on said underwear.

72. The presence of blood of N on the underwear of the accused corroborates the testimony of N that the accused had raped her on October 06, 2012. We thus hold that the testimony of N that the accused had raped her on October 06, 2012 inspires confidence, particularly when we find that no motive has been assigned to

N and her family members (father Munna PW-3, mother Tunia PW-2A and uncle Sonu PW-8) by the accused for his false implication in the present case. It is relevant to note it that it is the claim of prosecution that few days after the incident the accused was apprehended by some public persons while he was trying to entice a girl named J aged about one and half years. The deposition of Suresh Kumar PW-18, father of girl J, to said effect has not been controvered by the accused. (We are not examining the correctness of the reasoning given by the learned Trial Judge regarding remaining three circumstances relied upon by the prosecution to establish the guilt of the accused as circumstances (i) and (ii) relied upon by the prosecution, when seen cumulatively, are sufficient to establish the guilt of the accused person.) 73. In view of above discussion, the above captioned appeal is allowed. Impugned decision dated April 04, 2014 is set aside. The appellant is convicted of the charge framed against him : of raping Baby N.

74. The respondent is directed to remain present in Court on October 27, 2014 on which date arguments would be heard on the sentence.

75. During the arguments in the appeal, Mr.Gautam Khazanchi who appeared for the mother of Baby N showed medical papers concerning Baby N. As per the papers Baby N still requires medical treatment. So severe was the vaginal penetration that even the rectum had a tear. It would be the duty of the State to ensure that Baby N gets the best medical treatment so that the wounds she has suffered heal and she is not permanently disabled. We direct Secretary (Health), Government of NCT of Delhi to ensure that Baby N receives the best possible medical treatment, and if necessary at a reputed private hospital for which the expenses shall be borne by the State.

76. In view of the direction passed hereinabove in paragraph 75 a copy of the decision shall be sent to the Secretary (Health), Government of NCT of Delhi. (PRADEEP NANDRAJOG) JUDGE (MUKTA GUPTA) JUDGE OCTOBER13 2014 mamta

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