

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

**RESERVED ON : 11<sup>th</sup> SEPTEMBER, 2012**

**DECIDED ON : 18<sup>th</sup> October, 2012**

**+**

**CRL.A.122/2011**

**AMRIT SHARMA @ AMIT**

**....Appellant**

Through : Ms.Nitya Ramakrishnan, Amicus Curiae  
with Mr.Rahul Kripalani & Ms.Suhasini  
Sen, Advocates.

**versus**

**THE STATE**

**....Respondent**

Through : Ms. Richa Kapoor, APP.

**CORAM:**

**HON'BLE MR. JUSTICE SANJIV KHANNA**

**HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. Amrit Sharma @ Amit impugns the judgment dated 27.09.2010 in Sessions Case No.1144/2009 by which he was convicted for committing offences punishable under Sections 363/366/376 (2)(F) IPC and sentenced to undergo imprisonment for life with fine. In brief the prosecution case is as under :

2. Daily Dairy (DD) No.3A (Ex.PW-1/B) was recorded at 12.45 (night) on 18.04.2009 at police station Shalimar Bagh on getting information from Const.Vikram that a girl aged 3 - 4 years lying

unconscious near toilets, House No.52, Singalpur Village was admitted at Babu Jagjivan Ram Memorial Hospital. The DD was marked to SI Hira Lal who with Const.Naresh Pal reached the hospital. The child was unfit to make statement. SI Hira Lal made endorsement (Ex.PW-8/C) over DD No.3A and sent the rukka for lodging First Information Report under Section 376 IPC. The Investigating Officer recorded Jagbir's statement. He had informed the PCR about the child. Efforts were made to record the statement of the victim but in vain. SI Sushila Rana took photograph of the child on mobile and showed to various persons for identification. Smt.Shakuntala living in jhuggi No.101, AA-Block, Shalimar Bagh identified the photo to be that of her daughter 'N'. SI Sushila Rana met Pooja, a friend of the victim and she informed that one rickshaw puller known '*chor bhai*' had taken her with him. She further disclosed that the said rickshaw puller had offered biscuits and ₹ 10 to both of them. She declined to take the biscuits and rupee 10 note. 'N' accepted and went with him. On 21.04.2001, in her statement under Section 161 Cr.P.C., 'N' disclosed that '*chor bhai*' had taken her in the rickshaw towards the forest and thereafter, committed rape on her. She elaborated that '*chor bhai*' used to ply rickshaw and visit their '*jhuggies*'. On 25.04.2009, the accused was arrested from his jhuggi No.139-140, AA-Block, Shalimar

Bagh. He was interrogated and he made disclosure statement. Accused's underwear was seized vide seizure memo (Ex.PW-12/G). He was medically examined. During the course of investigation, statement of the prosecutrix 'N' was recorded under Section 164 Cr.P.C. The exhibits were sent to Forensic Science Laboratory and report was collected. The Investigating Officer recorded statements of the witnesses conversant with the facts and after completion of the investigation, submitted a charge-sheet against the appellant for committing the offence mentioned previously. The accused was duly charged and brought to trial.

3. In order to bring home the charge levelled against the accused, the prosecution had examined twelve witnesses in all at the trial. The accused was examined under Section 313 Cr.P.C. to explain the incriminating circumstance. He pleaded false implication at the behest of prosecutrix's mother (Smt.Shakuntla Devi) to extort money from him. After appreciating the evidence and documents on record and taking into consideration the submissions of the parties, the Trial Court concluded that the appellant was the perpetrator of the crime. Feeling aggrieved by the judgment and order of conviction, the appellant has preferred the appeal.

4. Learned counsel for the appellant assailing the findings of the Trial Court urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of PW-6 (N) and PW-11 (Pooja) without ensuring their capability to depose and identify the culprit. The prosecutrix and her friend Pooja were aged about 4-5 years on the day of occurrence, and it was improbable to recognise and identify the culprit in the Court after a gap of about one year. The learned Trial Court did not ask relevant questions to ascertain their ability to remember faces, susceptibility to suggestion, circumstances in which they made the identification and that they were in a position to give rationale answers. The appellant was not named in the FIR and the culprit was described by the victim and her friend Pooja as '*chor bhai*'. The prosecution did not collect any evidence to establish that the appellant was known as '*chor bhai*'. In his statement under Section 313 Cr.P.C., the appellant affirmatively denied that he was known as '*chor bhai*'. The Investigating Officer did not move any application before the Magistrate for holding Test Identification Proceedings. Neither the victim nor her friend Pooja had given description of the perpetrator of the crime. Identification by them in the Court for the first time after a considerable period, without a proper identification parade, was unsafe. The counsel

highlighted various discrepancies, contradictions and lapses in the investigation. She contended that the prosecutrix's mother did not report the incident to the police and did not lodge missing person report for two days. She or her family members did not attempt to trace her. Inference can be drawn that the prosecutrix had accompanied with a 'known' person. Her conduct is unnatural and inconsistent. It is mystery how the police reached Pooja. She did not inform victim's mother about N's disappearance. Adverse inference is to be drawn against the prosecution for withholding material witnesses i.e. Jagbir (who informed the police control room initially); PCR officials (who took the victim to the hospital); Riyasat Ali and Gablu, his assistant (who unloaded the milk drum from the tempo) and the Metropolitan Magistrate (who recorded statement of the prosecutrix under Section 164 Cr.P.C.). The police also did not make investigation about the lady who had left the child near Jagbir's residence. Relying on various studies and research, she highlighted, that a child witness is more likely to err than adults by choosing a wrong person in a target absent line up. This is probably true because adults take greater caution while making positive identification. She further contended that identification resting entirely on child witness testimony is problematic, particularly in respect of identification when the

children do not know the accused from before. A child witness aged about 4-5 years apparently has no mental capacity to retain memory for such a long time. She pointed out that young children have tendency to guess. They are simply impulsive in their responses. A child's inability to restrain from guessing can undermine his or her credibility as a witness. [See studies by Hans Gross et. al., Carole R. Beal et. al., Gail S. Goodman et. al., Lesile J.Carver and James W. Tanaka et. al.]. Counsel further placed reliance on '*Krishan Kumar Malik vs. State of Harayana*', (2011) 7 SCC 130, '*Mahabir vs. State of Delhi*', (2008) 16 SCC 481, '*Rameshwar vs. State of Rajasthan*', AIR 1952 SC 54, '*Caetano Piedade Fernandes and anr. vs. Union Territory of Goa, Daman & Diu Panaji, Goa,*' (3 JB) (1977) 1 SCC 707, '*Subhash Chand vs. Rajasthan*', (2002) 1 SCC 702, '*Habeeb Mohd. vs. State of Hyderabad*', AIR 1954 SC 51, '*State of U.P. vs. Jaggo*', (1971) 2 SCC 42 and '*Ramkishan Mithanlal Sharma vs. State of Bombay*', AIR 1955 SC 104. She pointed out that the Investigating Officer did not resort to the procedure of getting DNA Test or analysis to establish the identity of the appellant.

5. Learned APP supporting the judgment in its entirety, urged that it did not call for interference. The victim was put preliminary questions to ascertain if she was able to give rationale answers. The Trial

Court found that she was a competent witness and placed reliance on her testimony. She categorically identified the appellant as the perpetrator of the crime. PW-11 (Pooja), her friend corroborated her testimony without major variation. The medical evidence confirmed that the child was brutally ravished. The deficiencies pointed out by the learned counsel were dealt with by the Trial Court and are not fatal to throw away the innocent version given by both the child witnesses who had no animosity with the accused to falsely implicate him in the crime.

6. We have considered the submissions and examined the Trial Court record. At the outset, it may be mentioned that the factum of rape committed on the prosecutrix 'N' is not under challenge. Counsel for the appellant has emphasised that the appellant was not the perpetrator of the crime. The victim 'N' was found unconscious on the night intervening 17/18.04.2009 at about 11.45 P.M. and the information was recorded in Police Control Room (Ex.PW-10/A). The informant informed on phone No.9272179259 that '*Ek larki age 3 saal jise pita gaya hai jo injured hai*'. Again information was recorded in Ex.PW-10/A at 23.47 hours that the child aged 3 years who was bleeding was being taken to hospital. MLC (Ex.PW-3/A) reveals that the child was taken by HC Sube Singh, No.1081, PCR to Babu Jagjivan Ram Memorial Hospital and admitted at

12.45 A.M. on 18.04.2009. In the alleged history, it was mentioned that the child was found at the road side and was having multiple bruises over the face, fresh bleeding from perinial region. DD No. 3A (Ex.PW-1/B) was recorded at police station Shalimar Bagh by PW-1 (HC Jai Bhagwal). PW-4 (Dr.Anjali) proved MLC (Ex.PW-4/A) prepared by Dr.Sadhana. She deposed that there was fresh bleeding from perineal region, tear present, labia minora torn, skin tag and mucosal tag seen hanging from perineal and vulva region. The child was referred to LNJP Hospital as the facility for stitching the torn tag under anesthesia was not available in the hospital. PW-3 (Dr.Meet Kumar) who examined the child on 18.04.2009 proved the MLC (Ex.PW-3/A). The medical evidence produced on record confirms that rape was committed on the victim.

7. The basic and foremost issue for determination is as to whether the appellant was the perpetrator of the crime or whether he had been falsely implicated. Testimony of the victim appearing as PW-6 is crucial. PW-12 (SI Susheela Rana) visited the hospital but the child was not fit to make statement. PW-3 (Dr.Meet Kumar) categorically stated that on 18.04.2009 the patient was unfit for statement. Adverse inference, thus, cannot be drawn for delay in recording the statement of the prosecutrix. In her statement under Section 161 Cr.P.C. on 21.04.2009, the prosecutrix



gave vivid account as to how and under what circumstances she was raped by the assailant '*chor bhai*'. Her statement (Ex.PW-12/1) under Section 164 Cr.P.C. was recorded on 15.05.2009 by Sh.Neeraj Gaur, Metropolitan Magistrate. Before recording her statement, he (the Magistrate) was satisfied that the prosecutrix was in a fit state of mind and was willing to make true and voluntary statement without any fear. It is true that the Magistrate who recorded the proceedings under Section 164 Cr.P.C. was not examined. However, the accused in his statement made on 10.05.2010 did not dispute the correctness of the proceedings under Section 164 Cr.P.C. and the FSL report. Since the formal proof was not insisted by the appellant, the Trial Court did not examine the learned Magistrate. Contents of the proceedings reveal that the prosecutrix was categorical that she was raped by '*chor bhai*' who used to ply rickshaw. In her testimony in the Court, she proved the version given by her to the police under Section 161 Cr.P.C. and the Magistrate under Section 164 Cr.P.C. without deviation. She deposed :

*'Mein chowk par khel rahi thi. Chor bhai mujhe rikshaw mein bitha kar lal bagh mein le gaya tha. Mujhe mara aur chako dikhaya. Susu dall raha tha. Gaal cheel diya tha. Phir mujhe neher mein phék diya tha jisme pani nahin tha jis-se mere mathe mein chot lag gayi thi. Ek ghante ke baad mujhe pulis ne nikala aur hospital mein bharti karaya tha'.*

(I was playing in the chowk. Chor Bhai had taken me to Lal Bagh in a rickshaw. He showed me a knife and gave me beatings. He penetrated his penis. He scratched/peeled of my cheek. Thereafter, he threw me in a dry canal as a result of which I sustained injury on my forehead. After an hour, the police took me out and admitted me in the hospital.)

She claimed that she could identify '*chor bhai*'. She identified the accused present in the Court to whom she referred '*chor bhai*'. In the cross-examination, she explained that '*chor bhai*' used to ply rickshaw. He had also beaten her. In response to the question whether '*chor bhai*' had visited her house earlier, she fairly answered in negative. She admitted that when the police showed some photos, she recognised the accused and informed the police that he was '*chor bhai*' who committed rape on her. She denied the suggestion that rape was not committed by '*chor bhai*'. She denied the suggestion that she was tutored by her mother, aunt or Investigating Officer. She reiterated that she was shown a knife and subsequently, rape was committed. In response to the question that '*chor bhai*' had not taken her in a rickshaw in the *jungle*, she categorically asserted that he had taken her.

8. On critical analysis of the statement of the child witness, it appears that material facts deposed by her remained unchallenged in the cross-examination. No ulterior motive was imputed to the witness or her

mother Shakuntla Devi for falsely implicating the accused. No suggestion was put to the witness that the appellant was not known as '*chor bhai*' or that he was not present at the spot. Nothing was suggested to the witness as to where else the appellant was on the date and time of the occurrence. The appellant did not deny that he was not a rickshaw puller. Nothing was suggested to the witness that she was incapable to identify the accused.

9. Another crucial witness is PW-11 (Pooja), a child witness aged about 5-6 years. Before recording her statement, she was questioned and her statement was recorded in question/answer form. She deposed that prosecutrix 'N' was known to her and she resided in the second *gali* from her residence. About the incident, she disclosed that she and 'N' were playing in the *gali*. '*Chor bhai*' (present in the Court caught hold by hands by the police) came on a rickshaw. When '*chor bhai*' enquired '*ki bacche udhar jaoge*' (child, would you go there), she declined. Thereafter, the rickshaw-wala asked them to sit in the rickshaw. He gave ₹10 and Parle biscuit. She threw the note and biscuits. 'N' however took ten rupee note and the biscuits given by '*chor bhai*' and he took her on the rickshaw towards the *jungle*. She further disclosed that she was able to identify '*chor bhai*'. She thereafter, pointed out towards the accused and identified him as '*chor bhai*' who had taken 'N' with him. In the cross-examination,

she stated that she had not seen '*chor bhai*' earlier. She admitted that she did not disclose the incident to her mother. She explained that due to fear, she did not disclose the incident to her mother. She denied that she was telling a lie on the tutoring of her mother and no such incident happened. She asserted that she was telling the truth.

10. Scrutinising the statement of PW-11 (Pooja), it reveals that she has corroborated PW-6 N's version on all material facts. No material inconsistency or contradiction emerged in her examination to discard her version. Statement of this witness under Section 161 Cr.P.C. was recorded on 19.04.2009 prior to recording the statement of the prosecutrix 'N'. Only from her statement under Section 161 Cr.P.C. the police came to know that one '*chor bhai*' had taken the prosecutrix 'N' on his rickshaw. During the investigation, the appellant was arrested on the pointing out of the prosecutrix 'N' and PW-11 (Pooja) and was identified as '*chor bhai*' who committed rape. No suggestion was put to PW-11 (Pooja) that she was not playing with the prosecutrix when she was taken in a rickshaw or that she was not offered ₹10 and packet of biscuit. This child witness had no motive to falsely name and identify the accused. She is a material witness as she had seen the prosecutrix in the company of the accused soon before the incident.

11. PW-5 (Smt.Shakuntla Devi), prosecutrix's mother, went to the hospital after the Investigating Officer showed her the photograph of her missing daughter. She deposed that her daughter told her in the hospital that she was taken away by '*chor bhai*' in the *jungle* and thereafter, he committed rape (*ganda kaam*) on her. The accused was arrested vide arrest memo (Ex.PW-5/A) and her daughter 'N' identified him. She identified her underwear (Ex.P1). In the cross-examination, she admitted that the accused was not known to her prior to the incident and she saw him for the first time when police apprehended him on the identification of her daughter. She denied the suggestion that the accused was falsely implicated to extort money. She further denied that some other person had committed the offence and she falsely implicated the accused. She further refuted the suggestion that the prosecutrix was tutored by her.

12. We find no substance in the allegation that the accused was falsely implicated by PW-5 (Smt.Shakuntla Devi) to extort money. No foundation for such allegation was laid and nothing transpired as to when PW-5 (Smt.Shakuntla Devi) had demanded money from him. She was not aware about the whereabouts of her daughter. She was not aware if the accused was the perpetrator of the crime. She saw the accused only when the police apprehended him. Thereafter, he remained in police/judicial

custody. There was no possibility of the witness to extort money from him. The appellant being a rickshaw-puller residing in a *jhuggi* did not have any means to fulfil any such demand of the prosecutrix's mother. Moreover, a mother would not tarnish the reputation of her own daughter for the sake of money. She is not expected to let the real culprit go scot free and to extort money from an innocent. This defence deserves outright rejection.

13. Learned counsel for the appellant vehemently contended that PW-6 and PW-11 were child witnesses and it was improbable for them to identify the culprit who was not known to them prior to the incident. There was every possibility of the child witness to fault in identifying a wrong person. Dock identification is of no value as the accused alone was in judicial custody at the time of their examination and it was natural for them to point towards the accused to be the culprit. We are not impressed with these submissions. It is true that the accused was not known to PW-6 and PW-11. But it is also certain that he used to visit the *jhuggies*/colony. He also used to stay in the nearby *jhuggies* No.139-140. The child witnesses in their statement recorded under Sections 161/164 Cr.P.C. and in their deposition before the Court did not name the accused but identified him categorically stating that he was the person whom they

referred as '*chor bhai*'. In their statements, they had given specific description that the said '*chor bhai*' used to ply rickshaw and had taken the victim on the rickshaw. The accused did not deny that he was not a rickshaw puller and did not visit the spot from where the child was taken. Both PW-6 and PW-11 had interaction with the offender for sufficient time during day time in the month of April. They had sufficient opportunity to recognise him. The accused did not explain as to what prompted him to offer cash and biscuits to the child witnesses. It appears that PW-11 (Pooja) was suspicious and more cautious and did not take the bait. Identification by pseudo name '*chor bhai*' is perfectly legal and inspires implicit confidence since the accused was apprehended at the pointing out of PW-6 and PW-11.

14. The Trial Court put number of preliminary questions to the child witnesses before recording their statements to find out if they were competent to give rationale answers to the questions. After recording its satisfaction about the competence of the child witnesses to understand the questions and their ability to give rationale answers, their statements were recorded. The decision on the question whether the child witness has sufficient intelligence primarily rests with the Trial Judge. We find no good reasons to disturb the satisfaction of the Trial Court that the

witnesses were competent witness. Under Section 118 Evidence Act, no specific age has been prescribed and a child of any age can be a competent witness. Under Section 119 Evidence Act, even a deaf and dumb can be a competent witness. There is no fixed age on which a child must have arrived in order to be competent as a witness. Competency is determined at the time the child testifies rather than at the time the incident occurred.

15. Studies have revealed that traumatic experiences are likely to be highly distinctive, they may be particularly accessible to explicit memory under appropriate conditions (Bernstein, 2002; Howe, 1997).

16. As per ‘*Science Daily (Mar.17, 2008)*’ :

*“Scientists found that humans exhibit two types of memory. They call one “verbatim trace”, in which events are recorded very precisely and factually. Children have more “verbatim trace”, but as they mature, they develop more and more of a second type of memory: “gist trace”, in which they recall the meaning of an event, its emotional flavour, but not precise facts. Gist trace is the most common cause of false memories, occurring most often in adults. Research shows that children are less likely to produce false memories, because gist trace develops slowly. As a result, children’s recollections could be more reliable than those of adults, and this could lead to ramifications in the courtroom. This illustration shows the Roman two-faced god, Janus, on trial. Symbolically, his bearded, mature head speaks to judges of yore, while the young boy’s head is turned towards the judge of the future. (Credit: Zina Deretsky, National Science Foundation).”*



17. In the absence of any contra evidence we cannot assume that testimonies of PW-6 (Neha Kumari) and PW-11 (Pooja) should not be considered simply because they were child witnesses. There is nothing on record to show that both PW-6 and PW-11 were not capable to reveal the incident and identify the accused.

18. The legal position is well settled on this aspect. In ‘*State of Maharashtra vs. Damu*’, (2000) 6 SCC 269, the Supreme Court held :

*“28. The unrealistic approach made by the Division Bench of the High Court to the evidence of PW-30 and PW-31 can be seen even by a glance through the observation made by the learned Judges which is extracted below :*

*“Sagar is stating about the instances which took place, according to him, when he was 5 or 6 years of age. The instances by themselves are so minor that anybody, in ordinary course, being of that age, would not remember the same even by the end of the day on which the incident took place. Trying to find corroboration to the deposition of Sagar (PW-31) from the deposition of Ramakant (PW-30) is a futile exercise.”*

*29. For the boy the said instances might have been very minor not to keep them alive in memory even till the evening of that day. But when he was told later of the danger he escaped from that minor incident would winch to the surface of his mood (sic mind). This is how the human mind works and the mind of a child is no exception to the process. For the parents of the boy the two episodes could not have created any impact at the time the incidents happened. But when they knew later that A-4 was kidnapping infants and killing them it would have created the most probable reaction of the human mind in them also by realising how they escaped by the*

*skin of their teeth from a perennial calamity. The Division Bench was therefore too unrealistic when it brushed aside the truthful evidence of PW-31 (Sagar) and his father PW-30 (Ramakant)."*

19. In 'State of U.P. v. Krishna Master' : AIR 2010 SC 3071, the

Supreme Court held :

*"There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature."*

20. In 'Nivrutti Pandurang Kokate v. State of Maharashtra':

AIR 2008 SC 1460, the Supreme Court dealing with the child witness has

observed as under : (SCC pp. 567-68, para 10)

*"10. '... 7. ... 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, shaped 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.”*

21. In ‘*State of H.P. vs. Suresh Kumar @ DC*’, (2009) 8 SCALE 628, the prosecutrix was 5 – 6 years old. The accused therein was resident of the same village. The observations of the Supreme Court in paragraphs 12 & 13 are relevant to note :

*“12. There is another vital submission made by the respondent-accused which is required to be dealt with at this stage. It was submitted that both the child witnesses, namely, PW-3 and PW-4, the prosecutrix and her sister respectively, should not and could not have been believed due to the following two reasons. Firstly, both PW-3 as well as PW-4 was child at the time of commission of the said offence and secondly, they were tutored by their parents and police.*

*13. We have considered the said submission, but we find the same to be unacceptable. The depositions of these two witnesses, i.e. PW-3 and PW-4 with regard to the occurrence of such incidence are firm and convincing. We find no reason as to why a child of her age i.e. prosecutrix would get an innocent person named for an offence which was undisputedly committed on her. It is*

*settled position of law that the conviction for offence under Section 376 on the sole testimony of a rape victim if the evidence of the prosecutrix is found to be credible and convincing. This Court observed as follows in the case 'State of Rajasthan vs. MANU/SC/0416/2002 : Om Prakash 2002CriLJ2951' :*

*13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In 'State of Punjab vs. Gurmit Singh', MANU/SC/0138/1997, referring to 'State of Maharashtra vs. Chandraprakash Kewalchand Jain', MANU/SC/0122/1990, this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. "*

22. Non holding of Test Identification was not fatal. In '*Mahavir vs. State of Delhi*', (2008) 16 SCC 481, the Supreme Court held that

absence of Test Identification Parade in all cases was not fatal specifically when the accused is well known by sight.

23. In view of the above, the law on the issue is that the evidence of child witness cannot be rejected out-rightly. It must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by others and can be tutored. Small children can make false identification not because they want to depose and state false facts but because they may not be guided and be fully aware and conscious of the adverse consequence and the effect of making false positive identification. We have examined the testimonies of PW-6 and PW-11 within mere parameters.

24. Only in the statement recorded under Section 313 Cr.P.C., the appellant claimed that he was not called '*chor bhai*'. No such suggestion was put to the child witnesses and PW-5 (Smt.Shakuntla Devi). Moreover, it was the perception of the child witnesses as to how they connected the culprit as he was not known to them by name. There was no hesitation for both PW-6 and PW-11 to recognise and identify him in the Court. The accused was arrested on the identification of the prosecutrix and PW-11 (Pooja). He did not examine any witness in defence that he was not called '*chor bhai*' by the children living in his

neighbourhood. Minor discrepancies, contradictions and inconsistencies in the statements of the witnesses highlighted by the learned counsel are insignificant and do not affect the credibility of the statements of the child witnesses. Lapses on the part of the Investigating Officer also do not corrode the cogent testimony of the witnesses. The police came into motion when Jagbir informed the Police Control Room about a child aged 3 years lying unconscious near toilets House No.52, Singal Pur Village. He was not a witness to the incident and had set the police machinery into motion. His non-examination does not cause dent in the prosecution case. Contents of MLC (Ex.PW-3/A) reveal the pathetic condition in which the child aged about 4 years was found abandoned and admitted in BJRM Hospital at 12.45 night by PCR. Conduct of the prosecutrix's mother is abnormal as she did not attempt to find out the whereabouts of her daughter and did not lodge any missing person report with the police. Only when she was shown the photograph of the child, she went to the hospital and identified her. However, in the cross-examination, no enquiry was made from her about the unreasonable conduct. The Court cannot ignore the ground realities that it is not easy for a poor to lodge first information report at the first instance. Moreover, her unnatural conduct does not wash the truthful version narrated by PW-6 and PW-11. Gabdu,

though cited a witness, was not examined. We notice that the process was not issued for his appearance and after recording statements of PW-1 and PW-6 on 15.03.2010, the Trial Court adjourned the case for recording entire remaining prosecution evidence for 10.05.2010 and 11.05.2010. The witnesses who were present on the said dates were examined. The Trial Court closed the prosecution evidence on 10.05.2010 despite request by Addl. Public Prosecutor for one more opportunity to examine the remaining witnesses observing that the prosecution had already examined all the material prosecution witnesses. It appears that the Trial Court did not consider Gabdu a material witness to be examined. Moreover, he was not a witness to the incident and his non-examination does not affect the prosecution case. After the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23<sup>rd</sup> June, 2006 it has become necessary for the prosecution to go in for DNA Test facilitating the prosecution to prove its case against the accused. However, in this case, the Investigating Officer did not resort to the procedure of getting the DNA Test or analysis. In our view, this lapse is not fatal as factum of rape is not under challenge. The accused was arrested on the identification of the material witnesses including prosecutrix.

25. In the light of above discussion, we find no merit in the appeal preferred by the appellant. The order on conviction and sentence are upheld. The appeal is dismissed. The Trial Court record be sent back forthwith.

**CRL.M.B.141/2011**

In view of the orders passed above, the application stands disposed of, having become infructuous.

**(S.P.GARG)  
JUDGE**

**(SANJIV KHANNA)  
JUDGE**

**OCTOBER 18, 2012**

*tr*