Pankaj Kumar al. International Journal of Institutional & Industrial Research ISSN: 2456-1274, Vol. 3, Issue 1, Jan-April 2018, pp.94-99

"Nirbhya" Brutality to Justice

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Abstract: **Sexual assault trials have become the most complex matters which come before the criminal courts. They have always presented their own peculiar problems. Unlike the case in murders, thefts and non-sexual assaults, the prosecution must establish the threshold proposition that a crime has indeed been committed. Only then does it become necessary to enquire who committed it. Not all survivors find it necessary to report sexual assault to the criminal justice system in order to move forward from their experience. The essential object of criminal law is to protect society against criminals and law – breakers. For this purpose it provides the machinery for the detection of crime, apprehension of suspected criminals, collection of evidence, determination of guilt or innocence of the suspected person, and the imposition of suitable punishment on guilty person. the case of as Mukesh & Anr vs State of NCT of Delhi & Ors;i**

Keywords: **Nirbhya, Brutality to Justice**

1. Introduction

The Incident which shocked the entire humanity, *Popularly known as "Nirbhya Gang Rape Case of 2012",* after which a Committee headed by Justice J.S. Verma, Former Chief Justice of India was constituted to suggest amendments to deal with sexual offences more sternly and effectively in future. The suggestions of the Committee led to the enactment of Criminal Law (Amendment) Act, 2013 which, inter alia, brought in substantive as well as procedural reforms in the core areas of penal law of India. The above noted case / judgement is a classic example of the Justice delivery system in the country.

The facts and findings mentioned in this Article are the part of the said judgment of Supreme Court, dated 05 May 2017, in above noted case,. And the brief study of the Supreme Court Judgment under this article by the author is done purely in good faith and is for research and study purpose.

1.1 The Case of the Prosecution

In the instant case three statements of the prosecutrix were recorded at different interval the facts stated by her in her 1st statement were mention here; the facts were that she had gone to watch movie with her boyfriend and she left the movie at 8:45 PM and was waiting for bus at Munirka Bus stop where a bus going to Bahadurgarh, stopped and both climbed the bus at around 9 PM. At around 9:05 - 9:10 PM, around 4-5 people in the bus started misbehaving with the girl, took her to the rear side of bus while her boyfriend was taken to the front of bus, where both were beaten up badly. Her clothes were torn over and she was beaten up, slapped repeatedly over her face, bitten over lips, cheeks, breast and Mons veneris. She was also kicked over her abdomen again and again. She was raped by at least minimum of two men; she does not remember intercourse after that. She had rectal penetration. They also forced their penis into her mouth and forced her to suck which she refused and was beaten up instead. This continued for half hour and she was then thrown away from the moving bus with her boyfriend. She was taken up by PCR Van and brought to GRR. She has history of intercourse with her boyfriend about two months back. (Willfully)

1.2. Lodging of FIR and the Investigation

After the victims were rescued by PCR Van, upon the information of informant Awninder Pratap, which he gave to the police at 3:45 a.m. on 17.12.2012 which later on recorded as the first Information Report, being FIR No. 413/2012 dated 17.12.2012, PS Vasant Vihar under Section 120B IPC and Sections 365/366/376(2) (g)/377/307/302 IPC and/or Sections 396/395 IPC read with Sections 397/201/412 IPC. It was thereafter handed over to Lady IO for investigation. The investigation was cautious and modern and progressive scientific methods have been adopted. After arrest, all the accused were medically examined. There MLC report stated injuries on their body which was opined & suggested by doctors as struggle marks. While the arrest took place, victim underwent second and third surgeries on 19.12.2012 and 23.12.2012 respectively. As the condition of the prosecutrix did not improve much, but after being declare fit her second statement was recorded in the form of dying declaration on 21.12.2012 by Sub-Divisional Magistrate This dying declaration is an elaborate one where the prosecutrix has described the incident in detail including the insertion of rods in her private parts. She also stated that the accused were addressing each other with names like, "Ram Singh, Thakur, Raju, Mukesh, Pawan and Vinay".and on On 25th December, 2012, the Metropolitan Magistrate, went to the hospital to record the dying declaration of the prosecutrix. The attending doctors opined that the prosecutrix was not in a position to speak but she was otherwise conscious and responded by way of gestures and the same was recorded accordingly. The health condition of prosecutrix was examined on 26th December 2012 by a team of doctors since the condition of the prosecutrix was critical, it was decided that she be shifted

abroad for further treatment and fostering oasis of hope on 27th December, 2012, she was shifted to Mt. Elizabeth Hospital, Singapore, for her further treatment. But she died on 29th December, 2012 at Mt. Elizabeth Hospital, Singapore. the cause of her death was sepsis with multiple organ failure following multiple injuries. In the post-mortem report, Ex.PW-34/A, besides other serious injuries, various bite marks have been observed on her face, lips, jaw, rear ear, on the right and left breasts, left upper arm, right lower limb, right upper inner thigh (groin), right lower thigh, left thigh lateral and left leg lower anterior. During the course of investigation the vehicle was identified and the investigating agency went around collecting the electronic evidence. A CCTV footage and the photographs were collected from the Mall, Select City Walk, Saket to ascertain the presence of PW-1 and the prosecutrix at the Mall. Another important evidence is the CCTV footage of Hotel Delhi 37 situated near the dumping spot was collected. In the course of investigation, the test identification parade was also carried out and the blood sample of the informant was also collected certain samples from the person of the prosecutrix were also collected at Safdarjung Hospital Also the samples of gangrenous bowels of the prosecutrix were taken. A specimen of scalp hair of the prosecutrix was also taken. Investigating officer had also taken 10 photographs of different parts of the body of the prosecutrix. The accused were also subjected to medical examination and samples were taken from their people which were sent for DNA analysis. Bite mark analysis was also undertaken by the investigative team to establish the identity and involvement of the accused persons. on completion of the investigation, the charge sheet was filed on 03.01.2013 under Section 365/376(2)(g)/377/307/395/397/302/396/412/201/120/34 IPC and supplementary charge sheet was filed on 04.02.2013. IPC and supplementary charge sheet was filed on 04.02.2013. There were total 04 accused in the case.

1.1 Charges, Questions to deal with and the Findings of the Court

After filing of Charge sheet, all 4 accused were charged under section 120 – B, 365, 366, 307, 376 (2) G, 377, 302, 395, 396, 201, 412 of IPC, 1860. However during the course of trial one of the accused named - Ram Singh has committed suicide and all remaining accused were found guilty of offence of rape and has been awarded death penalty by the lower court which was also confirmed by the High Court. But the accused appealed against conviction & death sentence before the Hon'ble Supreme Court of India. The appeal was decided by the bench comprising Justice Dipak Misra & Ashok Bhushan. While deciding the appeal the Supreme Court scrutinizes the entire material on record along with the order of conviction pronounced by the Session Court and the High Court. The Court noted that the grievance relating to the lodging of FIR and the manner in which it has been registered has been seriously commented upon and criticized by the learned counsel for the appellants and it is the duty of this Court to see every aspect in detail and not to treat it as an ordinary appeal. Therefore it is appropriate to grant liberty to the learned counsel for the appellants to challenge the conviction and the imposition of death sentence from all aspects and counts and to dissect the evidence and project the irregularities in arrest and investigation.

The objections raised before the Hon' ble Supreme Court by the Appellants are: -

1. That there was delay in registration of FIR.
2. That the FIR does not contains the names of assailants. CCTV footage cannot be admissible
3. That refusal to participate in TIP may be considered as circumstance but it cannot by itself lead to an inference of guilt.
4. That the three dying declarations of the prosecutrix have been contrived and deserve to be kept out of consideration.
5. That the DNA test of the prosecutrix is not accurate is to be kept out of consideration.
6. That the Odontology test conducted on accused is not reliable.
7. That the plea of alibi has been wrongly rejected.
8. That the trial court and the High Court have committed the error of not applying the doctrine of equality which prescribes similar treatment to similar persons and the guidelines provided in the decision of Bachan Singh was completely disregarded.

Upon the above objections and contentions of the appellants the Supreme Court observed, pointed out and held as under:-

1. Delay in setting the law into motion by lodging of complaint in court or FIR at police station is normally viewed by courts with suspicion because there is possibility of concoction of evidence against an accused. Therefore, becomes necessary for the prosecution to satisfactorily explain the delay. Whether the delay is so long as to throw a cloud of suspicion on the case of the prosecution would depend upon a variety of factors. Even a long delay can be condoned if the informant has no motive for implicating the accused. The Court observed that:- In the present case, after the occurrence, the prosecutrix and the PW-1 were admitted to the hospital at 11:05 p.m.; the victim was admitted to the Gynaecology Ward and PW-1, the informant, in the casualty ward. In the initial stages, the intention of all concerned must have been to save the victim by giving her proper medical treatment. Even assuming for the sake of argument that there is delay, the same is in consonance with natural human conduct. Citing the observation made in the case of State *of Himachal*

Pradesh vs Rakesh Kumar,[1] the Court repelled the submission pertaining to delay in lodging of the FIR on the ground that the first endeavour is always to take the person to the hospital immediately so as to provide him medical treatment and only thereafter report the incident to the police. The Court in the said case further held that every minute was precious and, therefore, it is natural that the witnesses accompanying the deceased first tried to take him to the hospital so as to enable him to get immediate medical treatment. Such action was definitely in accordance with normal human conduct and psychology. When their efforts failed and the deceased died they immediately reported the incident to the police. The Court, under the said circumstances ruled that in fact, it was a case of quick reporting to the police. Judged on the anvil of the aforesaid decisions, It was held that there is no hesitation in arriving at the conclusion that there was no delay in lodging of the FIR.

2. Reiterating the principle in State of U.P v Naresh & ors, the Court opined that it is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has been falsely implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from the same. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. In the instant case the observation of the Court was that in view of the aforesaid settled position of law, we are not disposed to accept the contention that omission in the first statement of the informant is fatal to the case. We are disposed to think so, for the omission has to be considered in the backdrop of the entire factual scenario, the materials brought on record and objective weighing of the circumstances. The impact of the omission, as is discernible from the authorities, has to be adjudged in the totality of the circumstances and the veracity of the evidence. The involvement of the accused persons cannot be determined solely on the basis of what has been mentioned in the FIR. It cannot be said that merely because the names of the accused persons are not mentioned in the FIR, it raises serious doubts about the prosecution case.

3. In an attempt to discredit the CCTV footage, the counsel for the appellants has pointed out that only the CCTV recording alleged to be of this bus was recorded and not of all other white buses that had 'Yadav' written on them. The learned counsel for the defence subsequently maintained that the CCTV footage cannot be relied upon as the same has been tampered with by the investigating officers. It was contended that CCTV footage was not properly examined to check all possible buses plying on the said route. However the Court concluded that there is no reason or justification to disregard the CCTV footage, for the same has been duly proved and it clearly establishes the description and movement of the bus. Because CCTV footage produced by PW-25 Rajender Singh Bisht in two CDs (Ex.PW-25/C-1 and PW-25/C-2) and seven photographs (Ex.PW-25/B-1 to Ex.PW-25/B-7) corroborate the version of PW-1 that the complainant and the victim were present at Saket Mall till 8:57 p.m. The certificate under Section 65-B of the Indian Evidence Act, 1872 with respect to the said footage is proved by PW-26 Shri Sandeep Singh (Ex.PW-26/A) who is the CCTV operator at Select City Mall. And the computer generated electronic record in evidence, admissible at a trial is proved in the manner specified in Section 65-B of the Evidence Act. Sub-section (1) of Section 65 of the Evidence Act makes electronic records admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65-B of the Evidence Act. When those conditions are satisfied, the electronic record becomes admissible in any proceeding without further proof or production of the original, as evidence of any of the contents of the original or any fact stated therein of which direct evidence is admissible. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act.

4. Criticizing the TIP, it is urged by the learned counsel for the appellants and that refusal to participate may be considered as circumstance but it cannot by itself lead to an inference of guilt. It is also argued that there is material on record to show that the informant had the opportunity to see the accused persons after they were arrested. Upon this hon'ble Court found it

[1] (2009) 6 SCC 308

necessary to state that TIP does not constitute substantive evidence. Referring its earlier pronouncements on the subject such as *Matru alias Girish Chandra vs State of Uttar Pradesh,* [2] *Santokh Singh vs Izhar Hussain and another,* [3] *Malkhan Singh vs State of M.P,*[4] in which it was observed and held that identification test is primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation of an offence is proceeding on the right lines. The identification can only be used as corroborative of the statement in court. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine. The Court concluded that in the case at hand, the informant, apart from identifying the accused who had made themselves available in the TIP, has also identified all of them in Court. On a careful scrutiny of the evidence on record, we are of the convinced opinion that it deserves acceptance. Therefore, we hold that TIP is not dented.

5. Rejecting all the contention of appellants upon dying declarations of the prosecutrix the apex Court held that:-

> Appreciating the third dying declaration recorded on the basis of gestures, nods and writings on the base of aforesaid pronouncements, we have no hesitation in holding that the dying declaration made through signs, gestures or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the court ought to take is that the person recording the dying declaration is able to notice correctly as to what the declarant means by answering by gestures or nods. In the present case, this caution was aptly taken, as the person who recorded the prosecutrix's dying declaration was the Metropolitan Magistrate and he was satisfied himself as regards the mental alertness and fitness of the prosecutrix, and recorded the dying declaration of the prosecutrix by noticing her gestures and by her own writings. Considering the facts and circumstances of the present case and upon appreciation of the evidence and the material on record, in our view, all the three dying declarations are consistent with each other and well corroborated with other evidence and the trial court as well as the High Court has correctly placed reliance upon the dying declarations of the prosecutrix to record the conviction.

6. It was contented by the appellants that the DNA test cannot be treated to be accurate, for there was blood transfusion as the prosecutrix required blood and when there is mixing of blood, the DNA profiling is likely to differ. It is seemly to note, nothing had been put to the expert in his cross-examination in this regard. As the authorities relating to DNA would show, if the quality control is maintained, it is treated to be quite accurate and as the same has been established, we are compelled to repel the said submission of Mr. Sharma. The apex Court concluded that:-

> The DNA profiling, which has been done after taking due care for quality, proves to the hilt the presence of the accused persons in the bus and their involvement in the crime. The submission that certain samples were later on taken from the accused and planted on the deceased to prove the DNA aspect is noted only to be rejected because it has no legs to stand upon. The argument that the transfusion of blood has the potentiality to give rise to two categories of DNA or two DNAs is farthest from truth and there is no evidence on that score. On the contrary, the evidence in exclusivity points to the matching of the DNA of the deceased with that of the accused on many aspects. The evidence brought on record with regard to finger prints is absolutely impeccable and

[2] (1971) 2 SCC 75
[3] (1973) 2 SCC 406
[4] (2003) 5 SCC 746

the trial court and the High Court have correctly placed reliance on the same and we, in our analysis, have found that there is no reason to disbelieve the same.

7. Upon the objection of the appellants that Odontology test conducted on accused is not reliable. It was held by the Court that learned counsel for the appellants would only contend that the whole thing has been stage-managed. We are not impressed by the said submission, for the evidence brought on record cogently establishes the injuries sustained by the prosecutrix and there is consistency between the injuries and the report. We are not inclined to accept the hypothesis that bite marks have been managed. The Court concluded that the scientific evidence relating to odontology shows how far the accused have proceeded and where the bites have been found and definitely, it is extremely impossible to accept the submission that it has been a manipulation by the investigating agency to rope in the accused persons.

8. Appellants in their statement U/s 313 Crpc during the course of trial in lower court has advanced the plea of alibi. Explaining the plea of alibi the court stated that the Latin word alibi means 'elsewhere' and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. Considering the inconsistent and contradictory nature of the evidence of '*alibi'* led by the accused against the positive evidence of the prosecution, including the scientific one, the Court hold that the accused have miserably failed to discharge their burden of absolute certainty qua their plea of '*alibi'*. The plea taken by them appears to be an afterthought and rather may be read as an additional circumstance against them.

9. Criticizing the sentence the counsel for appellants has place reliance on *Bachan Singh vs State of Punjab* [5] and submitted that the trial court and the High Court have committed the error of not applying the doctrine of equality which prescribes similar treatment to similar persons and stated that the Court in *Bachan Singh* (supra) has categorically held that the extreme penalty can be inflicted only in gravest cases of extreme culpability; in making the choice of sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also; and that the mitigating circumstances referred therein are undoubtedly relevant and must be given great weight in the determination of sentence. Further placing reliance on *Machhi Singh vs. State of Punjab* [6], it is submitted that in the said case, the Court held that a balance sheet of the aggravating and mitigating circumstances should be drawn up and the mitigating circumstances should be accorded full weight age and a just balance should be struck between the aggravating and mitigating circumstances. He further pointed out number of decisions wherein this Court has given considerable weight to the circumstances of the criminal and commuted the sentence to life imprisonment. It was urged that in the present case, the decision in *Bachan Singh* (supra) was completely disregarded and the trial court, while sentencing the accused, only placed emphasis on the brutal and heinous nature of the crime and the mitigating factors including the possibility of reform and rehabilitation were ruled out on the basis of the nature of the crime and not on its own merits. Learned amicus curiae has further propounded that sentencing and non-consideration of the mitigating circumstances are violative of Articles 14 and 21 of the Constitution. Long lists of earlier judgments were referred in front of the Court. but ultimately after scrutinizing all material on record the Apex Court has Concluded as under :-

> It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, viz., the assault on the informant, PW-1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the appellants; their brutish behaviour in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, *inter alia*, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ex. PW-50/A and Ex. PW-50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which

[5] (1980) 2 SCC 684

[6] (1983) 3 SCC 470

ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, *inter alia*, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons has found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her alongwith her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.

When we cautiously, consciously and anxiously weigh the aggravating circumstances and the mitigating factors, we are compelled to arrive at the singular conclusion that the aggravating circumstances outweigh the mitigating circumstances now brought on record. Therefore, we conclude and hold that the High Court has correctly confirmed the death penalty and we see no reason to differ with the same. Thus the appeals of the appellants are dismissed accordingly.

1.2 Conclusion

The study of above note case is another classic example of the Justice system in the country. The entire Judgement of the Court is consisting of 429 pages and 149 paragraphs which is difficult to sum up few pages. The act committed by the accused in the above noted case was really inhuman, barbaric, against the law of nature and land and the innocent victims, their families and the entire nation suffered the immense pain and trauma of the said offence. They were righty awarded with the death penalty by the Court as persons of such lusty desires; mental capacity and physic behaviour have no right to be on this planate. They are worse than Animals. Such persons deserve not only the death penalty but even more than this. Because when the victim of such lustful act does not get a second chance to reform herself throughout the life from the mental trauma of such an act then why the offender should be served with a chance to reform. Such offenders must not have any kind of human rights. At last no doubt that the judiciary had played a pivotal role in justice administration system and stands upon the faith and hops of general public. The unbiased and independent judiciary has always played the role of a true guardian of justice.

[i] (2013) 2 SCC 587

