



**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA:**

Cr. Appeal No.485 of 2008

Judgment reserved on:4.11.2014.

Date of Decision: January 7, 2015.

State of Himachal Pradesh.Appellant.

Vs.

Pawan Kumar son of Sh Sanget Ram.Respondent.

Coram:

Hon'ble Mr. Justice Sanjay Karol, Judge.

Hon'ble Mr. Justice P.S.Rana, Judge.

Whether approved for reporting? Yes.

For the appellant: Mr.B.S.Parmar, Addl.A.G. with
Mr.J.S.Guleria, Asstt. Advocate
General.

For the respondent: Mr.Arvind Sharma, Advocate.

P.S.Rana, Judge.

JUDGMENT: Present appeal is filed against the
judgment passed by the learned Additional Sessions Judge

Whether reporters of the Local papers are allowed to see the judgment? yes.

Mandi HP in Sessions trial No. 40 of 2003 titled State of HP
Vs. Pawan Kumar decided on dated 26. 3.2006.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that about 4/5 months prior 19.6.2002 at place Char Kufri forest and rivulet accused repeatedly committed rape upon prosecutrix. It is alleged by prosecution that after committing rape upon prosecutrix accused threatened prosecutrix that he would kill the prosecutrix in case prosecutrix disclosed the incident of rape to anyone. It is alleged by prosecution that thereafter accused also committed rape upon prosecutrix for 4-5 times at place Char kufri forest. It is alleged by prosecution that on dated 20.6.2002 prosecutrix started vomiting and thereafter prosecutrix was taken by her father Babu Lal to Civil Hospital Karsog for medical check up and treatment. It is alleged by prosecution that medical officer after medical check up told that prosecutrix was pregnant. It is alleged by prosecution that thereafter prosecutrix along with her father Babu Lal went to Police Station Karsog where FIR Ext PW1/A was filed. It is alleged by prosecution that prosecutrix was medically examined by Dr. Jiya Lal on dated 20.6.2002 and medical officer observed that prosecutrix was pregnant for

about 18-20 weeks. It is alleged by prosecution that thereafter Dr. Jiya Lal Civil Hospital Karsog issued MLC Ext PW7/B and referred the prosecutrix for opinion of expert to IGMC Shimla. It is alleged by prosecution that thereafter Dr. Ravinder Sharma medical officer conducted ultrasound of the prosecutrix. It is alleged by prosecution that as per ultrasonography film Ext PW8/A medical officer has given opinion that prosecutrix was carrying pregnancy of 21 weeks. It is alleged by prosecution that thereafter prosecutrix was examined by Dr. Anil Sood Cardiologist IGMC Shimla and medical officer opined that prosecutrix was heart patient. It is alleged by prosecution that thereafter on dated 10.7.2002 abortion of the prosecutrix was conducted under the supervision of Dr. Ajay Kumar Sood at Kamla Nehru Hospital Shimla. It is alleged by prosecution that Dr. Ajay Kumar Sood prepared report Ext PW12/C. It is alleged by prosecution that during the investigation of case the prosecutrix located the place of incident and site plan Ext PW10/B and Ext PW10/C were prepared. It is alleged by prosecution that accused was also medically examined by Dr. Jiya Lal in Civil Hospital Karsog and MLC Ext PW7/D was obtained. It is alleged by prosecution that on the request of

Investigating Officer PW6 Man Singh panchayat Assistant issued certificate Ext PW6/C on the basis of entries of family register. Charge was framed against the accused by learned trial Court on dated 3.10.2005 and accused did not plead guilty and claimed trial.

3. Prosecution examined as many as twelve witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Sunita
PW2	Babu Lal
PW3	Satya Devi
PW4	Sunehru Devi
PW5	Amar Singh
PW6	Man Singh
PW7	Dr.Jiya Lal
PW8	Dr.Ravinder Sharma
PW9	HC Devinder Singh
PW10	Inspector Vijay Sen
PW11	Dr.Anil Sood
PW12	Dr.Ajay Kumar

4. Prosecution also produced following piece of documentary evidence in support of its case:

<i>Sr.No.</i>	<i>Description.</i>
<i>Ext PW1/A</i>	<i>FIR</i>
<i>Ext PW6/A</i>	<i>Certificate</i>
<i>Ext PW7/A</i>	<i>Prescription slip</i>
<i>Ext PW7/B</i>	<i>MLC</i>
<i>Ext PW7/C</i>	<i>X-ray form</i>
<i>Ext PW7/D</i>	<i>MLC</i>
<i>Ext PW8/A</i>	<i>Ultrasonography film</i>
<i>Ext PW8/B & Ext PW8/C</i>	<i>Identification mark</i>
<i>Ext PW10/A</i>	<i>Identification mark</i>
<i>Ext PW10/B & Ext PW10/C</i>	<i>Spot map</i>
<i>Ext PW10/D</i>	<i>Statement</i>
<i>Ext PW10/E</i>	<i>Application for medical examination of accused</i>
<i>Ext PW10/G</i>	<i>Letter sent by medical superintendent Kamla Nehru Hospital</i>
<i>Ext PW11/A</i>	<i>Cardiology report</i>
<i>Ext PW11/B</i>	<i>Prescription slip issued by IGMC</i>
<i>Ext PW11/C</i>	<i>Report</i>
<i>Ext PW12/A</i>	<i>Prescription slip issued by</i>

	<i>IGMC</i>
<i>Ext PW12/B</i>	<i>Face sheet issued by IGMC</i>
<i>Ext PW12/C</i>	<i>Abortion report of prosecutrix</i>

5. Statement of the accused was also recorded under Section 313 Cr.P.C. He has stated that a false case has been foisted against him. He has stated that he is innocent and falsely implicated in present case. Accused did not lead any defence evidence. Learned trial Court acquitted the accused under Section 376 IPC.

6. Feeling aggrieved against judgment passed by the learned Additional Sessions Judge Mandi appellant-State filed present appeal.

7. We have heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the respondent and also perused entire record carefully.

8. Point for determination in the present appeal is whether learned trial Court did not properly appreciate the oral as well as documentary evidence adduced by the parties and caused miscarriage of justice to the appellant as alleged in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 prosecutrix has stated that about four years back she went to Char Kufri forest to collect fuel wood. She has stated that at about 12 noon accused Pawan Kumar came there and committed rape upon her. She has stated that accused also threatened her to kill in case she disclosed the incident of rape to anyone. She has stated that since she was heart patient she was brought to Civil Hospital Karsog for medical check up after 4/5 months of the incident. She has stated that accused had raped her 4-5 times before her check up in the hospital. She has stated that medical officer told in the hospital that prosecutrix was pregnant. She has stated that thereafter she told to her mother that accused had committed rape upon her 4-5 times at place Char Kufri forest. She has stated that thereafter FIR Ext PW1/A was recorded. She has stated that during the investigation she disclosed the place of incident. She has stated that clothes which she was wearing at the time of occurrence were washed by her. She has stated that thereafter pregnancy was terminated in Kamla Nehru Hospital Shimla. She has stated that accused had forcibly committed rape upon her. She has stated that she is illiterate and a rustic lady. She has stated that she does not remember about the date, month and year

of the incident. She has stated that she did not try to defend herself with 'Darat' (Sharp edged weapon) when accused committed rape upon her. She has stated that she did not try to resist and did not receive any injury on her person. She has stated that she was in a possession of 'Darat' (Sharp edged weapon). She has stated that she was married to Des Raj by a court marriage at Hamirpur. She has denied suggestion that accused did not commit rape upon her. She denied suggestion that present case was filed against the accused just to grab money from accused.

9.1 PW2 Babu Lal has stated that prosecutrix is his daughter. He has stated that his daughter is heart patient. He has stated that in the month of June 2002 she was vomiting and thereafter he took prosecutrix to Civil Hospital Karsog for medical check up. He has stated that age of the prosecutrix at the time of incident was 17 ½ years. He has stated that thereafter medical officer told that prosecutrix was carrying pregnancy. He has stated that due to fear prosecutrix did not disclose to him as to who was responsible for her pregnancy. He has stated that after two days of medical check up prosecutrix told to her mother that accused had raped her 4-5 times at place Char Kufri forest

and once at the source of water ad-joining to his house. He has stated that prosecutrix used to go to collect fuel wood from the forest. He has stated that prosecutrix was threatened by accused not to disclose anyone about the incident otherwise he would kill her. He has stated that he reported the matter to the panchayat. He has stated that thereafter FIR Ext PW1/A was lodged. He has stated that thereafter medical officer advised for abortion of prosecutrix because prosecutrix was heart patient and she was not in a position to give birth to child. He has stated that prosecutrix was also medically examined. He has stated that prosecutrix was heart patient from her childhood. He has stated that prosecutrix is illiterate. He has stated that prosecutrix was sent to school only in first class. He has stated that since prosecutrix was heart patient thereafter her education was dropped. He has denied suggestion that accused was outsider and falsely implicated in the present case. He has stated that prosecutrix was married in District Hamirpur with Des Raj. He has denied suggestion that prosecutrix did not disclose that she was raped by accused.

9.2 PW3 Smt. Staya Devi has stated that prosecutrix is her daughter. She has stated that when

prosecutrix was vomiting her husband Babu Lal took prosecutrix for her medical treatment to Civil Hospital Karsog. She has stated that medical officer told that prosecutrix was pregnant. She has stated that after 4-5 days of her medical check up prosecutrix told to her that the child was of accused Pawan Kumar. She has stated that accused had raped prosecutrix at place Char Kufri forest. She has stated that prosecutrix was under fear and she did not disclose the incident to her earlier. She has stated that prosecutrix was threatened by accused that he would kill prosecutrix in case she disclosed the incident of rape to anyone. She has stated that prosecutrix was raped for 4-5 times. She has stated that prosecutrix is heart patient since her childhood. She has stated that prosecutrix was vomiting for one month prior to her medical check up. She has stated that she inquired from prosecutrix as to why she was vomiting but prosecutrix did not disclose anything. She has stated that she did not suspect prosecutrix to be pregnant before her medical check up. She has denied suggestion that prosecutrix was pregnant by someone else other than the accused. She denied suggestion that false case was filed against accused just to grab the money from accused.

9.3 PW4 Smt Sunehru Devi has stated that accused is distantly related to her. She has stated that accused visited her house only about ten years ago and thereafter accused never came to her house. Witness was declared hostile by prosecution. She has denied suggestion that accused visited in her house in the month of May 2002. She has stated that her son was working as labourer with Amar Singh about threshing work. She has stated that during threshing work the accused visited at her house for 3-4 days and he also used to go with her son and used to come with her son in the evening.

9.4 PW5 Amar Singh has stated that he had purchased a thresher in the year 2002. He has stated that he employed the son of Sunehru Devi for running thresher in the month of May 2002. He has stated that accused came to the house of Sunehru Devi and used to help son of Sunehru Devi in threshing work and accused worked for about 5-6 days. He has admitted that threshing work was conducted day and night during the month of May.

9.5 PW6 Man Singh has stated that in the year 2002 he was having additional charge of Secretary Gram Panchayat Karsog. He has stated that on the request of

police he issued certificate Ext PW6/A. He has stated that on the basis of certificate Ext PW6/A he made entries in family register. He has stated that the date of birth of the prosecutrix is recorded as 10.11.1983.

9.6 PW7 Dr Jiya Lal Medical Officer has stated that he was posted at CHC Karsog since 2003. Medical Officer has stated that on dated 20.6.2002 prosecutrix was brought to medical officer by police. M.O has stated that he examined the prosecutrix. Medical Officer has stated that patient was conscious, co-operative, well oriented to time place and person. Medical Officer has stated that there was no external injury on the part of the body of prosecutrix. Medical Officer has stated that vaginal orifice admitted two fingers. Medical Officer has stated that hymen was ruptured. Medical Officer has stated that there was no bleeding. Medical Officer has stated that posterior fornix was deep and vaginal wall lax. Medical Officer has stated that there was no vaginal injury. Medical Officer has stated that vaginal discharge was present in whitish colour. Medical Officer has stated that urine colour was positive. Medical Officer has stated that vaginal sperm was negative. Medical Officer has stated that he advised the prosecutrix for further medical examination.

Medical Officer has stated that the pregnancy of the prosecutrix was 21 weeks duration. Medical Officer has stated that there was no evidence that recent intercourse was took place. Medical Officer has stated that he issued MLC Ext PW7/B which bears his signature. Medical Officer has stated that he also examined the accused Pawan Kumar. Medical Officer has stated that accused was conscious, co-operative and well oriented to time place and person. Medical Officer has stated that there was no external injury on any part of the body of accused. Medical Officer has stated that external genitalia, penis, scrotum and testis were well formed of adult size. Medical Officer has stated that there was no evidence of external injury on external genitalia. Medical Officer has stated that blood samples for DNA test obtained. Medical Officer has stated that accused was able to perform sexual intercourse. Medical Officer has stated that he issued MLC Ext PW7/D. Medical Officer has stated that as per his opinion prosecutrix did not have sexual intercourse for about 4-5 days prior to her medical examination.

9.7 PW8 Dr. Ravinder Sharma has stated that he is running clinic at Hoshiarpur. He has stated that he was

Registrar in the Radiological department. He has stated that prosecutrix was referred by medical officer Karsog vide Ext PW7/C for determining the gestational age and confirmation of pregnancy. He has stated that he conducted ultra sonography of the abdomen of the prosecutrix. He has stated that ultra sonography film is Ext PW8/A which bears his signature. He has stated that he has given opinion Ext PW8/B. He has stated that there was pregnancy of 21 weeks duration. He has stated that prosecutrix was subjected to sexual relation. He has stated that exact duration of the pregnancy could not be determined by ultra sonography.

9.8 PW9 HC Devinder Singh has stated that he was posted as Investigating Officer in the year 2002. He has stated that on dated 9.8.2002 he recorded the statement of Dr. Anil Sood at Shimla according to his version and thereafter file was handed over to Station House Officer. He has denied suggestion that he did not record the statement according to the version of witness.

9.9. PW10 Vijay Sen has stated that he was posted as Investigating Officer Police Station Karsog in the year 2002. He has stated that on dated 19.6.2002 prosecutrix came along with her father Babu Lal and reported the matter and

thereafter he recorded FIR Ext PW1/A. He has stated that thereafter he deputed Koshalya Devi to get medical examination of prosecutrix from CHC Karsog. He has stated that MLC of the prosecutrix was obtained. He has stated that thereafter prosecutrix located the site where she was raped by accused prior to 4-5 months of the incident. He has stated that spot map of the place of incident was prepared at the instance of the prosecutrix. He has stated that thereafter he handed over case file to SI Nain Singh. He has stated that thereafter accused Pawan Kumar was medically examined. He has stated that on dated 22.6.2002 he got birth certificate of the prosecutrix from panchayat Secretary and recorded the statement of panchayat Secretary. He has stated that birth certificate of the prosecutrix is Ext PW6/A. He has stated that thereafter ultrasound sonography of the prosecutrix was conducted. He has stated that he also recorded supplementary statement of the prosecutrix. He has stated that prosecutrix was raped by accused several times as depicted in Ext PW10/B.

9.10. PW11 Dr.Anil Sood has stated that he was posted as Assistant Professor Cardiology IGMC Shimla in the year 2002. He has stated that on dated 5.7.2002 prosecutrix

was examined by him as victim of rape. He has stated that after examination of prosecutrix he observed that prosecutrix was suffering from heart disease. He has stated that he found hole in the heart of prosecutrix and she was carrying pregnancy of three months. He has stated that he referred the prosecutrix to Kamla Nehru Hospital Shimla.

9.11. PW12 Dr. Ajay Kumar Sharma has stated that he was posted as M.D. student at Kamla Nehru Hospital w.e.f. March 2001 to March 2004. He has stated that prosecutrix was admitted in Kamla Nehru Hospital. He has stated that abortion of the prosecutrix was conducted in his supervision on dated 10.7.2002 at 9 PM and report to this effect is Ext PW12/C. He has stated that prosecutrix was again examined after two hours at 11 PM. He has stated that thereafter the condition of the prosecutrix was found satisfactory.

10. Submission of learned Additional Advocate General appearing on behalf of the State that offence of rape is proved against the accused beyond reasonable doubt as per testimony of prosecutrix and the case of the prosecution falls under definition of rape defined under Section 375 IPC Clause-3 because consent of the prosecutrix was obtained

under fear of death by the accused and on this ground appeal be accepted is rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of prosecutrix placed on record. Rape is defined under Section 375 of the Indian Penal Code 1860 and two essential ingredients of Section 375 IPC are (1) That sexual intercourse by a man with woman (2) That sexual intercourse must be under circumstances falling under any of the seven clauses of Section 375 IPC. It is well settled law that rape is not only a crime against the person of a woman but it is crime against the entire society. It is well settled law that rape destroys entire psychology of a woman and pushed the woman into deep emotional crisis. It is a crime against basic human rights and is also violative of Fundamental Rights namely the Right to Life contained in Article 21 of the Constitution. See AIR 1996 SC 922 titled Sh Bodhisattwa Gautam Vs. Ms Subhra Chakraborty. It was held in case reported in AIR 1979 SC 185 titled Tukka Ram and another Vs. State of Maharashtra that consent is of two types (1) Willing consent (2) Passive consent and it depends upon the circumstances of each case whether the consent by the victim was mere passive consent or willing consent. It is

alleged by prosecution that the age of the prosecutrix at the time of incident was about 17 years and accused committed rape upon prosecutrix 4-5 times at place Char Kufri forest and in the rivulet when prosecutrix used to visit in forest in order to bring fuel wood. It is the case of the prosecution that prosecutrix used to take 'Darat' (Sharp edged weapon) along with her. Prosecutrix did not narrate the incident of first rape to her parents and even accused after the incident of first rape subsequently committed sexual intercourse with prosecutrix 4-5 times. PW2 Babu Lal and PW3 Smt. Satya Devi have specifically stated in positive manner that they did not force prosecutrix to go to forest to bring fuel wood because prosecutrix was suffering from heart disease. The fact that prosecutrix voluntarily went to the forest to bring fuel wood 3-4 times after the commission of first rape committed by the accused and fact that prosecutrix did not narrate the incident to her parents and sister about first rape and the fact that prosecutrix was not unarmed at the time of alleged commission of rape but prosecutrix was in possession of 'Darat' (Sharp edged weapon) and fact that prosecutrix did not inflict any injury upon the person of accused when accused tried to commit

sexual intercourse upon prosecutrix and fact that prosecutrix did not sustain any injury upon her vaginal part and fact that accused also did not sustain any injury upon his penis and any other parts of the body is clearly proved that present case is a case of passive consent on the part of the prosecutrix for sexual intercourse. It is well settled law that conviction can be sustained on the sole testimony of prosecutrix in rape case but we are of the opinion that testimony of prosecutrix qua rape in the present case is not trustworthy nor reliable because prosecutrix herself voluntarily went to forest after the commission of first rape and thereafter continuously four times performed sexual intercourse in different dates with accused but prosecutrix did not narrate the incident of sexual intercourse to her parents. Prosecutrix narrated the incident to her parents about sexual assault only when the factum of pregnancy was disclosed by medical officer to the parents of prosecutrix after 4-5 months of incident.

11. Another submission of learned Additional Advocate General appearing on behalf of the State that it is proved on record that accused was fit to perform sexual intercourse and the factum of sexual intercourse duly proved

on record by way of medical evidence and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that prosecution is under legal obligation to prove beyond reasonable doubt that the case of the prosecution covers within definition defined under Section 375 of the Indian Penal Code 1860. After careful perusal of entire oral as well as documentary evidence placed on record we are of the opinion that prosecution did not prove beyond reasonable doubt that accused had committed offence as defined under Section 375 of the Indian Penal Code 1860.

12. Another submission of learned Additional Advocate General appearing on behalf of the State that learned trial Court has wrongly acquitted the accused by holding that there was inordinate delay in reporting the matter to the police which is duly explained by the prosecution because prosecutrix was threatened by the accused not to disclose the incident of rape to anybody otherwise he would kill her and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is the case of prosecution that sexual intercourse was committed by accused 4-5 times

on different dates at place Char Kufri forest and rivulet but prosecutrix did not report the incident of sexual intercourse to anyone after the commission of first sexual intercourse. On the contrary prosecutrix thereafter had committed four times passive sexual intercourse with accused. It is proved on record beyond reasonable doubt that prosecutrix voluntarily went to lonely place at Char Kufri forest and rivulet. The factum that prosecutrix voluntarily went to the same place where initial sexual intercourse was committed by accused proved passive consent on the part of the prosecutrix for sexual intercourse. In the present case FIR was lodged when factum of pregnancy of prosecutrix came to the knowledge of her parents and when the FIR was lodged at that time prosecutrix was pregnant of about 21 weeks. Even PW8 Dr. Ravinder Sharma has stated that pregnancy of the prosecutrix was of 21 weeks. Hence we are of the opinion that delay is not satisfactory explained by the prosecution in the present case.

13. Another submission of learned Additional Advocate General appearing on behalf of the State that there was no enmity between the official witnesses and learned trial Court has illegally disbelieved the testimony of the

official witness and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Official witnesses are not the eye witness of the incident. Eye witness of the incident is only prosecutrix and the testimony of the prosecutrix clearly proves that there was passive consent on the part of the prosecutrix because prosecutrix with passive consent went to place Char Kufri forest and rivulet wherein accused committed sexual intercourse with prosecutrix 4-5 times in different dates.

14. Another submission of learned Additional Advocate General appearing on behalf of the State that offence of rape is proved against accused as per testimony of medical officers and as per MLC placed on record and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of medical officers. PW7 Dr. Jiya Lal has specifically stated that when he examined prosecutrix no external injury was found upon prosecutrix. PW7 Dr. Jiya Lal has specifically stated that vaginal orifice admitted two fingers. He has specifically stated that hymen was ruptured old. He has stated that he did not observe any bleeding and vaginal injury. He has specifically stated in

positive manner that he did not observe any spermatozoa in vaginal of the prosecutrix. PW7 has specifically stated in positive manner that there was no evidence of recent sexual intercourse. He has specifically stated that he did not observe any external injury on genital part of the prosecutrix. PW8 Dr. Ravinder Sharma has specifically stated in positive manner that pregnancy of the prosecutrix was of 21 weeks. He has stated that prosecutrix was subjected to sexual relationship. PW11 Dr. Anil Sood has stated that prosecutrix was pregnant and in view of the fact that 'Darat' (Sharp edged weapon) was in the hand of the prosecutrix at the time of alleged incident, in view of the fact that prosecutrix was about 17 years of age at the time of incident and in view of the fact that prosecutrix did not cause any injury to the accused through 'Darat' (Sharp edged weapon) or through nails or through teeth bites upon any portion of the body of accused clearly prove that present case is a case of passive consent on the part of prosecutrix. We have carefully perused MLC of accused Pawan Kumar placed on record and no injury was found upon external genitalia area of the accused and no injury was found upon any other parts of the body of accused.

15. Another submission of learned Additional Advocate General appearing on behalf of the State that as per prosecution story rape was committed by the accused in the forest which was a lonely place and although the prosecutrix has raised hue and cry but none came for her rescue and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the site plan submitted by the prosecution wherein the alleged rape was committed by the accused fifteen days prior to reporting of FIR. As per site plan Ext PW10/C placed on record last rape was committed by the accused at a distance of about 10 meters from the residential house of prosecutrix. There is no evidence on record that prosecutrix was forcibly dragged by the accused from her residential house to the place of last incident of rape which was situated merely at a distance of 10 meters from the residential house of prosecutrix and there is no evidence on record that prosecutrix raised hue and cry clearly proves passive consent on the part of prosecutrix. There is no evidence on record in order to prove that accused was in possession of any sharp or blunt weapon at the time of commission of rape. Non possession of any sharp edged

weapon or blunt weapon in the hand of accused clearly proves that the present case is case of passive consent on the part of the prosecutrix. No reason has been assigned by the prosecution as to why the prosecutrix did not raise any hue and cry when last sexual intercourse was committed upon prosecutrix by the accused at a distance of merely 10 meters from her residential house 15 days earlier of filing FIR as shown in site plan Ext PW10/C placed on record. It was held in case reported in (2005) 9 SCC 765 titled *Anjulus Ddungdung Vs. State of Jharkhand* that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled *Nanhar Vs. State of Haryana* that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defence. Also See: (1984) 4 SCC 116 *Sharad Birdhichand Sarda Vs. State of Maharashtra*. It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 *Charan Singh Vs. The State of Uttar Pradesh*. Also See: AIR 1971 SC 1898 *Gian Mahtani Vs. State of Maharashtra*. It was held in case reported in AIR 1979 SC 1382 *State (Delhi Administration) Vs. Gulzarilal Tandon* that suspicion however strong cannot take the place of legal proof. Also See:

AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajasthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another

Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P. See: (2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

16. Another submission of learned Additional Advocate General that as per amendment w.e.f. 3.2.2013 in Section 375 IPC age of consent has been enhanced to eighteen years and in present case at the time of medical examination of prosecutrix her age was 17 ½ years and on this ground appeal filed by State of HP be accepted is rejected being devoid of any force for the reason hereinafter mentioned. Present incident took place 4/5 months prior to 19.6.2002. We are of the opinion that amendment w.e.f.3.2.2013 in definition of rape is prospective in nature and is not retrospective in nature. We are of the opinion that

previous and subsequent conduct and behaviour of prosecutrix are material factors for conclusion of active consent or passive consent in rape cases as per Section 8 of Indian Evidence Act 1872.

17. In view of the above stated facts we are of the opinion that judgment passed by learned trial Court is based upon oral as well as documentary evidence placed on record and we also hold that no miscarriage of justice is caused to the State of HP in the present case while acquitting the accused. We give benefit of doubt to the accused in the present case and we dismiss the appeal filed by State of HP. Pending application(s) if any are also disposed of. Record of learned trial Court along with certified copy of judgment be sent back forthwith. Appeal disposed of.

**(Sanjay Karol)
Judge.**

**(P.S.Rana)
Judge.**

January 7, 2015(R)

High Court of H.P. ◊