IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.139 of 2008

Reserved on : 11.3.2015

Date of Decision : March 18, 2015

State of Himachal Pradesh ...Appellant.

Versus

Varun Kumar and another ...Respondents.

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge.

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

Whether approved for reporting? Yes.

For the Appellant : Mr. V.S. Chauhan, Additional Advocate General, and Mr. Vikram Thakur, Deputy Advocate General.

For the Respondents : Mr. Ashwani Sharma, Advocate for respondent No.1.

Mr. J.R. Thakur, Advocate, for respondent No.2

Sanjay Karol, Judge

State has appealed against the judgment dated 5.12.2007 of the learned Sessions Judge, Hamirpur, Himachal Pradesh, passed in Sessions Trial No.11 of 2007, titled as *State v.Varun Kumar & another,* challenging the acquittal of respondents Varun Kumar and Deepak Rai Verma (hereinafter referred to as the accused).

Whether reporters of the local papers may be allowed to see the judgment?

2. It is the case of prosecution that prosecutrix (PW-4), a student of 10th Class, was residing with her mother at village Khagal (District Hamirpur), Himachal Pradesh. At the end of the academic session, on 27.2.1007, a farewell party was arranged in the school, where prosecutrix was studying. After the party, prosecutrix went to the house of her friend Kanchan (PW-10), where accused Varun Kumar met her and took her to the house of his cousin co-accused Deepak Rai Verma, at Una, where they spent night. During midnight accused forcibly committed sexual intercourse with the prosecutrix. Finding that prosecutrix had not reached the house of her Mausi, as she had informed her mother, her uncle girdhari Lal (PW-6) lodged report with the police, on the basis of which FIR No.88 dated 28.2.2007 (Ex. PW-6/A), under the provisions of Sections 363,336 of the Indian Penal Code, was registered at Police Station, Sadar (Hamirpur). When accused Varun Kumar learnt about the same, Deepak Rai took them to his factory at Tahaliwal, near Una. There prosecutrix spent some time, where again she was subjected to carnal intercourse by accused Varun Kumar. Next day, Deepak Rai Verma brought back accused Varun Kumar and the prosecutrix to his house

and handed over the custody to the police. Investigation was taken over by SI Guler Chand, who got the prosecutrix medially examined from Dr. Deepa Diwan (PW-1) and Dr. Kavita (PW-2), who issued MLCs (Ex. PW-1/B and 2/B). Investigation revealed that prosecutrix, as on the date of commission of crime, was minor and as such, her ossification test was got conducted through Radiologist Partap Chand Indoria (PW-3) and Dr. D.V. Kulkarni (PW-5). Skiagrams and X-Ray rports (Ex.PW-3/A1 to A-4 & Ex. PW-5/A) were taken on record by the police. Also certificates establishing date of birth of the prosecutrix were taken on record by the police from Jai Kishan (PW-13) and Ms Pushpa Thakur (PW-14). Police also took into possession *Chaddar*, mattress, clothes, vaginal swab, which were sent for chemical analysis and report (Ex. PX) obtained and taken on record. With the completion of investigation, which revealed complicity of both the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused Varun Kumar was charged for having committed an offence punishable under the provisions of Sections 363, 366, 376 & 377 of the Indian Penal Code and accused Deepak Rai Verma was charged for having

committed offences under the provisions of Sections 212 and 368 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 23 witnesses and statements of the accused under the provisions of Section 313 of the Code of Criminal Procedure were also recorded, in which accused Deepak Rai Verma pleaded innocence and false implication, however accused Varun Kumar took the following defence:

> "I am innocent. I have not committed any wrong act. A false case has been foisted against me by the prosecutrix and her mother in order too make pressure on me and my parents to marry her daughter."

5. Based on the testimonies of witnesses and the material on record, trial Court acquitted both the accused persons of the charged offences. Hence, the present appeal by the State.

6. Finding that prosecution failed to establish its case, trial Court acquitted the accused, primarily on the following grounds. (i) Prosecutrix was not minor, (ii) medical evidence did not conclusively establish commission of crime, and (iii) in any event it was a case of consent.

7. Having heard learned counsel for the parties as also perused the record, we are of the considered view that the findings retuned by the trial Court cannot be said to be based on complete and proper appreciation of evidence on record. In our considered view, acquittal has resulted into miscarriage of justice, for prosecution has been able to establish its case, beyond reasonable doubt, against accused Varun Rana. As such, in our considered view, appeal has to be partly allowed.

8. A Constitution Bench of the Hon'ble Supreme Court of India in *M.G. Agarwal v. State of Maharashtra,* AIR 1963 SC 200, has held that in dealing with an appeal against judgment of acquittal, the appellate Court should normally be slow in disturbing the findings of fact recorded by the trial Court. However, there is a caveat. Such findings have to be based on proper and complete appreciation of evidence. Jurisdiction and the power of the appellate Court is also to reappreciate the evidence but with caution. The Court is not to substitute its own opinion with that of the trial Court. It is also settled position of law that where two views are possible, benefit of doubt must be given to the accused.

9. In *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, the Apex Court held the scope of the Court in an appeal against acquittal in the following manner:

> "26. In *Wilayat Khan v. State of U.P.,* AIR 1953 SC 122; this court while examining the scope of S. 417 and 423 of the old Code pointed out that even in appeals against acquittal, the powers of the High court are as wide as in appeals from convictions. See also (1) *Surajpal Singh v. State,* AIR 1952 SC 52, (2) *Tulsiram Kanu v. State,* AIR 1954 SC 1, *(3) Aher Raja Khima v. State of Saurashtra,* AIR 1956 SC 217, (*4) Radha Kishan v. State of U.P.*, AIR 1963 SC 822, holding that an appeal from acquittal need not be treated different from an appeal from conviction; (5) *Jadunath Singh v. State of U.P.*, (1971) 3 SCC 577, (6) *Dharam Das v. State of U.P.,* (1973) 2 SCC 216, (7) *Barati v. State of U.P.*, (1974) 4 SCC 258, and (8) *Sethu Madhavan Nair v. State of Kerala,* (1975) 3 SCC 150."

10. First, we shall deal with the medical evidence on record. Prosecutrix categorically states that she was subjected to sexual intercourse by accused Varun Kumar, in the night of 27.2.2007. This was in the house of co-accused Deepak Rai Verma, cousin of accused Varun Kumar. She further states that on 28.2.2007, accused subjected her to carnal intercourse at Tahaliwal. Investigating Officer Guler Chand (PW-23) deputed HC Surjit and lady Constable Swaran Lata for getting the prosecutrix medically examined at the Regional Hospital, Hamirpur, where she was first examined by Dr. Deepa

Diwan. Now, this doctor, at the time of medical examination, observed that prosecutrix, who was menstruating, had ruptured hymen and one finger (inside vagina) could be easily inserted. On touch, it was tender. The doctor categorically opined that prosecutrix may have undergone sexual intercourse within one week prior to her examination, which was done on 2.3.2007. The doctor advised the prosecutrix to be examined again after completion of her menstrual period.

11. It appears that since prosecutrix did not disclose to the said doctor, that she was subjected to carnal intercourse, as such same day, she was again got examined from Dr. Kavita, who on physical examination did not find any evidence of carnal intercourse, but on the basis of report of the Chemical Examiner, finally, did not rule out the possibility of prosecutrix being subjected to such act.

12. From the testimony of both the doctors, signs of semen were not found on the vaginal swab, but then it is also a matter of fact that the doctors have specifically opined the hymen to be ruptured and possibility of the prosecutrix being subjected to sexual intercourse not

ruled out. Medical evidence cannot be said to have rendered the prosecution version to be false or incorrect.

13. The Apex Court in *Puran Chand v. State of Himachal Pradesh,* (2014) 5 SCC 689, observed that even non-rupture of hymen itself would be of no consequence and rape could be held to be proved even if there is slight penetration.

14. Mere fact that hymen is intact or that there is no actual wound on the private part of the prosecutrix is not conclusive of the fact that prosecutrix was not subjected to rape. (*Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688).

15. Also, it is a settled principle of law that absence of injuries on the external or internal parts of the victim by itself cannot be a reason to disbelieve the testimony of the prosecutrix. (See: *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327); *State of Haryana v. Basti Ram,* (2013) 4 SCC 200; *O.M. Baby (Dead) by Legal Representative v. State of Keral,* (2012) 11 SCC 362; and *State of U.P. v. Chhotey Lal,* (2011) 2 SCC 550).

16. We shall now deal with the question of age of the prosecutrix. Significantly, at the time of her medial examination, prosecutrix disclosed her age to be 15-15½

years. Prosecutrix states that she was born on 6.4.1992. Even in the testimony of Kanchan (PW-10), it has come that prosecutrix used to disclose her age as 15 years.At the time of commission of crime, she was studying in 10th class. She admits to have failed twice in her class. We find that prosecutrix was lastly studying in a private school and not a Government school. Record pertaining to her admission in a Private School is not there. Thus, her failure in two classes would not even create any doubt, as is sought to be urged that prosecutrix was a major.

17. Also, based on this testimony of hers, accused Varun Kumar wants the Court to believe that police created evidence to establish her age to be below 16 years. We find the contention to be totally misconceived.

18. From the medical evidence, we find her age, so recorded at the time of medical examination to be 15-15½ years. X-Ray examination of the prosecutrix was conducted by Pratap Chand (PW-3). Dr. D.V. Kulkarni (PW-5), who conducted her skiagram test, has proved report (Ex.PW-5/A). From this report, which is dated 7.3.2007, bony age of the prosecutrix is opined to be 15-

15½ years. Our attention is invited to that part of his statement where he states that "keeping in view the variation, the age of the prosecutrix might be between 17-17½ years". This version of the doctor is not based on any scientific analysis of the prosecutrix. This version, it appears, is based on his assessment. In any event benefit of variation in age of two years can be on either side.

19. Even in the absence of categorical opinion about rape, opinion of the doctor about such act not being totally ruled out is relevant. Mere absence of spermatozoa would not cast doubt on correctness of the prosecution case. (See: *Datta v. State of Maharashtra,* (2013) 14 SCC 588; and *Prithi Chand v. State of H.P.,* (1989) 1 SCC 432).

20. The Apex Court had the occasion to deal with the case where there was a conflict between medical evidence and ocular evidence of the prosecution. There the Court held as under:

> "23. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of *Dayal Singh v State of Uttaranchal*, (2012) 8 SCC 263 (SCC p.283, paras 35036)

"35. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab*, (2003) 12 SCC 155, the Court, while dealing with discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)

> '8. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.'

36. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

> '34. ....The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case

> by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court.'

21. The Apex Court in *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, has held as under:

> "34. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court.
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> 35. Nariman, J. in *Queen v. Ahmed Ally,* (1989) 11 Sutherland WR Cr 25, while expressing his view a on medical evidence has observed as follows:
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> > "THE evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."
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> 36. Fazal Ali, J. in *Pratap Misra v. State of Orissa*, (1977 3 SCC 41, has stated thus:
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> > "... [I]t is well settled that the medical jurisprudence is not an exact science and

> it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty-first Edition) at page 369 which reads thus:

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

38. In Parikh 's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> "SEXUAL intercourse. In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally

> the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4 at page 1356, it is stated:

> "... [E]ven slight penetration is sufficient and emission is unnecessary."

40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of S. 44 of the Sexual Offences Act, 1956. Vide (1) *R. v. Hughes*, (1841) 9 C&P 752, (2) *R. v. Lines and R. v. Nicholls*, (1844) 1 Car & Kir 393.

41. See also Harris's Criminal Law, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of Califomia reads thus:

> "RAPE; essentials Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

43. The First Explanation to S. 375 of Indian Penal Code which defines 'Rape' reads thus:

> "EXPLANATION.PENETRATION is sufficient to constitute the sexual intercourse necessary to the offence of rape."

44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha v. Emperor,* (1925) 26 CrLJ

> 1185, *(2) Abdul Majid v. Emperor*, AIR 1927 Lah 735(2), *(3) Mst. Jantan v. Emperor,* (1934) 36 Punj LR 35, *(4) Ghanashyam Misra v. State,* 1957 CriLJ 469*, (5) Das Bernard v. State*, 1974 CriLJ 1098. In *re Anthony,* AIR 1960 Mad 308 it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's The Penal Law of India, 6th Edn. 1955 (Vol. II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape." ”

22. Be that as it may, we are of the considered view that benefit of variation in age by two years cannot be granted to the accused, in view of other overwhelming evidence on record, establishing the age of the prosecutrix to be less than 16 years.

23. Sunita Devi (PW-7) categorically states that prosecutrix, her daughter, was born on 6.4.1992. She admits that prosecutrix was born in village Kargu and entry of her birth was recorded in Gram Panchayat Neri. Prosecution has placed on record, birth certificate (Ex. PW-13/A), which stands duly proved on record by Jai Kishan (PW-13), Panchayat Sahayak of Gram Panchayat Neri. Now this certificate also records date of birth of the prosecutrix to be 6.4.1992. We find that date of registration of birth of the prosecutrix is 24.4.1992, which was immediately after her birth and not after the incident

in question. Certificate issued is under the provisions of Registration of Births and Deaths Act 1969 and Himachal Pradesh Registration of Births and Deaths Rules, 2003. It is a public document and this, in our considered view, there is presumption in favour of registration of this document as also its contents.

24. Significantly, this presumption remains unrebutted by the accused. Also we find that Pushpa Thakur (PW-14) has proved on record certificate (Ex. PW-14/A), so issued by her as Head Master of Government Primary School, Khaggal, indicating date of birth of the prosecutrix to be 6.4.1992. There is no rebuttal to the same.

25. We do not find testimonies of these witnesses to be shaken in any manner. Their deposition is truthful in nature; is based on the record so maintained by the Institutions in the normal course of business. As such, in our considered view, prosecution has been able to prove that prosecutrix was born on 6.4.1992 and her age, on the date of commission of crime, i.e. 27.2.2007 was below 16 years.

26. The Apex Court in *Ranjeet Goswami v. State of Jharkhand and another,* (2014) 1 SCC 588, held as under:

> "8. We are of the view that no cogent reasons have been stated by the High court to discard the school leaving certificate which was issued on 10.04.2004 by the then Principal of the school. The certificate reveals the date of birth of the accused as 10.05.1991. The school leaving certificate was proved by examining the Headmistress of the school. She has recognized the signatures of the Principal who issued the school leaving certificate. The evidence adduced by the Headmistress was not challenged....."

27. The Apex Court in *Mohd. Imran Khan v. State Government (NCT of Delhi)*, (2011) 10 SCC 192, had the occasion to deal with the case, even though the birth certificate issued under the Registration of Births and Deaths Act, 1969, reveals the age of the child to be below 16 years, but the medical report of the Radiologist reveals the age to be between 16 and 17 years, the Court, relying upon its earlier decisions in *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir and others,* (1982) 2 SCC 538, gave primacy not to the medical report but to the statutory record, hold that the medical report only gives an idea with a margin of 1-2 years on either side.

(See: *Vishnu alias Undrya v. State of Maharashtra,* (2006) 1 SCC 283; and *Mst. Aqeela and another v. State of U.P.,* (1998) 9 SCC 526).

28. The Court is duty bound when assessing the presence or absence of consent, to satisfy itself that both the parties are ad idem on essential features. (*Vinod Kumar v. State of Kerala,* (2014) 5 SCC 678).

29. In the instant case, one cannot forget that prosecutrix was in the company of accused Varun Kumar, in the house of his relative. She has explained that she remained mum, as accused Varun Kumar has asked her to do so. Thus, keeping in view the law laid down by the apex Court in *Roop Singh v. State of Madhya Pradesh,* (2013) 7 SCC 89, relevant portion of which is reproduced hereunder, it cannot be said that the prosecutrix consented to the act of crime.

> "9. In *State of U.P. v. Chhotey Lal (2011) 2 SCC 550,* the following passage from the judgment of a three-Judge Bench of this Court in State of H.P. v. Mango Ram3 on the meaning of "consent" for the purpose of the offence of rape as defined in Section 375 IPC, is quoted: (*Chhotey Lal (2011) 2 SCC 550*, SCC p. 560, para 20)
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> > "20. ... '13. ... Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the

> choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.' (*Mango Ram case (2000) 7 SCC 224, SCC 230*-31, para 13)"

30. The Apex Court in *Deepak Gulati v. State of Haryana,* (2013) 7 SCC 675, has further held that "Consent may be express or implied, coerced or misguided, obtained willingly or through deceipt. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. The Court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence".

31. In *Nagadeo s/o Kerba Maske v. State of Maharashtra and another,* (2013) 14 SCC 637, the Apex Court held as under:

> "17. Keeping the contents of the chemical analysis report, as noted by the Courts below in mind, when we consider the deposition of the prosecutrix PW-3, we find that she had narrated every minute detail as to how the appellant allured her by taking advantage of her contact with him while singing Bhajan songs, how he persuaded her by stating that recording of her Bhajans in audio cassette would enable her to earn tons of money and in that pretext also tempted her to take away the gold ornaments from the house worth Rs. 1 lakh and thus gained her confidence to go along with him and misused his company by keeping her in a place at Karnool where she was not acquainted with

the local language of Telugu and ultimately, abused her physically at least for more than for a month and twenty days. The vivid description of the behaviour of the appellant during the period when she was kept in his custody i.e., between 20.09.2005 to 07.11.2005, was clearly demonstrated by the prosecutrix and any amount of cross examination at the instance of the appellant, did not bring about any candid contradiction in her statement in order to disbelieve her deposition. The trial Court has also elaborately dealt with her deposition and found that the version of the prosecutrix was fully supported by the chemical analyst report, as well as. the medical evidence.

18. In such circumstances, the trial Court in our considered opinion rightly found the appellant guilty of the offences charged against him. The conclusion of the trial Court in having found the appellant guilty of offences under Sections 363 and 376IPC was further upheld by the High Court by the impugned judgment. The High Court, however, found that the conviction for the offence under Section 506 IPC was not sufficiently supported by evidence and conviction and sentence for offence under Section 506 IPC was set aside. Having perused the judgment of the High Court, we arc also convinced that the said conclusion is also perfectly justified.

19. This Court in Lillu alias Rajesh and another vs. State of Haryana reported in AIR 2013 SC 1784, where one of us was a party, held in para 11 that:

> "11. In State of Punjab v. Ramdev Singh, AIR 2004 SC 1290, this Court dealt with the issue and held that rape is violativc of victim's fundamental right under Article 21 of the Constitution. So, the Courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-

> esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also voilates the most cherished fundamental right guaranteed under Article 21 of the Constitution." "

32. Sexual intercourse, consensual in nature, becomes absolutely irrelevant in a case where prosecutrix is below 16 years of age. (*Dilip v. State of Madhya Pradesh,* (2013) 14 SCC 331).

> (Also see: *Kailash alias Tanti Banjara v. State of Madhya Pradesh,* (2013) 14 SCC 340; and *Jarnail Singh v. State of Haryana,* (2013) 7 SCC 263)

33. From the testimony of Sunita as also prosecutrix, it is evident that after attending the farewell function in the school, prosecutrix was not to return home but to spend the night in the house of her Mausi, who lived closeby. It is the specific case of the prosecution that instead of going to the house of her Mausi, prosecutrix went to spend the night in the house of her friend Kanchan (PW-10), where she met accused Varun Kumar, who took her to Una. Prosecution has also examined Lalita (PW-9), another friend of the prosecutrix.

We find that both Kanchan and Lalita have not supported the prosecution. They were declared hostile and extensively cross-examined by the prosecution.

34. From the conjoint reading of testimonies of these witnesses, it appears that accused Varun Kumar tried to set up a defence of familiarity and consent. Effort is made to establish that prosecutrix knew him from before and voluntarily went with him. Such fact still would not absolve accused Varun Kumar from his complicity in the alleged crime. Kanchan does admit that she knew accused Varun Kumar alias Sonu very well. But then she was confronted with her previous statement, duly proved by the Investigating Officer, wherein she had categorically stated to the police that accused took the prosecutrix in a private Bus towards Una. She also admits that she had given the telephone number of accused Sonu to the family members of the prosecutrix. She admits that accused Varun used to treat her as also Lalita as his sisters. Thus, to our mind version of the prosecutrix, that from the house of Kanchan she was taken away by the accused cannot be said to be false.

35. From the testimony of Girdhari Lal (PW-6), Chuni Lal (PW-11) and Uttam Chand (PW-12), uncles of

the prosecutrix, it is also evident that since prosecutrix had not reached the house of her Mausi, her mother became worried and asked Giardhari Lal to search for her. Prosecutrix was not found in the house of any one of the relatives. Resultantly, her friends were contacted, who disclosed that prosecutrix had been taken away by the accused to Una. Also, it has come on record through the testimony of the Investigating Officer that when prosecutrix was recovered she was in the custody of the accused.

36. In *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 230102014, In Re,* (2014) 4 SCC 786, the Apex Court has highlighted the need for having an effective State police machinery for curbing the menace of rape, for such crime is not only in contravention of the domestic laws, but is also in direct breach of obligations under International Law, treaties whereof stand ratified by the State, which is under an obligation to protect its women from any kind of discrimination.

37. The Apex Court has highlighted the need for prompt disposal of cases of crime against women and

children. (*Rajkumar v. State of Madhya Pradesh,* (2014) 5 SCC 353).

38. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held as under:

> "27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be

> in consonance with the legislative command and the discretion vested in the court."

39. In *Narender Kumar v. State (NCT of Delhi)*, (2012) 7 SCC 171, the apex Court has cautioned the Court to adopt the following approach:

> "The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

40. The Apex Court in *Munna v. State of Madhya Pradesh,* (2014) 10 SCC 254, has reiterated the principle that testimony of prosecutrix is almost at par with an immediate witness and can be acted upon without corroboration.

41. Reiterating its earlier view in *Mohd. Iqbal v. State of Jharkhand,* (2013) 14 SCC 481; *Narender Kumar v. State (NCT of Delh),* (2012) 7 SCC 171, the Apex Court in *Mukesh v. State of Chhattisgarh,* (2014) 10 SC 327, has held that sole testimony of prosecutrix is sufficient to establish commission of rape, even in the absence of any corroborative evidence.

42. In *Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held as under:

“33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-

> "17. ..... ‘16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely

> involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case *of State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.*, (2009) 16 SCC 69, para 19 whereof may be usefully extracted:

> '19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.' "

43. Prosecutrix, who hails from a rural background, categorically states that that when she reached the house of Kanchan, accused took her to Una in a Bus. At that time she had borrowed two pairs of suits from Kanchan. At Una, accused took her to the house of his cousin Deepak Rai, who was residing with his wife and small daughter. Accused and the prosecutrix slept in one room, whereas Deepak Rai slept with his wife in another room. During night, accused Varun Kumar subjected her to forcible intercourse. Next morning, she changed her clothes on the asking of wife of Deepak Rai. But then she is not an accused. In the evening, she was told by Deepak Rai that her family had lodged a report with the police, who was searching for them. Thereafter, they went to the factory premises of Deepak Rai and stayed there. There accused subjected her to carnal intercourse. Same day, at midnight, Deepak Rai brought them back to his house at Una, but made them spent the night in the car, which was parked by the side of his house. Next day, Deepak Rai dropped them at Bus Stand Una, from where they went to Chintpurni. From Chintpurni and spent some time, accused Varun Kumar called Deepak Rai, who asked them to come to the factory at Tahaliwal.

When they reached there, Deepak Rai took them home and handed over her custody to the family members of accused Varun Kumar, who took them to Police Station, Hamirpur.

44. From her testimony, it is evidently clear that she was subjected to sexual intercourse by accused Varun Kumar. We do not find this statement of hers to be either false, untrue or unbelievable. It is fully inspiring in confidence. Prosecutrix states that she did resist the acts of the accused. Evidently, prosecutrix travelled from place to place, in a public transport and did not disclose such act to any one. But then she explains that accused had asked her to keep mum. Medical evidence does not rule out possibility of rape. Assuming hypothetically, that prosecutrix had willfully volunteered herself to be subjected to sexual intercourse, it becomes immaterial, for she is minor in law.

45. Thus, the charges framed against accused Varun Kumar stand fully proved on record by the prosecution.

46. However, insofar as charges against accused Deepak Rai Verma are concerned, we do not find the same to have been proved on record. Prosecutrix does

not state that accused Deepak Rai Verma was aware of the fact that she was below 16 years of age or that she was kidnapped and brought without the consent of her parents or that the accused had seduced her to have illicit intercourse and subjected her to rape or sodomy. Even in the house of Deepak Rai or in his factory, where prosecutrix was subjected to rape and sodomy, she did not disclose any such fact to him. On the contrary, he asked them to leave and also on their return, handed over their custody to the lawful guardians.

47. Learned counsel has referred to various judicial pronouncements, which we find are totally irrelevant to the issue involved in the present case. We have ourselves, after carefully examining the exposition of law, referred to various decisions.

48. Thus, in our considered view, findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are partly reversed. We hold accused Varun Kumar guilty of having committed offences, punishable under the provisions of Sections 363, 366, 376 and 377 of the Indian Penal Code, for kidnapping the prosecutrix, when was then below 16 years of age, from the lawful

guardianship of her parents; seduced her to have illicit intercourse; committed sexual intercourse with her; and also committed carnal intercourse against the order of nature with the prosecutrix. Hence, appeal against accused Varun Kumar is allowed and against accused Deepak Rai Verma is dismissed.

49. Here we must reiterate the following directions issued by Hon'ble Supreme Court of India in *State of Gujarat v. Krishanbhai and others,* (2014) 5 SCC 108:

> "22. Every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore, essential that every State should put in place a procedural mechanism, which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent. In furtherance of the above purpose, it is considered essential to direct the Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments, should be vested with aforesaid responsibility. The consideration at the hands of the above committee, should be utilized for crystalizing mistakes committed during investigation, and/or prosecution, or both. The Home Department of every State Government will incorporate in its existing training programmes for junior investigation /prosecution officials course- content drawn from the above consideration. The same should

also constitute course-content of refresher training programmes, for senior investigating/prosecuting officials. The above responsibility for preparing training programmes for officials, should be vested in the same committee of senior officers referred to above. Judgments like the one in hand (depicting more than 10 glaring lapses in the investigation/prosecution of the case), and similar other judgments, may also be added to the training programmes. The course content will be reviewed by the above committee annually, on the basis of fresh inputs, including emerging scientific tools of investigation, judgments of Courts, and on the basis of experiences gained by the standing committee while examining failures, in unsuccessful prosecution of cases. We further direct, that the above training programme be put in place within 6 months. This would ensure that those persons who handle sensitive matters concerning investigation/prosecution are fully trained to handle the same. Thereupon, if any lapses are committed by them, they would not be able to feign innocence, when they are made liable to suffer departmental action, for their lapses.

23. On the culmination of a criminal case in acquittal, the concerned investigating/ prosecuting official(s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the concerned official may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly we direct, the Home Department of every State Government, to

> formulate a procedure for taking action against all erring investigating/prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant direction shall also be given effect to within 6 months."

50. Accused Varun Kumar be produced in the Court on 8.4.2015 for hearing him on the question of quantum of sentence.

Appeal stands disposed of, so also pending application(s), if any.

(Sanjay Karol),
Judge.

(P.S. Rana),
Judge.

March 18, 2015(sd)