IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cri. Appeal No. 105 of 2009 with
Cri. Appeal No. 74 of 2009

Reserved on : 15th November, 2010

Date of Decision: 29th December, 2010

Cri. Appeal No.105 of 2009

Ashok Kumar — Appellant

Versus

State of H.P. — Respondent

Cri. A. No.74 of 2009

Rajesh Kumar — Appellant

Versus

State of H.P. — Respondent

Coram

The Hon'ble Mr. Justice R.B.Misra,J.
The Hon'ble Mr. Justice Sanjay Karol,J.

Whether approved for reporting[1]? Yes.

Cri.Appeal No. 105 of 2009

For the appellant: M/s Anup Chitkara and Chaman Negi, Advocates.

For the respondent: Mr. R.K.Sharma, Sr. Addl. A.G. with Mr. Rajinder Dogra, Addl. A.G.

Cri.Appeal No. 74 of 2009

For the appellant: Mr. Onkar Jairath, Advocate.

For the respondent: Mr. R.K.Sharma, Sr. Addl. A.G. with Mr. Rajinder Dogra, Addl. A.G.

Sanjay Karol, J.

Accused Ashok Kumar and Rajesh Kumar are charged of having committed offences punishable under Sections 363, 376(2)(g), 342 and 506 read with Section

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[1] Whether the reporters of Local Papers are allowed to see the Judgment?

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34, IPC. In terms of judgment dated 4.4.2009 passed by Additional Sessions Judge (I), Kangra at Dharamshala, accused were held guilty of having committed the charged offences. They were sentenced to undergo rigorous imprisonment for a period of (i) one year and payment of fine of Rs.2000/- each for an offence punishable under Section 342 read with Section 34 IPC and in default thereof to further undergo simple imprisonment for a period of 2 months; (ii) five years and payment of fine of Rs.5000/- each for an offence punishable under Section 363 read with Section 34, IPC and in default thereof to further undergo simple imprisonment for a period of 6 months; (iii) ten years and payment of fine of Rs.20,000/- each for offences punishable under Section 376(2)(g) read with Section 34, IPC and in default thereof to further undergo simple imprisonment for a period of 2 years; and (iv) three years and payment of fine of Rs.5000/- each for offences punishable under Section 506 read with Section 34, IPC and in default thereof to further undergo simple imprisonment for a period of 6 months. All the sentences are to run concurrently.

2. Assailing the same accused Ashok Kumar has filed Criminal Appeal No.105 of 2009 and accused Rajesh Kumar has filed Criminal Appeal No. 74 of 2009.

3. It is the case of the prosecution that on 30.11.2005 Shri Varinder Rana (PW-1), who was serving in

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the Army, had come home on leave at his house in village Kunshal. Same day at about 4 – 4.30 p.m. he took his wife Smt. Sapna Rana (PW-2) for shopping to the market at Mahakal (Baijnath). They left their daughter i.e. the prosecutrix (PW-8) at home. Accused Rajesh Kumar, who lived in the neighbourhood, called her to the gate of the house on the pretext of telling her something. When she reached the gate he forcibly pushed her inside the Jeep (HP-53-0216) parked in front of the house in which accused Ashok Kumar was sitting on the driver seat. Ashok Kumar brandished knife and threatened the prosecutrix not to raise alarm or else her family would be killed. Thereafter both of them took the prosecutrix in the vehicle to various places. After some time they parked the vehicle at a lonely place and raped her. She was then taken to the house of accused Ashok Kumar at Pandol Road, Baijnath. There they tied her mouth and hands with a piece of cloth and during night kept her alone in a secluded room. In the late hours of 1.12.2005 they returned and again raped her turn by turn. Next day i.e. on 1.12.2005 at 7 a.m. prosecutrix was made to sit in the train at Puprola Railway Station. They bought her a ticket upto Maranda Railway Station and then went away. Prosecutrix alighted the train at Puprola itself and after returning home disclosed the incident to her parents. Her parents took her to the Police Station at Baijnath where she lodged report and FIR No. 172/05 (Ext.PW-8/A) dated

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2.12.2005 under Sections 376(2)g, 342, 363, 506, IPC, was registered. SI Shureshtha Thakur (PW-11) commenced investigation which revealed that prosecutrix was minor. She was got medically examined initially by Dr. Ramesh Kumar (PW-6), who issued MLC (Ext.PW-6/B) and thereafter by Dr.Bindu Sood (PW-7), who issued MLC (Ext.PW-7/A). Police took into possession certificate (Ext.PW-2/B) and abstract (Ext.PW-4/A) of the register showing that prosecutrix was below 16 years of age. Accused were arrested on 3.12.2005 and in the presence of Shri Nagesh Awasthi (PW-9) accused Ashok Kumar and Rajesh Kumar made disclosure statements (Ext.PW-9/A and Ext.PW-9/B respectively). They led the police to the place of crime. Knife (Ext.P-19) was also got recovered by them. Police took into possession blanket (Ext.P-20), on which prosecutrix was raped which had strains of her hair, bunch of sample hair of the prosecutrix (P-25) and underwear (Ext.P-26) belonging to accused Ashok Kumar. Spot maps (Exts.PW-11/A, PW-11/E and PW-1/F) were prepared at the spot. Documents of the vehicle in question were seized vide memo (Ext.PW-3/A). Accused were also got medically examined through Dr.Tilak Bhagra (PW-5), who issued MLCs (Ext.PW-5/B and Ext.PW-5/C). Pant (Ext.P-2), pajama (Ext.P-6), pubic hair (Ext.P-4 and Ext.P-7) of the accused and swab (Ext.P-3 and Ext.P-8) were also seized by the police. Clothes of the prosecutrix i.e. Salwar (Ext.P-9),

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shirt (Ext.P-10), dupatta (Ext.P-11), bra (Ext.P-12), underwear (Ext.P-13), sample of blood in a bottle (Ext.P-16), public hair (Ext.P-17) and vaginal swab (Ext.P-18) were also taken into possession. These articles were sent for chemical analysis to the State Forensic Laboratory and as per report (Ext.PW-17/B) human semen and blood were found on the samples collected by the police. Hair found on the blanket matched with the sample hair of the prosecutrix. Investigation revealed that case against the accused stood established, consequently challan was presented in the Court for trial.

4. Accused were charged for having committed offences punishable under Sections 363, 376(2)(g), 342 and 506 read with Section 34, Indian Penal Code, to which they did not plead guilty and claimed trial.

5. In order to prove its case prosecution examined 11 witnesses. Statements of the accused under Section 313, Cr.P.C. were also recorded in which they took up a defence of false implication.

6. Relying upon the testimonies of PW-1, PW-2, PW-8 and the medical evidence proved on record, Court below held the accused guilty, convicted them on all counts and sentenced them to undergo imprisonment and pay fine. Court found that there was no controversy with regard to the date of birth of the prosecutrix, which stood proved by prosecution by leading documentary evidence i.e. certificate

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(Ext.PW-2/B and Ext.PW-4/A) and MLCs (Ext.PW-6/B) and (Ext.PW-7/A); testimonies of the prosecution witnesses were consistent with the fact that prosecutrix was forcibly taken away from her house under threat of her life and life of her parents; she was under constant fear of her life which compelled her not to protest against the illegal acts of the accused; prosecutrix had no reason to falsely implicate the accused; no parents would put the honour of their daughter at stake by making false allegations; parents of the prosecutrix promptly reported the matter to the police; and version of the prosecutrix and her parents fully inspired confidence.

7. At the threshold we may point out that Court below appears to have been swayed by the fact that prosecutrix was found to be minor. We may also state that Court below has been extremely presumptuous in its approach while arriving at such conclusions. To our mind, the findings are not based on sound principles of law.

8. The power of this Court under Section 386 of the Code of Criminal Procedure is wide. Court can re-appreciate the entire evidence on record as also review the trial Court's conclusions with respect to both, facts and law. If the conclusions arrived at by the trial Court are likely to result in grave miscarriage of justice or that entire approach of the trial Court in dealing with the evidence is patently illegally rendering the judgment to be manifestly unjust and

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unreasonable due to misreading of material evidence, the Appellate Court can correct the errors within the frame work of law. [*Mohammed Ankoos & Ors. Vs. Public Prosecutor, High Court of Andhra Pradesh* (2010) 1 SCC 94].

9. In view of aforesaid statement of law we proceed to examine the evidence, oral and documentary, placed on record by the prosecution.

10. It is not in dispute that prosecutrix made a complaint in the presence of her parents, on the basis of which FIR (Ext.PW-8/A) was recorded by the police on 2.12.2005.

11. In the complaint, prosecutrix disclosed her age to be 15 years. In Court she also states this fact. According to her, at the time of the alleged offence, she was studying in 8th class. According to the parents, PWs 1 and 2, at the time of the alleged offence their daughter (prosecutrix) was 15 years and 2 months of age. This contradiction is insignificant. But, however, matter does not end here. Parents admit that out of the wedlock four children were born. Importantly, their names, ages and particulars of date of birth have not been placed or proved on record by the prosecution. PW-1 admits to have disclosed the age of the prosecutrix for the first time in Court. He admits that prosecutrix was born at Village Ahmednagar in Maharashtra and her date of birth was

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neither registered at Ahmednagar nor registered in the Panchayat of his village by him. He volunteers to state that he had requested his mother to enter the date of birth of his daughter in the village Panchayat but clarifies that he is not aware as to whether same was got done by her or not. Mother has not been examined. Smt. Sapna Rana (PW-2) admits that she handed over certificate (Ext.PW-2/B) obtained from the school of the prosecutrix to the police. According to this certificate, prosecutrix was born on 7.9.1990 which means as on 30.11.2005, the date of the alleged offence, prosecutrix was 15 years and 2 months of age. Certificate (Ext.PW-2/B) was taken into possession vide recovery memo Ext.PW-2/A dated 9.12.2005, by H.C. Rajinder Singh (PW-3) according to whom certificate was handed over by the prosecutrix and not by her mother. There is minor contradiction to this extent but we have ignored it. Shri Baldev Singh, Head Master of Govt. High School, Kunshal (PW-4) issued certificate (Ext.PW-4/A), according to which date of birth of the prosecutrix as entered in the school register is also 7.9.1990. Importantly, this witness admits that neither did he make the entry in the register nor was it made in his presence. He could not state as to whether parents of the prosecutrix had filed an affidavit pertaining to her age at the time of admission. Register pertains to the admission made on 16.4.2005 in the 9th standard. He further admits that birth

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certificate from the concerned Panchayat was not attached with the record. He could not state with certainty as to whether prior to 16.4.2005 prosecutrix was a student of the same school or not. Importantly Ext.PW-4/A pertains to the year in which the offence took place. Previous record has not been produced. Further it has also not been established as to who get the entry recorded in the school register. Therefore not much reliance can be placed on the same. None has come forward to prove the date of birth so recorded in certificate Ext.PW-2/B. None of the prosecution witnesses have deposed that entry in the school register was made on the basis of the entries recorded in the register maintained under the Births, Deaths and Marriages Registration Act, 1886 (for short the 'Registration Act') or the Pariwar register maintained by the Panchayat in which entry was made of the said basis..

12. In order to prove the exact date of birth of the prosecutrix, prosecution ought to have placed material on record to show that name of the prosecutrix was entered either in the register maintained under the Registration Act or the Pariwar register maintained by the Panchayat in which entry was made on the basis of some authentic source/record. Proof of date of birth of other children could have reflected the tentative age of the prosecutrix. Most importantly S.I. Shureshtha Thakur (PW-11) has deposed that :-

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"It is correct to suggest that the panchayat birth register extract of the prosecutrix has not been attached with the case file. It is also correct to suggest that even the parents of the prosecutrix had not produced such record of the panchayat about the age of the prosecutrix before me. It is also correct to suggest that the doctor has not written the bony age of the prosecutrix on her MLC. It is also correct to suggest that I had not applied for radiological age determination of the prosecutrix. Self stated the doctor had not advised for it. It is correct to suggest that I have not recorded statement of any panchayat official whether the age of the prosecutrix has been mentioned in the panchayat record or not."

13. Here we may also note that version of the Investigating Officer to the effect that doctor had not advised him to get the radiological age of the prosecutrix determined stands contradicted by Dr.Bindu Sood (PW-7) who states that:-

"I had also advised for x-ray examination of the prosecutrix to know her radiological age."

14. In almost similar circumstances, this Court in *State of H.P. v. Narender Kumar alias Hira and others,* 2010 Cri.L.J. 3545, has held as under:-

"9. The other evidence on this issue itself is the Family Register (Ext. PW-8/A) maintained by the Gram Panchayat Officer, Nayaye

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Panchayat Kendra, Titota, U.P., which records the date of birth of the prosecutrix to be 3.3.1977. The same has been proved by Sh. Ram Dutt Sharma (PW-8), Gram Panchayat Adhikari, Gram Panchayat Titota, Tehsil Anup Shahar, Distt. Bulland Shahar, U.P. The document as prepared and maintained raises doubt about its genuineness. The Pariwar Register is not shown to be maintained under any statute. It does not bear the signature of either the Pradhan or any other officer of the Panchayat. Even according to PW-8 the register is neither printed in a government press nor issued by any panchayat officer and is easily available in the open market. In fact the same was purchased and prepared by him in June, 1992 i.e. after the date of the alleged incident. He also did not verify the entries made in the register though previous registers were available with him. The prosecution has chosen neither to produce nor prove the entries made in the said registers. This witness has admitted to be in touch with PW-4. He admitted to have deleted the names of two persons entered as family members of PW-4. This he did even though they had died in the year 1987 and 1969. If the register was prepared in June,1992 then obviously the names of the persons having died prior thereto could not have been entered into therein. The manner of preparation of the Pariwar Register raises doubt about its authenticity and genuineness. Importantly the Pariwar Register does not disclose the name of the person who had

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disclosed the information on the basis of which the said entry of date of birth of the prosecutrix was made there. PW-8 was not in service at the time of making the entry in the earlier registers and the Pariwar Register is also not shown to be maintained under any statute. It is also not the case of PW-4 that he had got the particulars entered in the Pariwar Register at the time of the birth of the prosecutrix. In fact it is not the case of the prosecution that the prosecutrix was not born in Kasauli and was in fact born at the native place of her parents in the State of Uttar Pradesh. In any event Pariwar Registers cannot be held to be of conclusive and binding evidentiary value.

10. The Apex Court in *Birad Mal Singhvi v. Anand Purohit,* (1988) Supp. 1 SCC 604 has held as under:

> "To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much

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evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

(emphasis supplied)

11. The same has been reiterated in Ravinder Singh Gorkhi vs. State of U.P , (2006) 5 SCC 584 and Ram Suresh Singh vs. Prabhat Singh (2009) 6 SCC 681."

15. Consequently certificates (Ext.PW-2/B and Ext.PW-4/A) cannot be accepted to be legal evidence proving the factum of date of birth of the prosecutrix.

16. No doubt in MLCs Ext.PW-6/B and Ext.PW-7/A, age of the prosecutrix is recorded to be 15 years, but however, noticeably in Court it is not the version of the Doctors that upon medical examination they found the prosecutrix to be of 15 years of age. Doctor Bindu Sood was not sure of the age of the prosecutrix and therefore advised the police of getting the x-rays examination conducted to determine the radiological age of the prosecutrix. Reliance on the age indicated in the MLCs (Ext.PW-6/B and Ext.PW-7/A) to prove the age of the prosecutrix in the circumstances is thus misconceived. No ossification test/skiagram was conducted by the prosecution to determine the exact date of birth of the prosecutrix. Evidence with regard to the age of other children has been withheld.

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17. Keeping in view the ratio of law laid down by the Apex Court in Birad Mal Singhvi *(supra)*, it cannot be held that the prosecution has been able to establish the exact date of birth of the prosecutrix, beyond reasonable doubt. She also cannot be held to be below the age of discrimination.

18. Before we further discuss the prosecution case and the testimonies of the prosecution witnesses we fell it prudent to discuss certain other principles of law laid down by the Apex Court in its various judicial pronouncements.

19. In Radhu vs. State of Madhya Pradesh, (2008) 2 SCC (Cri.,) 207, the Apex Court has held that:-

> "6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. *If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of*

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rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

(Emphasis supplied)

20. In Tameezuddin alias Tammu vs. State (NCT of Delhi), (2009) 15 SCC 566, Court held that:

"It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

(Emphasis supplied)

21. Further in Dinesh Jaiswal vs. State of Madhya Pradesh, (2010) 3 SCC 232, Court held that:

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"10. Mr. CD. Singh has however placed reliance on Moti Lal's case (supra) to contend that the *evidence of the prosecutrix was liable to be believed save in exceptional circumstances*. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) *but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted.* The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one."

(Emphasis supplied)

22. In Mussauddin Ahmed vs. State of Assam, (2009) 14 SCC 541, Apex Court further held that:-

"It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, Court may draw adverse inference under Section 114 illustration (g) of the Evidence Act notwithstanding that onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide Gopal Krishnaji Ketkar vs. Mohamed Haji Latif & Ors., AIR 1968 SC 1413)."

23. In the instant case Dr. Ramesh Kumar (PW-6), medically examined the prosecutrix on 2.11.2005 and found the following injuries on her person, "1.Lower lip an rounded *minor laceration* was present over the left side of

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the lower lip. Painful to touch *½ cm x ½ cm* in length and half cm. in breath (in measurement). The injured part was covered by a white stuff (whitish material); 2. Right side of the neck. *Two scratch abrasions marks present over the right side of the neck.* (posterior triangle of the neck). The above one is *3 cm. from angle of mandible, 2 mm x 1 mm in breadth* covered with dark coloured blood (clotted blood), second *abrasion* (scratch) was situated at a distance of *5 cm. on the angle of mandible 2 mm x 1 mm in measurement and covered with clotted* blood. Two scratch abrasions are separated by 2 cm. apart, and 3. *Tenderness was present over the thyrohyorel region of the neck* (frontal region." (Emphasis supplied)

24. According to him, nature of the injuries were simple and 2-3 days old and abrasions could be sustained in a case of a person resisting rape. He states that tenderness found on the body of the prosecutrix was possible due to pressing of her throat and injury on her lip could be possible due to teeth bite. Further, after recording the aforesaid injuries he referred the prosecutrix to be examined by a lady doctor which was so done by Dr. Bindu Sood (Pw-7). Importantly on physical examination she found no injury marks on the breast, labia majora, labia minora, vagina. Hymen was torn and two fingers could be inserted in the vagina. No tear marks were found

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in anus. Doctor opined that possibility of sexual intercourse could not be ruled out.

25. From the medical evidence, it is quite apparent that except for minor laceration on the lower lip and abrasion on the neck and throat no injury was found on the body of the prosecutrix. Undoubtedly injuries are minor in nature. Prosecutrix admits that the injury on the lip was made by accused Rajesh Kumar. He is a neighbour. She was examined on the 3rd day of the incident. Two fingers could easily be inserted in her vagina, from which it is clear that she was subjected to intercourse from before. She is alleged to have been raped twice by both the accused turn by turn. Had it been so then definitely there would have been injury marks on her private parts. Injuries on the body of the prosecutrix are not of violent acts. They appear more to be out of passion. Possibility of the prosecutrix having developed intimate relationship with accused Rajesh Kumar, under the circumstances, cannot be ruled out. This view, as we shall see hereinafter, stands fortified from subsequent discussion.

26. At this juncture we feel it important to reproduce the contents of the FIR (Ext.PW-8/A):-

> "F.I.R. Contents (Attach separate sheets, if required) : At this time Kumari Manisha Rana D/o Sh.Virender Singh Rana, Caste Rajput, R/o Village Kunsal, P.O. Thara, Tehsil and P.S. Baijnath, aged 15 yrs. came to the Police

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Station alongwith her father Sh.Virender Singh and mother Sapna Rana and lodged the report, saying, "I am resident of the aforesaid address and am studying in class IX. Day before yesterday i.e. on 30.11.2005, at 4 p.m. my parents had gone to fetch some stuff from the bazaar and I was alone at home. Rajesh Kumar @ Nanna S/o Lahori Ram, Caste Brahmin, R/o Kunsal, P.O. Thana came at the gate outside our house and asked me to come out. *Since Rajesh Kumar is our neighbour, I went outside the gate. Then he forcibly pushed me inside his jeep No. HP-53-0216 (Track). Another person sitting inside the jeep brandished a knife at me and threatened to eliminate my family in case I raised an alarm*. Both of them kept on moving the vehicle hither and thither. *Then Nanna parked the vehicle at a lonely place and raped me.* Thereafter they took me to a room at Pandol Road, where both of them tied a cloth on my mouth and tied my hands as well. Then they went away bolting me inside the room. *They returned after dark on 1.12.05 and raped me turn by turn*. In the morning, around 7 o'clock both of them made me sit in the gadi (vehicle/train) at Puprola Railway Station and bought the ticket for Maranda. As they went back, I alighted the 'gadi' at Puprola itself and went back home. I told everything to my parents. *I have come alongwith my parents in order to lodge the report*. Legal action may please be taken against these two persons. And I may be medically examined.". Sd/- (in Hindi) – Manisha Rana- Sd/- illegible – Attested."

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27. Having minutely examined the deposition of the witnesses in Court, we find that prosecutrix as also her parents made several improvements from their earlier statements recorded by the police. Not only there are improvements, but material contradictions, which to our mind, have rendered their testimonies to be unbelievable and not worthy of credence. There are improbabilities and certain missing links remain un-explained. Serious doubts arise about the prosecution story itself.

28. While deposing in Court prosecutrix (PW-8) has made certain glaring contradictions in her statement. In Court she specifically states that accused Ashok Kumar brandished knife and threatened her. Importantly while recording FIR (Ext.PW-8/A) she does not name him or give his description but simply states "another person sitting in the jeep brandished the knife and threatened to eliminate my life in case I raise an alarm". Importantly, she does not even give the features of this "another person". It has come on record that Ashok Kumar is not a resident of the same village or area. She also does not state that she knew Ashok Kumar from before or could identify him by name or physical features. He was never seen in the area before. Both she and PW-11 admit that no Test identification Parade was got done prior to recording of their statements in the Court which is on 30.11.2007 and

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19.4.2008, respectively. Significantly complaint was lodged on 2.12.2005 and both the accused were arrested on 3.12.2005. It is not the prosecution case that accused Ashok Kumar was arrested after accused Ramesh Kumar made disclosure statement (Ext.PW-9/B). No test identification parade was carried out at all. Then on what basis was action taken against accused Ashok Kumar.

29. In Ravi alias Ravichandran vs. State, represented by Inspector of Police, (2007) 15 SCC 372, the Apex Court held that:-

> "18. It is no doubt true that the substantive evidence of identification of an accused is the one made in the court. A judgment of conviction can be arrived at even if no test identification parade has been held. But when a First Information Report has been lodged against unknown persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him. The witnesses were not very sure as to whether they had seen the appellant before. Had the accused been known, their identity would have been disclosed in the First Information Report. PW-1 for the first time before the court stated that he had known the accused from long before, but did not know their names earlier, although he came to know of their names at a later point of time.

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> 19. In a case of this nature, it was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the concerned witnesses or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

30. The aforesaid view was also taken earlier in State of H.P. vs. Lekh Raj and another, 2000 SCC (Cri.) 147.

31. In Mulla and another vs. State of Uttar Pradesh, (2010) 3 SCC 508, Apex Court held that, "Where identification of an accused by a witness is made for the first time in court, it should not form the basis of conviction.

32. In Soni vs. State of Uttar Pradesh, (1982) SCC 368 (I), Apex Court held that:

> "This delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a. long time the witnesses would be remembering the racial expressions of the appellant."

33. In the instant case, it was important for the police to have conducted the test identification parade and in the absence of the same possibility of the accused Ashok Kumar

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being falsely implicated cannot be ruled out. This has completely rendered the prosecution story to be extremely doubtful, if not false.

34. Further in Court, prosecutrix states that after the "accused" parked the vehicle at a lonely place both raped her inside the vehicle turn by turn. Now this stands materially contradicted by her earlier version (Ext.PW-8/A), wherein she got recorded that it was only accused Rajesh Kumar alias Nanna, who raped her on the 1st occasion.

35. In Court, prosecutrix states that when she tried to save herself accused gave beatings as a result of which she sustained injuries on her lips, neck and throat. She is categorical that tooth bite was given on her lips by accused Rajesh. Now, this significant fact is conspicuously missing in her statement on the basis of which FIR (Ext.PW-8/A) was recorded. This was an important fact which she could have not forgotten.

36. In Court she categorically states that accused left her at the Railway Station, Puprola, whereas in the FIR (Ext.PW-8/A), it is her version that she was made to sit in the train and only when accused had left that she alighted from the train and came back home.

37. She admits that she had disclosed the entire incident to her parents which fact also stands admitted by them. One can understand that being a minor prosecutrix was not in a position to disclose full particulars of the

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accused and get exact sequence of events recorded with the police. But then why did the parents not disclose complete facts. Admitted parents had accompanied the prosecutrix to the Police Station and were present at the time of recording of FIR (Ext.PW-8/A). We find that PW-1 has deposed that prosecutrix was taken to the house belonging to Ashok Kumar which fact is also missing in the complaint.

38. No doubt, in Court prosecutrix has narrated the sequence of events as per the prosecution story but we find that she has definitely not come out with whole truth. In cross-examination she admits that in front of her house there is house of Milkhi Ram Dhiman, who also has 2-3 shops there. She also admits that from her house one can hear the voices coming from the shops. She admits that there is moving traffic on the road and to go to Pandol road one has to cross through the bazaar at Baijnath where also there are many shops, a college, a bus stand. Baijnath Bazaar is situated on the National Highway. She also admits that on the Pandol road there are several shops and houses. Large number of people remain present at the bus stand and attention of such persons can easily be attracted by raising alarm. Surprisingly prosecutrix did not make any attempt to rescue herself by raising alarm. Had she done so it would have definitely attracted attention of passers-by. She also admits that the place where she was concealed

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during night, in the neighbourhood there are 2-3 houses and one moon light school which is adjoining to the road. She also admits that at the Railway Station Pauprola there is a booking office and in addition to the railway staff police personnel are always posted and available. Admittedly prosecutrix was taken through busy market places. Allegedly she was kidnapped at about 4 p.m. Markets are full with people at that time. In Court, it is not her case that accused constantly kept on threatening her and, therefore, out of fear she did not raise any alarm. It is understandable that she may not have been in a position to raise any alarm while crossing the bazaar at Baijnath but then nothing prevented her from raising alarm at the place where accused parked the vehicle on the Pandol road and allegedly raped her. Even after reaching the house of Ashok Kumar she could have raised alarm. Her version that on 30.11.2005 accused tied her mouth and hands and then left her alone for more than 20 hours does not appear to be true. The version is highly improbable. Police has not placed on record the cloth with which she was tied. Allegedly she was kept tied in the same position for more than 20 hours. This would have led to somebody pain, abrasion or injuries on her mouth and hands. Medical evidence does not corroborate this fact. That apart, why would accused confine her in a secluded place for such a long period of time. Prosecution wants us to believe that

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she was kept alone, under confinement, for more than 20 hours without food or water or access to toilet.

39. Story set up by the prosecution that prosecutrix was made to sit in the train at Pauprola with a railway ticket in her hand does not inspire confidence. There is nothing on record to show that train leaves Pauprola railway station at 7 a.m. in the morning. Further police has failed to place the railway ticket on record. Prosecution has concealed this relevant and important piece of evidence. That apart, what prevented the prosecutrix from first going to the house of her Massi, who admittedly lived in Pauprola and whose house she was familiar with. She admits that at Baijnath her mother had a beauty parlour and at Pauprola her aunt (mother's real sister) resides. Accused allegedly left her at about 7 a.m. at the railway station. Why did she not straightway got to the police or the railway staff. Her lonely presence in the early hours of the winter months would have attracted public attention. She reached her house only at about 12 noon. It has not been proved on record that it takes 5 hours for a person to reach the village from the Pauprola Railway Station. Further her parents admit that prosecutrix had narrated the events to them by about 1 p.m., yet they took more than seven hours to report the matter to the police. Why so has not been explained.

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40. For all the aforesaid reasons, we find that the version of the prosecutrix does not inspire confidence rendering the prosecution case to be not proved.

41. According to the parents (PW-1 and PW-2) when they returned from the bazaar at about 4.45 p.m., they found the gate of the house open and there was absolute darkness in the house. They searched for the prosecutrix at the places of their relations and neighbours. But this statement is vague, unspecific and lacks material particulars apart from not being corroborated. Now their daughter was away from home for more than 55 hours. What efforts were made by the parents to search for their daughter is not evident. There is not even a whisper about the other children present in the house. Parents do not state that inquiries were made from other children. After a long time their father had just returned home on leave and in all likelihood the entire family would have been together in the house anxiously waiting for him. Non-examination of children has rendered their version to be doubtful. Who are the relatives and neighbours from whom inquiries were made? Where do they live? Why they have not been examined in Court has not been explained. None from the neighbourhood was examined by the police. It is, highly unbelievable that parents would not promptly report the factum of their missing daughter to the police. Why was it not so done? Both PW-1 and PW-2 admit that police station

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is just at a walking distance of 30 minutes from their house and 20 minutes from the place they had set up a Beauty Parlour at Baijnath.

42. In Court, PW-1 has undoubtedly made several improvements from his earlier version recorded by the police with which he was confronted. He admits that he had not disclosed to the police that (i) there was darkness in the house at the time he opened the main gate of the house; (2) he searched for his daughter in the neighbourhood and relatives; (3) he inquired from his daughter the reason of her absence from the house; (4) he was informed by the prosecutrix that accused Rajesh Kumar took her to the house of Ashok Kumar; and (5) accused gave beatings to the prosecutrix. Similar is the position with regard to PW-2. Thus the version of the parents of the prosecutrix cannot be said to be reliable and their testimonies believable.

43. Accused were also got medically examined by Dr. Tilak Bhagra (PW-5), who found that on the penis of accused Ashok Kumar there was evidence of partial tear of frenulum with small raw area with clotted blood. We find that the injury on the penis of Ashok Kumar is not connected with the crime in question. There is no corresponding injury on the private parts of the prosecutrix. No injury was found on the penis of accused Rajesh Kumar.

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44. Report (Ext.PW-17/B) of the State Forensic Laboratory also does not link the accused with the alleged crime. Marks of blood and semen found on clothes of the prosecutrix cannot be linked with that of the accused.

45. We further find the Investigating Officer not to be a truthful witness. She admits that a case under Section 306, IPC stands registered against her at Police Station Baijnath. As observed earlier, she failed to prove the basis on which she could identify accused Ashok Kumar and arrest him. Prosecutrix categorically admits to have disclosed to the police the place where accused had taken her and then raped her. On 4.12.2005 the Investigating Officer recorded the disclosure statements of accused Ashok Kumar as Ext.PW-9/A and accused Rajesh Kumar as Ext.PW-9/B, which read as under:-

> "Memo regarding disclosure statement U/s 27 Evidence Act.
>
> In presence of the undersigned witnesses, accused Ashok Kumar @ Acchar s/o Sohan Singh, Caste S.C., R/o Pandol Road, Baijnath made the following disclosure statement under the custody of police, "On the night of 30.11.05, I and Rakesh Kumar parked the vehicle No. HP 53-A-0216 at a lonely place and raped Manisha Kumari Rana inside the vehicle. I can lead the police and can point out that place. In addition to that, I can lead the police and point out the house in the room of which I and Rakesh Kumar had raped Munisha Rana on the night of 1.12.05

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and also the room in which Munisha Kumari had been kept confined." Memo was prepared as per the version of accused Ashok Kumar. Memo was signed by the witnesses and the accused Ashok Kumar."

"Memo regarding disclosure statement U/s 27 Evidence Act.

In presence of the undersigned witnesses, accused Rajesh Kumar @ Nanna s/o Sh. Lahori Ram, Caste Brahmin, Village Kunsal, P.O. Thara, Tehsil and P.S. Baijnath made the following disclosure statement under the custody of police, "On the night of 30.11.05, I and Ashok Kumar parked the vehicle No. HP 53-A-0216 at a lonely place and raped Manisha Kumari Rana turn by turn inside the vehicle. I can lead the police and can point out that place. In addition to that, I can lead the police and point out the house in the room of which Munisha Rana had been kept confined and raped by me and Ashok Kumar turn by turn, on the night of 1.12.05." Memo was prepared as per the version of accused. Memo was signed by the witnesses and the accused."

46. We find that Shri Nagesh Awasthi (PW-9) witness to the disclosure statements not to have supported the prosecution case. Inspite of extensive cross-examination by the Public Prosecutor nothing fruitful could come out which could impeach the credibility of this witness.

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47. As on the date when statement was recorded, police was already aware of the identify of the accused and the place of the alleged crime yet the Investigating officer recorded the statement, which to our mind was so done only to create evidence against the accused. Noticeably the statements are identical.

48. It is true that there is nothing on record to show reason of false implication of the accused in the alleged crime. It is also true that no respectable person would falsely implicate a person particularly where honour of their own minor daughter is at stake. However, it is equally true that if no case is made out by the prosecution then liberty of an individual also needs to be protected.

49. We find that prosecutrix has not alleged that she was under constant threat. Trial Court has erred in so recording. We also find that findings returned by the trial Court that in the absence of proof of false allegations prosecution case would stand proved to be misconceived in law.

50. It cannot be said that prosecutrix was kidnapped from her lawful guardianship or that she was kept under wrongful confinement by the accused, nor can it be said that accused threatened the prosecutrix with any injury. It also cannot be said that the accused committed gang rape upon the prosecutrix.

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51. From the aforesaid discussion, we are of the considered view that Court below has wrongly convicted both the accused of having committed offences punishable under Sections 363, 376(2)(g), 342 and 506 read with Section 34, IPC. The judgment of conviction and sentence is thus set aside.

52. For all the aforesaid reasons, both the appeals are allowed. Bail bonds, if any, furnished by the accused are discharged.

(R.B.Misra)
Judge.

December 29, 2010
(C)

(Sanjay Karol)
Judge.

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