IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. A. No. 500 of 2012 along with Cr. A. No.460 of 2012

Reserved on: 17.12.2013

Decided on: 30.12. 2013

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1. Cr. A. No. 500 of 2012

Bal Krishan @ Kakoo .....Appellant

Versus

State of Himachal Pradesh .....Respondent

2. Cr. A. No. 460 of 2012

Dharam Singh .....Appellant

Versus

State of Himachal Pradesh .....Respondent

Coram:

Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1]

For the appellant(s) : **Mr. N.K. Tomar, Advocate, for the appellant in Cr. A. No.500/2012.**

Mr. Rupinder Singh, Advocate, for the appellant in Cr.A. No.460/2012.

For the respondent : **Mr. Parmod Thakur & Ms. Meenakshi Sharma, Addl. Advocate Generals with Mr. Neeraj K. Sharma, Dy. Advocate General and Mr. Ramesh Thakur, Asst. Advocate General.**

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

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Per Rajiv Sharma, Judge.

Since common questions of law and facts are involved in both the appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2 Both the appellants, namely, Bal Krishan alias Kakoo and Dharam Singh have challenged their conviction and sentence in Sessions Trial No. 3-N/7 of 2012, under Sections 376, 452 and 34 of the Indian Penal Code, decided vide judgment dated 10.10.2012 and order dated 15.10.2012. Appellant No.1, Bal Krishan alias Kakoo (hereinafter referred to as "accused No.1" for the sake of convenience) has been convicted and sentenced to undergo six months rigorous imprisonment and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo simple imprisonment for fifteen days under Section 452 of the Indian Penal Code; and to undergo seven years rigorous imprisonment and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo simple imprisonment for six months under Section 376(1) of the Indian Penal Code. Appellant No.2, Dharam Singh, (hereinafter referred to as "accused No.2" for the sake of convenience) has been convicted and sentenced to undergo six months rigorous imprisonment and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo simple imprisonment for thirty days under Section 452 of the Indian Penal Code. All sentences were ordered to run concurrently.

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Total fine amount imposed upon the accused persons, i.e. Rs.14,000/-, if realized, was ordered to be paid to PW1 prosecutrix, as compensation.

3 The case of the prosecution, in a nutshell, is that PW1 prosecutrix was resident of village Khaltu, Tehsil Pachhad, District Sirmaur. She was residing with her mother PW2 Dayal Payari. Prosecutrix was handicapped (polio affected). She was sleeping in her room on 19.7.2011 at 2.00 P.M.. The accused persons pushed door and entered into the room. Accused No.1 pretended that he had come to arrange her marriage with his younger brother. Accused No.1 bolted door from inside and accused No.2 stood guard outside the room. Accused No.1 untied string of her salwar and raped her. She raised alarm. Accused No.1 gagged her mouth with 'dupatta'. After committing rape, accused No.1 threatened prosecutrix not to narrate incident to her mother and he told that he would again come in the evening. Prosecutrix was all alone in the house and her mother had gone to paddy fields. Her mother came back at 6.00 P.M.. Prosecutrix narrated the incident to her mother. Accused No.1 on the same day at about 8.00 P.M. again visited house of the prosecutrix. PW2 Dayal Payari, mother of prosecutrix pelted stone on accused No.1 and ran away from the spot. Since, prosecutrix was suffering from disability and due to heavy rain next day, she could not report the matter to the police. However, on 21.7.2011 she along with her mother and maternal uncle, Hira Singh, after covering a

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distance of about 5 kms on foot visited the Police Station Pachhad and lodged an FIR against the accused persons. PW1 prosecutrix on 21.7.2011 produced one salwar, bed sheet and shirt before the police in the presence of the witnesses, which were put in a cloth parcel and sealed with seal impression 'A'. One shoe left by accused No.1 on the spot was also taken into possession by the police. Accused persons were arrested. On 27.7.2011, accused No.1 disclosed that another shoe was kept concealed by him in his residential house. He got recovered the same. Place of occurrence was also demarcated. Site plan was prepared. Prosecutrix was medically examined. Opinion of Gynecologist was obtained. The case property, i.e. shirt, salwar, bed sheet and underwear of accused No.1 were sent to SFSL Junga for analysis and report was received from the Assistant Director, FSL Junga. The matter was investigated and the challan was filed in the Court after completing all the codal formalities.

4 The prosecution examined as many as 15 witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C.. According to accused No.1, he had proposed marriage of prosecutrix with his younger brother. However, later on he came to know that she was handicapped and proposal was not materialized. According to him, he was falsely implicated. The learned trial court convicted and sentenced the accused persons, as stated hereinabove.

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5 Mr. N.K. Tomar and Mr. Rupinder Singh, learned Advocates, have vehemently argued that the prosecution has failed to prove its case against the accused persons.

6 Mr. Parmod Thakur, Addl. Advocate General, supported the impugned judgment dated 10.10.2012 and order dated 15.10.2012.

7 PW1, prosecutrix, has deposed that in the month of July 2011, she was in her house, situated at village Khaltu. She was sleeping in her room at about 2.00 P.M.. She was all alone in the house. Her mother had gone to paddy field. Accused persons entered her room. Both of them told her that they had come to arrange her marriage with younger brother of accused No.1. He told them that they should talk to her mother Dayal Payari. Accused No.1 untied string of her salwar and accused No.2 went outside and stood guard. According to her, she was physically handicapped and her one arm and leg was weak. Accused No.1 gagged her mouth with dupatta. She was forcibly raped by accused No.1 without her consent. She tried to resist the sexual assault with one arm. Accused No.1 left the spot and threatened her not to disclose the incident to her mother. He also told her that he would again come in the evening. Her mother Dayal Payari reached home at about 6.00 P.M.. She narrated entire incident to her mother. Accused No.1 against visited her house at about 8.00 P.M.. Her mother pelted stone on accused No.1 and he ran away from the spot. It was raining on that day. On 3rd day, her mother and

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maternal uncle had taken her to Police Station Pachhad to report the matter. Her mother had also reported the matter to the Pradhan. She had put her signature on FIR, Ext.PW1A. She was medically examined by a lady doctor at C.H. Sarahan. Police had visited the spot and she had produced salwar, shirt and bed sheet before the police in the presence of the witnesses, which were taken into possession by the police vide seizure memo Ext. PW1/B. She put her signature on the same. She identified salwar Ext.P2, bed sheet Ext.P3 and shirt Ext.P4. According to her, salwar Ext.P2 and shirt Ext.P4 were worn by her at the time of occurrence. During the course of investigation, shoe of accused No.1 was produced by her mother before the police. Accused No.1 had demarcated the spot of occurrence in the presence of witnesses. In cross-examination, she deposed that house of Hoshiar Singh was adjoining to her house. According to her, nobody was there. Hoshiar Singh was her uncle in relation. She had tried to resist the rape. She sustained injuries on her right knee and right shoulder. She did not know that her mother Dayal Payari had lodged a false FIR against her uncle Sunder Singh.

8 PW2 Dayal Payari is mother of the prosecutrix. According to her, prosecutrix was 20 years old. She was suffering from paralysis since her childhood and her right arm and right leg were very weak. Her husband was residing in another village, and had solemnized second marriage. She along with prosecutrix was living in village Khaltu. She came

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back to her house in the evening at about 6.00 P.M.. Prosecutrix started carrying. She asked what happened. Prosecutrix told that accused persons came inside her room and told her that they had come with a proposal of marriage. Prosecutrix told them that they should talk to her mother. She told that accused No.1 had forcibly committed sexual intercourse with her on the bed after opening string of salwar. According to her, accused No.1 had again come to her verandah in the evening. She pelted stone on him and he fled away from the spot. He left his shoe there. Next day, she went to the house of Pradhan, Gram Panchayat Katli, but Pradhan was not there. Sanjeev Kumar, husband of Pradhan, advised her to report the matter to the police. It was raining heavily and road was about 5 kms away from her house. She along with her brother Hira Singh and prosecutrix visited the Police Station Pachhad and lodged the FIR. Her daughter was medically examined at C.H. Sarahan. She recognized left shoe of accused No.1, Ext.P6. Police visited the spot. Accused No.1 was in custody of police. He identified the spot, where he committed rape with her daughter on the bed. Accused No.1 disclosed that he had concealed another shoe in the grass. Shoe Ext.P8 was recovered at the instance of accused No.1. In cross-examination, she deposed that distance from her house to paddy field is about 2 kms. Prosecutrix did not contact her from 2.00 P.M. to 6.00 P.M. She remained sitting on the spot.

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She became paralyzed in the age of 3 years. She produced the disability certificate of the prosecutrix.

9 PW3 Bhagwan Singh is Up-Pradhan of Gram Panchayat Katli. He joined investigation on 2.1.7.2011. According to him, prosecutrix produced Salwar Ext.P2, bed sheet Ext.P3 and shirt Ext.P4 before the police in his presence and one Naresh Kumar. Memo, Ext.PW1/B was prepared on the spot.

10 PW4 Gulab Singh has testified that accused No.2 came to his house on 19.7.2011 at about 7.00 P.M. He stayed in his house and took dinner with him. He left his house next day.

11 PW5 Vipta Ram, has deposed that on 19.7.2011 at 1.00 P.M he along with his son was working in his field. He had seen accused persons going to village Khaltu side through his paddy fields.

12 PW6 HHC Surender Singh has deposed that on 27.7.2011, accused No.1, who was in custody, gave a statement in his presence and Patwant Singh that on 19.7.2011 he had committed rape with the prosecutrix and at about 8.00 P.M., he had against come back to the house the prosecutrix. Stone was pelted by her mother on him and he left his shoe while running from the house of the prosecutrix. He also disclosed that one shoe was kept concealed by him nearby his cow shed underneath grass and he could get the same recovered. Statement of accused No.1 was recorded

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under Section 27 of the Indian Evidence Act vide Ext. PW6/A. It was signed by accused No.1. He identified his signatures and HC Patwant Singh.

13 PW7 HC Patwant Singh deposed that on 27.7.2011 accused No.1 while in custody gave a statement in his presence and Surender Singh that on 19.7.2011, he had raped the prosecutrix and at about 8.00 P.M. he had again visited the house of the prosecutrix and stone was pelted by her mother on him. He left his shoe while running from the house of the prosecutrix. Statement of accused No.1 was recorded under Section 27 of the Indian Evidence Act vide Ext.PW6/A. Shoe was recovered at the instance of accused No.1. On 1.8.2011 vide R.C. No.69/11, he had sent six parcels sealed with seal impression M.O. CH Sarahan containing cervical swab, vaginal swab, pubic hair and clothes of the prosecutrix, and one bed sheet sealed with 10 seals impressions of seal A and one another parcel containing underwear of accused No.1 to SFSL, Junga through HHC Mohd. Ikrar. He proved on record extract of RC Book vide Ext.PW7/A. In cross-examination, he deposed that statement Ext.PW6/A was recorded in the Police Station Pachhad by the Investigating Officer. He denied suggestion that statement Ext.PW6/A was obtained by the Investigating Officer by pressurizing accused No.1.

14 PW8 HHC Jeet Singh deposed that on 27.7.2011, accused No.1 led the police to village Mandla and on his identification a shoe was recovered underneath grass. Shoe

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was identified by Dayal Payari. Memo Ext.PW2/B was prepared to this effect.

15 PW9 HHC Mohd. Ikrar deposed that on 1.8.2011 MHC Patwant Singh had handed over to him six sealed parcels containing case property for depositing the same at SFSL Junga vide RC No.69/11. He deposited the case property same day at SFSL Junga and handed over the receipt to MHC, Police Station Pachhad.

16 PW10 Dr. Pankaj, M.O. PHC Maangarh, has deposed that on 25.7.2011 police moved an application Ext.PW10/A for medical examination of accused No.1. On medical examination, he opined that accused No.1 was average built, healthy and capable to do sexual intercourse. He issued MLC of accused No.1 vide Ext.PW10/B. He also examined accused No.2 on the application Ext.PW10/C and issued his MLC vide Ext. PW10/D.

17 PW11 Dr. Meena Mittal, M.O. C.H. Sarahan, has deposed that on the request of Police vide Ext.PW11/A, she examined the prosecutrix on 21.7.2011. She was physically handicapped for the last 15 to 16 years. Her left hand and leg were not working. She noticed bruise over right shoulder back side 2 x 2 cm, blue in colour, with three days duration. She did not notice any mark of violence on arms, wrist, mouth, inner side of thigh on the back. Local Examination of the prosecutrix is as under:-

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P/S-No abrasion bruise erosion or vault tear. Hymen was not intact. No fresh tear of hymen seen.

P/V-Vaginal wall are lax, vagina admitting three fingers, approximately 5 cm, upto posterior fornix. Cervical OS is closed, circular spotting only (+) (blood stains only not menstruating blood). No tenderness in vagina. No tear, no swelling. No injury to labia majora, labia minora. No swelling, no congestion. No avulsed pubic hair, no matted hair, no loose hair. No seminal fluid seen. Genital swabs from introitous, vagina and cervical OS is taken sealed and handed over to the police.

Menstrual history: 3 to 4 days after 28 to 30 days regular. Last period was on 27th June 2011. UPT to be done after 27th July 2011.

According to her opinion, prosecutrix had previous intercourse and she used to have intercourse and it could not be concluded whether rape was committed or not. She issued MLC Ext.PW11/B. The prosecutrix was suffering from 40% disability, therefore, she was not in a position to resist sexual assault.

18 PW12 HC Rajesh Kumar has deposed that on 21.7.2011, under supervision of Investigating Officer, LC Mamta No.207 had deposited three sealed parcels sealed with seal impression M.O. CH Sarahan stated to be containing

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vaginal swab, cervical swab, pubic hair along with sample seal. On the same day, SHO Parbal Singh had deposited one cloth parcel sealed with 10 seal impressions of "A". On 27.7.2011, ASI Lekh Raj had deposited cloth parcel sealed with seal impression "A" having 8 impressions stated to be containing one right shoe of accused No.1. Case property was kept in a safe custody. The extract of malkhana register is Ext.PW12/A.

19 PW13 Sanjeev Kashyap, has deposed that his wife was President of Gram Panchayat Katli. On 20.7.2011 his wife was not at home and she had gone in connection with some Panchayat work. According to him, it was raining on that day. Prosecutrix and her mother came to his house. Mother of the prosecutrix told him that her daughter was raped. He told her that she should report the matter to the police.

20 PW14 ASI Lekh Raj has partly investigated the matter. According to him, accused No.1 during custody disclosed that on 19.7.2011 he had committed rape with the prosecutrix and while running from the house of the prosecutrix, he left one shoe on the spot and another shoe had been concealed by him under grass near his cow shed at village Mandla and he could get the same recovered. Statement of accused No.1 was recorded under section 27 of the Indian Evidence Act in the presence of HC Patwant Singh and HHC Surender Singh vide Ext.PW6/A. Accused No.1 led the police to village Mandla near his house and got recovered one shoe from the roof of the cow shed, which was concealed under the

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grass. He prepared map of recovery of shoe vide Ext.PW14/B. He also got clicked the photographs.

21 PW15 SI/SHO Parbal Singh, has deposed that on 21.7.2011, prosecutrix along with her mother and maternal uncle visited the Police Station Pachhad and made a statement before him, on the basis of which FIR Ext.PW1/A was registered. An application Ext.PW11/A was moved to the M.O. Sarahan for medical examination of the prosecutrix. Medical examination of the prosecutrix was got done and MLC Ext.PW11/B was obtained at C.H. Sarahan. The Medical Officer also handed over sealed parcels to LC Mamta stated to be containing vaginal swab, pubic hair and cervical swab, which were deposited in the Malkhana. According to him, incident took place on 19.7.2011, but prosecutrix told that she could not report matter earlier because road was closed due to rain and her physical condition was not good being polio stricken. On 21.7.2011, he along with prosecutrix and her mother visited the spot and inspected the spot. The prosecutrix handed over salwar Ext.P2, shirt Ext.P4 and one bed sheet Ext.P3 The clothes were taken into possession vide memo Ext.PW1/B, on which witnesses Bhagwan Singh and Naresh put their signatures. Dayal Payari mother of the prosecutrix also handed over one shoe of accused No.1, which he had left near the house of the prosecutrix. The case property was handed over to MHC Rajesh Kumar, Police Station Pachhad. Report of SFSL Ext.PX was received. He had recorded

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statements of the witnesses as per their respective version. He found during investigation that accused No.1 had committed rape with the prosecutrix without her consent and accused No.2 guarded the house.

22 What emerges from the statement of PW1 prosecutrix is that on 19.7.2011 at 2.00 P.M.. when she was all alone in her house, accused persons entered her room on the pretext of arranging her marriage with younger brother of accused No.1. Accused No.1 committed rape with the prosecutrix and accused No.2 was standing as guard. The act was without her consent. She tried to resist with one arm. She was physically handicapped. She narrated entire incident to her mother PW2 Dayal Payari, when she came back to home from paddy fields at about 6.00 P.M.. PW2 Dayal Payari has corroborated statement of PW1 prosecutrix and stated the manner in which rape was committed by accused No.1. Accused No.1 also visited house of the prosecutrix in the evening. Next day, PW2 Dayal Payari had gone to the house of Pradhan, Gram Panchayat Katli. The Pradhan was not present in her house. PW13 Sanjeev Kashyap, husband of Pradhan, was present in the house, who advised PW2 Dayal Payari to report the matter of the police. PW2 Dayal Payari has also deposed that it was raining heavily and nearest road from her house was about 5 kms. She along with her brother Hira Singh and prosecutrix went to the Police Station Pachhad on 21.7.2011. PW2 Dayal Payari has also proved disability

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certificate of the prosecutrix. PW4 Gulab Singh has deposed that accused No.2 had stayed at his house on 19.7.2011. PW5 Vipta Ram had seen the accused persons going towards village Khaltu on 19.7.2011 at about 1.00 P.M.. PW10 Dr. Pankaj had medically examined accused persons and issued MLCs Ext.PW10/B and Ext.PW10/D. According to his opinion, accused No.1 was capable of performing sexual intercourse. PW13 Sanjeev Kashyap has corroborated statement of PW2 Dayal Payari. According to him, his wife was not present on 20.7.2011. PW2 mother of the prosecutrix along with prosecutrix had come to his house. PW2 Dayal Payari had told him that her daughter was raped. He told PW2 Dayal Payari to report the matter to the Police. According to PW11, Dr. Meena Mittal, disability of the prosecutrix was 40%. She had issued MLC Ext. PW11/B. According to her, prosecutrix had previous history of intercourse. She used to have intercourse. She could not conclude whether rape was performed or not. Version of accused No.1 that he has been falsely implicated cannot be believed. He has taken advantage of helplessness of a girl being polio stricken. A person will not be falsely implicated on the ground that proposal of marriage could not materialize. Prosecutrix has identified both accused persons in the court. There is no enmity between the family of prosecutrix and accused persons.

23 Mr. N.K. Tomar, Advocate, appearing on behalf of accused No.1 has vehemently argued that there were no

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injuries on the private parts of the prosecutrix. According to him, PW11 Dr. Meena Mittal has deposed that the prosecutrix had previous history of intercourse. He also argued that spermatozoa was not found on the exhibits. According to the report of SFSL Junga, Ext.PX, human blood was detected on exhibit-1 (cervical swab) and exhibit-2 (vaginal swab) of the prosecutrix. Semen was not detected on the exhibits. Blood and semen was not detected on exhibit-3 (pubic hair), exhibit-4 (shirt) and exhibit-4b (salwar) of the prosecutrix including exhibit-4c (bed sheet), exhibit-5 (pubic hair) and exhibit-6 (underwear) of accused No.1.

24 Their Lordships of Hon'ble Supreme Court in **Radhu vs. State of Madhya Pradesh, (2007) 12 Supreme Court Cases 57** have held that absence of injuries on the private parts of the victim will not by itself falsify the case of rape nor the opinion of a doctor that there was no evidence of any sexual intercourse or rape sufficient to disbelieve the victim. Their Lordships have held as under:-

> **"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 subject 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**

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> **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 rape, or 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 as 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 the case."**

25 In the instant case, the prosecutrix has received bruise over back side of right shoulder. Duration of the injury was three days back. She was medically examined on 21.7.2011 and the incident took place on 19.7.2011. It strengthens the statement of the prosecutrix that she had resisted the sexual assault.

26 Their Lordships of the Hon'ble Supreme Court in ***State of Himachal Pradesh*** vs. ***Raghubir Singh***, (1993) 2 SCC 622 have held that there is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Medical evidence provides sufficient corroboration. Their Lordships have further held that absence of spermatozoa cannot be a circumstance against the prosecution case and there is no inflexible axiom of law which lays down that the absence of injuries on the male organ

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of the accused would always be fatal to the prosecution case. Their Lordships have held as under:

> **"5. We have heard learned counsel for the parties at length and have gone through the evidence on the record. The statement of the prosecutrix, Raksha Devi Public Witness 4 is clear, cogent and specific. The learned Sessions Judge before recording her statement was conscious of her age and had, therefore, taken all the precautions required by law to ascertain whether she was capable of giving evidence or not and on being satisfied that she was so capable, recorded her statement. She narrated the occurrence in a simple and straight forward manner. The prosecution case as noticed in the earlier part of the judgment was fully supported by her during her statement and nothing has been brought out in the cross-examination frorti which any doubt could be caused about her veracity. Her statement receives ample corroboration from the testimony of Nikkoo Ram Public Witness 5, her father who even otherwise would be the last person to come forward with a false accusation of the type of rape on his young unmarried daughter. His testimony has impressed us and we find him to be a truthful and reliable witness. The medical evidence of Dr Urmil Gupta has supported the prosecutrix in all material particulars. She has also testified to the presence of mud and blood stains on the shawl. The evidence of Taru Public Witness 7 who had also seen the accused running away from the scene of crime carrying his underwear further lends credence to the prosecution version. The learned Sessions Judge, in our opinion, was therefore justified in relying upon the prosecution evidence and recording an order of conviction against the respondent for an offence under Section 376 Indian Penal Code. His findings were based on proper appreciation of evidence and were not unreasonable much less perverse. The learned Single Judge of the High court in our opinion, without appreciating or properly discussing the evidence set aside the findings recorded by the Sessions Judge. The High court appears to have embarked upon a course to find some minor contradictions in the oral evidence**

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with a view to disbelieve the prosecution version. In the opinion of the High court, conviction on the basis of uncorroborated testimony of the prosecutrix was not safe. We cannot agree. There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. In the present case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be looked for, though enough was available on the record. The medical evidence provided sufficient corroboration. The High court, however, while dealing with the medical evidence observed as follows:

"Lady doctor Urmil Gupta Public Witness I, who had examined the prosecutrix, had admitted in so many words towards the end of her cross-examination that the injury found on the private part of the prosecutrix and which is the only injury found in the instant case, could be caused by insertion of a finger by a grown up person like the parents of the prosecutrix. It is true that normally no parents would not (sic) do so but in the peculiar circumstances of this case, this possibility may not be ruled out altogether. In any case the mere fact that the hymen of the prosecutrix had been found ruptured, would not prove the prosecution version and connect the appellant with the offence charged against him."

The above approach to say the least was highly improper. What were the 'peculiar circumstances' of the case from which the learned Single Judge of the High court thought that the possibility could not be ruled out that the parents of the prosecutrix would have themselves caused injury to the prosecutrix by inserting finger in her vagina rupturing her hymen is not at all understandable. There is no suggestion that on account of any enmity, the parents of the girl would go to that length to falsely implicate the respondent. Dr Ghatate, the learned senior counsel was also unable to point out any such 'circumstances' from the record which could

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show that there was any possibility of the hymen of the prosecutrix having been ruptured in the manner suggested by the High court or any reason to falsely implicate the respondent. In fairness to Dr Ghatate it must be recorded that he did not support the observations of the High court noticed above.

"6. The learned Single Judge of the High court also drew an inference against the prosecution from the fact that only two blood stains had been found on the shawl by the Chemical Examiner and doubted the prosecution version on that account. According to the learned Single Judge:

> **"In natural course if this shawl had been used under the prosecutrix at the time of the alleged offence, the same should have been drenched with blood in the middle. Moreover, this shawl should have been full of mud as it remained lying on the ground under the prosecutrix for such a long time and when it had rained throughout."**
>
> **In making the above observations, obviously the High court ignored the testimony of Doctor Urmil Gupta who had found the presence of blood stains and mud on the shawl and who had opined that the bleeding from the edges of the vagina was slight and that some amount of clotted blood was also present. The prosecutrix was a girl of tender age and on account of the rape committed on her, there was bleeding from her vagina but to expect that the shawl should have got "drenched with blood" as if the large blood arteries had been cut, is letting the imagination run wild and ignoring the circumstances of the case. The absence of spermatozoa on the vaginal slide, which was also pressed into aid by the High court to acquit the respondent, was not based on proper scrutiny of the evidence. The prosecution case itself was that on being surprised while the respondent was in the act of committing sexual intercourse on the prosecutrix, he ran away carrying his underwear. The absence of spermatozoa under the circumstances could not be said to be a circumstance in favour of the**

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respondent at all. The judgment of the High court, in our opinion, is based more on surmises and conjectures than on proper appreciation of evidence. It exposes the insensitivity of the learned Judge to the serious crime committed against human dignity. We are not impressed by the manner in which the High court dealt with the case. courts must be wary, circumspect and slow to interfere with reasonable and proper findings based on appreciation of evidence as recorded by the lower courts, before upsetting the same and acquitting an accused involved in the commission of heinous offence of rape of hapless girl child.

7. Dr Ghatate, learned senior counsel for the respondent submitted, by reference to Rahim Beg v. State of U.P. that the absence of injuries on the penis of the respondent should be treated as sufficient to negative the prosecution case. We are afraid we cannot agree. Inferences have to be drawn in every case from the given set of facts and circumstances. There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal to the prosecution case and would discredit the evidence of the prosecutrix, otherwise found to be reliable. The presence of injuries on the male organ may lend support to the prosecution case, but their absence is not always fatal. Rahim Beg case was based on its peculiar facts and the observations made therein were in a totally different context and cannot advance the case of the respondent. The observations in Rahim Beg case cannot be mechanically pressed into aid in every case regardless of the specific circumstances of the crime and absence of the fact situation as existing in that case. Every case has to be approached with realistic diversity based on peculiar facts and circumstances of that case. Doctor Sharma who had examined the respondent had found him to be capable of sexual intercourse and according to his opinion the absence of injury on his male organ was not suggestive of the fact that he had not indulged in sexual intercourse with the prosecutrix, then offender years of age. His evidence was not at all challenged on this aspect by the defence."

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27 Their Lordships of the Hon'ble Supreme Court in ***Narayanamma (Kum)*** vs. ***State of Karnataka and others***, (1994) 5 SCC 728 have again reiterated that absence of spermatozoa on vaginal smear does not falsify the version of the prosecutrix. Their Lordships have held as under:

> **"4.....(IV) According to Dr Reeta, Public Witness 3 hymen of the prosecutrix was ruptured, admitted two fingers, bled on touch, was reddish in colour, and was painful and tender. On this basis, the doctor opined that these were signs of rape. The ability of admission of two fingers and the hymen being ruptured was viewed by the High court as if the prosecutrix was habitual to sexual intercourse. When the doctor had opined that the hymen was ruptured, she did not qualify her statement that it stood ruptured as of old or carried an old tear. With clear objective in view, the doctor must be presumed to have noticed the hymen as freshly ruptured, as otherwise, the doctor would not have described it in that fashion to be bleeding, tender and painful. The factum of admission of two fingers could not be held adverse to the prosecutrix for it would depend upon the size of the fingers inserted. Experience tells us that when medical experts try to opine about the medical condition of a woman used to sexual intercourse, it is described as admission of two fingers easily, but here the doctor qualified her statement by saying that it was painful and bleeding on touch. These conditions obviously related to the hymen. The doctor was thus clear in her opinion that rape had been committed on the prosecutrix. There was no occasion for the High court in holding it to the contrary."**

28 Their Lordships of the Hon'ble Supreme Court in ***State of H.P.*** vs. ***Gian Chand***, (2001) 6 SCC 71 have held that conviction can be based on prosecutrix's testimony corroborated by medical evidence and other circumstances

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such as report of chemical examination, if available evidence is otherwise trustworthy. Their Lordships have further held that discovery of spermatozoa in victim's private part not necessary to establish penetration. Their Lordships have further held that courts should examine broader probabilities of a case and not get swayed by minor contradictions of insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. Their Lordships have held as under:

> **"14. So far as non-examination of other witnesses and an adverse inference drawn by the High Court therefrom is concerned, here again we find ourselves not persuaded to subscribe to the view taken by the High Court. The prosecutrix P.W. 7 has stated that soon before the incident she was playing with three girl children of the same age as of hers and they were present when the accused committed rape on her. One of the girls picked up a broom and had tried to scar away the accused by striking the broom on him. This little friend of the victim had also raised a hue and cry but none from the neighbourhood came to the spot. These girls were none else than daughters of her uncle. What the High Court has failed to see is that these girls were of tender age and could hardly be expected to describe the act of forcible sexual intercourse committed by the accused on P.W. 7. Secondly, these girls would obviously be under the influence of their parents. We have already noted the co-sister of P.W. 1 turning hostile and not supporting the prosecution version. How could these little girls be expected to be away from the influence of their parents and depose freely and truthfully in the Court? Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony**

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available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of facts and circumstances of each case so as to find whether the witnesses were available for being examined in the Court and were yet withheld by the prosecution. The Court has first to assess the trustworthiness of the evidence adduced and available on record. If the Court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence which though available has been withheld from the Court then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise. It is now well settled that conviction for an offence of rape can be based on the sole testimony of prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc. if the same is found to be natural, trustworthy and worth being relied on. "If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations." - is the law declared in State of Punjab v. Gurmit Singh (1996) 2 SCC 384 : (1996

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AIR SCW 998 : AIR 1996 SC 1393 : 1996 Cri LJ 1728). (Also see State of Rajasthan v. N. K. (2000) 5 SCC 30 : (2000 AIR SCW 1407 : AIR 2000 SC 1812 : 2000 Cri LJ 2205) State of Himachal Pradesh v. Lekh Raj (2000) 1 SCC 247 : (1999 AIR SCW 4008 : AIR 1999 SC 3916: 2000 Cri LJ 44), Madan Gopal Kakkad v. Naval Dubey (1992) 3 SCC 204 : (1992 AIR SCW 1480)). In the present case we are clearly of the opinion that in view of the accused being a relation of the in-laws of the mother of the prosecutrix and the other young girls who are alleged to have been not examined being from the family of such in-laws, it is futile to expect that such girls would have been allowed by their parents to be examined as witnesses, and if allowed, could have freely deposed to in the Court. The question of drawing an adverse inference against the prosecution for such non-examination does not arise.

15. The observations made and noted by Dr. Mudita Gupta during medico legal examination of P.W. 7 clearly make out the prosecutrix having been subjected to rape. The prosecutrix has spoken of "penetration" in her statement. The discovery of spermatozoa in the private part of the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa. (See Narayanamma v. State of Karnataka (1994) 5 SCC 728). Slightest penetration of penis into vagina without rupturing the hymen would constitute rape. (See Madan Gopal Kakkad v. Naval Dubey (1992) 3 SCC 204 : (1992 AIR SCW 1480)). The suggestion made in the cross-examination of Dr. Mudita Gupta that injury of the nature found on hymen of prosecutrix could be caused by a fall does not lead us anywhere. Firstly, no such suggestion was given to prosecutrix or her mother during cross-examination. Secondly, why would the girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall? There is nothing to draw such an inference not even a

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suggestion, to be found on record. Answer to the suggestion made to Dr. Gupta cannot discredit the prosecution case in the absence of any other material to support the suggestion. So is the case with absence of external marks of violence on the body of the victim. In case of children who are incapable of offering any resistance external marks of violence may not be found. (See Modi's Medical Jurisprudence, 22nd Edn., p. 502). It is true that marks of external injury have not been found on the person of the accused but that by itself does not negate the prosecution case. Modi has opined (see, Modi ibid, page 509) that even in the case of a child victim being ravished by a grown up person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had elapsed between the time of the incident and medical examination of the accused within which time minor injuries, even if caused, might have healed.

17. In State of Punjab v. Gurmit Singh, (1996) 2 SCC 384 : (1996 AIR SCW 998 : AIR 1996 SC 1393 : 1996 Cri LJ 1728) , one of us, Dr. A.S. Anand, J. (as His Lordship then was) has thus spoken for the Court "A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." The approach adopted by the High Court runs into the teeth of law so stated and hence stands vitiated."

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29 Now as far as accused No.2 is concerned, he was also accompanying accused No.1 at the relevant time. He had visited house of the prosecutrix with accused No.1. He also entered the room of the prosecutrix and while the prosecutrix was being raped by accused No.1, he was standing as guard outside the house. He has also been identified by the prosecutrix in the Court. He has not led any evidence in defence that there was any enmity of the prosecutrix with him or his family members. In the present case, statement of the prosecutrix is consistent and natural. The statement of the prosecutrix inspires confidence. The findings returned by the learned trail court cannot be held to be perverse and there is no reason to interfere with the well-reasoned judgment rendered by the learned trial court.

30 Accordingly, in view of the discussions and analysis made hereinabove, there is no merit in the appeals and the same are dismissed. However, the Court after taking into consideration the facts and circumstances of the case is of the considered opinion that Dharam Singh (accused No.2) can be granted the benefit of Section 4 of the Probation of Offenders Act. Accordingly, the Registry is directed to call for the report of the Probation Officer, Sirmaur District, HP, on or before next date of hearing. List on **26.2.2014.**

(Rajiv Sharma),
Judge.

December 30, 2013
(pankaj)

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