

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. 384/2000

Decision on : 5th May 2009

PANKAJ CHAUDHARY & ORS. Appellants
Through:Mr.Dharmender Arya with Mr.Sunil
Bainsla and Mr.Sunil Kumar, Advocates.

versus

STATE(GOVT.OF NCT OF DELHI) Respondent
Through:Mr.Pawan Bahl, APP with
SI Inderjeet, PS Hauz Khas.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT
05.05.2009

S. MURALIDHAR, J.(open court)

Introduction

1. This case is an instance of how a false criminal case, instituted in connivance with obliging police officials, can virtually ruin the lives of innocent persons. The four appellants have been facing criminal proceedings for the offence of gang rape for over twelve years. The orders passed by this Court in appeal and the facts brought forth by some conscientious senior officers of the police have helped unravel the whole truth and bring an end to the misery of the appellants. The process has

however taken a tortuously long time of twelve years, a period precious and unrecoverable for the appellants. This case also demonstrates the value of the right of appeal and the need for self corrective processes within the police and the judiciary. The 'brooding sense of injustice' brought about a false accusation that has tormented the appellants for nearly twelve years should finally be assuaged.

2. This appeal is directed against a judgment dated 23rd May 2000 passed by the learned Additional Sessions Judge (ASJ) in Sessions Case No. 147 of 1999 arising out of the FIR No. 559 of 1997 registered at Police Station (P.S.) Hauz Khas under Section 376/34 IPC. By the said judgment the learned ASJ convicted the four appellants for the offence of gang rape under Section 376 (2) (g) IPC. The appeal also challenges the order dated 24th May 2000 passed by the learned ASJ sentencing each of the appellants to ten years' rigorous imprisonment (RI) and to pay a fine of Rs. 5000/- each and in default of payment of to undergo a further RI of one year.

Case of the prosecution

3. According to the prosecution, the four appellants who were living in the neighbourhood of the prosecutrix (PW 1) at the Shaheed Bhagat Singh Jhuggi Camp, Katwaria Sarai, entered her jhuggi about 9 pm on 28th July 1997 and demanded a bidi from her. She refused to give them any bidi.

Thereafter they demanded water which she again refused. She alleged that thereafter the appellants switched off the electricity and appellant Gunjesh caught hold of her hands and the other three accused tore out her clothes and committed rape on her. The prosecutrix alleged that she raised an alarm and fell unconscious thereafter. Her mother Bashira Khatoon (PW3) came there on hearing the alarm and saw the four appellants coming out of the jhuggi. PW 3 found the prosecutrix lying unconscious inside the jhuggi. It is stated that the police control room (PCR) van took the prosecutrix to the All India Institute of Medical Sciences (AIIMS) Hospital, where her statement was recorded by the police. Thereafter the FIR No.559 of 1997 was registered.

4. According to the prosecution, information was received in the Police Control Room (PCR) at around 9.30 pm about a quarrel at the Shaheed Bhagat Singh Jhuggi and was noted down in a daily diary (D.D. No. 26-A). Sub Inspector (SI) Jai Bhagwan (PW 7), who was the Investigating Officer (IO), along with Constable Khushi Ram (PW 4) went to the place of occurrence. They were told that the prosecutrix had already been taken to AIIMS. After reaching the AIIMS Hospital SI Jai Bhagwan sought the permission of the doctor on duty to record the statement (*ruqqa*) of the prosecutrix. By this time at around 11.45 pm the prosecutrix was medically examined by Dr.Monika. The medico legal certificate (MLC) (marked as Ex.PW6/A) records that the prosecutrix informed the doctor

that she was assaulted by four men and raped by three of them. The doctor recorded that there were “no external signs of injury on the face, breasts, abdomen and upper limbs.” There were “bruises of 4x4 cm on medial aspects of both thighs.” The blouse of the prosecutrix was found torn in the back side along the left sleeve. However, since she did not have spare clothes, the clothes she was wearing could not be sealed. Three slides were made and handed over to the police.

5. After the doctor declared her fit SI Jai Bhagwan recorded the statement of the prosecutrix at around 2 am and thereafter sent the *ruqqa* with Constable Khushi Ram to the Police Station where Head Constable Raghuvir Singh (PW 2) registered the FIR No. 559 of 1997 against the four accused. Constable Khushi Ram then took the FIR and the original *ruqqa* back to SI Jai Bhagwan at AIIMS, by which time according to SI Jai Bhagwan the duty constable produced before him “2 sealed parcels containing petticoat and slide of the prosecutrix and a sample seal which I seized vide memo Ex.PW4/A.” According to SI Jai Bhagwan he, Constable Khushi Ram and the prosecutrix then proceeded to the place of occurrence where he prepared a site plan (Ex.PW7/B). He recorded a supplementary statement of the prosecutrix as well as the statement of her mother PW3. He and Khushi Ram then returned to P.S.Hauz Khas and deposited the seized articles in the *malkhana*. The next day, i.e. 29th July 1997 SI Jai Bhagwan accompanied by Constable Mohan Singh (PW 5)

reached the jhuggi of the prosecutrix and on her pointing out arrested the four appellants. They were then taken to AIIMS where they were subjected to medical examination. The doctor on clinical examination opined that there was nothing to suggest that any of the said accused persons were incapable of performing sexual intercourse. The blood sample and the slide of smegma of the above named three accused persons were seized and the case property was deposited in the malkhana from where it was sent to the Forensic Sciences Laboratory (FSL). After committal of the case to the Court of Sessions, a charge under Section 376 (2) (g) IPC was framed against the appellants on 25th August 1999. They pleaded not guilty and claimed trial.

Proceedings before the trial court

6. Seven witnesses were examined for the prosecution. In their statements under Section 313 CrPC, the appellants denied the incriminating circumstances put to them. They stated that the prosecutrix was indulging in prostitution and that earlier also complaints had been lodged against the prosecutrix and certain other women in that regard. It was the case of the appellants that they had been falsely implicated. They examined two defence witnesses, Mahanand Jha (DW 1) and Sharabuddin (DW 2).

7. On behalf of the accused persons, it was argued before the trial court that the MLC of the prosecutrix belied her allegation that she had been

raped. The FSL report also did not bear this out. It was argued that if the prosecutrix indeed fell unconscious it could not be said that she was aware as to who had committed rape on her. Constable Mohan Singh in whose presence the accused persons were arrested and thereafter sent for medical examination could not identify them in court. The fact that the prosecutrix was indulging in prostitution was proved by the evidence of DW1 Mahanand Jha and DW2 Sharabuddin. They confirmed that complaints had been lodged earlier against her and certain other women by the residents of the jhuggi camp.

Judgment of the trial court

8. The learned trial court held that the testimony of the prosecutrix (PW1) was corroborated by her mother PW2 who had stated that she had seen the four accused persons coming out of the jhuggi. According to the trial court, the testimony of the prosecutrix was corroborated by the MLC which recorded that her blouse was torn. The submission of the accused that she was not injured was belied by the presence of bruises measuring 4 x 4 cm on both her thighs. The argument that since she was unconscious and her mother too found her in that state and therefore the prosecutrix could not have known who committed the rape was belied by the MLC which recorded that she was conscious and coherent. The trial court concluded that since the examination of the prosecutrix at AIIMS took place at about 11.45 p.m., and she was raped at around 9 pm, it was

possible that she could have regained consciousness between 9 p.m. and 11.45 p.m. Since the accused Pankaj Chaudhary, Qasim and Jai Lal admitted that they had been medically examined at AIIMS, the fact that the Constable Mohan Singh PW 5 who took them for medical examination did not identify them was to no avail. The accused persons had failed to prove that they had lodged any complaint against the prosecutrix. It was opined by the trial judge that “the prosecutrix was having no axe to grind against the accused persons for falsely implicating them in this case.” Relying upon the judgment of the Supreme Court in the *State of Rajasthan v. Noore Khan 2000 (3) Supreme Today 70*, the learned trial court held that there was no reason to disbelieve the testimony of the prosecutrix and that she had no reason to implicate only them for this offence. Although accused Gunjesh had not committed the rape, by virtue of the proviso to Section 376(2)(g) IPC he was liable to be convicted for the offence. As far as the sentence was concerned, the learned trial court held that since the appellants were involved in a heinous offence, each of them should be sentenced to ten years’ RI.

Orders in appeal

9. The present appeal was admitted by this Court on 10th July 2000. An application was filed by the appellants under Section 391 CrPC praying that the additional evidence should be permitted to be led by them in their defence during the pendency of the appeal. In this application it was urged

that on 28th July 1997 at about 9.20 p.m., the prosecutrix along with three other women, was in police custody having been arrested in FIR No. 558 of 1997 under Section 160 IPC registered at P.S: Hauz Khas. If indeed she was in police custody at about 9.20 p.m. on 28th July 1997 the question of the appellants having committed the rape on her at around 9 p.m. on that day did not arise. Copies of both FIRs were enclosed with the said application. By an order dated 12th January 2001 this Court opined that “In this case, additional defence evidence sought to be led, is copy of the FIR and the charge-sheet of the same police station. If it is true it would go to the root of the matter and thus essential for the justice here in the case.” The application was accordingly allowed and the trial court was directed to record additional evidence in defence sought to be produced by the defence. The prosecution was given an opportunity to cross-examine the witnesses produced in defence.

Additional Evidence

10. Pursuant to the aforementioned directions, the trial court recorded the additional evidence. On 16th March 2001, the deposition of Asst. Sub Inspector (ASI) Prem Chand (DW3) was recorded. On 30th March 2001, the evidence of Head Constable (HC) Ratan Lal (DW4) and Constable Sagar Chand (DW5), Dharamvir Singh (DW6) and SI Sher Mohammed (DW7) were recorded. DW3 got the original *rukka* on the basis of which FIR No. 558/97 was registered marked as Ex. DW3/A. The personal bond

of the prosecutrix which was marked as Ex. DW3/B and the *jama talashi* (search memo) was marked as Ex. DW3/C. The DD entry No.73B recorded in the police station by ASI Prem Chand was marked as Ex. DW3/D. DW4 HC Ratan Lal got DD entry No.67B which was made by him on 28th July 1997 marked as Ex. DW4/A. DD No. 25A which was also made by him on the same day regarding registration of the FIR No.558/97 was got marked as Ex.DW4/B. DW6 Dharamvir Singh got marked copy of the report of the Joint Commissioner (Crime & Traffic) dated 7th November 2000 and the connected notes on file as Ex. DW6/A. SI Sher Mohammed (DW7) brought the record of the PCR for 28th July 1997.

11. After the recording of the additional evidence this Court by its order dated 22nd May 2001 directed the release of the appellants on bail. At the next hearing this Court was informed by the learned APP for the State that an enquiry had been conducted by the Joint Commissioner of Police and appropriate action would be taken in “due course.” The order dated 24th September 2001 passed by this Court reads as under:

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On the last date of hearing, learned APP for the State had stated that enquiry had been conducted in the matter by the Joint Commissioner of Police and appropriate action in the matter would be taken in due course. A copy of the enquiry report and action by the Joint Commissioner was ordered to

be placed on record. The same has not been done.
Let the same be now positively filed within four weeks.

Renotify on 2nd November, 2001.”

12. Thereafter on 4th December 2001 the Court recorded:

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Learned APP for the State submits that the matter has been examined by the senior officers and the departmental action has been approved by the Commissioner of Police.

List the appeal for hearing in due course.”

Submissions of Counsel

13. Mr. Dharmender Arya, Mr. Sunil Bainisla and Mr. Sunil Kumar, learned Advocates appearing for the appellants submitted that the appellants have been falsely implicated in this case as is evident from the additional evidence recorded pursuant to the orders passed by this court. It is submitted that the evidence discloses that at around 9.20 p.m. on 28th July 1997 the prosecutrix was in fact in the custody of the police in FIR No. 558 of 1997, and therefore there was no question at all of the appellants having committed rape on her. Narrating the sequence of events, it is pointed out by the learned counsel that the information was received at P.S. Haus Khas about a quarrel at the jhuggis involving sex workers around 7.30 p.m. DD entry No. 67B was written at around 8.05 p.m. Thereafter ASI Prem Chand (DW 3) visited the spot with a female

constable Ms.Topo and a male constable Sagar Chand (DW5). DW 3 drew up a *rukka* on the spot at 8.50 p.m., and sent it to the PS with DW 5 police station where a DD entry as well as the FIR was registered at 9.20 p.m by Head Constable Ratan Lal (DW 4). DW 5 then left the police station taking with him the original *ruqqa* and the FIR and reached Katwaria Sarai bus stop where DW 3 is alleged to have been waiting, and thereafter returned to the police station only at 10.20 p.m. as is evidenced by DD entry No.73B. The DD entry No.25A shows that the FIR 558 of 1997 was registered only at 9.20 p.m. The arrest and search memos and the bail bonds could have been drawn up only thereafter. The policemen (DWs 3 and 4) returned to the PS only at 10.20 pm. Therefore the prosecutrix was in the custody of the police at least till around 10 pm.

14. It is pointed out that FIR No. 559 of 1997 it was preceded by DD entry No.26A recorded at P.S. Hauz Khas. At that stage the PCR was only informed that there was a quarrel and not of any rape having been committed. Although the rape is alleged to have been committed at around 9.00 p.m. on 28.7.1997, and the prosecutrix was alleged to have been taken to AIIMS even before SI Jai Bhagwan could reach there at around 9.30 pm. The medical examination of the prosecutrix took place only at 11.45 pm on 28.7.1997. The FIR in respect thereof was registered only at 3.15 a.m. on 29.7.1997. Considering that AIIMS was only 7 kilometers away from the scene of occurrence, the delay was unexplained. Although

the prosecutrix stated that her clothes were torn out by the accused at the time of rape, her medical examination showed that only the blouse was torn along the back of the left sleeve and her clothes could not be sealed as the prosecutrix did not have any extra clothes. This belied the statement that the sealed clothes along with the slides were seized by SI Jai Bhagwan from the duty constable at the hospital and deposited by him at the police malkhana as soon as he reached there in the early hours of 29.7.1997. No such clothes were produced during the trial. The learned counsel also pointed out that the presence of smegma on the three accused persons who were medically examined also showed that they had not recently indulged in any sexual activity. The FSL report only showed that the semen stains were found on the petticoat of the prosecutrix and that this matched the blood group of the accused Jai Lal. But this solitary circumstance could not be said to prove the offence of rape.

15. Learned counsel for the appellants point out that the facts concerning FIR No.558 of 1997 registered at the same police station against the prosecutrix under Section 160 IPC were deliberately suppressed by the prosecution during the trial of the present case. Although the charge sheet in FIR No.558 of 1997 was readied on 30th July 1997 itself it was filed in the court only on 8th October 1998. It is alleged that whole prosecution against the appellants was mala fide and that since they had protested against the running of the prostitution racket in the Shaheed Bhagat Singh

Jhuggis by the prosecutrix and certain other women and this case was deliberately foisted on them by the local police. The learned counsel have placed on record the copies of the written representations dated 21st July 1997 and 1st May 1996 written by the residents of the Shaheed Bhagat Singh Jhuggi Camp, protesting against the running of the prostitution racket. These representations bear the stamp of the Hauz Khas Police Station in acknowledgment of the receipt thereof. It is submitted that the police had deliberately kept back this material also from the trial court and that this would have clearly proved the fact of previous complaints having been made by the jhuggi dwellers which included some of the appellants. In any event both DW 1 and DW 2 had categorically stated that the prosecutrix was involved in prostitution and this evidence was ignored by the learned trial court. The reports of the Joint Commissioner of Police as well as the DCP, Vigilance have substantiated the submissions of the appellants that the case against them was a false one.

16. Mr. Pawan Bahl, the learned APP submits that the evidence of DWs 3 to 5 showed that although the prosecutrix was arrested on the spot, she and the other women arrested were released at around 8.50 pm on 28th July 1997 upon furnishing their bail bonds and even before the *ruqqa* was sent by DW 3 to the P.S. for registration of the FIR. He then refers to the evidence of DW4 HC Ratan Lal, who stated that he telephonically informed ASI Prem Chand (DW3) about the FIR number which was

written on the bail bond furnished by one of the women arrested along with the prosecutrix and that this telephonic call took place at around 8.52 p.m. According to Mr.Bahl the evidence of DW 3 that he left the spot at around 8.52 pm after releasing the women after taking their bail bonds should be believed.

17. It is urged by Mr. Bahl that the report of the Joint Commissioner (Crime & Traffic) Ex. DW6/A should not be relied upon by this Court because it was merely an opinion of one police officer. He refers to certain observations of the Supreme Court in the decisions in *Sham Kant v. State of Maharashtra 1992 Suppl. (2) SCC 521* and *T.T. Antony v. State of Kerala 2001 II AD (Crime) SC 513*. According to him, the subsequent inquiry report submitted in December 2001 by Shri S.K. Gautam, Deputy Commissioner of Police also should not be referred to by this Court since that was not part of the evidence in the case. Mr. Bahl refers to the written submissions of the State where the following three factors are pointed out as proving the case of the prosecution:

“C. Corroborative evidence.

- (i) MLC of the prosecutrix Ex PW 6A shows injury ‘Bruises on 4 x 4 cm on medial aspects of both thighs’. ‘Blouse torn along the back of the (L) sleeve. (The injury found could be possible by use of force).
- (ii) FSL report Ex PW7/G shows semen stains of ‘B’ group on the petticoat of the prosecutrix, which

matches with the blood 'B' group on the petticoat of the prosecutrix, which matches with the blood of 'B' group of accused Jailal.

- (iii) PW-3 Bashira Khatoon met her of the prosecutrix saw all the accused persons coming out of the house of prosecutrix after the alleged occurrence.”

Sequence of events on the evening of 28th July 1997 pertaining to FIR 558 of 1997

18. The most crucial aspect of the present case is about the sequence of events that took place on the evening of 28th July 1997. The incident of quarrel involving sex workers at the Shaheed Bhagat Singh Jhuggi beginning at around 7.30 pm on 28th July 1997 was first reported to PS Hauz Khas by telephone by an unidentified caller. DD entry No.67B of 28th July 1997 at PS Hauz Khas records that at 8.05 pm, an unidentified person had informed that in the Shaheed Bhagat Singh Jhuggi Camp “a lady is quarreling.” The entry records that the information received on telephone, was registered in the *rojnamcha*, and the copy of the report was handed over to ASI Prem Chand (DW 3) who along with Constable Sarla Topo and Constable Sagar Chand (DW 5) left for the place of occurrence. The *ruqqa* drawn up by SI Prem Chand also indicates the time of the occurrence as 7.30 p.m. on 28th July 1997. The *ruqqa* records that when he reached the place i.e., at “Aruna Asaf Ali Shaheed Bhagat Singh Road” there was a large crowd of people present on the road and women “were hurling filthy language with loud voices.” The ASI with the two

constables brought under control four women including the prosecutrix. It was recorded that the above named women were hurling abuses openly on the common road and obstructing the movement of the people and thus had committed the offence under Section 160 IPC (affray). The *ruqqa* records that the date and time of the sending of the report was 8.50 p.m. Significantly, this *ruqqa* written by DW 3 himself states that he is sending it to the PS with DW 5 and that he is staying back for continuing investigations. It also makes no mention of DW 3 having already arrested the four women, or having already drawn up their arrest and search memos, their bail bonds and of having already released them.

19. By the time DW 3 deposed before the trial Court on 16th March 2001 pursuant to this Court's directions, the appellants had already been convicted and it was their specific case that the prosecutrix was in police custody in FIR No. 558 of 1997 till about 10 pm. In his deposition DW 3 gave a version, not reflected in the *ruqqa* and clearly in a bid to explain how the prosecutrix could have been in her jhuggi at 9 pm. DW 3 stated that all of the above steps, i.e. the arrest and search of the four women, their giving bail bonds and being released was done between 8.17/8.18 pm (when according to him he reached the spot which was three km away from the PS) till 8.50 pm. He says in his deposition that "I had completed investigation up to 8.50 pm. After sending rukka I went and made telephone call to the duty officer and told him (*sic* asked him) what would

be the serial number of the case.” Here again there is a problem. The FIR was registered only at 9.20 pm and therefore no FIR number would have been available prior thereto. So DW 3 uses the term “serial number.” However, there was no such ‘serial number’. Clearly what the IO would have needed for the bail bond, arrest memo etc., was the FIR number. In fact the photocopy of the bail bond of one of the four women (enclosed at page 61 of the paperbook) reflects the FIR number. The statement of DW 3 that he left the spot soon after sending the *ruqqa* is also not supported by DW 4 HC Ratan Lal who was also the person who made DD Entry 25 A which states that FIR 558 of 1997 was registered at 9.20 pm. In it is stated that the copy of the FIR along with the *ruqqa* in original has been sent to the ASI Prem Chand (DW 3) who was busy investigating the case at that time at the place of occurrence.

20. In his cross examination by the APP DW 3 states that “I had released these ladies prior to 8.50 – 8.52 pm.” And in response to the question by the court he stated “the entire investigation was carried by me on the road leading to Vasant Kunj as the quarrel had taken place on the road.” The time of release of the four women as given by DW 3 in his deposition is not supported by the record. It will be recalled that in the *ruqqa* it was stated that a large crowd had gathered at the spot and that the four women had to be overpowered and brought under control by the ASI and the two constables as they were creating obstructions in the movement of people.

If the police reached there only around 8.18 pm and this was the situation it was highly unlikely for the police to have completed all the steps referred to (i.e., the arrest, the search, the drawing up of bail bonds and the release) in respect of each of the four women and released them by even 8.52 pm as claimed by DW 3. As per the site plan drawn in FIR 559 of 1997, the distance between the road and the jhuggi was such that it was impossible for the prosecutrix to be alone back in her jhuggi at 9 pm. It will also be recalled that according to SI Jai Bhagwan when he reached the spot (i.e. the jhuggi of the prosecutrix) at 9.30 pm, she had already been picked up by the PCR van and taken to AIIMS.

21. In his deposition ASI Prem Chand (DW 3) states that after making the call to the P.S. he told lady constable Ms.Topo that she should return home. However, there is a difficulty here too since the DD entry no. 73B, which admittedly was recorded by DW3, states that he and the two accompanying constables Ms.Topo and Sagar Chand (DW 5) returned to the P.S. at 10.20 pm. Therefore DW 3 tries to make up for this by stating that “usually such an entry (is made) about the staff returning to the police station. Although they may return to their homes without doing so.” What exactly DW 3 was doing between 8.52 pm and 10.20 pm is not very clear. It is improbable that throughout this time he was at the Katwaria Sarai bus stop as is sought to be suggested. All this raises more questions. To this court it is plain that DW 3 was not speaking the truth before the court.

22. HC Ratan Lal (DW4) in his deposition states as under:

“DD entry No.67B was made by me on 28-7-97. The entries Ex. DW4/A DD No.25A was also made by me on the same day regarding regn. of FIR No.558/97. This FIR was recorded on the basis of rukka brought by constable. FIR No. 558/97 was recorded by me. The copy of FIR is Ex. DW4/B. After recording FIR No.558/97 I had sent Ct. Sagar Chand with original rukka and copy of FIR to the IO who was reported to be on the spot. Prem Chand had made a telephone call prior to 9.20 p.m. and he made enquiry from me that he had sent Ct. Sagar Chand with rukka and I should inform him FIR No. **I told FIR No. to him.** He had telephone call around 8.52 p.m. **I could not have registered another FIR between 8.52 p.m. and 9.20 p.m. because I was in process of recording this FIR. At 8.52 p.m. I had not registered the FIR, the FIR was registered at 9.20 I only told case number.** I do not remember if I had similarly told FIR No. to any other IO. However whenever next FIR number is asked by some senior officer, I can tell.” (emphasis supplied)

23. A careful perusal of the above deposition would show that that DW4 had not yet registered the FIR at 8.52 p.m. Although in the initial part of his deposition he says that he gave ASI Prem Chand the FIR number, he then says that “the FIR was registered at 9.20 I only told case number.” Clearly another desperate attempt at fudging facts. It will be recalled that in DD Entry 25 A DW 4 notes that ASI Prem Chand was even at the time

of that DD entry i.e. 9.20 pm., still investigating the case at the place of occurrence. Therefore the versions of DW3 and DW4 as to when DW 3 left the spot are not consistent. The version of DW 3 about when he released the four women and when he left the spot after completing investigation is not supported by DW 4. It appears to this court that neither DW 3 nor DW 4 is speaking the truth.

24. What happened after the registration of the FIR is spoken to by DW5 Constable Sagar Chand (DW 5), who took the *rukka* from the spot and reached the police station at 9.05 p.m. He states that he started the spot at about 8.50 p.m. with the *rukka*. He again left the police station around 9.30 p.m. with the copy of the FIR and the original *rukka* and instead of reaching the spot, he reached the Katwaria Sarai bus stop at around 9.40 p.m. where he found the IO standing. He stayed at the bus stop up to 10.00 – 10.15 p.m. and did not go to the police station. According to him since the Katwaria Sarai bus stop was a sensitive point he was asked by the SHO to stay at the bus stop. He therefore maintains that the DD entry at 73-B showing their having returned to the police station at 10.20 p.m. is correct. It appears that an alibi is being created with a view to somehow show that the prosecutrix was released at 8.50 pm on 28th July 1997. The attempt seems to be hopeless to this court as these versions are not supported by contemporaneous documents. It seems more probable that bail bonds of the four women were prepared only after DW 5 returned to the

spot with the FIR and *ruqqa* which must be around 9.45 pm considering that the spot was at a distance of 3 km from the PS. Given the description of the scene of occurrence as depicted in the *ruqqa* with the large crowd gathered and the four women in a belligerent mood, it is likely that they were being detained till DW 5 came back to the spot. It seems highly improbable that the four women, including the prosecutrix, were released before 8.50 pm on 28th July 1997 as claimed by DW 3. On his part DW 5 is also not speaking the truth when he says that he took the FIR and *ruqqa* not to the spot but to ASI Prem Chand at the Katwaria bus stand where he remained till 10.10 pm.

25. Considerable confusion created by these versions of DWs 3 to 5, who clearly are not speaking the truth. This is fortified by the report dated 7th November 2000 of the Joint Commissioner (Crime & Traffic) which has been brought on record as Ex. DW6/A. This document having been duly proved by DW 6 has to be treated as evidence forming part of the record. Therefore, this Court finds that the decisions in *Sham Kant* and *T.T. Antony* referred to by the learned APP do not really apply on the facts of the present case. There is therefore no merit in the opposition by the learned APP to this Court referring to the said report.

26. In the said report, the Joint Commissioner notes as under:

“This case has been registered at 9.20 p.m. The contents of the FIR run into two pages. It is natural that twice

carbon copy would have been changed. The FIR has been registered in the 'Hindi' language. Corresponding Daily Diary entry has also been lodged. All this could have taken, at least 12-15 minutes. Now the timing comes to 9.32 – 9.35 p.m. Const. Sagar Chand took the copy of FIR and went at the spot. The place of occurrence is at a distance of 3 kilometres. For covering this much, the least possible time could be between 10 to 12 minutes (It is not mentioned, whether he went by scooter, M/cycle or a bus, but we presume, he went by the fastest available mode of transport i.e. by scooter). Now the timings comes to 9.42 – 9.47 minutes p.m. Thereafter, bail form etc. were filled-in, and the ladies were released on bail. The ladies were 4 in numbers, and the minimum time taken by the I.O. to fill in the documents etc. would be safely assumed at between 15 – 20 minutes. So, the times comes to about 9.57 to 10.07 p.m. At 10.20 p.m., the I.O. was back in the police station. (It is recorded accordingly). So from 8.05 p.m. till about 10 p.m. all the ladies were in the police custody. This includes prosecutrix.”

27. The above report of the Joint Commissioner is dated 7th November 2000. The sequence as explained by the Joint Commissioner shows that it is only after the FIR was number was given by Constable Sagar Chand to the ASI Prem Chand at the spot, which is at the distance of three kilometers from the police station, that the bail forms were filled in and the ladies were released on bail. It is for covering this aspect that ASI Prem Chand has made a false statement in his deposition that he had

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released the ladies even before sending *rukka* to the police station. It is not possible for him to have noted the FIR number on the bail bond of one of them without the FIR first being registered. If indeed the bail bonds were drawn up by him even before sending the *rukka*, clearly the FIR number which was available only at 9.20 p.m. could not have been written on one of them. He therefore was at the spot with the four women, including the prosecutrix, in his custody till at least 9.30 pm.

28. This Court concludes therefore that the version of DWs 3, 4 and 5 that the four women including the prosecutrix were released by 8.52 pm on 28th July 1997 after preparing their arrest and search memos and bail bonds is unbelievable and not supported by the record. Having perused the site plan drawn up by SI Jai Bhagwan of the location of the jhuggis vis-à-vis the road where the quarrel and the investigation took place, it seems unlikely that after her release the prosecutrix returned to her jhuggi by 9 pm. It appears to this Court that DWs 3, 4 and 5 have given false evidence in this case with a view to secure the wrongful conviction of the appellants.

Sequence of events on the evening of 28th July 1997 pertaining to FIR 559 of 1997

29. The events leading to the registration of FIR 559 of 1997 which led to the present case will now be examined. The FIR was triggered by an

information received in the PCR at around 9.18 pm on 28th July 1997 that a quarrel was taking place at the Shaheed Bhagat Singh Jhuggi. DW 7 SI Sher Mohammed stated in his cross-examination that there was an entry at 9.18 p.m. on 28th July 1997 about a call received by one Dewan ji regarding a quarrel between some sex workers in the jhuggi of JNU Camp. However, later (as mentioned in the report of DCP S.K.Gautam, which will be referred to shortly) the caller was identified as Sharabuddin DW 2. In fact in his deposition DW 2 has said so. This information was then conveyed to a PCR van in which ASI Kamal Dev was sitting. He then reached the spot, picked up the prosecutrix and took her to AIIMS. The information was conveyed by the PCR to P.S. Hauz Khas as well. There DD entry No.26A was made to the effect that at 9.30 p.m. information was received about a quarrel between the sex workers. Significantly this DD entry does not record any incident or complaint of rape. By the time the SI Jai Bhagwan, the IO in the case reached the spot he was told that the prosecutrix had already been taken to the hospital by the PCR van.

30. The MLC of the prosecutrix was recorded at 11.45 p.m. The doctor who prepared the MLC (who was identified by PW6 as Dr. Monika) was not examined. PW6 was Dr. Alka Sahni of AIIMS who stated that she identified the handwriting of Dr. Monika. The MLC only bears an initial at the bottom, which should be presumed to be of Dr.Monika, although the MLCs of the accused bear the signatures with names in the brackets of

the doctors who prepared them. In the MLC of the prosecutrix, she is shown as being conscious and coherent with no external signs of injuries on the face, breast, abdomen and upper limbs. It was noticed that there were bruises of 4 x 4 cms on the medial aspects of both thighs. Three slides were made and handed over to the police. The blouse was “torn along with the back of the left sleeve.” Significantly the MLC records that “clothes could not be sealed as pt. does not have any extra clothes.”

31. It will be recalled that SI Jai Bhagwan (PW 7) stated that “duty constable of the hospital produced before me two sealed parcels containing the petticoat and slide” The MLC of the prosecutrix clearly therefore, does not support the version of the police that two sealed parcels containing the clothes of the prosecutrix and the slides were handed over to SI Jai Bhagwan by the duty constable at the hospital and deposited at the police malkhana by the latter. The evidence of PW3 SI Jai Bhagwan is unbelievable. In fact PW 4 Constable Khushi Ram first made no mention of the sealed packet containing clothes in his examination in chief. Later when the APP cross-examined him, he made up for this. Clearly his version on this aspect is not supported by the record. The duty constable at AIIMS was not examined.

32. The prosecutrix has also given different versions of the incident. Initially in her statement to SI Jai Bhagwan she said that the accused put a

cloth over her mouth and committed rape. In her supplementary statement she said that accused Gunjesh had put a hand over her mouth. In her deposition before the court she stated that the accused persons “had torn out my clothes and committed rape.” No such torn clothes were ever seized by the police. What was sent to the FSL was a petticoat allegedly worn by the prosecutrix. It is not clear when this was seized by the police. The MLC only reflects that the left sleeve of the blouse at the back portion was torn. Even that could not be sealed as the prosecutrix had no spare clothes. Therefore, on the aspect of the seizure of the clothes worn by the prosecutrix the evidence of the prosecution witnesses is unbelievable and unsupported by the MLC.

33. There is no dispute that the AIIMS is about seven km from the scene of occurrence. SI Jai Bhagwan says he reached the place of occurrence at 9.30 pm only to be told that the PCR van had already taken the prosecutrix to AIIMS. He then says he reached AIIMS at 12.30 am. Why would it take the SI three hours to reach AIIMS? What was he doing in the meanwhile? Also if the prosecutrix was taken away to AIIMS even before 9.30 pm, and the hospital records show that she was brought to AIIMS at 10.05 pm, why was she not examined till 11.45 pm? The report of Sri S.K.Gautam, DCP Vigilance, shows that ASI Kamal Dev was in the PCR and he was the one who went to the spot and took the prosecutrix to the hospital. Kamal Dev stated that the prosecutrix was conscious and had not alleged

rape when questioned by him. She only told him that she had been beaten up by three to four boys. The time of prosecutrix being brought to the hospital is also full of uncertainties. The report of Shri S.K. Gautam DCP Vigilance states as under in this regard:

“SI Jai Bhagwan went to the hospital and found lady (prosecutrix*). He recorded her statement concerning allegations of rape by four persons and sent a Rukka for registration of a case. The statement of the lady (prosecutrix*) was recorded at 2.30 a.m. and Rukka for registration of case u/s 376 IPC was sent at 2.50 a.m. In the hospital records, the PCR van reportedly arrived with the lady under reference i.e. (prosecutrix*) at 2205 hrs. There is over writing in the timing mentioned in the records. Initially it was 2005 which have been made 2205. In this connection, complaint Sh. Amod Shashtri alleged that the PCR van reached with the lady under reference at 2305 which has been made 2205 by over writing whereas the statement revealed that it was 2005 which was made 2205 by over writing. Even examination of the documents indicates that it was written as 2005 which was subsequently changed to 2205 by over writing. The statement of ASI Kamal Dev, in this connection, confirms the time of arrival as 2205 who had taken by the injured to the hospital.”

* (In order to protect her privacy, the name of the PW1 has been mentioned as `prosecutrix`)

34. There are inconsistencies in the evidence of the prosecutrix herself.

The most startling is the first statement made by her in her cross-examination which reads: "I regained consciousness on the next date at about 10.00 a.m." It is unbelievable that if the prosecutrix regained consciousness only on the following day at about 10.00 a.m., the police could have recorded her statement at around 2.11 a.m. as claimed by SI Jai Bhagwan. The trial court simply failed to notice these aspects.

35. If this is seen in the background of the events concerning FIR 558 of 1997, it seems highly improbable that after her release at 8.50 pm at the road leading to Vasant Kunj the prosecutrix came back and was alone in her jhuggi at 9 pm on 28th July 1997, that four of her neighbours entered her jhuggi and committed rape between then and around 9.18 pm and that even before 9.30 pm she was picked up from there by the PCR van. It appears to this court that SI Jai Bhagwan (PW 7), Constable Khushi Ram (PW 4) and the prosecutrix PW1 have given false evidence in this case.

36. The Joint Commissioner in his report dated 7th November 2000 has also undertaken a detailed analysis of the evidence and concluded as follows:

"Analysis of this FIR

As per FIR, the rape is committed at 9 p.m. While at this time the lady (prosecutrix) was in the custody of the police in case FIR No. 558 u/s 160 IPC. Four persons committed the rape. PCR Van took e hours 15 minutes to

cover 7 kms. Case is registered at 3.15 a.m. on 29.07.97. The rape victim is the same. Police station is the same. SHO is the same. Even then nobody noticed the facts. It is, very difficult to judge now, what would have been the real situation. But the rape case is full of clouds.

Conclusion

As per police records, (prosecutrix*) remained in the custody of police one hour before and after the time of alleged rape. This is the truth, based on the documentary evidence and simply cannot be ignored. *Confidential enquiries have revealed that the (prosecutrix*) is a prostitute, and still active in her business from her jhuggi.*”

* (In order to protect her privacy, the name of the PW1 has been mentioned as `prosecutrix`)

37. Just like the Joint Commissioner of Police, who in his report dated 7th November 2000 states that the possibility of the prosecutrix having been raped is highly unlikely, Sri S.K. Gautam, the DCP also comes to the same conclusion in his report of December 2001. The reasons given by him are inter alia as under:

“The PCR call to South District Control Room at 9.20 p.m. must have been made after about 5/10 minutes after the actual occurrence of the incidence. Some time is also taken in transferring the call from PCR to the concerned District. The person who made the PCR call has been identified to be Mr. Shrabuddin. He has not been examined by the E.O. as he could not be located.

However, he would also have taken at least 5/10 minutes in locating a telephone to make a call. By any stretch of imagination, the incidence would not have been possibly occurred after about 9 p.m. That also is about the time when Smt. (prosecutrix*) had been released by the IO ASI Prem Chand in case FIR No. 558/97 u/s 160 IPC. Time indicated by ASI Prem Chand is 8.50 p.m. The time sequence therefore does not support the allegation of rape. The possibility of rape, therefore, is highly unlikely, if the time sequence is correctly recorded.”

* (In order to protect her privacy, the name of the PW1 has been mentioned as `prosecutrix’)

Other aspects of the case

38. The other aspects noted is that SI Jai Bhagwan did not examine ASI Kamal Dev who was the person in the PCR van which picked up the prosecutrix from the scene of occurrence. It is indeed incredible that no independent public witness in a crowded and congested jhuggi camp (other than PW 3 the mother of the prosecutrix who was an obviously interested witness) spoke of the police van coming and picking up the prosecutrix or bringing her back in the early hours of 29th July 1997.

39. The learned APP has placed considerable reliance on the FSL report. This court has perused the FSL report. None of the slides taken confirmed the version of the prosecutrix as regards the rape. The mere fact that the

semen stain on the petticoat of the prosecutrix (which incidentally was not seized at the hospital) is of the B blood group which matches the blood group of the one of the appellants cannot by itself prove the offence of gang rape against him. The injuries on the thighs of the prosecutrix could well be consistent with the version of ASI Kamal Dev who stated that prosecutrix told him that she had been beaten up by four boys. The third piece of evidence sought to be relied upon by the prosecution is that of the mother PW 3. She only says that she saw the four appellants (incidentally she identified only two of them in court) leaving the jhuggi. This is too weak a piece of evidence to prove the offence of gang rape. In any event it is inconsistent with the additional evidence that has now come on record.

40. The evidence of PW 5 Constable Mohan Singh who failed to identify any of the appellants in the court when they are supposed to have been arrested in his presence ought not to have been brushed aside lightly by the trial court. The version of DW 2 as to what transpired on 28th July 1997 also has not been taken note of by the trial court. The trial court erred in accepting the evidence of the prosecutrix uncritically when the entire evidence that has come on record belies her version completely.

41. That there were complaints of prostitution being carried on in the jhuggis by the prosecutrix and other women is also borne out not only by the evidence of DWs 1 and 2 but by the report of Shri S.K. Gautam DCP

Vigilance as well. In the light of the evidence of DWs 1 and 2, who have not been shaken in their cross-examination on this aspect, the conclusion of the trial court that the accused had failed to prove the making of previous complaints against the prosecutrix and the other women is contrary to the record. It is seen that the representations were made over a period of time since 2003. There was one given on 21st July 1997, just one week prior to the incident, which specifically named the prosecutrix as one of the women indulging in prostitution.

42. The trial court's reasoning and conclusions are therefore erroneous and deserve to be set aside.

The conduct of the police

43. It is indeed also inexplicable that in the same police station, Hauz Khas, on the same date, i.e., 28th July 1997 the aforementioned DD entries, i.e., DD entries 25A, 26A, 67B and 73B were recorded and yet no one noticed the connection between them. To any ordinarily skilled investigator it would have been plain, had these entries been placed side by side, that something was not ringing right. It would be plain that the story of gang rape of the prosecutrix in her jhuggi at 9 pm on that day was unbelievable. It is indeed surprising that Inspector S.M. Bakshi, the then SHO of the Police Station Hauz Khas who was in full knowledge of all these events did not detect any inconsistency in the timing of the

registration of the FIR in the rape case.

44. What is most surprising as far as this Court is concerned is that the police had the entire trial in FIR No.559 of 1997 took place without even a whisper of FIR No.558 of 1997 which involved the prosecutrix herself as an accused. Although the charge sheet in FIR 558 of 1997 was prepared on 5th September 1997, it was not filed in the court till 8th October 1998. This delay remains unexplained. The trial court was deprived of seeing the sequence of events in the manner that has come to light in the present proceedings. There can be no manner of doubt that the concerned police officers of police station Hauz Khas had deliberately misled the trial court by keeping back information which was vital for the decision in the case. But for the orders passed by this Court on 12th January 2001, it is possible that the above facts may not have come on the record of the present case at all.

45. The Joint Commissioner of Police who prepared his report dated 7th November 2000 deserves to be commended for the objectivity and honesty with which he has unearthed the facts on a careful perusal of the police records. So does Shri S.K. Gautam, Dy. Commissioner of Police, Vigilance who made an independent inquiry into the entire episode in December 2001. The notings of the Commissioner of Police on the report of the Joint Commissioner of Police reveal that initially the police were

perhaps awaiting the decision in this appeal to take further action against the erring police officers. However, in his report Shri S.K. Gautam DCP Vigilance has stated that the facts unearthed “indicate negligence and dereliction of duty on the part of the SI Jai Bhagwan and ASI Prem Chand and Inspector H.M.Bakshi the then SHO PS Hauz Khas. Necessary departmental action against them have since been approved by the Commissioner of Police, Delhi.” This Court hopes that the necessary departmental action has already been taken and if not will not be delayed any further. A report of the departmental action taken against the identified delinquent police officials be placed on record by the Commissioner of Police within a period of eight weeks from today.

Conclusions and consequential directions

46. It is shocking that four innocent persons have been made to face the ordeal of a criminal trial on false charges of a grievous crime for nearly 12 years now. The above narration shows that this has happened on account of the malafide actions of certain police officials in connivance with the prosecutrix who had little concern for truth, justice or the rule of law. They have subverted the course of justice by misleading the trial court into convicting four innocent citizens, who have lost twelve precious years of their lives in facing a damning indictment, the stigma of which is unlikely to be erased for some time notwithstanding their acquittal by this judgment. This court considers that mere disciplinary action against the delinquent

police officials, who have already been identified by the police itself, will not be adequate reparation for this heinous act.

47. There is a need to remind ourselves that there has to be accountability for the abuse of statutory powers, particularly where it has the potential of adversely affecting the life and liberty of persons. In *D.K. Basu v. State of W.B. (1997) 1 SCC 416*, the Supreme Court spoke in the context of abuse of police powers and the need to enforce accountability. It observed (SCC, p. 433):

“How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values.....”

48. In the present case, the DCP Vigilance has identified three police officers i.e. SI Jai Bhagwan and ASI Prem Chand and Inspector H.M.Bakshi the then SHO PS Hauz Khas as being guilty of dereliction of duty. Of these two of them i.e. SI Jai Bhagwan and ASI Prem Chand have deposed as PW 7 and DW 3 respectively in the trial of the present case. This Court has found that both of them have not spoken the truth before

the trial court. In addition this Court also finds that DWs 4 and 5, Head Constable Ratan Lal Constable Sagar Chand respectively have also not spoken the truth. Section 193 IPC punishes the offence of giving false evidence, as defined in Section 191 IPC. Section 195 IPC punishes the offence of giving or fabricating false evidence with the intent to procure the conviction of an offence punishable with imprisonment for life “or imprisonment for a term of seven years or upwards.” In the present case, the punishment for the offence under Section 376 (2) (g) for which the appellants were convicted is punishable for a term of “not less than ten years” and they were accordingly sentenced by the trial court to that minimum sentence. Therefore the offences under Sections 193 and 195 IPC appear to be attracted as far as SI Jai Bhagwan (PW 7), ASI Prem Chand (DW 3), Head Constable Ratan Lal (DW 4) and Constable Sagar Chand (DW 5) are concerned.

49. The prosecutrix PW 1 too has spoken falsehood. As far as she is concerned the offence under Section 211 IPC of instituting or causing to institute a criminal proceeding “knowing that there is no just or lawful ground for such proceeding” would seem to be attracted.

50. Turning to the procedural aspect, in terms of Section 195 (1) (c) CrPC no court shall take cognisance of any offence punishable under the above provisions (i.e Sections 193, 195 and 211 IPC) when such offence is

alleged to have been committed in or in relation to any proceeding in any Court “except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate”. The Registrar General of this Court is therefore directed to make a written complaint to the concerned court on the basis of this judgment against the aforementioned persons for the offences under Sections 193,195 and 211 IPC. The concerned court will thereafter proceed in accordance with law.

51. There is also the aspect of compensation to the four appellants for the loss of their precious twelve years in battling a false prosecution. The State should consider suitably compensating them, monetarily and/or in any other appropriate manner. It is directed that a decision to this effect be taken by the State within a period of twelve weeks from today and a compliance report be placed before this court.

52. It is clarified that the above directions will not come in the way of the appellants seeking appropriate remedies available to them in law to seek redress for the violations of their fundamental and human rights to life and liberty. The costs awarded by this court to the appellants will also be independent of any other amount they may be awarded as compensation by the state and/or any other authority.

53. The impugned judgment dated 23rd May 2000 and the impugned order

on sentence dated 24th May 2000 of the learned Additional Sessions Judge are accordingly set aside. The appellants are acquitted of the offence under Section 376(2) (g) IPC. The appellants are set at liberty forthwith. Their bail bonds are discharged and sureties cancelled. The fine amounts, if paid, will be returned to each of them within a period of four weeks from today. In the facts and circumstances of the present case, the appeal is allowed with costs of Rs. 25,000/- to each of the appellants. The costs will be paid to each of them by the State within a period of four weeks from today. Proof of payment of costs will be placed on the record by the State.

54. Copies of this judgment be given dasti to the counsel for the parties. In addition, certified copies of this judgment be delivered within one week by the Registry to the Chief Secretary, GNCTD, and the Commissioner of Police, with covering letters drawing attention to the directions issued to each of them in paras 45, 51 and 53 of this judgment. The Registrar General will, after complying with the directions in para 50, return the record to the court concerned together with a certified copy of this judgment.

S. MURALIDHAR, J.

MAY 05, 2009

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