

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRIMINAL APPEAL NO. 755/2009**

% **Reserved on : 16th July, 2012**
Date of Decision: 23rd August, 2012

HARPREET SINGH Appellant
Through Mr. Michael Peter, Mr. Dharmendra
Vashistha, Mr. Saurabh Jana &
Mr. Sumit Kalra, Advocates.

Versus

STATE OF DELHI Respondent
Through Ms. Richa Kapoor, APP for the State.

CRIMINAL APPEAL NO. 803/2009

KULDEEP SINGH Appellant
Through Mr. S.N. Gupta & Mr. Ayush Gupta,
Advocates.

Versus

STATE GOVT. OF NCT Respondent
Through Ms. Richa Kapoor, APP for the State.

CRIMINAL APPEAL NO. 908/2009

MUNISH KUMAR Appellant
Through Mr. Maninder Singh, Ms. Aekta Vats,
Mr. Sanjay Chaubey, Mr. Sermon Rawat
& Mr. Jagmeet Randhawa, Advocates.

Versus

STATE Respondent
Through Ms. Richa Kapoor, APP for the State.

CRIMINAL APPEAL NO. 299/2010

SATYENDER SINGH Appellant
Through Mr. Bhupesh Narula, Advocate.

Versus

THE STATE (NCT OF DELHI) Respondent
Through Ms. Richa Kapoor, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE S.P.GARG

SANJIV KHANNA, J:

These four appeals by Harpreet Singh, Satyender Singh, Kuldeep Singh and Munish Kumar impugn the judgment dated 17th August, 2009 in Case No. 10/2004 arising out of FIR No. 247/2003 and the order of sentence dated 22nd August, 2009. The appellants Harpreet Singh and Satyender Singh have been convicted under Section 376(2)(g) of the Indian Penal Code, 1860 (IPC, for short) and all the appellants-accused have been convicted under Section 394/366/34 IPC. Kuldeep Singh and Munish Kumar were also tried for charge under Section 376(2)(g) IPC, but have been acquitted. State has not preferred any appeal against the said acquittal.

2. The appellants-Harpreet Singh and Satyender Singh have been awarded life imprisonment for the offence under Section 376(2)(g) and directed to pay fine of Rs.5,000/- each and in default of payment of fine to undergo simple imprisonment for nine months. For the offence under Section 394 IPC, the appellants have been awarded life imprisonment and directed to pay fine of Rs.2,000/- each and in default of payment of fine, to undergo simple imprisonment of four months. For the offence under Section 366 IPC, the four appellants have been sentenced to rigorous imprisonment for ten years each and in addition

have been directed to pay fine of Rs.2,000/- each. In default of payment of fine, they have to undergo simple imprisonment of four months.

3. The case of the prosecution, which has been accepted by the trial court, is that the four accused, who were wearing military uniforms had gone to Buddha Jayanti Park in a military truck. There they met Ashish Kumar and the prosecutrix (the name of the prosecutrix is withheld to protect her privacy). Two of them, Harpreet and Munish caught hold of Ashish and took him aside. Harpreet, slapped him and took out Rs.100/- from his purse. After walking some distance, Ashish broke free and ran away. The other two, Satyender and Kuldeep caught hold of the prosecutrix, gagged her mouth and dragged her to the forest. They took her to the military vehicle, where Harpreet and Munish also joined them. Four of them forced and made her sit in the back side of the military truck. After driving for about 5-10 minutes, the vehicle stopped and the prosecutrix was made to get out of the vehicle and was taken towards the bushes. Thereafter, Harpreet and then Satyender raped her. Harpreet Singh also slapped her twice/thrice and took Rs.120/- from her purse. Later on all of them left in the vehicle. The prosecutrix wept, cried and after wearing her clothes started walking back. After walking some distance, she met Ashish, who had come looking for her along with the police. SI Satbir Singh

along with Ct. Raghuraj, Ashish and the prosecutrix went into the forest to search for the accused. They reached a hut located near the Polo Club. When called out, whether anybody was there, the appellant Harpreet came out and was recognized by the prosecutrix and Ashish. He was detained and taken to the police station. The prosecutrix was medically examined on the same day. On the next day, on the basis of statement made by Harpreet, the three other appellants-accused were arrested. The police completed the investigation and filed the charge sheet for commission of offence of gang rape punishable under Section 376(2)(g), kidnapping under Section 366 and for robbery under Section 394 IPC.

4. Before we examine the factual matrix and the merits of the appeals, it will be appropriate if we examine and decide the legal contention raised by Harpreet relying upon Sections 69 and 70 of the Army Act, 1950 (Army Act, for short) read with Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 (Rules, for short). In order to appreciate the controversy, we deem it appropriate to reproduce Sections 3(i), 69, 70, 125 and 126 of the Army Act and Section 475 of the Code of Criminal Procedure, 1973 (Cr.P.C., for short):

“Army Act, 1950

3. Definitions.—In this Act, unless the context otherwise requires,—

(i) “active service”, as applied to a person subject to this Act, means the time during which such person—

(a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or

(b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or

(c) is attached to or forms part of a force which is in military occupation of a foreign country;

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69. Civil offences.—Subject to the provisions of Section 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,—

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.

70. Civil offences not triable by court-martial.—A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act shall not be tried by a court-martial, unless he commits any of the said offences—

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf.

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125. Choice between criminal court and court-martial.—When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody.

126. Power of criminal court to require delivery of offender.—(1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final.

Code of Criminal Procedure, 1973

475. Delivery to commanding officers of persons liable to be tried by Court-martial.

(1) The Central Government may make rules consistent with this Code and the **Army Act, 1950** (46 of 1950), the **Navy Act, 1957** (62 of 1957), and the **Air Force Act, 1950** (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, navel or air force law, or such other law, shall be tried by a court to which this Code applies or by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a court to which this Code applies or by a Court-martial, such Magistrate

shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air-force station, as the case may be, for purpose of being tried by a Court-martial.

Explanation. In this section-

(a) "Unit" includes a regiment, corps, ship, detachment, group, battalion or company.

(b) "Court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purposes by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavors to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial”

5. Under the Army Act offences have been categorized into three categories. Firstly, there are offences which are exclusively triable by Court Martial. The second category consists of offences, which are exclusively triable by ordinary criminal courts. These offences have been classified and have been described as civil offences under Section 3(ii) of the Army Act. The third and the last category are the offences which are triable both by the criminal courts and by Court Martial. The Court Martial and the criminal courts have concurrent jurisdiction over these offences. The Army Act demarcates the three categories of offences and incorporates provisions to avoid a conflict or dispute

about jurisdiction or choice of forum. Sections 125 and 126 of the Army Act have been enacted to ensure that questions regarding conflict of jurisdiction regarding the third category should be and can be resolved at the earliest and by the prescribed procedure. Section 475 of the Cr.P.C. ensures that there is no conflict of jurisdiction and the dispute, if any arising as to the forum having jurisdiction is resolved amicably. In terms of the said provisions, the 1978 Rules have been framed and provide for procedure to be followed when offences fall under the third category.

6. Offence of murder, culpable homicide not amounting to murder and rape have been classified as civil offences under Section 70 of Army Act, unless the offence is committed by a person, who is subject to the Army Act; (a) on active service, (b) at any place outside India and (c) at a frontier post specified by the Central Government by notification in this behalf. The term “active service” has been defined in Section 3(i) to mean the time during which a person, who is subject to the Act, is attached to or forms part of the force, which is engaged in operations against the enemy, engaged in military operations in or is in the line of march to a country or place wholly or partly occupied by an enemy or is attached or forms part of the post, which is in occupation of a foreign country. By definition the term “active service” is restrictive.

7. During the course of hearing before us, learned counsel appearing for Harpreet had submitted that Section 70 of the Army Act is not applicable in view of the notification issued by the Government of India, Ministry of Defence, No. S.R.O. 6-E dated 28th November, 1962 and in view of the said notification in terms of clause (c) of Section 70, the appellants were deemed to be on “active service”. Learned counsel for the appellant was asked to file an application enclosing therewith copy of the said notification with a statement or averment that the notification continues to be in operation. No such application has been filed and the learned counsel had stated before us that he cannot make any statement, whether or not the said notification S.R.O. 6-E dated 28th November, 1962 was still in operation.

8. Counsel for the appellant-Harpreet in support of his contention that the criminal court did not have jurisdiction has relied on *Superintendent and Remembrancer of Legal Affairs, West Bengal versus Usha Ranjan Roy Choudhury*, 1986 (Supp.) SCC 190, *Union of India versus Major S.K. Sharma*, (1987) 3 SCC 490, *Delhi Special Police Establishment versus Lt. Col. S.K. Loraiya*, AIR 1972 SC 2548 and decision of the Bombay High Court in *Kanwardeepsingh Harbansingh Bedi versus State of Maharashtra*, 2010 Cr LJ 315.

9. On verification, we find that Ministry of Defence has issued notification No. S.R.O. 17-E dated 5th September, 1977, which reads as under:-

“NO. IX. ACTIVE SERVICE

(MINISTRY OF DEFENCE NOTIFICATION No.
S.R.O.17-E DATED 5 SEP. 1977)

S.R.O 17-(E).—In exercise of the powers conferred by section 9 of the Army Act, 1950 (46 of 1950) and in supersession of the notification of the Government of India in the Ministry of Defence, No. SRO 6-E, dated the 28th November 1962, the Central Government hereby declares that all persons subject to that Act who are not on active service under clause (i) of section 3 thereof shall, while serving in the areas specified below, be deemed to be on active service within the meaning of that Act for the purpose of the said Act or any other law for the time being in force —

(1) The State of—

- (a) Jammu and Kashmir
- (b) Manipur
- (c) Nagaland
- (d) Tripura
- (e) Sikkim;

(2) The Union Territories of—

- (a) The Amdaman and Nicobar Islands.
- (b) Arunachal Pradesh
- (c) Mizoram;

(3) The District of-

- (a) Uttarkashi, Chamoli and Pithoragarh in the State of Uttar Pradesh;
- (b) Lahaul and Spiti, Kinnaur and Kulu in the State of Himachal Pradesh.”

10. Thus, it is clear that the earlier notification No. S.R.O. 6-E dated 28th November, 1962 has been superseded and all persons subject to

the Army Act while serving in the “areas specified” are deemed on “active service” within the meaning of the Act or for any other law for the time being in force. The areas mentioned/specified in the Notification No. SRO.17-E dated 5th September, 1977 does not include the National Capital Territory of Delhi. Admittedly, the appellants, including Harpreet were serving in Delhi and, therefore, would not be covered under any specific notification under Clause (c) to Section 70 of the Army Act. The appellants herein were charged for an offence under Section 376, i.e., rape. The said offence is exclusively triable by the criminal courts and not by Court Martial under Section 70 of the Army Act. Therefore, the said offence falls in category two and thus the Court Martial and the criminal court did not have concurrent jurisdiction. The ordinary criminal courts had/have exclusive jurisdiction for the offence of rape. Accordingly, the provisions relating to concurrent jurisdiction will not apply.

11. Kuldeep and Munish were also charged for an offence under Section 376, but have been acquitted. Subject matter jurisdiction in such cases should be determined on the criteria/principle of “the offence of which cognizance is taken by the Magistrate or Court Martial” and not whether the accused is ultimately acquitted or punished for the said offence. Acquittal of Kuldeep and Munish is not determinative on the question of exclusive jurisdiction of the ordinary

criminal courts. The offences under Sections 366 and 394 IPC were interlinked and connected intrinsically with the offence under Section 376 IPC. In such cases, Section 70 of the Army Act should be and has to be applied. The reason and logic behind it is that there cannot be and should not be bifurcation or two trials of the accused; one before the Court Martial and the other before the criminal court. If an army person is accused of any of the three offences mentioned in Section 70 as well as other offences and clauses (a) to (c) do not apply, then all offence would be triable before the criminal court. In such cases, the question of the concurrent jurisdiction does not arise. Ordinary criminal courts alone have the exclusive jurisdiction.

12. In these circumstances, we need not, therefore, examine whether or not there was violation of the Rules and the effect thereof. We may, however, note that the Supreme Court in ***Balbir Singh vs. State of Punjab*** (1995) 1 SCC 90 after referring to the earlier decisions in the case of ***Usha Ranjan Roy Choudhury*** (supra) and ***Major S.K. Sharma*** (supra) had held as under:-

“17. A conjoint reading of the above provisions shows that when a criminal court and court-martial each have jurisdiction in respect of the trial of the offence, it shall be in the discretion of the officer commanding the group, wing or station in which the accused is serving or such other officer as may be prescribed, in the first instance, to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a “court-martial”, to direct that the accused persons shall be detained in air force custody. Thus, the option to try a person subject

to the Air Force Act who commits an offence while on “active service” is in the first instance with the Air Force Authorities. The criminal court, when such an accused is brought before it shall not proceed to try such a person or to inquire with a view to his commitment for trial and shall give a notice to the Commanding Officer of the accused, to decide whether they would like to try the accused by a court-martial or allow the criminal court to proceed with the trial. In case, the Air Force Authorities decide either not to try such a person by a court-martial or fail to exercise the option when intimated by the criminal court within the period prescribed by Rule 4 of the 1952 Rules (*supra*), the accused can be tried by the ordinary criminal court in accordance with the Code of Criminal Procedure. On the other hand if the Authorities under the Act opt to try the accused by the ‘court-martial’, the criminal court shall direct delivery of the custody of the accused to the Authorities under the Act and to forward to the Authorities a statement of the offence of which he is accused. It is explicit that the option to try the accused subject to the Act by a court-martial is with the Air Force Authorities and the accused person has *no option or right to claim trial by a particular forum*. The option appears to have been left with the Air Force Authorities for good and proper reasons. There may be a variety of circumstances which may influence the decision of the Air Force Authorities as to whether the accused be tried by a court-martial or by a criminal court. This Court in *Ram Sarup v. Union of India* [AIR 1965 SC 247 : (1964) 5 SCR 931 : (1965) 1 Cri LJ 236] opined:

“In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a court-martial or by an ordinary criminal court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.”

There appears to be sound logic to give the first option to the Authorities under the Act to decide whether the accused should be tried by the court-martial or the criminal court. The defence of the country being of paramount importance, the Air Force Authorities would know best as to whether the accused should be tried by the court-martial or by the ordinary criminal court because the trial by the ordinary criminal court would necessarily involve a member of the

force being taken away for trial by the ordinary criminal court and not being available to the Authorities and the like considerations. However, in the event the criminal court is of the opinion, for reasons to be recorded, that instead of giving option to the Authorities under the Act, the said court should proceed with the trial of the accused, without being moved by the competent authority under the Act and the Authorities under the Act decide to the contrary, the conflict of jurisdiction shall be resolved by the Central Government under Section 125(2) of the Act and the decision as to the forum of trial by the Central Government in that eventuality shall be final.

18. In our opinion, on a construction of the various provisions referred to above the criminal courts are not deprived of their inherent jurisdiction to take cognizance of civil offences under the Code. Before the Full Bench of the Punjab & Haryana High Court in *Ajit Singh v. State of Punjab* [AIR 1970 P&H 351 : 1970 Cri LJ 1119 : 72 Punj LR 396 (FB)] it was argued on behalf of the appellant therein, who was in “active service” of the Air Force, that on account of the non-compliance with the provisions of Section 125 of the Act and Section 549 CrPC (corresponding to Section 475 of the Code), the committal of the appellant and his trial held in pursuance thereof must be held to be without jurisdiction. The Full Bench repelled the argument and opined:

“No room is left for doubt about the legal position being that the inherent jurisdiction which a Magistrate has to take cognizance of civil offences under the Code of Criminal Procedure is not taken away by any provisions of the Army Act (and, therefore, of the Air Force Act), and of Section 549 of the Code of Criminal Procedure and the rules made thereunder. What those provisions, envisage is concurrent jurisdiction in the criminal courts and the court-martial and an arrangement for the proper exercise of such jurisdiction including, when necessary a way of resolving a conflict of jurisdiction.”

and went on to hold:

“[T]hat the contention raised on behalf of the appellant that the trial was vitiated by lack of jurisdiction in the Magistrate and the learned Additional Sessions Judge must be rejected as untenable.”

19. In our opinion, the view of the Full Bench is correct and we agree with it and hold that the inherent jurisdiction under

which the criminal courts have to take cognizance of civil offences is not taken away by any of the provisions of the Act or Section 475 CrPC and the rules framed thereunder.”

13. The aforesaid ratio is equally and squarely applicable to the facts of the present case. The appellants did not contest and question the jurisdiction for the trial before the criminal court or submit or state that he or they can be proceeded for Court Martial under the Army Act. The army authorities were fully aware and in knowledge of the criminal prosecution under the ordinary law. Exhibit PW-21/B is the letter dated 14th November, 2003 written by Major Rajiv Bansal for the Commandant admitting that the four accused, who were then under judicial custody, were on bona fide military duty on 6th October, 2003 in the President Bodyguard Area. Before that Major B.P. Singh had written a letter on behalf of the Commandant, Exhibit PW-21/C dated 7th October, 2003 referring to case FIR No. 247/2003 under Section 392/376/34 IPC and stating that Satyender, Munish and Kuldeep were being made available to the police authorities, i.e., SHO, Chanakyapuri for conduct of investigation. The said letter also invited attention of the SHO to the Government of India instructions from time to time regarding handling of cases relating to military personnel. Learned counsel appearing for Harpreet submitted that this letter Exhibit PW-21/C refers only to conduct of investigation and not the trial before the criminal court. There is a fallacy in the said argument. The question

and issue is whether the army authorities were aware and had knowledge of the criminal proceeding/trial before the ordinary court and had accepted the same or had protested/questioned the jurisdiction of the ordinary courts. The army authorities in the present case have never objected/questioned the criminal prosecution of the appellants under the ordinary law.

14. Learned counsel submitted that the decision of the Supreme Court in **Balbir Singh** (supra) is per incuriam and is contrary to the decision of the Supreme Court in **S.K. Loraiya's** case (supra), which is a decision of three Judges. The submission before us has no merit. In **S.K. Loraiya's** case (supra), the challenge to the jurisdiction of the ordinary courts was raised at the stage of framing of charge. It was observed that prima facie both ordinary criminal courts and Court Martial had concurrent jurisdiction. The Supreme Court observed with reference to Section 549(1) of the Code of Criminal Procedure, 1898 that the expression "is liable to be tried either by a court to which this Code applies or by a Court Martial" refers to the initial jurisdiction of the court and the Court Martial to take cognizance and not their jurisdiction to decide it on merits. The object is to avoid collision between the ordinary criminal court and the Court Martial, i.e., army authorities. In the case of **Balbir Singh** (supra) and in the present case,

there is no conflict between the two authorities and the two authorities are ad idem.

15. Decision of the Supreme Court in *Lt. Col. S.K. Loraiya (supra)* was referred to in the case of *Usha Ranjan Roy Choudhury (supra)*. Therefore, it is incorrect and wrong to state that in case of *Balbir Singh (supra)*, the court did not examine and consider the effect of ratio and decision in the case of *S.K. Loraiya (supra)*. We have also examined the decision in the case of *S.K. Loraiya (supra)*. The contentions raised by the learned counsel that reference to the expression ‘initial jurisdiction’ is to the “subject matter jurisdiction” or the “inherent jurisdiction” of the criminal court are incorrect. In the said case, the respondent, an officer of the Indian Army was being prosecuted under Section 467 and 471 IPC and Section 5(1)(c) and (d) and 5(2) of the Prevention of Corruption Act. The alleged offences were committed by him as a Commander, Air Field Engineers, Tejpur. The stage before the criminal court was framing of charges and the charges framed were made subject matter of challenge before the High Court where *S.K. Loraiya (supra)* succeeded and this order was then made subject matter of challenge before the Supreme Court by the prosecution. One of the contentions raised by the prosecution was that it was not a case of concurrent jurisdiction as no trial by “Court Martial” was permissible after expiry of three years from the date of

offence. Reliance was placed on Section 122(1) of the Army Act. Accordingly, the prosecution, the appellant before the Supreme Court had submitted that the ordinary criminal court alone had exclusive jurisdiction as trial by Court Martial was not permissible and barred by limitation under Section 122 of the Army Act.

16. The argument of the Prosecution that respondent therein could not be tried by way of “court martial” because of bar of limitation under Section 122(1) was rejected with reference to Section 549(1) of the Code of Criminal Procedure, 1898, wherein expression used was ‘liable to be tried by a court to which this code applies, or a court martial’. This, it was interpreted, refers to offence for which cognizance can be taken by the ordinary court as well as court martial. The question whether the period of limitation for trial by court martial had come to an end, it was held can only be decided in the proceeding under the Army Act. The term ‘initial jurisdiction’ was used in this context. Thus it was stated that “initial jurisdiction” to conduct court martial by the army authorities is not taken away as period of three years had lapsed or the bar of Section 122(1) may be applicable. It was observed that the question whether or not the bar of limitation under Section 122(1) has become applicable, cannot be decided by the ordinary criminal court but by the authorities under the Army Act. The term “initial jurisdiction” refers to the right of the authorities under the

Army Act to decide whether or not period specified under Section 122(1) has expired. The “initial jurisdiction” as used in the said judgment is not with reference to the “subject matter jurisdiction”.

17. As a first appellate court, we are required to reappraise and assess the entire facts and the law and determine whether or not the appellants are guilty or innocent. Therefore, we have to examine and consider the evidence and law on all aspects and give and record an independent conclusion. In doing so we can be assisted by the opinion expressed by the Additional Sessions Judge (*see Jumman & Ors. vs. State of Punjab*, AIR 1957 SC 469). Keeping the said ratio in mind we have examined the evidence and material on record. For the sake of convenience we first deal with the charge under Sections 366 and 376 and then with Section 394 IPC. The charge under Section 366 and 376 are substantially interconnected and are being taken up for consideration together.

Charge under Sections 366 and 376

18. The State to prove and establish charges under Sections 366 and 376, has relied on the testimony of prosecutrix (PW-2); Ashish Kumar (PW-8); the MLC of the prosecutrix (Ex. PW1/A); statement of PW-1, Dr. Monika Hooda who was the Senior Resident in Gynecology Department, Lady Harding Hospital and the forensic reports (Ex. PW-4/A & PW-4/B); statement of PW-4 Dr. A.K. Srivastava, Sr. Scientific

Officer, Biology Department, FSL Delhi. They also rely on the statements of PW-12 – Constable Raghuraj Singh, PW-23 S.I. Satbir Singh and PW-25 Inspector Lakshmi – Investigating Officer. We have to analyze these statements, documents, keeping in mind the contentions raised by the appellants and the State.

19. The prosecutrix has stated that on 6th October, 2003, at about 10/11 AM, she along with her friend Ashish had gone to Buddha Jayanti Garden. While they were roaming in the garden, four military personnel came, two of them caught hold of Ashish and two of them caught hold of her. She identified the four accused, present in the court. She identified two persons who had taken away Ashish as Kuldeep and Satyender and the two who had taken her away as Harpreet and Manish. She was dragged to jungle by Harpreet and Manish and taken to a place where a military vehicle was standing. The two accused Kuldeep and Satyender also joined them. She was forced to sit in the back side of the vehicle. Two persons sat with her and two other persons sat in the front of the military vehicle. The vehicle stopped after five minutes on the instructions of Satyender, the fat person. She was made to disembark from the vehicle and taken into the bushes by Harpreet and Satyender. She was then beaten and the accused Harpreet and thereafter Satyender proceeded to rape her. After being raped, she was slapped two-three times by the Harpreet. He also

took out Rs. 120/- from her purse. Before leaving, Satyender had threatened her that she would be killed in case she spoke to anyone. Two others namely Kuldeep and Manish did not rape her. She cried. After putting on her clothes, she walked some distance, where she met Ashish with the police officers and narrated the incidence to them. They went into Jungle to search for the accused. They reached deep inside the jungle where there was a hut, which was closed. The police called out whether any person was inside. Harpreet came out and was immediately recognized by her. Police caught hold of Harpreet. Her statement was recorded. She was taken to the hospital for medical examination. On 17th October, 2003, she was called for Test Identification Parade in the jail, where she identified the three accused namely Satyender, Kuldeep and Manish. At the time of rape, Harpreet had used a hankie to clean his private part. Her hankie, kadahi wala button and blue colour toy of cricketer were left behind at the scene of the crime. These articles were identified by her in the court. She identified the Salwar, Shirt, Chunni and underwear worn by her at the time of occurrence as Ex. P-1, P-2, P-3 and P-4. The same were produced in a sealed parcel with FSL seal. These articles had been taken into custody by the Doctor, when she had gone for medical examination. They were seized and later on sent for FSL examination.

20. PW-8 Ashish Kumar in his testimony has stated that they i.e. he and the prosecutrix on 6th October, 2003, had gone to Buddha Jayanti Park on a scooter to see the Dalai Lama's function. As there was a crowd, they did not attend the function and were walking on the side alley. When they reached near the jungle, four persons in military dress approached them. Two persons caught him and two persons caught the prosecutrix. He identified the persons who had caught him, as Harpreet and Manish in the court. The two other persons took the prosecutrix away by dragging her. He caught the feet of Harpreet and beseeched where he was being taken. He was asked to remain quiet and walk straight. Harpreet slapped him and took out Rs.100/- from his purse. He (PW- 8 Ashish) freed himself and ran towards the park. He told the entire story to the police personnel who were stationed there for the security arrangements for the Dalai Lama's function. He and the police officers went to the jungle to search the prosecutrix. After about one and a half hour, they saw the prosecutrix coming out from the jungle. She was crying. She narrated the occurrence. They went into the jungle to search for the accused. Inside the Jungle, there was a horse ground and an office, which was locked. The policemen asked if anybody was there. Harpreet came from behind the building and was identified by the prosecutrix as one of the persons who had committed rape. The prosecutrix had stated that there were three other

accomplices. The police then interrogated Harpreet who admitted that he along with three other accomplices had raped the prosecutrix. He gave the names of three accomplices. He also showed the place where the prosecutrix was kidnapped after separating her from him. He (Ashish) was asked to identify the three accused namely Kuldeep, Satyender and Manish in the Test Identification Parade on 17th October, 2003. Ashish in the examination in chief had stated that while standing outside Tihar Jail gate, 5-6 people came and softly asked his name. After he gave out his name, he was threatened not to identify anyone during the TIP, otherwise he would be killed. He became nervous and did not identify the accused during TIP and returned to home after making excuse of headache. He was scared.

21. PW-12, Constable Raghuraj Singh has stated that on 6th October, 2002, (the year is wrong, it should be 2003), he along with Satbir and others were posted on law and order duty at Buddha Garden. At about 11.45 AM, a boy came to him and informed that his girlfriend was dragged by four persons in military uniform. He informed SI Satbir and proceeded towards jungle. No clue was found. When they came out of the jungle, they saw one girl, coming from the jungle. She was weeping. The girl was the prosecutrix, who gave details of the occurrence. They proceeded inside the jungle, with the girl. They reached Ghoda Maidan, where a room was constructed. The room was

locked from outside. SI Satbir shouted and asked if there was anyone inside. One Sardarji came out and was identified by Ashish as one of the four persons who had dragged his girlfriend. His name was ascertained and was disclosed as Harpreet. He confessed commission of rape with the prosecutrix and named his three associates. The place was inspected and the statement of prosecutrix was recorded. Inspector Lakshmi, Investigating Officer had reached there. Rukka was taken to the police station and the case was registered. Harpreet was medically examined on 6th October, 2003 and was arrested. On 7th October, 2003, Harpreet was interrogated. He disclosed names of Satyender, Kuldeep and Manish as his associates. They were also arrested. Satyender, Manish and Kuldeep were also medically examined.

22. PW-23, SI Satbir Singh affirmed that on 6th October, 2003, he was posted along with others at Buddha Jayanti Park for maintaining law and order as there was assembly of the Dalai Lama. At about 11.00 AM, a boy Ashish came to Ct. Raghu Raj and told him that four persons had dragged his girlfriend inside the jungle and they were in military uniform and one of them was a Sardar. They went inside jungle along with Ashish. They searched and after some time they saw a girl coming from inside the jungle. She was weeping. Ashish identified the girl i.e. the prosecutrix. She narrated that she was

dragged by four persons inside the jungle and a military vehicle was with them and thereafter she was raped by two of the said army men. One of them was a Sardar and other one was a fat person. Thereafter, they accompanied by the prosecutrix, searched for the accused persons and went inside the jungle. They reached Ghoda Maidan, where there was an office, which was closed. He shouted if there was anyone and he should come out. One Sardarji came out, and was identified as one of the four military persons. On enquiry Sardarji disclosed his name as Harpreet. He confessed. Thereafter, Inspector Lakshmi came to the spot and recorded the statement of prosecutrix. Rukka was handed over to Ct. Raghuraj for registration of FIR. The accused Harpreet took the police inside the jungle but could not point out the spot where the rape was committed on the prosecutrix. Harpreet was arrested. He came back to the police station and handed over pulandas, seizure memos and statements to the Investigating Officer. Salwar suit, chunni were kept in the pulanda. Next day i.e. on 7th October, 2003, the accused Harpreet was interrogated. He disclosed that he could recover the uniform and underwear which he had concealed in the jungle. Thereafter, Satyender, Manish and Kuldeep were arrested after the Commander handed over the said persons. These persons had been identified by Harpreet as the other co-accused. Their uniforms were taken into custody and they were taken to the hospital for medical

examination. On 8th October, 2003, again the accused were interrogated and taken to Buddha Jayanti Garden. Harpreet got his uniform, which he had worn at the time of incident, recovered. The same was sealed in a pulanda. Satyender took the police to the spot where they committed rape on the prosecutrix. The crime team took photographs of spot. One blood stained handkerchief, one toy, one button and some hair were seized and sealed and handed over to the IO. On 16th October, 2003, the military vehicle involved in the incident was handed over to them by Major Bansal. TIP was conducted by the learned M.M. on 17th October, 2003. PW-23 identified the salwar, suit and chunni worn by the prosecutrix and the same were marked as Ex. P1 to P3. He also identified the military uniform namely pant and shirt and cloth piece as PW23/P4, P5 and P6.

23. PW-25, Inspector Lakshmi has stated that on 6th October, 2003, she was posted at CAW Cell, New Delhi. She received message from control room to report at the Buddha Jayanti Garden. She reached the spot where the prosecutrix was present along with S.I. Satbir. Police officers were making enquiries from the prosecutrix. S.I. Satbir recorded the statement of the prosecutrix in her presence i.e. PW2/A. Rukka was handed over to Ct. Raghuraj for registration of the FIR. Harpreet was interrogated and personal search was conducted vide memo Ex. PW-12/A. Disclosure statement marked Ex. PW12/B

was recorded. A site plan was prepared on the pointing out of Ashish. Parents of prosecutrix were informed. Harpreet was sent for medical examination. Prosecutrix was also sent for medical examination with her mother. After medical examination, Doctor handed over four pulandas along with sample seal which was seized as Ex. PW11/A. The clothes of the prosecutrix were seized as Ex. PW23/B. Next day, the three associates of Harpreet were arrested. Thereafter, Harpreet led the police party to the jungle for recovery of uniform and underwear but the same could not be recovered. However, Satyender and Harpreet subsequently pointed out the place of incident and Ex.PW23/F was prepared. One handkerchief, one plastic toy, one button of green/moongia colour having flower on it, were found at the spot by the police. These articles were seized vide memo Ex.PW12/K. TIP of the accused was conducted by the Metropolitan Magistrate. She also identified clothes of the prosecutrix which were marked Ex. P1 to P3. She averred that the case property was sent to FSL for their report and their report was marked as PW4/A and B.

24. PW6 Barkha Gupta, Metropolitan Magistrate has affirmed the TIP proceedings which were conducted in Tihar Jail. She has given full details of the manner in which the TIP was conducted and stated that the prosecutrix had recognized and identified Satyender, Kuldeep

and Manish. Ashish had not identified Kuldeep and Manish and did not participate in the TIP of Satyender, as Ashish had left the place.

25. Statements of PW-2 prosecutrix, PW-8 Ashish and PW-12 Raghuraj, PW-23 Satbir on material and relevant aspects are identical. There is no contradiction between what has been stated and averred by them with regard to commission of offence under Section 366 and 376(2)(g).

26. Counsel for Harpreet did not touch upon the testimony of PW-2 prosecutrix and PW-8 Ashish. He, however, referred to the statements of PW-12 Raghuraj, PW-23 Satbir and PW-25 Lakshmi. He submitted that the prosecutrix had not made any allegation of kidnapping or robbery before the doctor who had medically examined her. This was also accepted by PW-1, Dr. Monika Hooda in her cross-examination. Learned counsel for Harpreet submitted that TIP of handkerchief, button, and toy was not undertaken. It was submitted that the said articles marked Exhibits P5, P6 and P7 were shown to the prosecutrix in the court for the first time. These articles do not specifically find mention in the statement of the prosecutrix Ex PW2/A which was recorded on 26th July, 2004. Neither do they find mention in the MLC Ex PW1/A. It was submitted that these are major discrepancies in the statement made by the prosecutrix. Thirdly, the trial court had drawn adverse inference because Harpreet and

Satyender had refused to give their blood sample on 13th November, 2003 on an application made by the State before PW-7 Sunil K. Aggarwal, Metropolitan Magistrate. It was submitted that Harpreet and Satyender had earlier given their blood samples immediately after their arrest. The report given by FSL that these blood samples had putrefied, (Ex. PW-4/A and 4/B) was dated 17th November, 2003. On the date of refusal, i.e. 13th November, 2003, FSL reports Ex. PW-4/A and 4/B dated 17th November, 2003 were not made available. He further submitted that the application was filed for blood samples for DNA tests and not for the reason that the blood samples given earlier had putrefied. FSL report Ex. 4/A itself states that one micro slide was preserved for DNA analysis, if required, in future. He had submitted that the police despite having the slide did not conduct the DNA test.

27. There is no merit in the said contentions. FSL report Ex. PW4/A states as under:-

“Note-1 – One micro slide i.e. P1 has been preserved for DNA analysis if required in future.”

28. Parcel 1 which includes Ex. P-1 contained two micro slides 1a and 1b, and were described as two micro slides having whitish smear. Human semen was detected on Ex. 1a and Ex. 1b was preserved for future analysis as per report dated 17th November, 2003. Logically, it is not possible to have DNA analysis on the basis of only one micro

slide. Comparison is required. DNA analysis in 2003, it is a common knowledge, was not undertaken in every forensic lab. It required special equipment. The statement of PW-7, Sunil Kumar Aggarwal, M.M., is clear that he had warned the accused Harpreet and Satyender that adverse inference might be drawn in case they did not agree for giving blood samples but they refused as is clear from PW7/B and PW7/C. Thus, the appellant, Harpreet and Satyender had failed to give their blood sample for DNA tests, inspite of warning that adverse inference could be drawn.

29. Reliance placed on the decision of the Supreme Court in *Krishan Kumar Malik vs. State of Haryana* (2011) 7 SCC 130, is misconceived. In the said case, the appellant was acquitted because of several inconsistencies noticed in the evidence of the prosecutrix apart from the false statements made by her. She had alleged that 11 persons including the prosecutrix had travelled in a Maruti Van. The medical evidence was contrary to the allegations made. The story itself was highly improbable. Thus the appeal was allowed. The Supreme Court further observed that Section 53(A) was introduced in the Cr.P.C. w.e.f. 23rd June, 2006, and thereafter it is necessary for the prosecution to go for DNA tests as it helps and assists in reaching appropriate judicial decision. In the said case, the prosecution did not try to get the DNA test and analysis done. In the present case, prosecution did try

but because of the refusal by the accused Harpreet and Satyender, DNA testing could not be done.

30. MLC was conducted by the doctor, PW1. The statement was made by the prosecutrix Ex. PW1/A and the facts recorded in the MLC match and are identical. The statement of the prosecutrix in the court is to the same effect. The factum of kidnapping and rape at Buddha Jayanti Park is specifically mentioned and stated. MLC was done to examine the prosecutrix medically and to ascertain and confirm her medical condition. MLC need not record specifically the entire or the minute details including what was left behind and thrown out of the purse of the prosecutrix. The clothes worn by the prosecutrix including lower under garments were seized and sealed by the doctor. The handkerchief was identified by the prosecutrix as one belonging to her and used by Harpreet to clean his private part. The FSL report Ex. PW4/A confirms that the same had human semen of Group B. Ex. 6 of the FSL report was the underwear worn by accused Harpreet. Human semen was also detected on the said exhibit. The semen on the underwear was of group B. The underwear of Harpreet was seized and sealed at the time of his medical examination on 6th October, 2003 at 8.30 P.M. vide MLC Ex. PW5/A (See statement of PW5 Dr. Pradeep Saxena).

31. Learned counsel for Harpreet had submitted that the underwear was of a blue colour. The said underwear given serial no. 6 FSL report Ex. PW4/A was indicated to be of blue colour but the said colour is not mentioned in the seizure memo Ex. PW12/D. He also relied upon statement of PW5—Dr. Pradeep Saxena in which colour has not been indicated. It was submitted that the samples were not properly kept and there was discrepancy, how and which sample was kept and retained in the malkhana.

32. Harpreet was examined on 6th October, 2003 by PW5- Dr. Pradeep Saxena and his MLC has been marked Ex. PW5/A. The MLC records that he was capable of having intercourse and 4 articles, blue coloured underwear, pubic hair, blood sample and semen sample were taken and sealed. These samples were subsequently sent to FSL and reports PW4/A and 5/B were furnished. The prosecution has examined Dr. A.K. Srivatava, Sr. Scientific Officer, Biology Department, FSL Delhi as PW4. He has confirmed the seal which was put on the said sample and the result of his analysis. On the question of seals etc. no questions were asked. It was not alleged or stated that the seals were tampered with. What is material and relevant is that the semen was found on the vaginal swab Ex 2a and 2b. Similarly, semen was found on Ex. 3 brownish hair, Ex. 4 underwear of the prosecutrix, Ex. 5a

salwar and Ex. 5b Shirt. The semen was of group 'B'. The semen found on the underwear Ex. 6 of Harpreet was of group 'B'.

33. Learned counsel for Harpreet relying upon Encyclopedia of Forensic Sciences edited by Jay Siegel & Ors. at pages 1327 and 1328 under the Chapter SeroChronology/overview submitted that FSL report is inconclusive as group 'B' mentioned, could also mean group 'O'. We are not inclined to accept the said contention as PW4 was not questioned about reports Ex.PW4/A & 4/B with regard to the testing manner and how and why he had arrived at the conclusion that the strain were of group 'B'. The reports specifically mentioned that persons involved in this case including victim could be of group 'B' (as the reaction was observed with antigen 'B') or group 'O' (as reaction observed with antigen 'H'). The principle applied was of matching. Moreover, in the present case, we have statement of PW-1 Dr. Monika Hooda who had examined the prosecutrix and had prepared MLC-Ex.PW1/A. She in her statement was categorical. On the basis of physical examination of the prosecutrix and the FSL report, she confirmed the rape charge. She had seen one bruise near the right temple which is mentioned in the MLC. In her cross-examination she had stated that in the MLC she had mentioned perineal tear which was fresh due to intercourse. She had also opined that there was a tear at interiotis which was suggestive of intercourse

on the same day. Further the FSL showed that semen was present on the vaginal swab. Keeping these aspects in mind she had confirmed the possibility of rape. Thus, the medical evidence completely supports the statement made by the prosecutrix that she was raped.

34. Learned counsel appearing for Munish and Kuldeep submitted that Munish and Kuldeep have been convicted under Sections 366 and 394 IPC and not under Section 376 (2)(g) IPC. It was stated that two of them along with Satyender were arrested on 7th October, 2003 and not on 6th October, 2003. Learned counsel for Munish highlighted the following aspects, which according to him constitute and should be treated as major discrepancies;-

(i) There is discrepancy in recording the rukka, dispatch and registration of the FIR. The rukka mentions names of Satyender, Kuldeep and Munish and is dated 6th October, 2003, whereas the disclosure statement of Harpreet is dated 7th October, 2003.

(ii) The site plans prepared marked Exhibit PW-25/A and B and Exhibit PW-15/A do not specifically show the place of kidnapping.

(iii) Vehicle in and out Register marked Exhibit PW-10/A and the timings mentioned therein do not corroborate and support the prosecution case. As per the said Register, the military vehicle in question had recorded 4 kilometers of travel by the speedometer and had come back within one and fifteen minutes. It was not possible for

the said vehicle to go to Buddha Jayanti Park and come back and record only 4 kilometers. Travel time, rape etc. as alleged would have taken at-least 90 minutes.

(iv) Semen and blood samples of PW-8, Ashish were not taken. It was suggested that the prosecution did not examine and verify whether Ashish and the prosecutrix had any fornication.

(v) Ashish's inability to identify Munish, Kuldeep and Satyender in TIP proceedings was highlighted. There was delay in conducting the TIP and the same was not conducted as per the High Court rules and, therefore, was vitiated.

(vi) As per the statement of PW-12, Ct. Raghuraj Singh, appellant-Harpreet had made a disclosure statement on 6th October, 2003, but the same was not placed on record. Disclosure statement marked Exhibit PW-12/B dated 7th October, 2003 is inconsequential in view of the earlier disclosure statement dated 6th October, 2003, which has not been placed on record.

(vii) The allegation of the prosecution is unbelievable and immaterial as there were gardeners and public in the park. They would have certainly seen the prosecutrix and Ashish being taken away by the four military men as alleged or the prosecutrix being subjected to rape.

35. We have examined the aforesaid contentions and are not inclined to accept the same. As far as the TIP is concerned, Inspector

Lakshmi had moved an application marked Exhibit PW-6/A on 8th October, 2003 in respect of Satyender, Kuldeep and Munish. Inspector Lakshmi, therefore, had acted promptly. The delay, if any, in conducting TIP was on behalf of judicial authority as the Magistrate had to go to the Central Jail. TIP was accordingly conducted on 17th October, 2003. We have examined the TIP proceedings and find that that the Metropolitan Magistrate, Ms. Barkha Gupta, who had appeared as PW-6, had taken pain to note down the names of the under trials, who were selected to join TIP along with the accused-appellants. In fact, the accused-appellants were asked to pick and select 8-10 under trials of their age group and with similar physic. The details and names of said persons have been mentioned in the TIP proceedings. The prosecutrix identified all three i.e. Satyender, Kuldeep and Munish in the TIP proceedings. She identified them again, when she appeared as a witness in the Court. We do not think that the challenge to the TIP proceedings is sustainable and merits acceptance.

36. Vehicle in and out entry Register Exhibit PW-10/A has the relevant entry at Sr.No.19 and the said entry is signed by Satyender, who was the driver of the truck. The register had only 18 columns. The said entry, it is apparent, is the last entry on the page. The said entry records that the military truck had left the President's Estate for kachra duty at 10.55 a.m. and returned at 12.10 p.m. The place of visit

is not mentioned clearly and is not decipherable. It is stated that at the time of going out, the speedometer as recorded was 18832 Km and on the return it was 18836 Km and, therefore, the vehicle had done only 4 kilometers.

37. PW-10 Vidya Dhar Singh working in the Indian Army was posted at PBG Lines, Rastrapati Bhavan at Gate No.23 on vehicle guard duty. He has admitted that the vehicle in question was being driven by Satyender. As he had not supported the prosecution case, he was cross-examined by the Public Prosecutor. We do not think that number of kilometers recorded in the Register, destroys or is contrary to the prosecution version. The entry made in the Register itself is somewhat debatable and is in question, as it is the last entry on the said page and the column/line has been created. The column relating the Kilometers was filled up by the driver i.e. Satyender. It may or may not be correctly recorded. What is important and relevant is the time when the vehicle left and came back. The vehicle had left at 10.55 a.m. and returned after more than 01 hour and 15 minutes at 12.10 p.m. The vehicle was, therefore, out of Rashtrapati Bhavan Complex for the said period during which the prosecutrix was kidnapped and raped. The contention that it would have taken a minimum of 90 minutes to leave and return back in the truck and commit the offence of rape etc. is based upon assumptions and presumptions. The driving time etc.

depends upon number of factors including the traffic on the street, the route taken, quantity of garbage, manner of disposal etc. and the time spent by the four appellants at Budha Jayanti Park. This cannot be calculated with exact mathematical precision. As noticed above, the time mentioned in the register PW10/A was recorded by Satyender. Authenticity and precise exactness thereof can be subject matter of some debate. The time period of 75 minutes as recorded is not less or insignificant period. What is relevant and material is the testimony of prosecutrix, PW2 and the police officers who had immediately reached the place of occurrence and thereafter the arrest of Harpreet. The said statements when read with medical evidence as well as the register Ex. PW10/A which proves that the truck involved had left the Presidential estate and returned after one hour and 15 minutes, supports, harmonises and uniformly establishes and affirms the involvement and commission of the offence by the appellants.

38. Similarly, the contention that the prosecutrix had not visited and seen the place of occurrence when the site plans were prepared and recoveries were made on 8th October, 2003, is inconsequential. The prosecutrix and Ashish on 6th October, 2003 had identified the site of occurrence and had taken the police officials there. After what the prosecutrix had been through and suffered, it was not possible for her to again visit the site immediately after two days on 8th October, 2003.

39. The contention that the site plans do not reflect or show the place of kidnapping does not impress us. The site plans placed on record marked Exhibit PW-25/A, PW-25/B and PW-15/A indicate the place where the garbage was dumped and the truck was parked and the place from where the prosecutrix and Ashish were taken away by the appellants, and the place where the prosecutrix was made to board the truck. The site plans also indicate the place where the truck was stopped and the prosecutrix was made to get down. The details given in the said site plans are sufficient and are fairly detailed.

40. As noticed, one of the contentions raised was that there is discrepancy in statement of PW-12, Constable Raghuraj Singh, PW-23 SI Satbir Singh and PW-25 Inspector Lakshmi regarding recording of the disclosure statement of Harpreet and the rukka. PW-12, Constable Raghuraj Singh had stated that he had taken rukka to the police station and thereafter the FIR was registered. Harpreet was examined medically on the same date. On 7th October, 2003, after disclosure statement made by Harpreet, other appellants, viz., Satyender, Kuldeep and Munish were arrested and they made their disclosure statements. On the disclosure made by Satyender, one handkerchief, a toy and a button were recovered and were seized vide memo Exhibit PW-12/K. The rukka Exhibit PW2/A does mention name of appellants-Satyender, Kuldeep and Munish, but this can be easily explained as Harpreet was

arrested on 6th October, 2003 itself. He was interrogated orally at that time. The disclosure statement of Harpreet is dated 7th October, 2003. The same was recorded in writing and is marked Exhibit PW-12/B. Statement of PW-12, Ct. Raghuraj Singh was recorded after nearly 3 years in February and April, 2006. We do not think that his testimony that 6th October, 2003 and 7th October, 2003 were the dates on which the disclosure statements of Harpreet were recorded, in any manner materially affects his statement or casts doubt on the case set up by the prosecution. The said lapse and reference to 6th October, 2003 as the date of the disclosure statement or two disclosure statements of Harpreet is not unnatural. Perhaps it would have been abnormal in case the statements of all the three police witnesses, namely, PW-12, Constable Raghuraj Singh, PW-23 SI Satbir Singh and PW-25 Inspector Lakshmi were identical and did not have any minor difference or discrepancy.

41. There is no merit in the contention that medical examination of Ashish was required or taking of his semen sample or blood sample for verification or testing by the FSL Laboratory was necessary and required. Ashish immediately after he was taken away by two appellant and slapped, had approached the police. He along with the police officers went in search of the prosecutrix. This is evident from the testimony of Ashish, PW-12, Constable Raghuraj Singh and PW-23

SI Satbir Singh. In the said circumstances, there was no need to examine and take blood or semen sample of Ashish. The trial in question relates to the conduct of the appellants and we are examining the charges of kidnapping and rape against the appellants. Ashish and his relationship with the prosecutrix is not the subject matter with which we are concerned and which requires examination. Ashish and the prosecutrix are entitled to their privacy, which must be protected and respected.

42. The three articles, namely, button, toy and the handkerchief were seized on 8th October, 2003 on inspection of the area. This was done after two days of the incident/occurrence. Even if, we ignore the said recoveries, there is ample evidence and material against the four appellants to convict them and hold them liable for the offence under Section 366 IPC and rape against Harpreet and Satyender under Section 376(2)(g) for gang rape.

43. The term “gang rape” has been defined in Explanation 1 to Section 376 as under:-

“Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.”

44. It is not necessary that the person should actually commit rape to be convicted for gang rape. Gang rape is committed when one or more

person commit rape. Others involved with the commission of the said offence are equally liable and can be convicted for the offence under Section 376 (2)(g). In the present case, there is enough material and evidence to show that Munish as well as Kuldeep were present at the time when the rape was being committed by Harpreet and Satyender. The four appellants were in truck when the prosecutrix was forcibly made to board and then climb down from the truck. Taking and forcing the prosecutrix to get into truck, driving the truck, and then commission of rape after she was forced to disembark are aspects which cannot and should not be ignored. They are indicative of the common intention. Interpreted in this manner, both Kuldeep and Munish can be indicted and punished for the offence of rape. However, they have been acquitted and the State has not preferred any appeal and, therefore, we are not commenting and giving any firm opinion. However, as far as, offence under Section 366 is concerned, it is certainly made out against all the four appellants including Kuldeep and Munish.

45. In the present case, the statements made by PW-2, the prosecutrix and PW-8, Ashish are trustworthy, truthful and credible and should be accepted. The prosecutrix was a young girl, a teenager, who was studying in the first year in a college. She had no enmity or ill will or any reason to falsely implicate the appellants by alleging that

she was subjected to rape by them. The agony and pain suffered by her and the heinous and grievous crime committed by the appellants get reflected in her testimony in the Court. The arrest of Harpreet immediately after the incident when police along with the prosecutrix and Ashish went searching in the Jungle, corroborates her statement of rape after kidnapping. The medical evidence and the FSL report also corroborate her statement that she was subjected to rape. Statement of the prosecutrix as repeatedly observed by the Supreme Court should be accepted, unless there are good and valid reasons to discard and hold that her statement is not truthful. (See *State of Rajasthan vs. Narayan*, (1992) 3 SCC 615; *State of M.P. vs. Babulal*; (2008) 1 SCC 234); *Mohd. Imran Khan vs. State of Government (NCT of Delhi)*, (2011) 10 SCC 192.

Charge under Section 394 IPC

46. In the impugned judgment, it has been held that the charge under Section 394 consists of two parts. The first part is when PW-8, Ashish was slapped and Rs.100/- was taken out from his purse by the appellant Harpreet, while Munish had caught him and was present. It has been held and observed by the learned Additional Session Judge that the four appellants had common intention to commit the said robbery and, therefore, they were liable for the offence under Section 394 IPC. Learned Additional Session Judge has held that the second robbery

was committed by Harpreet and Satyender. After slapping the prosecutrix, they had taken out Rs.120/- from her purse. Common intention was not attributed to Kuldeep and Munish as they were not present at the place of rape. As noticed above, the State has not filed any appeal against the decision of the learned Additional Session Judge. We have noticed that Rs.220/- were recovered from Satyender on 7th October, 2003. The appellants are right that there is no material or evidence to show that the said recovery of Rs.220/- represents the same notes or currency of Rs.100/- and Rs.120/- of which Ashish, PW-8 and the prosecutrix PW-2 were robbed. But this does not destroy or mean that the charge of robbery is not established. Both PW-8, Ashish and PW-2, the prosecutrix have made the statements that they were robbed of Rs.100/- and Rs.120/- respectively from their purses. Ashish had stated that he was slapped and robbed. Similarly, the prosecutrix was slapped as well as raped. The four appellants had come together in the truck and their common intention can be inferred from the facts stated above. Munish and Harpreet were present when the prosecutrix was taken away. Satyender was also present when the prosecutrix PW-2 was slapped and Rs.120/- were taken out from her purse. The common intention of all the four appellants, therefore, is established. We notice that there is a disconnect in the findings recorded by the learned Additional Session Judge on the robbery

committed on PW-8, Ashish and the robbery committed on PW-2, the prosecutrix, which has been noticed above. As the State has not come up in appeal, we are not disturbing the final finding. It is observed that it is apparent that all the four appellants had common intention to rob Ashish PW-8. Conviction of Harpreet and Satyender that they had robbed the prosecutrix is also confirmed.

47. This brings us to the last issue which relates to the quantum of punishment or proportionality of punishment, which the appellants deserve. Harpreet and Satyender have been given life imprisonment for the offence under Section 376(2)(g). They have also been punished along with Kuldeep and Munish for rigorous imprisonment of 10 years each for the offences under Sections 366 and 394 IPC. In addition fine has also been imposed. Learned counsel for the appellants relied upon the judgments in the cases of *State of Madhya Pradesh Vs. Babbu Barkare @ Dalap Singh*, (2005) 5 SCC 413 *Dhananjoy Chatterjee alias Dhana Vs. State of West Bengal* (1994) 2 SCC 220, *Mahesh Vs. State of M.P.* 1987 (2) SCR 710, *Ravji alias Ram Chandra Vs. State of Rajasthan* AIR 1996 SC 787 and *State of Madhya Pradesh Vs. Santosh kumar* (2006) 6 SCC 1.

48. The question of quantum of punishment has been considered in several cases. This Court in its judgment in the case of *Raj Kumar Khandelwal (supra)* has pointed out mitigating and aggravating factors

which should be taken into consideration. This Court in another decision in *Khem Chand and Others* (*supra*) had examined the said question. The Supreme Court has in *Babbu Barkare* (*supra*), *Deo Narain Mandal* (*supra*) and *Prem Sagar & Others* (*supra*) made observations and comments on the question of quantum of punishment. Our attention was also drawn to English decisions in *William Christopher Millberry & Ors. Vs. R.*, (2002) EWCA Crim 2891; *R. vs. Billam*, (1986) 1 ALLER 985.

49. In the present case, as far as offence under Section 376 (2)(g) IPC is concerned, the two appellants Harpreet and Satyender deserve the maximum punishment i.e. life imprisonment. They were military men and in uniform in broad day-light, committed rape of a young girl, who was completely helpless before them. They have exhibited moral turpitude of extreme depravity by subjecting the teenage prosecutrix to rape and making her a victim of their physical lust. Both of them are more than six feet tall and well built. Instead of defending and protecting the public, they have committed an offence which does not deserve any soft or lenient approach. Their sentences under section 376 (2)(g) are confirmed. Similarly, we are inclined to confirm the sentences under Section 366 IPC awarded to the four appellants. The crime of kidnapping in the present case is connected and interlinked with the offence of rape. The conduct of the four appellants in

abducting both the prosecutrix and Ashish cannot be isolated from the act of rape, which was committed by Harpreet and Satyender. We, therefore, confirm the sentence of 10 years' rigorous imprisonment awarded to the four appellants for the offence under Section 366 IPC. Fine awarded is also confirmed. As far as the offence under Section 394 IPC is concerned, the statement of PW-2, the prosecutrix and PW-8, Ashish is that they were given slaps and Rs.100/- and Rs.120/- were taken out of their purse. We feel that end of justice would be met if the four appellants are sentenced to rigorous imprisonment of five years and fine of Rs.2,000/- each. In default of payment of fine, they shall undergo simple imprisonment of four months. Section 428 Cr.P.C. will be applicable.

50. The appeals are accordingly disposed of. The conviction of the appellant Harpreet and Satyender under Sections 376(2)(g), 366 and 394 are confirmed. Conviction of Munish and Kuldeep under Sections 366 and 394 are also confirmed. The sentence of life imprisonment and 10 years' rigorous imprisonment with fine as awarded to Harpreet and Satyender under Sections 376 (2)(g) and 366 are confirmed. Similarly, the sentence of 10 years' rigorous imprisonment and fine of Rs.2,000/- awarded to Munish and Kuldeep under Section 366 are confirmed. The sentence under Section 394 IPC awarded to the four appellants is modified to 5 years' rigorous imprisonment and

fine of Rs.2,000/- and in default of payment of fine, the appellants will have to undergo further simple imprisonment of 4 months. Section 428 Cr.P.C. will apply.

51. Munish and Kuldeep will surrender within two days and serve their remainder sentence. In case they do not surrender, the trial court will take appropriate steps for their arrest for the said purpose. Trial court record be sent back immediately.

(SANJIV KHANNA)
JUDGE

(S.P. GARG)
JUDGE

AUGUST 23rd, 2012
VKR/kkb