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

% Judgment reserved on: 14.02.2014
Date of Decision: 20.02.2014

+ CRL.A. 305/2010

BHAWNA GARG ..... Appellant
Through: Mr. K. Singhal, Adv.

versus

STATE ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

+ CRL.A. 333/2010

NEELAM ..... Appellant
Through: Mr. Sunil Kumar, Adv.

versus

STATE ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

+ CRL.A. 396/2010

USHA ..... Appellant
Through: Mr. M.A. Niyazi with Ms. Anamik Ghai Niyazi and Mr. Manish Kumar, Advs.

versus

STATE ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

+ CRL.A. 590/2010

HEMANT GARG @ BITTOO ..... Appellant
Through: Mr. K. Singhal, Adv.

versus

STATE ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

+ **CRL.A. 1205/2010**

SHAHID ..... Appellant
Through: Mr. K. Singhal, Adv.

versus

STATE ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

+ **CRL.A. 1279/2010**

SARLA ..... Appellant
Through: Mr. K. Singhal, Adv.

versus

STATE ..... Respondent
Through: Mr. Feroz Khan Ghazi, APP.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

On 23.11.2002, the complainant Hari Ram came to police post Jharoda and made a complaint that his daughter aged 17 years had left the house on 10.09.2002 to give coaching in Gali No. 44 of Sant Nagar, but had not returned home. He further stated that he had been trying to locate her with relatives and persons known to him, but could find no trace of his daughter. He also stated that since the matter was related to his daughter, he had been trying to locate her of his own. The

complainant further stated that on 21.11.2002, his daughter called up her maternal uncle Brijesh Kumar on telephone and informed him that a boy named Bittoo had taken her with him by inducing her and now he along with another boy Shahid and other persons wanted to force her to do bad things and are beating her. She further informed him that she was in the flats near bus stop of route No. 212 in Nand Nagri. The complainant also stated that in search of her daughter, they went to Nand Nagri and came to know that she was in MS Building, Sahibabad. Reaching there, they showed her photograph to the *Chowkidar* and enquired from him about her. The *Chowkidar* informed them that he had seen his daughter in H-2 flats. The *Chowkidar* also expressed doubts regarding character of the persons living in that flat which at that time was closed. Later, those persons called them up and assured to send his daughter back. He also stated that on 23.11.2002, they had lodged a report in this regard at Police Station Timar Pur, but in order to avoid the bad name in the society had reported only the missing report of his daughter. He further stated that on that day, they had caught hold of a boy named Shahid, who was trying to escape after vacating the flat. Shahid promised to take them to his daughter, but his daughter had not returned. The complainant suspected that Bittoo, Shahid and their associates had

concealed his daughter. Shahid was produced by him before the police officer, who recorded the complaint. On the aforesaid complaint, FIR under Section 365/34 of IPC was registered at the Police Station and the investigation was handed over to SI Mahavir Singh.

During the course of investigation, Flat No. H-2 in SS Group Housing, Shalimar Garden, Sahibabad, U.P. was searched and two *salwar* suits and one *dupata* of the prosecutrix was found in that flat.

2. The case of the prosecution is that on 9.2.2003, the prosecutrix was recovered from House No.1/151, Ramesh Nagar. In her statement under Section 164 Cr.P.C, the prosecutrix alleged that Kajal @ Shalu who had been their tenant and used to visit their house, called her from the tuition centre where she had gone to give coaching and took her to Gurudwara, Ashok Vihar where she had called her husband Hemant Garg @ Bittoo. Kajal left, leaving her at Gurudwara on the pretext that she would be coming back shortly. Thereafter, her husband Hemant came there in an Indica car, which was being driven by one Momin. Hemant's second wife Bhawna and Sarla, mother-in-law of Hemant was also present in the car. Hemant asked her to sit in the car. Presuming that Kajal was inside, she boarded the car. However, Kajal was not in the car, whereupon she asked them to stop the car, but they did not do

so. The car was taken to *Ghantaghar* bus terminus etc. and in the night they reached Tri Nagar where those persons were residing as tenants. She further stated that in the house, Bittoo asked others to keep a check on her, lest she runs away. She further stated that next day, the appellant – Usha came to Tri Nagar house. After some time, she was made to wear jeans and Usha took her to Rajdhani Enclave, Rani Bagh in her car. One person named Ashiq came to the said house whereupon she was sent out. After some time, she was brought back to Tri Nagar. Next day, she was again taken to Rajdhani Enclave, Rani Bagh where Ashiq misbehaved with her and when she told other persons about misbehavior, she was beaten by them and told that she had been brought there for that very purpose and if she resisted, she would be beaten and left at G.B. Road (red-light area of Delhi), after taking money for her. She further alleged that for 4-5 days she was taken to the aforesaid house and forced to do 'bad acts'. Ashiq and a number of other persons committed 'bad acts' with her against her wish. Thereafter, vacating the Tri Nagar house, those persons shifted the prosecutrix to Sector-15 of Rohini. She also alleged that Shahid, father of Bittoo knew that she was being forced to do such acts, but he did nothing in the matter. Thereafter, those persons shifted to a house in Shalimar Garden. There

also, she was forced to do 'bad acts'. One day, the appellants – Hemant and Sarla took her to Nand Nagri to the house of her sister. In the night, she was sent to another place in Nand Nagri along with a passport dealer. When she narrated the matter to the dealer, he made her call her maternal uncle. However, in the night, she was sent to Sunder Nagri. She also alleged that as she tried to escape from there, she was caught and taken to Shalimar Garden where she was beaten. In the night, she was sent to Shahranpur in the company of Bhavna, Sarla etc. There they came to know that Shahid had been arrested by the police. She was then taken to a house in Ghaziabad where they lived there for about one and a half month. Then she was brought to the house of their another relative in Shahdara. After 7-10 days, they came back to Ramesh Nagar where they lived for 2-3 weeks. They again returned to Shahdara where they lived for one and a half weeks and then came back to Ramesh Nagar on 9.2.2003, when the police recovered her.

3. The appellant – Hemant is alleged to have been arrested on 15.4.2003 after he had been declared proclaimed offender. On being pointed out by appellant – Hemant, appellant – Usha was arrested from Dilshad Garden on 16.4.2003 whereas the appellant – Neelam was arrested from Janta Flat, Dilshad Garden on 19.6.2003. The appellant –

Bhavna was arrested on 14.10.2004 from Super Bazar, Model Town. Appellant – Sarla was arrested on 22.3.2005 from the red light of Uttam Nagar. Ashiq, who was acquitted by the trial court, was arrested on 30.05.2005 from Burari crossing.

4. On 3.7.2004, the appellant – Shahid was charged with offence punishable under Sections 120B/368/376/109/506 of IPC on the allegations that he along with his co-accused had entered into a criminal conspiracy and in pursuance of the said criminal conspiracy wrongfully confined or concealed the prosecutrix in a house in Sector-15, Rohini knowing that she had been kidnapped or abducted and he had also instigated Ashiq and other persons to have forcible intercourse with her, besides threatening to kill her. Appellant – Hemant @ Bittoo and Neelam were also charged under Section 120B/366A/368/323/506-I/372/376/109 of IPC on the allegation that they along with their co-accused had entered into a criminal conspiracy and in pursuance of the said conspiracy they had induced the prosecutrix aged 17 years, to go from Gali no.44, Sant Nagar knowing that she might be or knowing that it was likely that she would be forced or induced to illicit intercourse, with Ashiq and others and had taken her to different places, wrongfully confining and concealing or knowing that she had been kidnapped or

abducted and they had also beaten her, criminally intimidated her and had either told to hire or sold her to their co-accused Usha with the intention that she would be employed or used for the purpose of prostitution or illicit intercourse with Ashiq and others. They were also charged for instigating Ashiq to have forcible intercourse with the prosecutrix.

5. The appellant – Usha was charged under Section 120B/373/376/109 of IPC on the allegation that she along with her co-accused had entered into a criminal conspiracy and pursuant to the said conspiracy, she had paid or forced or obtained possession of the prosecutrix with the intention that she would be employed or used for the purpose of prostitution or illegal intercourse or for any unlawful and immoral purposes or knowing it to be likely that she would be employed or used for any such purposes and had brought her in her house situated in Rajdhani Enclave, Rani Bagh, besides instigating Ashiq and others to commit rape upon her. They were also alleged to have beaten the prosecutrix.

On 3.11.2004, appellant – Bhavna was charged under Section 120B/366A/368/328/506/376/109 of IPC on the allegation of entering into a criminal conspiracy with her co-accused and pursuant to the said

conspiracy, inducing the prosecutrix to go from Gali no.44, Sant Nagar with the intent that she would be forced or seduced to illicit intercourse with Ashiq and others. She was also charged for wrongfully confining or concealing the prosecutrix knowing that she had been kidnapped or abducted, besides beatings and criminally intimidating her. She was also charged for selling the prosecutrix to her co-accused Usha with the intent that she would be employed or used for the purpose of prostitution or illicit intercourse with Ashiq and others. She was further charged for instigating Ashiq and others to have forcible sexual intercourse with her.

On 16.05.2005, appellant – Sarla was charged under Section 120B/366A/368/323/506-I/376/109 of IPC on the allegation that she had entered into a criminal conspiracy with her co-accused and in furtherance of the said conspiracy had induced the prosecutrix to go from Gali no.44, Sant Nagar with the intent that she would be forced or seduced to illicit intercourse with co-accused Ashiq and others. She was also charged for wrongfully confining or concealing the prosecutrix, knowing that she had been kidnapped or abducted; besides beating and criminally intimidating her. She was further charged with selling the prosecutrix to Usha with the intention that she would be employed or

used for the purpose of prostitution or illegal intercourse with Ashiq and others.

6. Since all the appellants pleaded not guilty to the charges framed against them, as many as 39 witnesses were examined by the prosecution.

During the course of trial, prosecutrix was examined three times; firstly after Shahid was charge-sheeted; secondly after Bittoo, Bhavna and Usha were charge-sheeted and lastly after Sarla was charge-sheeted.

7. In her deposition dated 20.09.2005 and 19.10.2005, the prosecutrix, *inter alia,* stated that on 10.09.2002, Kajal reached the place where she was taking tuitions in Gali no.44 and asked her to accompany her to Gurudwara. She accordingly accompanied her to the aforesaid Gurudwara. Kajal left her outside Gurudwara and went away. After some time, Hemant, Sarla, Bhavna and their driver Momin came in an Indica car. Hemant came out of the car, stating that Kajal was sitting in the car. She then sat in the car but found that Kajal was not present there. When the car was started, she asked them to stop it but they did not heed to her request and kept roaming at different places. Thereafter, they took her to a room in Tri Nagar which Hemant and Shahid had taken on rent. She was taken to a room where a man was already sitting.

Bhavna left her in that room with the man who was already present there and came out. She was then raped in that room. The man who raped her came out and paid money to Sarla and went away. When she complained to Hemant, Shahid and Bhavna, they locked her inside the room. She was told by Hemant, Bhavna and Shahid that she had been brought there for prostitution. Next day, appellant – Usha came to that house whereupon she (prosecutrix) was asked to put jeans. Thereafter, Usha left in her own car, whereas she was taken to Rajdhani Enclave in another car in the company of Hemant, Bhavna and Sarla. One person named Ashiq, who was present in that house, misbehaved with her. At that time, Bittoo, Bhavna, Sarla and Usha also sitting in another room of that house. When she complained to them about misbehavior by Ashiq, they said nothing but took her back to Tri Nagar house. Next day, she was again brought to that house where Ashiq committed rape upon her. When she complained to Bittoo, Bhavna, Sarla and Usha, they told her that she would have to do that work otherwise they would leave her to G.B. Road since they were concerned only with money. The prosecutrix further stated that Usha, Bhavna, Sarla and Bittoo used to take her to different places for doing sex and they were taking money from the persons who were committing wrong acts upon her. According to the

prosecutrix on 21.11.2002, she was taken to Nand Nagri and was sent with a person dealing in passports. The appellants – Hemant, Neelam and Sarla were present in the Nand Nagri house. The passport dealer took her to some other place in Nand Nagri. Then she narrated the facts to that person, she rang up to her maternal uncle and she then informed her maternal uncle. Thereafter, she was left in Sundar Nagari in the house of Neelam. When she tried to run away from that house, Bittoo, sarla and Bhavna met her and took her to a house in Shalimar Garden which Shahid and Hemant had taken on rent. She was beaten in that house and then taken to Hapur in a car in the company of Sarla, Bhavna, etc.

The prosecutrix further stated that on 25.04.2002, when they were returning back, Sarla received a telephone call informing her about arrest of Shahid, whereupon she was beaten and abused in the car. She was then taken to Ghaziabad to the house of a relative of Sarla, where they stayed for about one and a half month. Then she was taken to house of another relative of Sarla at Shahdara, where they stayed for 10-15 days. From Shahdara house, she was taken to Ramesh Nagar, to the house of relative of Sarla, where they stayed for about 7-10 days. They again went back to the house of their another relative at Shahdara, but

next day she was taken to Ramesh Nagar where she was rescued by the police.

8. PW2 Hari Ram is the father of the prosecutrix. He, *inter alia,* stated that on 10.09.2002, the prosecutrix, who was born on 2.8.1985 had gone to Gali No.44, Sant Nagar to give tuitions in a tuition centre, but did not return till evening. On 21.11.2002, on receipt of a call by her maternal uncle, they went to Nand Nagri in her search and came to know that she was present at S.S. Building, Sahibabad in Flat No. H-2. They reached there and inquired from the *chowkidar*. The flat was found locked at that time. On 23.11.2002, they again went to the aforesaid flat at Sahibabad and made inquiries from *chowkidar* after showing the photographs of his daughter to him. They came to know that his daughter had been visiting that flat. He also showed photographs of Bittoo, which he had with him, to the *chowkidar,* who told him that he, had been visiting that flat along with his daughter. He further stated that on 23.11.2002 itself he received a telephone call that his daughter was being released, but actually she was not released. According to the witness on 25.11.2002 they again reached house no.H-2, Sahibabad and found the appellant – Shahid present there. They brought him to Police Post Jharoda where his statement Ex.PW2/A was recorded by the police.

On the same day, he along with the police and Shahid went to the aforesaid flat and found two ladies suits of his daughter there. The suits were seized by the police and Shahid was arrested. The witness identified the suits of her daughter Ex.P1 to P5.

9. PW3 – Brijesh Kumar, who is the maternal uncle of the prosecutrix stated that on 21.11.2002 he received a telephone call from the prosecutrix who told him that she was present at the bus stand of 212 Nand Nagri and that she was in the custody of Shahid and Bittoo. She was waiting and she asked him to release her from the clutches of Shahid and Bittoo. According to the witness, he could not talk more to the prosecutrix since the phone got disconnected. He then informed his sister about it and came to know that the prosecutrix was missing since 10.09.2002. They reached Nand Nagri and searched at the bus stop of bus no.212 and other places. Someone told them that Shahid and Bittoo were residing in SS Flats, Sahibabad whereupon they came back to their house. Next day, they again went to SS Building, Sahibabad, where the flat was found locked. They showed the photographs of the prosecutrix to the neighbours who told them that they had seen her in the said flat. On 22.11.2002, they received a telephone from Shahid informing that they were releasing the prosecutrix. She, however, did not return back.

Therefore, a missing report was lodged at Police Station Timarpur on 23.11.2002. He further stated that on 25.11.2002, they again went to Sahibabad and found Shahid locking the said flat. They brought him to police post Jharodha and produced him before the police. They again went to Sahibabad flat with the police and two suits of the prosecutrix were found there, which were seized by the police.

10. PW5 – Avilash Kumar is the caretaker of Flat no.H2, SS Builders, Shalimar Garden, Sahibabad. He stated that the appellant – Hemant was the tenant in the aforesaid house since 19.11.2002. According to the witness, being the caretaker of the house, he had let it out on rent to Hemant.

11. PW7 Constable Bala Shahib and PW11 SI Mahavir have deposed with respect to recovery of the clothes of the prosecutrix from the house number H-2, Sahibabad. PW11 – SI Mahavir Singh stated that on 9.2.2003, he along with Constable Rambir went to House No.1/151, Ramesh Nagar, on receipt of secret information that the prosecutrix could be available there. The prosecutrix was found present there and was brought from there. PW8 – Ramesh Chand is an official from the Office of Sub Registrar, Civil Lines, who produced the copy of the record of birth of a female child to Usha, wife of Hari Ram on 2.8.1985.

12. PW34 – Dr. Rekha Jain examined the prosecutrix in Hindu Rao Hospital and on examination found that her hymen was torn. PW36 Dr. Archana Sinha, Metropolitan Magistrate stated that on 2.7.2003, the appellant – Neelam who was produced before her in jail refused to participate in TIP vide proceedings Ex.PW36/B.

13. In their statement under Section 313 Cr.P.C, all the appellants denied the allegations against them and claimed to be innocent and claimed trial.

14. Vide impugned judgement dated 3.3.2010, the appellants Shahid, Hemant @ Bittoo, Usha, Neelam, Bhawna and Sarla were convicted under Section 120B read with Section 366A of IPC. The appellants Hemant @ Bittoo, Bhawna and Sarla were also convicted under Section 366A read with Section 120B of IPC. The appellants Neelam, Shahid, Bhawna and Sarla were further convicted under Section 368 read with Section 120B of IPC. The accused Usha, Bhawna, Hemant @ Bittoo and Sarla were further convicted under Section 109 read with Section 376 of IPC. Appellants Hemant @ Bittoo, Neelam, Bhawna and Sarla were also convicted under Section 506 Part I of IPC. Vide order on sentence the appellants Shahid, Hemant @ Bittoo, Usha, Neelam, Bhawna and Sarla were sentenced to undergo SI for five (5) years each

and to pay fine of Rs.5,000/- each or in default of payment to pay fine to undergo SI for five (5) months each in respect of offence under Section 120B read with Section 366A of IPC. The appellants Hemant @ Bittoo, Bhawna and Sarla were sentenced to undergo SI for five (5) years each in respect of offence under Section 366A read with Section 120B of IPC and to pay fine of Rs.5,000/- each or in default of payment to pay fine, were directed to undergo SI for five (5) months each. Appellants Neelam, Shahid, Bhawna and Sarla were sentenced to undergo SI for three (3) years each in respect of offence under Section 368 read with Section 120B of IPC and to pay fine of Rs.4,000/- each or in default of payment to pay fine, were directed to undergo SI for four (4) months each. Appellants Usha, Bhawna, Hemant @ Bittoo and Sarla were sentenced to undergo SI for seven (7) years each in respect of offence under Section 109 read with Section 376 of IPC and to pay fine of Rs.10,000/- each or in default of payment to pay fine, were directed to undergo SI for ten (10) months each. Appellants Hemant @ Bittoo, Neelam, Bhawna and Sarla were sentenced to SI for a period of one (1) year under Section 506 Part I of IPC.

15. The following are the ingredients of Section 366A of IPC:

i. that the accused induced a girl;

ii. that the person induced was a girl under the age of eighteen years;

iii. that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse;

iv. such intercourse must be with a person other than the accused;

v. that the inducement caused the girl to go from any place or to do any act.

16. The expression "inducement" means an act or process of enticing, persuading or influencing another person to take a certain course of action. The expression "seduce", as per Oxford Dictionary *inter alia* means (1) to tempt, or entice a person to do something wrong (2) entice a woman into sexual activity.

The facts & circumstances of the case show that the prosecutrix was persuaded to leave the house of her parents and accompany the appellants Hemant @ Bittoo, Bhawna and Sarla to the house in Tri Nagar and thereafter she was induced to accompany them and the appellant Usha to Rajdhani Enclave and several other places with intent or at least knowing that she was likely to be seduced to illicit intercourse, at the aforesaid places, with several persons, by offering and paying money to her for the purpose. But for offer and/or payment of

money to her, the prosecutrix would never have surrendered her body to the persons who had illicit intercourse with her.

17. It has come in the deposition of the father of the prosecutrix that she was born on 2.8.1985. The deposition of the father of the complainant finds corroboration from the municipal certificate Ex.PW8/A. This would mean that on 10.9.2002, the prosecutrix was less than eighteen (18) years old though more than seventeen (17) years old.

18. The next question which arises is as to whether the prosecutrix was induced to go from any place or to do any act with intent that she might be or knowing that she was likely to be forced or seduced to illicit intercourse. It has come in the deposition of the prosecutrix that she had gone to give coaching on 10.9.2002 and from the coaching centre she had gone to Gurudwara Ashok Vihar, where the appellants Hemant @ Bittoo, his wife Bhawna and his mother-in-law Sarla met her in a car. As noted earlier, the prosecutrix was examined three times, firstly when only Shahid was chargesheeted, secondly when Bhawna, Hemant @ Bittoo, Usha and Neelam were chargesheeted and thirdly when Sarla and Ashiq (who has been acquitted) were chargesheeted. In all her statements she maintained that Kajal had taken her to Gurudwara Ashok

Vihar on the aforesaid date. In her deposition dated 22.9.2004, the prosecutrix had also stated that Kajal had instigated her against her family saying that they would marry her off in a bad family. The aforesaid averment was not repeated by her when she was examined on 14.12.2004 and 19.10.2005. Excluding the deposition with regard to Kajal instigating the prosecutrix, the fact remains that the prosecutrix did not abandon the guardianship of her parents of her own, without any aid or influence from any person. This is not a case where a girl leaves the house of her parents on account of her becoming friendly to a boy and joins the company of that boy, of her own. This is also not a case of a girl abandoning the guardianship of her parents on account of being annoyed or dissatisfied with them. It was Kajal who facilitated her going to Gurudwara by accompanying her to that place in an autorickshaw. The very fact that the appellants Hemant @ Bittoo, Bhawna and Sarla were already present at the Gurudwara when the prosecutrix reached there along with Kajal leaves no reasonable doubt that they were acting in concert with Kajal and that is why they were already present at Gurudwara in a vehicle. The relationship between Kajal and Hemant is yet another circumstance which indicates the meeting of mind between the aforesaid appellants and Kajal. It has

come in evidence that Kajal had disappeared from Gurudwara, asking the prosecutrix to wait there and thereafter, the appellants Hemant @ Bittoo, Bhawna and Sarla came there in a car being driven by their driver Momin. The sudden disappearance of Kajal on reaching Gurudwara is also indicative of the connivance between her and the aforesaid appellants. Therefore, I have no hesitation in holding that on the aforesaid date the prosecutrix had gone to Gurudwara pursuant to a criminal conspiracy which the appellants Hemant @ Bittoo, Bhawna and Sarla had hatched with Kajal.

19. The next question which arises for consideration is whether any inducement was offered to the prosecutrix while taking her from the coaching centre to Gurudwara. In my view, though the prosecutrix does not say so, the facts & circumstances of the case as stated hereinafter, clearly show that she was induced by the appellants Hemant @ Bittoo, Bhawna and Sarla, acting in conspiracy with Kajal by tempting or alluring her that she would get money if she strays on the path of illicit intercourse for consideration. It has come in the deposition of the prosecutrix that she had illicit intercourse with a male in the Tri Nagar house where she was taken on 10.9.2002. Though in her statement under Section 164 Cr.P.C., the prosecutrix did not refer to the said

episode, the omission, to my mind, would not be material considering that the prosecutrix was in the company of the appellants for about five (5) months before she was recovered by the police and she had illicit intercourse with so many persons at various places during the aforesaid period and, therefore, it may not have been possible for her to recall and narrate all such episodes at the time she was examined before the Magistrate. In any case, nothing really turns on whether the prosecutrix had intercourse with a male or not at the Tri Nagar house, since even thereafter she was taken for and had illicit intercourse with a number of persons on several occasions.

20. It has come in the deposition of the prosecutrix that on the next day she was taken by the appellants Hemant @ Bittoo, Bhawna and Sarla to Rajdhani Enclave, Rani Bagh in a vehicle. The prosecutrix had illicit intercourse with a person who was introduced to her as Ashiq, in the house at Rajdhani Enclave. It is true that during the course of trial, the prosecutrix did not identify Ashiq who was prosecuted along with the appellants, but that, in my opinion, would not be relevant because this was not the deposition of the prosecutrix that she did not have illicit intercourse with anyone in Rajdhani Enclave house. Her deposition in the court was that Ashiq who had been prosecuted in this case was not

the person who had illicit intercourse with her in Rajdhani Enclave. What emerges from the deposition of the prosecutrix is that some person other than the person named Ashiq, who was prosecuted in this case, had illicit intercourse with her in the house, when she was taken by the appellants Hemant @ Bittoo, Bhawna and Sarla. In fact, the illicit intercourse in Rajdhani Enclave house on the first day the prosecutrix was taken to that house was not the sole incident of this nature. According to the prosecutrix she was taken to the aforesaid house a number of times and had illicit intercourse with several persons.

The prosecutrix has clearly stated that even thereafter she was taken to various places on different days by the appellants Hemant @ Bittoo, Bhawna and Sarla and she had illicit intercourse with various persons. It is quite evident from the act of the appellants Hemant @ Bittoo, Bhawna and Sarla in taking the prosecutrix to Rajdhani Enclave house and several other places where she had illicit intercourse with several persons that the prosecutrix was induced, firstly through Kajal, to accompany her to Gurudwara, Ashok Vihar and then she was induced by the appellants Hemant, Bhawna and Sarla, to accompany them to the house in Tri Nagar as well as to the house in Rajdhani Enclave and several other places, with intent and knowing that she was likely to be

seduced to illicit intercourse. Though the prosecutrix does not say that she was offered or given money for having illicit intercourse with several persons, such offer and payments can be easily inferred from the circumstances of the case.

21. The facts & circumstances of the case, in my view do not indicate that the prosecutrix was forced to have illicit intercourse with any person. She did not have any kind of friendship with the persons with whom she had illicit intercourse. Therefore, offer and payment of money to her could be the only possible reason for her to leave her house, join the appellants Hemant @ Bittoo, Bhawna and Sarla in their car and thereafter accompany them firstly to the house in Tri Nagar and then to the house in Rajdhani Enclave and several other places.

According to the prosecutrix she boarded the car at Gurudwara on the representation or under an impression that Kajal was inside the car. However, despite noticing that Kajal was not in the car she made no effort to raise an alarm though, according to her the car was on the road for quite some time before they reached the house in Tri Nagar. On reaching Tri Nagar house, no alarm was raised by the prosecutrix. Had she not willingly accompanied the other occupants of the car, she would have raised alarm on reaching Tri Nagar house, instead of meekly

accompanying the aforesaid appellants upstairs the house in Tri Nagar, which is situated in a thickly populated area. The prosecutrix knew that if she raised alarm, people would gather there and would not allow her to be taken upstairs. Despite that no alarm was raised by her. It has come in evidence that the landlord of the house was residing on the ground floor. Had the prosecutrix not been willing to accompany the aforesaid appellants to the upper floor of the house she would have raised alarm and in that event, she would have been rescued by the landlord and other persons residing in the neighbourhood.

Next day the prosecutrix came out of the Tri Nagar house in broad day light and boarded the car in which she was taken to Rajdhani Enclave. Again, she did not protest before sitting in the car and, in fact, this is not her case that she was forced in any manner to board the said car. This is also not the case of the prosecutrix that on the way from Tri Nagar to Rajdhani Enclave an alarm was raised by her so as to attract the attention of other users of the road. This is not the case of the prosecutrix that any arm was shown to her in the vehicle or before she was made to board the vehicle. Though it has come in the deposition of the prosecutrix that the appellant Sarla had threatened her that in case she revealed anything to anyone Shahid would kill her family members

and take away her sisters. It has also come in the deposition of the prosecutrix that in Rajdhani Enclave, the appellants Hemant @ Bittoo had threatened her that if she did not comply with their directions he would leave her at G.B. Road and get money for that. However, the aforesaid parts of the deposition of the prosecutrix do not inspire confidence and cannot be believed. There could be no ground for her to believe that Shahid would kill her and kidnap his sisters. This is more so when Shahid was not some hardened criminal and was not armed with a weapon. There could be no reason for the prosecutrix to get frightened on account of the threat alleged to have been given by the appellant Hemant, since he was not in a position to implement the said threat. Moreover, the subsequent conduct of the prosecutrix in accompanying the aforesaid appellants Hemant @ Bittoo, Bhawna and Sarla to various places and having illicit intercourse with several persons also rules out any such threat having been extended to her. This is not the case of the prosecutrix that she had complained to any of the persons with whom she had illicit intercourse that she was not a consenting party for such an act and was submitting only on account of the threat being extended to her by appellants Hemant @ Bittoo, Bhawna and Sarla. Had the prosecutrix not been a consenting party not

only would she have complained to the persons with whom she had illicit intercourse, she would also have raised alarm at several places where she was taken for the said purpose.

When the prosecutrix was taken to Rajdhani Enclave on several dates no alarm was raised by her either while getting in the house or while coming out of the house. Had she not been a consenting party, she would not have gone to that house several times and would not have agreed to have illicit intercourse with several persons, particularly when she does not claim that any of the appellants was armed with a weapon. In any case, she would certainly have told the persons who were brought to Rajdhani Enclave house for the purpose of having illicit intercourse with her that she was not a willing party and was being threatened to have illicit intercourse with them.

Similarly when the prosecutrix was taken to several other places on different dates she would have raised alarm while getting out of the house in which she was living, while getting inside the places where she had illicit intercourse, while coming out of the places where she had illicit intercourse or while getting back to the house where she was living.

It has come in the deposition of the prosecutrix that the appellants had sent her to Nand Nagri on the two wheeler scooter of a passport agent and at her request, the passport agent had taken her to a PCO from where she called her maternal uncle. Admittedly, no alarm was raised by the prosecutrix while travelling on the scooter of that agent. The fact that the agent took her to a PCO and facilitated her making a telephone call to her maternal uncle would show that the aforesaid agent was not acting in connivance with the appellants. Therefore, the prosecutrix could easily have asked him to take her to her house or to a police station on the way. No such attempt, however, was made by her. There is no evidence of the prosecutrix having requested the aforesaid agent to inform the police about her plight. Admittedly, even at PCO no alarm was raised by the prosecutrix. More importantly, while at the PCO, the prosecutrix had an opportunity to call the police and report her plight to them. However, no such attempt was made by her despite availability of a telephone to her. If she did not know the telephone number of the police control room, she could have asked the PCO owner about it. However, no such course of action was adopted by her.

It has also come in evidence that she was taken out of Delhi in the company of Sarla, Bhawna, etc. The prosecutrix remained in their

company for quite some time. No alarm was raised by the prosecutrix when she accompanied Sarla, Bhawna, etc. outside Delhi in a car. The court can take judicial notice of the fact that police officials are always present at interstate borders. Therefore, the prosecutrix must have noticed the police officials while crossing Delhi border and entering UP border. Had she not been a willing person she would certainly have raised alarm at seeing the police officials, while passing through border for travelling to outside Delhi. According to the prosecutrix, on 25.4.2002, when they were returning back Sarla received information about arrest of Shahid whereupon she was taken to a house in Ghaziabad, UP. Again, no alarm was raised by the prosecutrix nor did she make an attempt to flee from the company of the aforesaid appellants. From Ghaziabad the prosecutrix was taken to Shahdara where she stayed for 10-15 days and from Shahdara she was taken to Ramesh Nagar where she stayed for 7-10 days. She was again brought to Shahdara and then again to Ramesh Nagar. During all these journeys no attempt was made by the prosecutrix either to raise alarm or to flee from the company of the appellants.

In view of the above discussion, I am satisfied that the prosecutrix was not under any kind of pressure, nor was she subjected to any kind of

threat or intimidation before she accompanied the aforesaid appellants to several places and she had illicit intercourse with several persons at different places. The aforesaid facts & circumstances, in my view, indicate only one probability, that she was sharing the money which the persons with whom she had illicit intercourse would be paying and that is why she willingly accompanied the aforesaid appellants to several places where she had illicit intercourse. However, as far as the appellants Hemant @ Bittoo, Bhawna and Sarla are concerned, the aforesaid facts & circumstances leave no reasonable doubt that they were party to a criminal conspiracy to induce the prosecutrix firstly to come to Gurudwara Ashok Vihar and then to accompany them to Tri Nagar, Rajdhani Enclave and several other places intending as well as knowing that she was likely to be induced to illicit intercourse at the aforesaid places.

Therefore, no fault can be found with the conviction of the appellants Hemant @ Bittoo, Bhawna and Sarla under Section 120B read with Section 366A of IPC.

22. Coming to the appellant Usha, it has come in the deposition of the prosecutrix that she came to Tri Nagar house on 12.9.2002 and from there, the prosecutrix, in the company of the appellants Hemant @

Bittoo, Bhawna and Sarla, accompanied her in a separate car to the house which Usha had taken on rent in Rajdhani Enclave. The prosecutrix had illicit intercourse with several persons in the aforesaid house of the appellant Usha. It has also come in the deposition of the prosecutrix that Usha, Hemant @ Bittoo, Bhawna and Sarla used to take her to different places for doing illicit intercourse and they were taking money from the persons who were committing such acts with her. It is evident from the act of the appellant Usha in taking the prosecutrix to Rajdhani Enclave house and several other places and taking money from the persons who had illicit intercourse with the prosecutrix that she was a party to the criminal conspiracy pursuant to which the prosecutrix was induced to go to Rajdhani Enclave and several other places for the purpose of illicit intercourse. It is settled legal proposition that every person party to a criminal conspiracy need not join the conspiracy at the stage of its inception and a person, party to the conspiracy may join it at a later date. Therefore, even if I proceed on the basis that Usha was not a party to the criminal conspiracy to the prosecutrix going to Ashok Vihar Gurudwara and then to the house in Tri Nagar she was certainly a party to the criminal conspiracy pursuant to which she was taken to Rajdhani Enclave and several other places for the purpose of having

illicit intercourse with several persons. Therefore, the appellant Usha has been rightly convicted under Section 120B read with Section 366A of IPC.

23. In my view, the conviction of the appellants under Section 120B read with Section 368 of IPC is not justified. A person can be convicted under Section 368 of IPC only if he knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person. However, there is absolutely no evidence of the prosecutrix being concealed or confined. She was openly going to several places where she had illicit intercourse with several persons and coming back to the place where she was living in the company of the appellants. There is no credible evidence of her having been wrongfully confined at any place. Therefore, the appellants are liable to be acquitted of the charge under Section 120B read with Section 368 of IPC.

24. In my view the conviction of the appellants Usha, Bhawna, Hemant @ Bittoo and Sarla under Section 109 read with Section 376 of IPC is also not made out from the facts & circumstances of the case. As discussed earlier, the facts & circumstances of the case clearly indicate that the prosecutrix was a consenting party to have illicit intercourse with several persons. There is no credible evidence of the prosecutrix

having been put in fear of death or hurt. She was more than sixteen (16) years old at the time she left the house of her parents in the company of Kajal. The amended provisions of Section 375 of the Indian Penal Code do not apply to this case, since the alleged offence took place before the said Section came to be amended w.e.f. 3.2.2013. Therefore, the appellants Hemant @ Bittoo, Bhawna and Sarla are liable to be acquitted of the charge under Section 109 read with Section 376 of IPC.

25. Since the deposition of the prosecutrix alleging threat to kill her family, take away her sisters and sell her at G.B. Road for consideration do not inspire confidence, the charge under Section 506 of IPC cannot be sustained and accordingly the appellants Usha, Hemant @ Bittoo, Bhawna and Sarla are liable to be acquitted of the said charge.

26. The learned counsel for the appellants pointed out the following contradictions/discrepancies in the deposition of the prosecutrix:

a. In her deposition the prosecutrix stated that on reaching Gurudwara, Kajal went somewhere and in the mean while Hemant @ Bittoo, Bhawna & Sarla and driver came there, whereas in her statement under Section 164 of Cr.P.C., she stated that they were already present when she reached Gurudwara.

b. In her statement under Section 164 of Cr.P.C. as well as in her statement recorded on 14.12.2004, she stated that from Gurudwara she was taken to Ghantaghar, whereas in the other statements recorded in the court she did not refer to Ghantaghar.

c. In the statement under Section 164 of Cr.P.C. she did not depose regarding the alleged rape on 10.9.2002 in Tri Nagar house whereas she claimed such rape when she was examined in the court.

d. In the statement under Section 164 Cr.P.C. she did not refer to molestation by Ashiq on the first day she was taken to Rajdhani Enclave whereas she alleged molestation by Ashiq on the first day, when she was examined in the court.

e. In her deposition she stated that when she was taken to Rajdhani Enclave for the second time, she was forced to have illicit intercourse with Ashiq, whereas in her statement under Section 164 of Cr.P.C. she stated that for the next 4-5 days she was forced to do wrong acts with Ashiq and many other persons against her consent.

f. According to prosecutrix she had not taken clothes other than the grey suit she was wearing when she went with Kajal whereas according to her father she had already arranged to get extra clothing, i.e., one pair

of jeans and one red colour shirt as well as watch and gold rings, prior to the day she left the house.

The aforesaid discrepancies, in my view, are minor and inconsequential and therefore much importance cannot be attached to them. There is no material discrepancy as regards core part of the case of the prosecution, i.e., (a) Kajal taking the prosecutrix to Gurudwara with her (b) the appellants Hemant @ Bittoo, Bhawna and Sarla meeting the prosecutrix at Gurudwara and getting in the car (c) the prosecutrix being taken to Tri Nagar house by the aforesaid appellants (d) the prosecutrix being taken to Rajdhani Enclave by the appellants Usha, Hemant @ Bittoo, Bhawna and Sarla on 12.9.2002, and several other days (e) the prosecutrix being taken to various places by Usha, Hemant @ Bittoo, Bhawna and Sarla for illicit intercourse and taking money from the persons who had illicit intercourse with her and (f) the prosecutrix being sent with a passport agent to Nand Nagri on his two wheeler scooter and she making a telephone call to her maternal uncle on the way to a place in Nand Nagri.

27. The learned counsel for the appellants placed strong reliance upon the fact that the father of the prosecutrix did not lodge any complaint with the police prior to 23.11.2002, and lodged only a missing report

instead of report of kidnapping despite having come to know through his brother-in-law that she was in the clutches of Shahid and Bittoo. It has come in the deposition of PW2 Hari Ram that he did not report the matter earlier since family honour was involved. As noted earlier, this was not a case of someone forcibly taking the prosecutrix with him/her. This is a case where the prosecutrix was induced to accompany the appellants by alluring her with money, in case she accompanied the appellants and indulge into illicit intercourse. It has also come in the deposition of PW2 that the prosecutrix had already arranged to smuggle her jeans and T-shirt along with some jewellery out of the house even prior to 10.9.2002. In these circumstances, particularly on account of the prosecutrix having taken her clothes, jewellery and some cash from the house, her father had no difficulty in understanding that this was not a case of forcible kidnapping of his daughter. It is not uncommon, in our tradition bound society, for the father of a young girl to hesitate in reporting a matter of this nature to the police, when he is convinced that no one had forced her daughter to leave the house. It was only when the prosecutrix complained to her maternal uncle that he decided to go to the police station and report the incident. Even at that time either because he had received a telephone call informing him that his

daughter would soon be sent home or because of his anxiety to protect the honour and dignity of his daughter, it was not unnatural for him not to disclose all the facts to the police. The purpose of the complaint would have been satisfied had the prosecutrix returned home as per the assurance given to him on telephone. He, however, had no option but to lodge an FIR when on visiting Sahibabad, he came to know from the *chowkidar* that persons of suspicious character were frequenting the flat in which his daughter had been see and he was able to catch hold of Shahid.

28. The reasons for the courts normally insisting upon prompt lodging of FIR is that the delay in reporting the matter to the police may sometimes result in embellishment and exaggeration, which is a creature of an afterthought. There is a danger of a coloured version of the incident creeping in, if there is unreasonable delay in reporting the incident to the police. Therefore, as a rule of prudence, the court insist that wherever there is unreasonable delay in lodging an FIR it needs to be satisfactorily explained by the prosecution.

However, as far as the cases involving sexual assault are concerned, they stand on an altogether different footing. Since the issue of honour of the family is involved in reporting such matters to the

police, the members of the family sometimes take their own time in deciding whether to take the matter further or not. Therefore, delays in reporting such matters to the police, are sometimes bound to occur in our tradition-bound society. Ordinarily a traditional Indian family would not like a stigma to be attached to the victim and, therefore, a lot of thought process goes into taking a final decision whether to report such case to the police or not. The following view taken by the Hon'ble Supreme Court in State of Himachal Pradesh Vs. Prem Singh AIR 2009 SC 1010, is pertinent in this regard:

> "So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR."

29. The case set out by the prosecution clearly indicates that Kajal who is the wife of the appellant Hemant was an accomplice of the appellant, she being a party to the criminal conspiracy pursuant to which the prosecutrix left the guardianship of her parents in her company on 10.9.2002, but, the failure of the investigating agency to prosecute her does not benefit the appellants in any manner since the charges against

them have to be examined independently of the aforesaid lapse of the investigating agency.

30. It was pointed out by the learned counsel for the appellants that a number of material witnesses such as chowkidar at Shalimar Garden house, passport agent and the owners of the houses in Tri Nagar, Shalimar Garden, Rani Bagh and Sunder Nagri, the owner of STD booth and the owner of tuition centre have not been examined. As regards the house in Shalimar Garden, the person who had let out the premises and who is related to the owner of the house has been examined by the prosecution and documentary evidence of this house being let out to Hemant has already been collected. This can hardly be disputed that the investigating agency ought to have examined the owners of Tri Nagar house and Rani Bagh house if the address came to known to the Investigating Officer. However, the deposition of the prosecutrix does not indicate that she knew the addresses of the Tri Nagar house or the other houses. Therefore, it might not have been possible for the Investigating Officer to examine the owners of the said houses. Moreover, when the Investigating Officer was cross-examined, he was not asked as to why he had not examined the owners of the said houses. Therefore, no adverse inference can be drawn against the prosecution on

account of the failure of the investigating agency to examine the owners of the aforesaid house. The Investigating Officer did not examine the owner of Ramesh Nagar house, despite the fact that the prosecutrix was recovered from there. But there is no evidence of the prosecutrix having been subject to illicit intercourse in that house.

In any case it is settled legal proposition that defect in the investigation on account of, connivance of the Investigating Officer with the accused or his incompetence or negligence does not accrue to the benefit of the accused provided the evidence which the prosecution has brought on record, establishes their guilt beyond reasonable doubt.

As held by the Hon'ble Suprme Court in Karnel Singh vs. State of M.P. JT 1995 (6) SC 437, it is not proper to acquit the person due to defective investigation, if the case otherwise stands established, since doing so would be falling in to the hands of the erring Investigating Officer. As noted by the Supreme Court in Ram Bihari Yadav vs. State of Bihar and others, JT 1998 (3) SC 290, the story of the prosecution is to be examined *de hors* the contaminated conduct of the Investigating Officer lest the mischief which may also be deliberate one is perpetuated. The criminal justice should not be made casualty because of the wrong doing of a police officer.

The Apex Court in Dhanaj Singh @ Shera & Ors. v. State of Punjab (2004) 3 SCC 654, held, "in the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

The Apex Court in the case of Paras Yadav v. State of Bihar AIR 1999 SC 644, enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

In State of Karnataka Vs. K. Yarappa Reddy 2000 SCC (Crl.) 61, the Apex Court *inter alia* held as under:

> "19. ….It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the Court in the case cannot be allowed to depend solely on the probity of investigation. It is well- nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the

impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by the investigation officers. Criminal Justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case."

31. It was also contended by the learned counsel for the appellants that no effort was made by the investigating agency to get the appellants, other than appellant Neelam, identified in a judicial TIP. In my view, no such effort was necessary since the prosecutrix having been in the company of the appellants for a long period and even knowing their names, there is no way she could have committed any mistake in identifying them in the course of trial.

The following view taken by this Court in *Rijaul Karim* versus *State (GNCT of Delhi)*, *Crl. Apeal no.32/2013, decided on* 27.01.2014 is pertinent in this regard:

> *"12. The legal position with respect to identification of an accused was summarized by the Hon'ble Supreme Court in Dana Yadav @ Dahu and Ors. Vs. State of Bihar (2002) 7 SCC 295 inter alia as under:*
> *"(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive*

one, and the same can be used only to corroborate identification of accused by a witness in court.

X X

X

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

13. The power to identify also varies in terms of power of observation and memory of the identifying person. Another relevant circumstance in this regard is as to for how much time the witness had seen the accused. If, for instance, he had only a glimpse of the accused, he may not be in a position to firmly recall his identity, but if he had interacted the accused for a substantial time

and had ample opportunity to observe him, he may face no difficulty in identifying him at a later date.

32. The learned counsel for the appellant Usha has relied upon Ramesh Vs. The State of Maharashtra AIR 1962 Supreme Court 1908; Premwati Vs. State of NCT of Delhi & Anr. 2010 (4) JCC 2491; State (Delhi Admn.) Vs. Jagdish & Anr. 1988 (3) Crimes (Delhi DB) and Madan Raj Bhandari Vs. State of Rajasthan 1969 (2) SCC 385.

In Ramesh Vs. The State of Maharashtra (supra) an accused named Patilba introduced the prosecutrix to some customers and she started indulging in promiscuous intercourse for money. On January 13, 1960, the appellant Ramesh went to the resident of Patilba and asked him to bring the prosecutrix and another women engaged in the prostitution to Gulzar Theatre and accordingly Patilba and the two women went to the Theatre. At the instance of the appellant, the two women were taken by one Devidas to Bohori Kathada. The police raided a room at Bohori Kathada and found accused Nos.1 to 5 and Devidas consuming liquour in a room. The women were found in the inner apartment. It was found that the prosecutrix had not attained the age of eighteen (18) years. Nine (9) persons including the appellant Ramesh who was accused No.3 in the case were charged under Section 366 & 366A of IPC. The appellant was convicted, holding that he had

induced the prosecutrix to go from her resident to Gulzar Theatre and from Theatre to Bohori Kathada with intent that she might be or knowing that it was likely that she would be forced or seduced to illicit intercourse. The High Court maintained the conviction of the appellant on the ground that he had instigated Patilba and Devidas to bring the girl to the threatre and thereafter to the room in question. Allowing the appeal, the Apex Court noted that the prosecutrix was brought up by Patilba and even though she was married for a long time before the date of the offence she was accustomed to indulge in promiscuous intercourse with customers for money. It was also noted that the prosecutrix had admitted that she used to entertain one or two customers every day and was habituated to the life of a prostitute. It was further noted that on the day in question the prosecutrix and her companion Chandrakala had gone to Gulzar Theatre accompanied by Patilba and in the Theatre they were seeking customers but were disappointed on finding a police van parked near the entrance of the Theatre. It was in these circumstances that the Apex Court held that there was no evidence on record that Patilba induced the prosecutrix to go to Theatre or from Theatre to Bohori Kathada. During the course of the judgement, the Apex Court observed that a person who merely accompanies a woman

going out to ply her profession of a prostitute, even if she has not attained the age of eighteen (18) years does not commits an offence under Section 366A of the IPC and it cannot be said that thereby, he induced her to go to any place or to do any act with the intent or knowledge that she will be forced or seduced to illicit intercourse. During the course of the judgement, the Apex Court further observed that the word 'seduce' had been used in the Section in the wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. It was further noted by the Apex Court that the case before it was not a case in which a girl who had strayed from the path of virtue when she was in the custody of her guardian and had with a view to carry on her affair accompanied her seducer or another person. Such a case, the Apex Court felt may certainly fall within the terms of Section 366 or 366A whichever applies but where a woman follows the profession of a prostitute, she is accustomed to offer herself promiscuously for money to customers and in following that profession she is encouraged or assisted by someone, no offence under Section 366A is committed by such person, for it cannot be said that the person who assists a girl accustomed to indulge in promiscuous intercourse for

money in carrying on her profession that she will be forced or seduced to illicit intercourse.

However, in the case before this Court, there is absolutely no indication that the prosecutrix was accustomed to promiscuous sexual intercourse or was already engaged in the profession of a prostitute when she left the guardianship of her father on 10.9.2002, in the company of Kajal, first wife of the appellant Hemant. In the case before this Court, the prosecutrix was influenced to stray from the path of virtue, when she was still in the custody of her guardian and this was done pursuant to a criminal conspiracy to which the appellants Hemant, Sarla and Bhawna as well as Kajal, first wife of appellant Hemant, were parties. Therefore, this judgement does not help the appellant in any manner.

In Madan Raj Bhandari (supra), the Apex Court *inter alia* held that as a general rule a charge of abetment fails when the substantive offence is not established against the principal though there may be exceptions. However, considering the view being taken by me that the prosecutrix was not subjected to rape, this judgement becomes irrelevant.

In Premwati Vs. State of NCT of Delhi & Anr., the appellant before this Court was charged under Sections 363/34, 368, 506 Part II read with Section 34 and Section 376(2)(g)/34 of IPC but was convicted under Section 109 read with Sections 376 & 366A of IPC without framing any charge under the said Sections. Allowing the appeal, this Court noted that the charges framed against the appellant did not suggest allegations of inducement by the appellant of the prosecutrix which made the prosecutrix to go from any place or to do any act. It was also noted that the appellant was not confronted with specific allegations of inducement in the statement recorded under Section 313 of Cr.P.C. However, in the case before this Court, the appellants were duly charged under Section 120B of IPC read with Section 366A thereof and the relevant incriminating evidence was duly put to them under Section 313 Cr.P.C. This judgement, therefore, is of no help to them.

In State (Delhi Admn.) Vs. Jagdish & Anr. (supra), this Court *inter alia* held that to bring the guilt under Section 366A of IPC, the prosecution has to prove – (1) that a minor girl was induced by the accused; (2) that she was induced to go and (3) that she was induced with intent that she might or knowing that it was likely that she would be forced or subjected to illicit intercourse with any person.

In the case before this Court, all these ingredients stand duly established. Therefore, this judgement also does not avail to the benefit of the appellants.

33. The learned counsel for the appellants Bhawna, Shahid, Sarla & Hemant @ Bittoo has relied upon Radhu Vs. State of M.P. (2007) 12 SCC 57; Rajesh Patel Vs. State of Jharkhand (2013) 3 SCC 791; and Alamelu and Anr. Vs. State represented by Inspector of Police (2011) 2 SCC 385.

In Radhu Vs. State of M.P. (supra) when the prosecutrix was going to purchase groceries, she was invited by one Gyarsibai who was related to her to come inside. The case of the prosecution was that when the prosecutrix came inside, she was confined in a room and in the night she was sexually assaulted by the son of Gyarsibai. When the prosecutrix was examined in the court, the version given by her was substantially different from the version given at the time of registration of the case. In the facts & circumstances of the case, noticing a number of discrepancies and improbabilities, the Apex Court was of the view that the testimony of the prosecutrix did not inspire confidence and acquitted the accused persons. The decision being based on the facts of the case, has no applicability to the case before this Court and it contains

no such legal proposition which, in the facts & circumstances of the case before this Court, would be of any assistance to the appellants.

In Rajesh Patel (supra), the case of the prosecution was that the prosecutrix, who was working as a nurse, went to the house of the appellant, on his request, to get back her book from him. On her entering the house the door was closed, she was threatened to be killed with a knife in case she raised alarm and the appellant committed rape on her person. The Apex Court noted that the appellant and the prosecutrix were classmates and had good acquaintance with each other. It was also noticed that she raised no alarm. It was further noticed that after about half an hour of the alleged rape when a common friend of the prosecutrix and the appellant unlocked the room, no alarm was raised by her. Neither the prosecutrix nor the common friend informed the police with respect to the alleged offence, even after she was unlocked from the house. In these circumstances, the Apex Court found the case of the prosecution to be unnatural and improbable. During the course of the judgement, the Apex Court also took note of the fact that there was delay of eleven (11) days in filing the FIR and a number of material witnesses had not been examined. The explanation given by the prosecution for the delay in lodging FIR was found to be unsatisfactory

and unacceptable. It was in these circumstances that the benefit of doubt was given to the appellant. Again the case being based on its own facts is of no consequence in the present case.

In Alamelu & Anr. (supra), the case of the prosecution was that accused No.1 expressed his love for the prosecutrix and wanted to marry her. She, however, did not agree to his proposal. Thereafter the prosecutrix was forcibly pushed in a car by accused Nos.1, 2, 4 & 5. This was also the case of the prosecution that all the accused had taken the victim to the temple where accused No.1 forcibly tied the *mangalsutra* around her neck, despite resistance from her and thereafter she was taken to a house, where she was repeatedly raped for three (3) days. The Apex Court noticing the improbabilities of the case rejected the case set up by the prosecution. It was noted that there was no evidence to prove that the victim was forcibly taken in a car. Neither the owner nor the driver of the car had been examined. The Apex Court felt that in the facts & circumstances of the case the possibility of the victim having run away from her parental house could not be ruled out. During the course of the judgement, the Apex Court noted a number of discrepancies including that though some known persons were present at the temple, no alarm was raised by the prosecutrix, though, admittedly

they would have helped her had she told them that she was in trouble. It was also noted that the prosecutrix did not make any complaint at the residence of sister of accused No.1 where she was taken, by him. It was further noticed that the relatives of the prosecutrix took no steps at the time when *mangalsutra* was allegedly forcibly tied around her neck by accused No.1 and no police help was sought for a car was available. The facts of the case before this Court, however, are altogether different. This judgement, therefore, has no application to the facts of the case before this Court.

34. As far as appellant Shahid is concerned, the only evidence against him is that – (a) he did not protest despite knowing that the prosecutrix was being taken to various places for illicit intercourse; (b) he was residing in Shalimar Garden house, which the appellant, Hemant had taken on rent; and (c) he caught hold of the prosecutrix and brought her back to Shalimar Garden house when she tried to escape from the house in Sunder Nagri.

As regards Shahid catching hold of prosecutrix and bringing her back to Shalimar Garden house, the deposition of the prosecutrix in this regard does not inspire confidence. The prosecutrix did not claim that she had tried to escape in darkness and nobody was on the road at the

time Shahid caught hold of her and brought her back to Shalimar Garden house. If the prosecutrix wanted to run away from Sunder Nagri, she would have raised alarm when Shahid allegedly caught hold of her and brought her to a house in Shalimar Garden. The prosecutrix would have been brought to Shalimar Garden house in a vehicle. If she wanted to escape, she would have raised alarm in the vehicle and in that case, someone on the road or the driver of the public vehicle would have intervened and come to her rescue. Therefore, I am not inclined to believe the claim of the prosecutrix in this regard.

As regards appellant Shahid not protesting despite knowing that the prosecutrix was being taken to various places for illicit intercourse, neither does it prove beyond reasonable doubt that he was a party to the criminal conspiracy pursuant to which the prosecutrix left the house of her parents on 10.9.2002, nor does it make out commission of any substantive offence by him. Appellant Shahid was not present when the prosecutrix reached Gurudwara Ashok Vihar. He was not present even in Tri Nagar house when the prosecutrix was taken there by the appellants Hemant @ Bittoo, Bhawna and Sarla. There is no evidence of his having taken or even accompanying the prosecutrix anywhere for the purpose of illicit intercourse. The house in Shalimar Garden was

taken on rent by Hemant as is evident from the rent memo Ex. PW5/B. Appellant Shahid was residing in that house only on account of his being father-in-law of the appellant Hemant. Therefore, nothing really turns on his residing in the said house. In these circumstances, the appellant Shahid needs to be given benefit of doubt and is acquitted.

35. Coming to the appellant Neelam, who is related the appellant Sarla and Bhawna, the only evidence against her is that as per the last testimony of the prosecutrix in the court on 19.10.2005, is that – (a) she was present in Tri Nagar house when the prosecutrix was taken there on 10.9.2002; (b) she was present in Nand Nagri in the house of Rani and Gopi, relative of Sarla when the prosecutrix was taken there on 21.11.2002; (c) the prosecutrix was beaten by her and one Pappu in the house at Shalimar Garden for informing her maternal uncle and for trying to run away from Sunder Nagri where she was taken for her passport and speaking to her maternal uncle; and (d) the prosecutrix was beaten by Neelam, when she was brought to Shalimar Garden house.

There is no evidence of the appellant Neelam having taken or even accompanied the prosecutrix to any place where she was subject to illicit intercourse. There is no evidence of the appellant Neelam having accepted the money from any person, who had committed illicit

intercourse with the prosecutrix. The said appellant was not present at Ashok Vihar Gurudwara when the prosecutrix reached there on 10.9.2002. Since the appellant Neelam admittedly is related to appellant Sarla, Bhawna and Hemant, her presence in their Tri Nagar house on 10.9.2002, by itself would not indicate her being a party to a criminal conspiracy, pursuant to which the prosecutrix left her house on that day. Similarly the prosecutrix being found in the house at Sunder Nagri is of no consequence since according to the prosecutrix, the said house belonged to the father of Neelam. As regards the appellant Neelam beating her on account of trying to run away and speaking to her maternal uncle, as noted earlier, the story of the prosecutrix trying to run away from Sunder Nagri does not inspire confidence. As regards her speaking to her maternal uncle, there is no way the appellant would have known of it by the date the prosecutrix claimed to have been beaten in the Shalimar Garden house. Neither she would have shared this information with the appellant nor would the passport agent have disclosed it to them. In these circumstances, the benefit of doubt needs to be extended to the appellant Neelam as well and she needs to be acquitted.

36. For the reasons stated hereinabove, the appellants Shahid and Neelam are given benefit of doubt and are hereby acquitted.

The conviction of the appellants Hemant @ Bittoo, Sarla, Bhawna and Usha is confirmed under Section 120B read with Section 366A of IPC and they are acquitted of the remaining charges.

The appellant Hemand @ Bittoo is sentenced to undergo imprisonment for five (5) years and to pay fine of Rs.5,000/- or to undergo SI for six (6) months in default. The appellants Usha, Sarla and Bhawna are sentenced to undergo SI for three (3) years each and to pay fine of Rs.5,000/- each or to undergo SI for three (3) months each in default. The appellants are directed to surrender forthwith before the trial court to undergo the remaining sentence awarded to them. The fine unless already deposited can be deposited within four (4) weeks from today. If realized, 75 per cent of the fine be paid as compensation to the prosecutrix.

The appeals stand disposed of accordingly.

One copy of this order be sent to the concerned Jail Superintendent.

LCR be sent back along with a copy of this order.

FEBRUARY 20, 2014 V.K. JAIN, J.
BG/rd/b'nesh