$~R-69-73

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

\+ **CRL. A. 970/2012**

% ***Judgment reserved on: 10th May, 2016***
Judgment pronounced on: 30 May 16.

DEEPAK @ DEEPU .....Appellant
Through: Mr. Ajay Verma, Adv. (DHCLSC)
And Ms. Manjeeta Kumari, Adv.

Versus

STATE ..... Respondent
Through: Ms. Aashaa Tiwari, APP for the State with Inspector Ajay Kumar, P.S.-Jahangir Puri.

\+ **CRL. A. 1118/2012 & CRL.M.(BAIL) 604/2016**

RAJEEV @ BUNTI .....Appellant
Through: Ms. Puja Shrivastava, Adv.

Versus

STATE ..... Respondent
Through: Ms. Aashaa Tiwari, APP for the State with Inspector Ajay Kumar, P.S.-Jahangir Puri.

\+ **CRL. A. 1119/2012 & CRL.M. (BAIL) 530/2016**

PRABHANS YADAV @ RAMJANE .....Appellant
Through: Mr. Kanhaiya Singhal Vani, Adv. (DHCLSC)

Versus

Signature Not Verified
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By:AMULYA

STATE ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State with Inspector Ajay Kumar, P.S.- Jahangir Puri.

\+ **CRL. A. 1303/2012**

MUKESH KUMAR @ BITTOO .....Appellant

Through: Mr. M. L. Yadav, Adv. (DHCLSC)

Versus

STATE ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State with Inspector Ajay Kumar, P.S.- Jahangir Puri.

\+ **CRL. A. 1304/2012**

RAVINDER KUMAR @ RAJU .....Appellant

Through: Mr. Ravi Chaturvedi, Adv.

Versus

STATE ..... Respondent

Through: Ms. Aashaa Tiwari, APP for the State with Inspector Ajay Kumar, P.S.- Jahangir Puri

CORAM:
HON'BLE MR. JUSTICE G. S. SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. All the present appeals are set down for final hearing and disposal. The aforesaid five appeals were heard together, as they arise out of a

common judgment and hence, are being disposed of by a common judgment.

2. Present appeals have been filed under Section 374 (2) of the Code of Criminal Procedure and are directed against the judgment dated 13.01.2012 and order on sentence dated 28.01.2012 passed by the Additional Sessions Judge in Sessions Case No. 62/2011, by virtue of which all the appellants have been convicted under Section 363 read with Section 366 and Section 342/376 (2) (g) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of seven year and to pay a fine of Rs. 2,000/- and in default of payment of fine to further undergo simple imprisonment for a period of fifteen days for the offence punishable under Section 363 read with Section 366 of the Indian Penal Code. The appellants were further sentenced to undergo rigorous imprisonment for one year for the offence punishable under Section 342 of the Indian Penal Code. The appellants were also sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 25,000/- and in default of payment of fine to further undergo simple imprisonment for three months for the offence punishable under Section 376 (2) (g) of the Indian Penal Code. All the sentences were ordered to run concurrently.

3. The facts of the case are as under:

> *"On 20.3.2011 one Shakeel Ahmed who is a resident of Tilak Bazar, Karkhane Wali Gali, Delhi had made a complaint that his daughter 'R' aged about 16½ years who had come to Jahangir Puri to the house of her mama (maternal uncle) on 14.3.2011along with her mother, was missing since 19.3.2011. On the basis of the complaint*

made by Shakeel Ahmed, initially a case under Section 363 Indian Penal Code was registered.

On 21.3.2011 an information was received in the Police Station Jahangir Puri vide DD No. 89B that the girl who was kidnapped on 19.3.2011 had been recovered. Pursuant to the said information ASI Ved Prakash reached at main road K Block, near Mother Dairy Booth, Jahangir Puri where the prosecutrix 'R' was present along with her relatives. Thereafter on 22.3.2011 she was produced before the Ld. Metropolitan Magistrate for recording her statement under Section 164 Cr.P.C. In her statement made to the Ld. MM the prosecutrix had stated that on 19.3.2011at about 5:00 PM when she was standing in the gali near the house of her maami (maternal-aunt), five boys came on foot and forcible took her to the Jhuggi of Bittoo whose name she came to know later and all the five boys took turns in committed rape upon her. She had further informed the Ld. MM that during this period all the said boys were addressing each other by their names i.e. Bittoo, Ramdesh, Bunti, Raju and Deepu. According to her, all the said boys kept her captive till 6:00 PM of 21.3.2011 and during this period they committed rape upon three-four times. She had also stated in her statement under Section 164 Cr.P.C. that on the evening of 21.3.2011 Bittoo left her near the toilet and when she was standing their, her Khala (Mausi) Naeem came there and took her back.

On the basis of the same, the provisions of Sections 376 (2) (g), 342/34 IPC were added. On 22.3.2011 the accused Mukesh @ Bittoo was arrested and the other accused namely Prabhans Yadav @ Ramjane, Deepak @ Deepu and Ravinder Kumar @ Raju were also arrested whereas the accused Rajeev @ Bunti had himself surrendered on 2.4.2011. After completion of investigations charge sheet was filed against all the accused."

4. After completion of investigation, charge sheet for the offences punishable under Section 363/366/342/376(2)(g)/34 of the Indian Penal Code was filed. The prosecution relied on the testimonies of 18 witnesses, besides the exhibits produced during the trial. The statements under Section 313 of the Code of Criminal Procedure were recorded wherein the appellants denied all the incriminating circumstances appearing in evidence against them and claimed to be falsely implicated.

Common Arguments on behalf of all the appellants

5. Challenging the findings of the trial court, learned counsel appearing on behalf of the appellants contended that the judgment of the trial court is contrary to the facts and law and same is based on surmises and conjectures. They have further contended that the prosecution has failed to prove its case beyond reasonable doubt and overlooked the basic principles of criminal jurisprudence.

6. It is contended by the counsel for the appellants that the real identity of the accused persons is not established and the prosecution has failed to prove its case against all the appellants beyond any shadow of doubt.

7. The counsel appearing on behalf of all the appellants strongly opposed the inspection of the spot carried out by the learned judge within the ambit of Section 310 of the Code of Criminal Procedure and submitted that such inspection cannot be done which would have benefitted the prosecutrix. Counsel for the appellants further submitted that such an inspection cannot take the place of evidence or proof but is meant for

appreciating the evidence on record. Therefore, the above mentioned inspection has no evidentiary value and can not be relied upon. It is also contended that the learned judge neither afforded an opportunity to the appellants to represent their case on this aspect nor the same was carried out in presence of the appellants. To substantiate their arguments counsel have relied upon ***Keisam Kumar vs. State of Manipur*** reported in ***AIR 1985 SC 1664***.

8. The counsel for the appellants fervently urged that there are serious contradictions, inconsistencies and improvements in the testimony of the prosecutrix and does not inspire confidence and creates a genuine doubt about her version. It was further submitted that her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness and the court may look into the other evidence, direct or substantial, which may lend assurance to her testimony. Counsel further pointed towards the contradictions in the testimony of the Investigation Officer who deposed that the place of occurrence was first floor.

9. On the aspect of medical evidence, the counsel appearing on behalf of the appellants urged that injury is a sine qua non for deciding whether gang rape has been committed. In the present case, even if the story of the prosecutrix is believed to be true, there would have been some injuries or bruises on the body of the prosecutrix, absence of which belies the case of the prosecution that the prosecutrix was held captive for three days and was raped multiple times by five persons. To substantiate their arguments learned counsel for the appellants have relied on the judgment of the Apex Court titled as ***Pratap Mishra vs.***

State of Orissa reported in ***(1977) 3 SCC 41, Lalliram and Another vs. State of Madhya Pradesh*** reported in ***(2008) 10 SCC 69.***

10. Learned counsel further contended that the area from where the prosecturix was kidnapped was densely populated and it is hard to believe that nobody witnessed the kidnapping of the prosecutrix. Learned counsel further argued that it is not humanly possible to carry a person forcefully on the staircase in question and further the staircase was not wide and strong enough to sustain the weight of two persons at one time.

11. Counsel for the appellants contended that the present case belongs to the year 2011, the prosecution has miserably failed to comply with the circular dated 7th March, 2012, that makes DNA profiling mandatory for rape cases. The counsel further stressed that there were serious lapses in the investigation which makes the story of the prosecution unbelievable. The counsel further alleged that in order to implicate all the appellants, a false and mendacious story was made by the prosecution.

12. Ms. Pooja Srivastava, learned counsel appearing on behalf of the appellant Rajeev @ Bunti has relied upon ***Radhu Vs. State of Madhya Pradesh*** reported in ***2007 Crl. L.J. 4704, Abbas Ahmed Choudhury v. State of Assam*** reported in ***(2010) 12 SCC 115, Raju v. State of Madhya Pradesh (2008) 15 SCC 133*** and ***Md. Ali @ Guddu vs. State of U.P. (Crl. Appeal No. 2238/2010)***

13. Per contra, Ms. Aashaa Tiwari learned APP for the State submits that the evidence produced on record establishes the guilt of the appellants beyond any shadow of doubt and the trial court has rightly convicted

the appellant for the offences punishable under Section 363 read with Section 366 and Section 342/376(2)(g)/34 of the Indian Penal Code and hence the findings warrant no interference, accordingly the appeal is liable to be dismissed.

14. The counsel for the State, in support of the view expressed by the trial court, contends that the prosecution has succeeded in proving the guilt of the appellant beyond reasonable doubt and the scanning of the evidence by the learned trial Judge does not remotely indicate any contradiction or discrepancy. It is proponed by her that all the witnesses have remained absolutely unshaken in their version and nothing substantial has been elicited from them during the cross-examination which could create a dent in their testimony. Learned Counsel would further contend that if the ocular and documentary evidence is appreciated in its proper perspective, there remains no scintilla of doubt that the appellant had committed the brutal and heinous crime and in such a circumstance when the society cries for justice, the Court should not show any leniency in acquitting the appellants.

15. The counsel for the State vehemently urged that the commission of the alleged offence is supported by the MLC of the prosecutrix and the FSL report available on record.

16. We have heard learned counsel for both the parties and considered their rival submissions. The counsel also took us through the record of the trial court and the testimonies of the witnesses.

17. Before proceeding with the evaluation of the aforementioned five appeals on merits, it would be necessary to notice the ambit of Section 310 of the Code of Criminal Procedure:

Section 310: Local inspection

> *1. Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.*
> *2. Such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desires, a copy of the memorandum shall be furnished to him free of cost.*

18. To put the controversy at rest relating to the spot where the victim was held captive for three days, the trial judge visited and inspected the spot in view of the abovesaid provision. The relevant observations of the trial court are extracted hereunder:

> *"House No. K-655 where the prosecutrix was taken and kept for two to three days and allegedly raped was inspected and it was observed that the house/ jhuggi was constructed upto the first floor. This Court inspected both the ground and first floor. The way to the first floor was observed to be from the gali on the backside which was hardly about 30-35 steps away from the spot from where the prosecutrix was dragged and it took about one minute to reach the same from the place where the prosecutrix was dragged. The ground floor was divided into two portions. The room on the back portion was bearing no. K-655 whereas the room on the front portion was bearing*

no. K-647. The first floor had two rooms and both were found to be having the No. K-655. The gali on the front side was about 4-5 feet wide whereas the gali from where the approach to the first floor room was possible was about three feet and at the same time the roofs were not very high and there was a fixed wooden ladder for going to the first floor and it was observed that one could easily move up the ladder without any difficulty as there was support of adjoining wall. It was also observed by the Court that keeping in view the low height of the roof it was not difficult to lift or even drag a young girl up the ladder when more than one person is involved.

The ground floor rooms were also inspected with the due permission of the residents. After entering inside the Jhuggi, it was found that there was a wall separating the two rooms with an opening in the form of a door which appeared to be a recent construction. The lady residing there informed that she was staying there for last more than seven to eight years. Initially she was residing in only the front room bearing no. K-647 but recently the tenant residing in the back portion bearing no. K-655 had vacated and therefore she had taken the said portion also on record due to which reason the two rooms had now been joined by creating above opening. She also informed the Court that the roof rights were with the owner of the back portion and hence the number of rooms on the first floor was also K-655 (not 647). This Court further observed a water outlet in the room on the backside (i.e. K-655) in the corner which was perhaps being used by the occupants for washing purposes. It was also observed that the entire ground floor and first floor structure was pucca construction. The rooms on the ground floor were slightly below the road level with not very high doors (but one could enter easily without bending/ stooping). It was also observed that the roof of the adjoining jhuggi which was only constructed till ground floor was much lower to the roof to the Jhuggi No.K-655 and therefore, in case if any person is held captive on the first floor, it would not

be possible to either call out or catch the attention of person residing there. Further, the jhuggi in front of the jhuggi where the incident reportedly took place belonged to the accused Prabhans Yadav and perhaps it was for this reason that the prosecutrix could not catch the attention of any other person in the vicinity and none came to her rescue.

Further, the public toilet where the prosecutrix was recovered was also inspected and it was found to be at a distance of hardly three to five minutes from the jhuggi where she had been held captive. This Court also observed that there were two routes to reach the said public toilet, one through the main gali via main road and another from the gali's inside the Jhuggi cluster.

This Court further observed that the entire area was an unauthorized Jhuggi Cluster with hundreds of people residing there, open drainage and many of the galis which were hardly one to one and a half feet wide. Some of the galis were even three or five feet wide (as reflected in the rough plan drawn by the Court at the spot). The jhuggi's were mostly a pucca construction and population density was extremely high with a low and suppressed voice/ sound quality on account of noise. Many of the house were below the level of the gali and in case if two or more persons surrounded a young girl they could easily drag her away without anybody noticing the same in view of the nature of congestion. Many of the Jhuggies were found with single door and no ventilation. The Jhuggi No. 655 (first floor) rooms were found to be having water outlets inside the rooms which water flowed into the open drains outside through pipes. In one of the rooms on the first floor there also existed a water tap and a temporary partition in the corner which was being used as a washroom though it cannot be stated whether it was an old feature or a recent addition. The windows (as indicated in the rough site plan prepared by the Court) were small with iron grills affixed on it. Distance between House No. 655 to main road was hardly observed to be

300-350 steps. This Court also prepared a rough site plan on the spots so visited which was made a part of the memorandum of relevant facts which now forms a part of the Judicial Record (in terms of the provisions of Section 310 Code of Criminal Procedure)."

19. PW18 SI Vineeta Prasad who was the Investigating Officer in the present case in her cross examination stated as under:

"I did not make any specific inquiry from the prosecutrix regarding the description and details of the accused when I first met her on 24.03.2011. It did not come to my knowledge that Jhuggi No. A-655 had been sealed by the 1st IO by putting a lock. It is correct that Juggi No. A655 was locked when I reached there on 24.03.2011. It is wrong to suggest that I did not inspect the jhuggi. I had climbed the staircase and inspected the first floor. It is correct that first floor room was also locked. It is correct that there is no grill/parapet wall on the first floor. It is correct that if a person does not take the assistance of the wall while climbing on the staircase, he can fall down because there is no support on the first floor. It is correct that the passage leading to the door on the first floor is about 1/1.25 ft. wide."

20. In ***Keisam Kumar vs. State of Manipur*** reported in ***AIR 1985 SC 1664,*** the Hon'ble Supreme Court dealt with the similar issue and held as under:

"13. The learned Sessions Judge relied on the local inspection made by him. Here, the High Court rightly pointed out that the learned Sessions Judge had committed a serious error of law. Normally, a court is not entitled to make a local inspection and even if such an inspection is made, it can never take the place of evidence or proof but is legally meant for appreciating the position

at the spot. The Sessions Judge, seems to have converted himself into a witness in order to draw full support to the defence case by what he may have seen.

14. This Court in ***Pritam Singh and Anr. vs. State of Punjab 1956 Cri LJ 805*** *observed thus:*

> *A Magistrate is certainly not entitled to allow his view or observation to take the place of evidence because such view or observation of his cannot be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same.*

15. We are satisfied that in the instant case the learned Sessions Judge has exceeded his jurisdiction in making a local inspection."

21. In ***Re: Sr. Abhaya's case*** reported in ***2006 Cri LJ 3843,*** the High Court of Kerala while dealing with the similar issue made the following observations:

> *"15. It is argued by the Amicus Curiae that in Tirkah v. Namak (AIR 1927 All 350) it was held that if a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial. It was also held that a local inspection of the Magistrate is permitted for the purpose of properly appreciating the evidence in this case and cannot take the place of evidence itself. In Sheikh Badas Ali v. Emperor (40 Crl.Law Journal (1939) 624) the Magistrate visited the spot on the evening and came to the conclusion that there was sufficient light to enable anybody to mark closely the features of a stranger. The High Court held that the learned Magistrate assumed that the condition of the light and atmosphere were the same on the night that*

he went to the spot as they were at the time of the occurrence. It was held that the Magistrate had gone beyond the scope of section 539(b) and result of such inspection could not be made the basis of conviction. In Dwaraka Prasad v. Ram Nath Modi & others AIR 1951 Vindhyapradesh 1, it was held that the only purpose of local inspection is to properly appreciate the evidence given at the trial. It was held as follows:

The only purpose of local inspection being to properly appreciate the evidence given at the trial and it is only reasonable that the local inspection should, as a rule, come after all the evidence is recorded.....Even that should be resorted to very sparingly, the Court taking special precautions to prevent itself becoming a witness unconsciously. On some occasions, it is practically impossible for the Court to make a local inspection, and not import new materials collected by it. The moment the Court collects new materials it becomes a witness, and as it cannot cross-examine itself, it cannot try the case.

16. In Pritam Singh v. State of Punjab (AIR 1956 SC 415) a three Judge Bench of the Supreme Court held that a Magistrate is not entitled to allow his views or observations to take the place of evidence because such view or observation cannot be tested by cross-examination.

17. In ***Deva Setty v. State of Mysore: AIR 1959 Mys 1701*** *it was held as follows:*

A local inspection may be made for the purpose of properly appreciating the evidence given during the trial. The magistrate should not, in making the local inspection, do any thing which would reduce him to the position of a witness.

A Division Bench of this Court had occasion to consider the scope of section 539 in State of Kerala v. Chandran (1974 Crl. Law Journal 52). It was held as follows:

.....But the Code provides for the Judge making a local inspection himself. That inspection can be used by him for properly appreciating the evidence in the case and for no other purpose. It cannot be used for preparation of the background for appreciating the evidence of the witnesses because preparation of the background has to be made by the parties themselves by letting in evidence for that purpose and the Judge is not expected to supply that lacuna in evidence. Preparation of the background to appreciate the evidence of witnesses is not the same as "properly appreciating the evidence' contemplated by the Section.

It was further held as follows:

... If the impressions gained by the Judge on controversial matters are allowed to get in without being tested by cross-examination there is the likelihood of miscarriage of justice resulting from it.

*In **State of Uttar Pradesh v. Het Ram and others, AIR 1976 SC 2124**, it was held as follows:*

What Section 539-B contemplates is the local inspection of the topography of the place in which the offence was alleged to have been committed or its local peculiarities for the purpose of properly appreciating the evidence which was already on record.

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So, it is settled position of law that though the Magistrate has power to conduct a local inspection that can only be for the purpose of appreciating the evidence on record and that all shall not be done in a manner so as to reduce the Magistrate as a witness."

22. In view of the above settled position of law and in light of the given facts and circumstances of the present case, we find that the Sessions Judge relied upon the local inspection conducted by her and the appellants were not afforded an opportunity to cross examine or to explain the incriminating circumstances against them. In our view, perhaps the local inspection was conducted by the trial court to have a clear view and understanding of the spot where the offence took place. Undoubtedly, the object of such local inspection is to appreciate the evidence available on record and cannot take the place of evidence itself. On the basis of the above, it would be highly unsafe to rely upon such inspection and cannot be made the basis of conviction.

Contradictions in the testimony of the prosecutrix:

23. Before deciding the case in hand, it would be necessary to examine the testimony of relevant witnesses. The prosecutrix in her statement Ex.PW9/A recorded before Magistrate deposed that on 19.03.2011 she was standing in front of the house of her mami when five accused persons lifted her forcefully and took her to the jhuggi of Bitto, where she was kept in their custody till 6.00 PM of 21.03.2011 and during that period they had done *"Galat kaam"* three four times.

24. The prosecutrix i.e. PW9 in her testimony before the court deposed as under:

> *"On 19.03.2011, I had gone to the house of my mami at K Block, Jahangir Puri. On 19th March of this year at about 5 pm I was standing in the gali near the house of my mami. 5 boys who were coming on foot came in the gali out of which one of them caught hold of me and took me to a room situated in the next gali. All these 5 boys did galat kaam with me. These boys were addressing each*

other with names and that is how I came to know about their names i.e. Bittoo, Raju, Ramjane, Deepu and Bunti. I was held by these boys and they have kept me captivating for about 3 days and on 21.03.2011 I had escaped from their clutches. During this period, all these boys did galat kaam with me on 2-3 occasions (sab ladko ne 2-3 baar mere saath galat kaam kiya tha).

***Court Ques**: Galat Kaam se kya matlab hai?*
***Ans**. They had removed my clothes and touched me on my private parts and after removing their clothes they committed rape (balatkaar) upon me.*
Court Observation: The victim is feeling very apprehensive and shy and after great persuasions she has come out.

***Court Ques**: Who all committed rape on you? (kis kisne rape kiya tha)*
***Ans**. Sabhi ne 2-3 baar kiya tha.*
I can identify all the accused persons.

***Court Ques:** Who was the boy who has lifted you and taken you to the room?*
***Ans.** Bittoo.*
The police had come to the house later and I showed them room where I was kept captivating and where the incident had taken place and thereafter I was medically examined. Next day my statement was recorded by the police. I had also come to the Court. My statement is Ex. PW9/A, the arrest memo of accused Mukesh is Ex. PW9/B bearing my signatures at point A, the arrest memo of accused Prabhans Yadav @ Ramjane is already Ex. PW4/D bearing my signatures at point D, the arrest memo of accused Deepak is already Ex.PW4/E bearing my signatures at point C, the arrest memo of accused Ravinder @ Raju is already Ex.PW4/F bearing my signatures at point B. I was studying in 7th class at that time.

I had also gone to the Jail and I identified one of the accused as Bunti who was the person who had caught hold of me and dragged me to the room and committed rape upon me first.

25. PW9 in her cross examination stated as under:

".....It is correct that the place where I was taken is situated in a thickly populated area. It is wrong to suggest that the room where I was taken has a small door and only person can enter at a time and that too by bending the neck or by stooping over. The place where the said room is situated is single storey and is only on ground floor. The toilet is situated outside the room. It is correct that there is no tap in the room. It is wrong to suggest that there was no source of water. Voln., there was a matka inside the room. On court question, the witness has stated that the room was locked from outside so I did not go out of the room to attend the call of nature.

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It is wrong to suggest that the room where I was kept had adjoining jhuggi's with common walls. Voln., there is no room/jhuggi adjoining where I was taken. There was no khidki/window in the said jhuggi/room."

26. PW4 Shakeel Ahmad (father of the prosecutrix/complainant) in his testimony deposed as under:

"It is correct that my daughter had gone to the house of her mama at Jhuggi no. 333, behind ITI on 14.03.11 and got missing on 19.03.11. It is also correct that I had stated to the police in my statement Ex. PW4/A that my daughter was taken away by some unknown person by alluring her. I had given the birth certificate of my daughter Rukhsar to the IO which was taken by him into possession vide seizure memo Ex. PW4/B bearing my

signatures at point A. My daughter Rukhsar was recovered on 21.03.11 near Shauchalaya by one public person namely Rizwan who took one lady Naem who was wife of my borther in law, Israel. Naem and Rizwan brought my daughter from there. I was called in the Police Station and my statement was recorded by the IO. The memo of recovery of my daughter was prepared by the IO vide Ex. PW4/C bearing my signatures at point A. Two accused persons who were brothers were arrested from their jhuggi. Another accused was apprehended later on. I do not remember the name of either accused but I can identify them if shown to me."

27. PW 4 in his cross examination stated as under:

"I had made a 100 number call as soon as I came to know that my daughter is missing. The PCR officials had come to the house of my in-laws. Vol. The local police had also come. I did not hand over the photograph of my daughter to them. My daughter has never gone alone to my in-laws' house and always accompanied by somebody even in the past. It is wrong to suggest that my daughter often travel alone and went to my in-laws' house. It is correct that I had given the description of clothes worn by my daughter as per description given by the members of my in-laws. It is wrong to suggest that my daughter had gone to my in-laws' house in my absence. Vol. I had myself left her there....

28. After reading the above mentioned testimonies it is apparent that there are improvements and contradictions in the testimony of the prosecutrix as to where she was held captive, how she was kept for three days, and how and why did she not avail an opportunity to inform the public that she had been kidnapped or that she had been raped by the appellants and found her unworthy of reliance.

29. In ***Radhu Vs. State of Madhya Pradesh*** reported in ***2007 Crl. L.J. 4704,*** wherein the Hon'ble Supreme Court observed that the courts should bear in mind that false charges of rape are not uncommon and held as under:

> *"5.... The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.*
>
> *15. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned Counsel for the respondent submitted that defence had failed to prove that Mangilal, father of prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix, of the suggestion made on behalf of the defence, that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money, they had made the false charge of rape, to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication, does not have much relevance, as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the Trial Court and High Court erred in returning a finding of guilt."*

30. In ***Raju v. State of Madhya Pradesh (2008) 15 SCC 133,*** the Hon'ble Supreme Court stated that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be gospel truth. Para 11 of the judgment is extracted hereunder:

> *"10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.*
>
> *11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."*

31. In the case of ***Abbas Ahmed Choudhury v. State of Assam (2010) 12 SCC 115,*** while observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no

presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court observed as under:

> *"11. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."*

32. In ***Rai Sandeep @ Deepu vs. State of NCT of Delhi (2012) 8 SCC 21,*** the Hon'ble Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. The Hon'ble Supreme Court held as under:

> *"In our considered opinion, the **'sterling witness'** should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-*

relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ***'sterling witness'*** *whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."*

33. In a recent judgment of the Hon'ble Supreme Court ***Md. Ali @ Guddu vs. State of U.P. (Crl. Appeal No. 2238/2010),*** wherein the Apex Court held that the testimony of the prosecutrix can be accepted without any corroboration, but if on careful examination if the court finds it difficult to accept the version of the prosecutrix, the court may look for such direct or circumstantial evidence which corroborates her testimony and held as under:

"It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the

testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-Appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

34. In the present case, the prosecutrix in her statement before the Metropolitan Magistrate Ex-PW-9/A has deposed that when she was standing outside the house of her Mami she was forcefully picked up by the five accused persons. However, in her statement before the court she made improvement and stated that she was dragged by accused Bunty. In her testimony before the court the prosecutrix deposed that the place of occurrence was thicky populated and she has raised alarm when she was dragged by the five accused persons in the presence of public person. It is highly improbable that in such a thickly populated area a girl was dragged by the accused persons in full public view. It is further astonishing that to prove this fact neither the prosecution has produced any public witness nor the prosecutrix named any person who has witnessed the incident. The prosecutrix further deposed before the court that when she was dragged by the

accused persons she raised alarm and her sister and mami were present in the house. It is again hard to believe that despite raising alarm none of them came out of the house to save the prosecutrix. The prosecutrix further deposed that the place where she was lifted to the room is just half km and there was no jhuggi adjoining the jhuggi where she was kept. However, the version of the prosecution is falsified by the fact that it was a thickly populated area and the site plan prepared by SI Vineeta Prasad Ex.PX goes on to prove that the jhuggi in question was bordered by jhuggis from both the sides. The prosecutrix has deposed that the room where she was held captive was locked from outside due to which reason she did not go out of the room to attend the call of nature which does not appear probable. In an attempt to conceal her condition and answer to questions relating to her personal hygiene she improved upon the earlier information given to the doctor that she had not taken any bath by deposing in the Court that she had taken a bath. Lastly, prosecution has made a case that she was raped on the first floor of the jhuggi however, in the staement of the prosecutrix it is not clear whether she was being raped was a ground floor or first floor.

35. To deal with the submission related to DNA profiling and the notification dated 07.03.2012 adduced by the counsel for the appellants, we find that as per Section 164A of the Code of Criminal Procedure, the examination of the prosecutrix by the Medical Officer is necessary in all the cases of sexual assault. Further Section 53A of the Code of Criminal Procedure also requires that the DNA test must be done in all the cases of sexual assault. It is to be noted that the

impugned judgment was passed on 13.01.2012 and the notification relied upon by the counsel for the appellants was issued subsequently i.e. on 07.03.2012. Hence, it is therefore clear that it was not possible for the trial court to comply with the notification before it being notified. Moreover, it is worth while to mention that this aspect has been raised by the counsel for the appellant for the first time.

36. Having said so, it would be fruitful to mention the view of the Hon'ble Supreme Court in ***Krishan Kumar Malik Vs. State*** reported in ***(2011) 7 SCC 130***, wherein it was observed that after incorporation of Section 53-A, it has become necessary for the prosecution to conduct DNA test in all such cases. The relevant para 44 is as under:

> *"44. Now, after the incorporation of Section 53(A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned Counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Code of Criminal Procedure prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences."*

37. Therefore, after a conjoint reading of the statute and the view of the Hon'ble Supreme Court, we conclude that in view of the false rape cases filed in the present scenario, it becomes mandatory for the prosecution to conduct the same and to prove the allegations against the accused beyond all reasonable doubt.

Medical Examination:

38. Dr. Mamta, Senior Gynae examined the prosecutrix and opined in MLC Ex. PW5/A that hymen was torn, no external injury over abdomen or breast were found, no bleeding, admitting 2 finger test easily.

39. As per the case of the prosecution the prosecutrix was raped three four times by the accused persons. In her cross examination, in response to the court question, the prosecutrix testified as under :

> ***Court Ques****: Who all committed rape on you? (kis kisne rape kiya tha)*
> ***Ans.*** *: Sabhi ne 2-3 baar kiya tha.*
> *I can identify all the accused persons.*

The fact of this answer to the court question would mean that five persons raped the prosecutrix 2-3 times, but, the medical examination does not show any external injury on the body of the prosecutrix which proves that she was gang raped by the accused persons three four times for three days.

40. In the case of ***Pratap Mishra vs. State of Orissa*** reported in ***(1977) 3 SCC 41***, the Hon'ble Supreme Court made the following observartions in this regard:

> *"The medical evidence, therefore, clearly discloses that the prosecutrix does not appear to have put up any resistance to the alleged onslaught committed on her by the appellants. From this the only irresistible inference can be that the prosecutrix was a consenting party which would be reinforced by other circumstances to which we shall refer hereafter."*

41. In ***Lalliram & Anr. Vs. State of Madhya Pradesh*** reported in ***(2008) 10 SCC 69***, wherein the Hon'ble Supreme Court took the similar view as taken in the case of ***Pratap Mishra (supra).*** The relevant para is as under:

> *"It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra and Ors. v. State of Orissa 1977 Cri LJ 817 where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See **Aman Kumar and Ors. v. State of Haryana 2004 Cri LJ 1399**)."*

42. Keeping in view the observation made by the Hon'ble Supreme Court we are of the opinion that where there has been any real resistance there is bound to be local injury and marks of violence on the body and the limbs of the victim. We may also note that assuming out of fear, the victim did not put any resistence even then the medical evidence does not support the case of the prosecution in view of the number of people and the number of times, the victim was raped during the period between 19th - 21st March, 2011. The medical evidence, therefore, clearly discloses that the prosecutrix does not appear to have put up any resistance to the alleged onslaught committed on her by the appellants. From this the only irresistible inference can be that the prosecutrix was a consenting party. If the story of the prosecutrix was true, then there would be injuries or atleast bruise-mark on the breasts or chest or on the thighs or other

part of the body. The learned Sessions Judge seems to have brushed aside this important circumstance on the ground that the prosecutrix was suffering from Eplilepsy.

43. From the above above discussion, it has emerged on record that there are several discrepancies and gaps in the evidence and also other circumstances make it highly improbable that such an incident ever took place. It is also in evidence that on the date of examination of the prosecutrix no physical injury was found on her person or on her private parts which suggested that there was no element of force upon her. The prosecutrix had given a most improbable and unacceptable version of events that the appellants continued to rape her for about three days. From the above noted contradictions we are of the considered view that the testimony of the prosecutrix suffers from material discrepancies on various aspects and not worthy of credence and does not inspire confidence.

44. "***Summun ius summa iniuria***" is an ancient legal maxim cited by Cicero, which means ***Extreme justice is extreme injustice***. It implies that to apply the law of the letter without taking into account the extenuating circumstances can often eclipse the gospel truth. It becomes the largest form of injustice.

45. For these reasons, therefore, we are satisfied that the prosecution has failed to bring home any of the charges against the appellants. The appeals are accordingly allowed, the convictions and sentences passed on the appellants are set aside and the appellants are acquitted of all the charges framed against them. The appellants are now directed to be released forthwith.

46. Trial Court Record be returned.

47. Copy of this decision be sent to the Superintendent- Central Jail, Tihar for updating the jail record.

CRL.M. (BAIL) 604/2016 and CRL.M. (BAIL) 530/2016

48. In view of the judgment passed in the appeals, the present applications are rendered infructous.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MAY, 30th, 2016
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