

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

Crl A(D) No. 47/2022

Reserved on : 21.09.2023

Pronounced on: 01.11.2023

Mohd Maqbool Ganai age 54 years, S/O
Mohd Anwar Ganai R/O D.K. Pora
Harmain Shopian Tehsil & District Shopian
(through brother Sajad Ahmad Ganai age 34
years S/O Mohd Anwar Ganai R/O D.K.
Pora Harmain Shopian Tehsil & District
Shopian).

.....Appellant (s)

Through:- M/S Tahir Ahmad Bhat, Bhat Shafi,
Abdul Wakeel Koka Advocates.

V/s

Union Territory of J&K through SHO
Police Station Shopian.

.....Respondent(s)

Through:- Mr. Mubeen Wani, Dy. AG with
Ms. Ruheela Khan, Assisting Counsel.

**CORAM: HON'BLE MR. JUSTICE ATUL SREEDHARAN, JUDGE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE**

J U D G M E N T

Per Mohan Lal-J

1. Instant Criminal Conviction Appeal under Section 374(2) of the Code of Criminal Procedure 1973 (hereinafter referred as the 'Code') is directed by the appellant against the judgment dated 10.10.2022 and order of sentence dated 17.10.2022 rendered by the Court of Ld. Principal Sessions Judge Shopian in file case No.69/2015/Sessions titled **State Versus Mohd Maqbool Ganai**, whereby, appellant has been convicted for commission of offences in FIR No. 179/2015 of Police Station Shopian under Sections 376(2)(f)/342/506 RPC and sentenced to rigorous imprisonment of 20 years and fine of ₹ Ten Lacs under Section 376(f) RPC, and 1 year & 2 years imprisonments under Sections 342 & 506 RPC respectively, the fine amount has been directed to be paid to the victim.
2. Aggrieved of and dissatisfied with the impugned judgment of conviction and order of sentence, appellant has assailed it's legality, propriety and correctness, and has sought it's quashment/setting aside on the following grounds:-
 - (i) that the impugned judgment is perverse, based on non-application of mind, the evidence on record has been misread and not appreciated in proper manner, scrutiny of evidence would clearly point to the

uncontroverted facts that the appellant cannot be convicted at all, there is no evidence against the appellant, the court below has convicted the appellant on mere surmises, conjectures and imaginary projections;

- (ii) that the settled principle of law that accused is always innocent till proven guilty has been absolutely ignored by the trial court and the guilt of accused has been pre-determined, Ld. Trial Judge has not appreciated the submissions and various authorities submitted before him and has not reached at specific conclusion, there is no coherence in the evidence, prosecution has not proved its case beyond reasonable doubt, therefore no basis exist for conviction of appellant;
- (iii) that the alleged occurrence has taken place on 16.07.2015, FIR has been registered on 24.08.2015 after a delay of 38 days, FIR has been lodged after due deliberations and consultations as no plausible explanation has been furnished in regard to delay in the registration of FIR, prosecution has failed to satisfactorily explain the delay which is fatal for the prosecution and even Hon'ble Supreme Court in a recent case has held, that inordinate delay of 11 days is fatal for prosecution [vide **Rajesh Patel Versus State of Jharkhand**, 2013(2) Criminal Court Cases 202(S.C) para 9];
- (iv) that there are material contradictory versions in regard to date of occurrence, PW-1 (Prosecutrix) has stated that she disclosed the incident to her parents and relatives after 48 days of occurrence and was taken to his house by accused at 11am in the month of August, furthermore PW-7 Mohd Yousaf Bhat has stated before the trial court that prosecutrix told her that the occurrence has taken place in the month of June, PW-6 Abdul Hamid Parray has stated that they took the prosecutrix for pregnancy test on July 17, 2015 and he was accompanied by father of the prosecutrix PW-4 Mohd Maqbool Parray & PW-3 Abdul Qayoom Parray;
- (v) that the medical evidence is not supporting the allegations of rape, the court below has failed to appreciate this vital aspect of the case, prosecutrix was examined on 22.06.2015 at 6 pm by Dr. PW-16 Waseem Rasool who in his opinion certificate EXPW-M/16 opined that the hymen was not intact and freshly torn which means that almost the occurrence is of 3/4 days (recent rape or interference) with virginal parts which means that the occurrence has probably happened on 20.08.2015 or 21.08.2015 which totally belies the prosecution case of alleged rape upon the victim/prosecutrix on 16.07.2015;
- (vi) that the prosecution case is that the prosecutrix was taken by the accused immediately after the examination at 2 pm and raped in his house, however, prosecutrix in her deposition before the trial court has categorically stated that after completion of examination she alongwith her friends reached to one shop near Shrine (Asthan) from where she went towards her home alongwith her friends, she left her friends and proceeded towards her home, Saba Showkat (Pw-13) first entered her home, thereafter she reached home at 2.30pm, she took meals and did not go back to school, on the next day there was holidays for 4/5 days, whereafter she went to school however the accused was not teaching them, the aforesaid statement of prosecutrix during cross-examination completely demolishes the prosecution case that she was raped by the accused after 2pm immediately after the paper was over;

- (vii) that the prosecutrix has alleged that accused was asking her to sit in his chair, however, PW-10 Bisma Gulzar, PW-11 Umaira Qadir, PW-12 Nargis Hamid, PW-13 Saba Showkat have not corroborated the said allegations of the prosecutrix and even they have gone to the extent of deposing that accused never asked any student to sit with him in his chair which totally belies the prosecution evidence;
- (viii) that the statement of prosecutrix is full of discrepancies and does not inspire confidence, the medical evidence is not supporting the prosecution version as there was fresh torn hymen, there is delay of 39 days in registration of FIR, the evidence of prosecutrix is not of a “sterling quality”, the testimony of prosecutrix is self contradictory and inconsistent with prosecution witnesses and doctors evidence, FSL report also does not support the prosecution case [vide Santosh Prashad @ Santosh Kumar Vs. The State of Bihar, Criminal Appeal No. 264 of 2020];
- (ix) that the court below has not appreciated the evidence in its entirety, has mentioned only few lines of statement of prosecution witnesses in the impugned judgment, the basic principle of appreciation of evidence has been ignored by the court below which has caused great miscarriage of justice.
3. Ld. Counsel for appellant/convict has vehemently articulated arguments, has sought the reversal of the impugned judgment of conviction dated 10.10.2022 and acquittal of appellant on the following grounds:-
- (i) **Delay In Lodging FIR:-**
It is argued, that occurrence of rape as attributed to the appellant in the FIR and by the deposition of victim/prosecutrix has occurred on 16.07.2015, whereby, FIR has been lodged in Police Station Shopian on 24.08.2015 after a delay of 38 days of the occurrence, victim/prosecutrix has not furnished any explanation regarding the inordinate delay, even I/O has not satisfactorily explained the delay which gives rise to a grave suspicion regarding the credibility and genuineness of the prosecution case; the delay has the effect of putting the court on its guard to search if any explanation has been offered for such delay, and if offered, whether it is satisfactory or not, if the prosecution fails to satisfactorily explain the delay there is possibility of embellishments in the prosecution version on account of such delay which would be fatal to the prosecution. Reliance has been placed on, RAJESH PATEL—Appellant Vs. STATE OF JHARKHAND—Respondent (Cr. Appeal No. 1149 of 2008, decided by Hon’ble Supreme Court on 15.03.2013).
- (ii) **Glaring Contradictions In The Deposition Of Prosecutrix:-**
 (a) It is argued, that prosecutrix (PW-1) in her examination-in-chief has categorically deposed, that on the day of occurrence she was studying in D.K. Pora School and on 16.07.2015 when she completed her examination paper, accused called her, caught hold of her hand and told her that he will give her a book, then accused took her in his old house in a room in 2nd story put out his own clothes and her clothes and then forcibly raped her, after forcible raping the accused told her to wear the clothes, she went home and on the next day she went to school again; in cross-examination victim/prosecutrix has completely demolished her own version of the examination-in-chief by deposing that on 16.07.2015 the last paper was of Science subject, the exam

started at 1 pm and ended at 2 pm, after completing the papers her friends were discussing about the paper for half an hour, it is wrong that on the day of occurrence after completing paper and after spending some time with her friends accused asked her to stop, she alongwith her friends came to school compound and while walking they were discussing the paper and reached near a shop adjacent to Shrine and passing thereby she alongwith her friends went towards her home, she left her friends and proceeded towards her home, firstly, Saba Showkat proceeded towards her home and thereafter she proceeded towards her home, at about 2.30 pm she reached home took meals and did not returned back to school, from next day there were holidays for 5 to 6 days, thereafter she went to school and accused was not teaching them the class; Ld. Counsel for appellant has further strenuously argued, that by the deposition of prosecutrix it is abundantly clear, that on the day of occurrence on 16.07.2015 prosecutrix on one hand was allegedly raped by the appellant after completion of exam at about 2pm, simultaneously she after completing the paper at 2pm were discussing with her friends about the paper for half an hour whereafter she alongwith her friends came to school compound from where she reached home at 2.30pm had meals and did not return back to school; the evidence of prosecutrix as per Ld. Counsel is unworthy of reliance for the reasons that the prosecutrix could not be expected at the same time being raped by the appellant and having discussion with her friends in regard to the paper, whereafter she returned home and did not went back to school.

- (b) It is argued, that PW-1 prosecutrix in her examination-in-chief has categorically stated that she was raped by the accused on 16.07.2015 when she completed her examination paper and accused took her in a room in the 2nd story of his house, however, in cross-examination she has made huge embellishment/improvement by deposing that she told the police that on the day of occurrence accused forcibly raped her and even after Eid he took her to his house and after 5/6 days committed rape upon her probably in the month of August at 10/11 am which is totally contradictory to the prosecution story.
- (c) It is argued, that as per the deposition of PW-1 (prosecutrix/victim) before the trial court, the examination of the paper started at 1 pm and finished at 2 pm, whereafter prosecutrix with her friends were discussing about the paper, and on the same day of occurrence on 16.07.2015 appellant committed rape upon her and she alongwith her friends Saba Showkat and Sumaira came towards their homes, whereas PW-10 Bisma Gulzar, PW-11 Umaira Qadir, PW-12 Nargis Hamid & PW-13 Saba Showkat the witnesses to support the testimony of the prosecutrix have unequivocally deposed before the trial court that the prosecutrix was studying in Govt. High School D.K. Pora as student of 8th standard, she was weak in her studies and used to be beaten by appellant who was teacher in the school, but the prosecutrix had no narrated to them that she was raped by the appellant, but simply told them that appellant used to harass her; it is argued, that it is highly strange that the prosecutrix even has not narrated the occurrence to her school mates and narrating the occurrence to her parents after a delay of 38 days casts huge shadow upon the creditworthiness and reliability of the prosecution case.

(iii) Oral Evidence Of Prosecutrix And Medical Evidence Of PW-16

Dr. Waseem Rasool:-

It is argued, that as per the prosecution story and the deposition of prosecutrix, occurrence of rape has happened on 16.07.2015, FIR has been registered on 24.08.2015 after 38 days of occurrence, the prosecutrix has been examined by Dr. Waseem Rasool (PW-16) on 24.08.2015 and on examination Doctor has found hymen not intact, freshly torn, it admit one (1) finger and no sign of violence was found on the body of prosecutrix; in cross-examination the Doctor has categorically opined that if victim/prosecutrix is subjected to rape 1 or 2 days prior to her medical examination then the Doctor writes hymen freshly torn, and it is true that rape victim of 40 days cannot suggest hymen freshly torn, writing of freshly torn hymen in the certificate EXPW-M/16 means that occurrence has taken place 3-4 days earlier on the day of examination. Ld. Counsel while appreciating the evidence of prosecutrix and medical evidence on record, has strenuously argued, that the medical evidence of Doctor Waseem Rasool categorically demolishes the evidence of the prosecutrix that she was raped 38 days ago, as the medical examination of prosecutrix suggest that she was raped 3/4 days prior to the date of examination on 24.08.2015, meaning thereby, that the prosecutrix could have been raped on 20.08.2015 or 21.08.2015 which is a glaring/material contradiction to the prosecution story that the alleged rape has occurred with the prosecutrix on 16.07.2015. Reliance has been placed on, (2012) 8 Supreme Court Cases 21 [RAI SANDEEP ALIAS DEEPU—APPELLANT Versus STATE (NCT OF DELHI) AND OTHERS—RESPONDENTS].

- (iv) It is argued, that it is the primary duty of the prosecution to bring home the charges leveled against the accused beyond reasonable doubt, it may be true that if the accused involved in a heinous crime goes unpunished a kind of agony/frustration occurs in the society and to the family of the victim in particular, however, the law does not permit the courts to punish the accused on the basis of moral conviction or suspicion in the prosecution case; Ld. Counsel has strenuously urged, that as in the case in hand there are glaring/material contradictions in the testimonies of ocular and medical evidence which render the prosecution version highly concocted and unworthy of reliance, no punishment/conviction can be rendered against the appellant merely on the apprehension of his indictment, as it is the fundamental principle of criminal jurisprudence that every case has to be decided by the courts strictly on merits in accordance with law and uninfluenced by outside moral pressures etc. To support his arguments, Ld. Counsel has relied upon a judgment rendered by Hon'ble Supreme Court on 07.11.2022 titled "RAHUL—Appellant Versus STATE OF DELHI MINISTRY OF HOME AFFAIRS & ANR.—Respondents" [CRIMINAL APPEAL NO. 611 of 2022].

4. Ld. Dy. AG for respondent has vehemently argued and has sought the affirmation of the impugned judgment of conviction on the following counts:-

- (i) It is argued, that the prosecutrix was a minor and a student of 8th class at the time of incident, it was very difficult for her to speak about her teacher who committed rape upon her and also threatened to kill her

and consequences to fail her in the class, therefore, the delay in reporting the matter to the police is not fatal for the prosecution; FIR cannot be used as ritualistic formula to doubt the authenticity of prosecution evidence, delay per-se is not mitigating circumstances for the accused when the accusations of rape are proved. To support his arguments, Ld. Dy. AG has relied upon a judgment titled **Satyapal—Appellant Versus State of Haryana—Respondent** [CRIMINAL APPEAL NO. 664 OF 2009, (Arising out of SLP (Crl.) No. 3855 of 2007)].

- (ii) It is argued, that the prosecutrix has appeared before the trial court and fully corroborated her statement recorded u/s 164-A Cr.pc by the court of Ld. Judicial Magistrate, the minor contradictions and omissions in the evidence of prosecutrix cannot be given much importance as the whole testimony of prosecutrix is sufficient to convict the accused, testimony of the prosecutrix inspires confidence which does not require any corroboration, the contradictions regarding date and time of occurrence do not discredit the material evidence of the prosecutrix, moreso, the absence of injury of the private part of victim may not be of significant nature.

5. We have heard Ld. Counsel for appellant and Ld. Dy. AG for respondent. Ld. Counsel for appellant at the time of adducing arguments has specifically urged, that the trial court while writing impugned judgment has not translated the complete version of prosecution witnesses and has only adopted “pick and choose” method in appreciating the prosecution evidence with conceived notion to punish the appellant. We, therefore, find it significant to translate in it’s entirety the Urdu versions of the material prosecution witnesses into English vernacular for the purpose of appreciation of the evidence of the prosecution witnesses.
6. Appellant/convict lying in custody in District Jail Pulwama since 11.10.2022 [more than 1 year] has preferred this appeal which has been registered as Criminal Appeal No. CrlA(D) 47/2022.
7. In a bid to prove it’s case against appellant, the prosecution has led oral as well as documentary evidence. The prosecution has examined as many as 16 witnesses out of listed 19 in the charge sheet. PWs. 9, 17 & 19 have remained unexamined by the prosecution for reasons best known to it. The prosecution examined ‘oral witnesses’ as under:-

PW	NAME	ROLE
1	Khushboo Shafi (d/o Mohd Shafi)	Complainant/prosecutrix
2	Mohammad Shafi	To support the testimony of prosecutrix

	Parray (f/o prosecutrix)	
3	Abdul Qayoom Parray	To support the testimony of prosecutrix
4	Mohammad Maqbool Parray	To support the testimony of prosecutrix
5	Mst. Nishat Begum	To support the testimony of prosecutrix
6	Abdul Hamid Parray	To support the testimony of prosecutrix
7	Mohammad Yousuf Bhat	To support the testimony of prosecutrix
8	Gh. Mohi-ud-Din Bhat	To support the testimony of prosecutrix
10	Bisma Gulzar	To support the testimony of prosecutrix
11	Umaira Qadir	To support the testimony of prosecutrix
12	Nargis Hamid	To support the testimony of prosecutrix
13	Saba Showkat	To support the testimony of prosecutrix
14	Bashir Ahmad Ganai (I/C Headmaster Govt. High School D.K. Pora)	To prove D.O.B. of the Prosecutrix
15	Mohammad Syed Shah	Circumstantial witness
16	Dr. Waseem Rasool (presently posted at D.K. Shopian)	To prove medical examination of prosecutrix
18	SI Jazib Hamid	I/O of the case

8. Before coming to the conclusion whether prosecution has successfully substantiated charges against appellant/convict beyond hilt, we find it pertinent to give a brief resume of the evidence tendered by the prosecution witnesses before the trial court. Relevant portions of the testimonies of prosecution witnesses can be summarized as under:-

PW-1 Prosecutrix (d/o Mohd Shafi, complainant) in her examination-in-chief has deposed that accused is known to her. On 16.07.2015 she was reading in a school at D.K. Pora. After completing the golden test paper accused called her and told her that he will provide books to her. Then accused took her in an old house on its 2nd floor. He removed his clothes and also removed her clothes. Thereafter he forcibly raped her. After that he told her to clean the sperms from the private part. Thereafter she went to home. Next day accused asked her to get her urine in order to get the same tested. After that she told the incident to her family. She could not remember the date when her family members came to know about the incident, perhaps she has told them after 48 days of the incident. Her uncle Qayoom took her to the police station where he wrote the complaint and she has signed the same. The report is on the file. Contents of the same are true and correct, it bears her signatures and is exhibited as EXPW-1. Then

police took her to the hospital for medical examination and her statement was recorded before the Magistrate under section 164-A Cr.P.C. The contents of the statement are correct and bear her signatures. She has admitted the contents of preliminary report as true and correct which is exhibited as EXPW-1. **During cross-examination** by the counsel for the accused, she has deposed that she was studying in Govt. High School D.K. Pora. She was reading in this school from class 1st. On the day of occurrence she was studying in class 8th. She has never failed in any class. In the year 2014 she was going to school and she has never discontinued her studies. She does not remember her date of birth. Her date of birth recorded in the school is the same which was recorded by her family members. Accused was teaching History Subject of class 8th while as Syed Sir was not teaching any subject. There were 25 students in her section. Mehak, Bisma, Humaira Qadir and Nargis were her friends and were reading in her class. When accused Mohammad Maqbool was coming to the class for teaching purpose, he was humiliating and scolding her for the reason that she is not studying well. The accused was only scolding her. The accused was Scolding all the students in the class but he was scolding her more. The accused was giving her seat in his own chair and was sitting with him. When accused was coming to class for teaching and during teaching he was calling her and harassing her and he was keeping the other students busy in teaching. She does not know the definition of Noun. The accused was continuously teaching her till she was in the school. It is wrong that during winter vacations she was going to attend the tuition from him but she was studying from Bilal Dhobi. Bilal Dhobi is of the age of accused. There were some classmates of her relation. The last paper was on 16.07.2015 which was science subject. The exam started at 01:00 PM and ended at 02:00 PM. She did not remember what was the holiday on the day of occurrence. However it was the day of Arfa (Before Eid Day). After completing the papers her friends were discussing about the paper for about half an hour. It is wrong that on the day of occurrence after completing the paper and after spending some time with her friends the accused asked her to stop. She along with her friends came to school compound after completion of paper and by walking they were discussing about the question paper, she alongwith her friends reached near the shop adjacent to Shrine and passing thereby she alongwith her friends went towards her home. She left her friends and proceeded towards her home. Firstly, Saba Showikat proceeded towards her home and thereafter she proceeded towards her home. At about 02:30 pm she reached home. Thereafter she took meals and did not return back to school. From next day there was holiday for next 5/6 days. Thereafter she went to school and the accused was not teaching them in the class. Her family members told her that whether accused Mohammad Maqbool is teaching them, she replied in negative. It is wrong that her father told her that accused is a dirty person and did not study from him. She only told her family members that the accused use to harass her and use to commit unwelcome physical contacts with her. She told police that apart from molestation in the school the accused has forcibly raped her on the day of occurrence. After Eid accused took her to the house and after 5/6 days committed rape upon her. The month was probably August. Accused took her to house and forcibly raped her. On the day when accused took her to the house for committing rape there was nobody in the said house. She did not told to her friends Humaira and Saba that accused took her to his house for giving her book. In the month of August when accused took her

to his house the time was about 10:00- 11:00 am. She does not know from which date the accused was not residing in that old house. The accused was residing in his new house at that time. Accused was residing in his new residential house for which the pathway is going from institution. Accused asked her to keep her head down and she did not look right or left. When she was studying in class 6, 7th and 8th and during those days accused was residing in his new residential house. She had not seen any bakery shop. She entered into that room from the gate which is situated towards Masjid Sharief. She did not see towards the old house and she did not look towards right or left as she was seeing downwards due to which she was not looking anybody. She did not see those laborers who were doing labour work at pond, as she was suggested. The compound of the house has no gate. As soon as we reached near the outer gate of house, the accused himself unlocked the lock and after entering inside closed the outer door. When accused unlocked the lock she felt that there is nobody inside the house, but she thought that accused will left her after giving her the book, but it did not happen. When accused locked door from inside she think that accused will give her book and will allow her to leave. Thereafter accused took her to a room at second storey of house through cement ladder. Then the accused also locked that room. There was no matting in that room. The floor was without matting. The floor was made of mud. The windows of that room were closed. It is correct that the wall of that house lying towards the school was totally damaged and had fell down. She intended to shout to save herself but the accused gagged her mouth and did not allow her to shout. The accused tight up her hands by cloth from backside and thereafter gagged her mouth and forcibly raped her. It is correct that firstly the accused tied her hands by cloth and thereafter removed her clothes. When accused removed her clothes, she tried to shout and save herself but the accused did not leave her due to which she received some scratches on her body. She also received scratches on her arms because of binding. During rape the accused made forcible attempts due to which she also receive some scratches on her face. During the period of rape by the accused she did not get unconscious. Due to bare flooring she received lot of injuries on her back like scratches. Blood and white water oozed out from her private part. Accused took 2-3 minutes for doing this. The blood which came out from her private part fell on her trouser and panty. She is saying it with confidence that accused forcibly raped her. On the day of occurrence she was wearing Fraq, Shalwar and panty. After occurrence, she again wore those clothes. After 2 to 5 minutes of rape she went to her home. Nobody saw her while coming out from that house. When accused came out of that house she has no knowledge. It is wrong that on the asking of her family members she has alleged about the commission of rape. The house was two storied. However she does not remember whether that house was concrete or not. She was not going towards the old house of accused. However she was going to her home through the pathway leading through Shrine. She had not washed the blood stained clothes at her own. She did not give these clothes to her mother for washing. After 48 days of occurrence she told it to his family members and relatives about the said episode. The occurrence took place in the month of August, as suggested. It is correct that at first she told to his father about the said occurrence who thereafter narrated the relatives about the same. He fully understands the difference between day and night. It is correct that she get influenced by the said occurrence to the extent that she remembers each and every moment of the

occurrence. It is also correct that actually she at first narrated the episode to her mother and thereafter she told it to his father. She is not staying with her mother but staying with her grandmother. She did not tell her mother about the occurrence on that day. When after 48 days of occurrence she informed her mother about the said episode, it was evening time and at that time only she and her mother were present in the room, as suggested. Thereafter on next day morning her mother narrated the matter before her father, as suggested. However in her presence her mother did not tell it to her father. They did not approach the Headmaster, as suggested. She alongwith her parents did not went to Syed Sahab, as suggested. She does not know after how many days of stating the matter of occurrence to her mother they went to police station. When she told her family members about the occurrence then after five days her uncle took her to police station. She does not know whether her parents visited the school or not and the accused was beaten. She does not remember whether it was the morning or evening time when they went to police station. She has not scribed the First Information Report application by her own hands, as suggested. It is wrong that police told her to bring her mother to the police station on next day as she is required to be produced before the doctor, as suggested. It is also wrong that she and her parents went to Zainapora Hospital. When she was taken to Hospital she was accompanied by her uncle Abdul Qayoom, maternal aunt Zainab and two police personnel. She does not remember as to when her maternal aunt was called. Her maternal aunt is residing at village Gund. Police took her to Shopian Hospital. She did not give her apparels worn by her on the day of occurrence to the police because they were washed. When she went to police she was wearing other clothes. She had only singed on the first information report presented to the police. She had not signed on any blank paper. Also she had not signed on any extra paper. Thereafter she had not seen the police at D.H. Pora. When she gave statement before the I.O she had narrated the same statement before him. She had narrated the same story to him which had happened with her. She had not remained ill for the last few years, as suggested. She was not being taken to any priest/peer baba, as suggested. No further question was asked.

PW-2 Mohammad Shafi Parray (f/o prosecutrix, witness to support the testimony of prosecutrix) in examination-in-chief has stated that he knows the accused as well as the prosecutrix who is his daughter reading in 8th Standard at D.K.Pora Govt. High School and accused is teacher in that school. His daughter surprisingly denied to go to school and she was not taking food properly and was remaining ill. Accused told his daughter to take the urine for test. On this his daughter disclosed the occurrence to him and he came to know about the occurrence and told about the same to his relatives. After the school examination, accused stopped his daughter who was induced by the accused for providing books and asked her to accompany him. On this pretext she was ready to take books and accompanied the accused and in the double storey house where the accused committed rape upon her and asked that if she will disclose he will fail her in the examination. The accused present in the court used to harass his daughter. After one month hearing about the incident his daughter went to the police post Imam Sahib and she lodged the report and police has taken her for medical check-up and her statement was also recorded before the Magistrate. He has given the statement before the court which bears his signature. **In cross-examination** has deposed that

his daughter was ill in the month of July and she refused to go to school. On 24.08.2015 she has disclosed about the occurrence to her family. He has not seen the occurrence by his own eyes. He has heard from his daughter. Accused has committed rape upon her. The house of the accused was situated near the mosque. On the day of last paper he has committed this incident. On 24th of August he went alongwith some respectable persons to the school and complained before the Principal about the occurrence. Accused was not present there. No other is involved in the incident except the accused. Application was drafted by Qayoom Parray which was lodged before the police post Imam Sahib. His daughter was medically examined. Police did not visit his house.

PW-3 Abdul Qayoom Parray (witness to support the testimony of prosecutrix) in examination-in-chief has deposed, that on 24th of August 2015 he was out of his home in connection with the family matters. He was called by his family members on phone. When he reached at home he found that prosecutrix was in tension and she did not want to go to school. On enquiry she told that accused had raped her and threatened her that in case she will disclose this to anyone, he will kill her and will not allow her to sit in the exams. Thereafter, he drafted an application whatever disclosed by the prosecutrix and signed by her. Police recorded her statement and took her to the hospital. Thereafter, police has started the investigation. His statement was recorded which bears his signature. The statement, which he has made before the police has already been exhibited as EXPW-1 is correct. **In cross-examination** by the defence counsel, has stated that accused does not bear good character in the village. Whatever told by the prosecutrix he has full knowledge about that. He does not remember the time when he was called on the phone, however, date is known to him. The parents of prosecutrix enquired from her. He, Mohd Shafi and aunt of the prosecutrix went to the police station. Prosecutrix was taken to Shopian Hospital. Abdul Qayoom, Gulshana and police personnel accompanied the prosecutrix to the hospital. He has no knowledge that prior to him the prosecutrix had disclosed the matter to her parents. On 24th of August the prosecutrix disclosed about the incident before him. He has no knowledge whether accused is putting in the old house or not. Prosecutrix has told that accused had removed her trouser and after committing rape there were blood stains on her private part. His statement was recorded on 24th by the police. He has no knowledge in which room she was raped.

PW-4 Mohammad Maqbool Parray (witness to support the testimony of prosecutrix) in examination-in-chief has deposed that accused is known to him. Occurrence is of the last year. When Mohd Shafi Parray called him on the phone and asked him to come to his home. When he reached there Abdul Qayoom Parray, Abdul Hamid, Mohd Yousuf Bhat and Mst. Nishat were already there. They told him that prosecutrix does not want to go to the school. I asked her as to why she does not desire to go to school, they told him that her teacher committed rape upon her. Thereafter, they went to police station Imam Sahib alongwith prosecutrix. The application was written by her Uncle Qayoom and filed the same before the police. Police recorded his statement which bears his thumb impression. That is true and correct. **In cross-examination** by the defence counsel the witness stated that Shafi Parray is his brother. He has no knowledge about the day, date and month of the occurrence, but he only came to know from Mohd Shafi. Then he enquired from the prosecutrix as to why she is not going to

school. She narrated the story to him that accused has committed rape upon her and threatened her to kill her if she discloses the same to anyone and also asked her to take urine for examination. He has no knowledge that whether she was unconscious during the course of rape. The application was written by Abdul Qayoom Uncle of the prosecutrix.

PW-5 Mst. Nishat Begum (witness to support the testimony of prosecutrix) in examination-in-chief has deposed that accused is the teacher of the prosecutrix who is studying in 8th class. According to prosecutrix the accused removed her trouser and thereafter committed rape and threatened that if she will disclose it to anyone he will fail her and kill her. Her statement was recorded by the police which bear her thumb impression and the same is true and correct. **During cross-examination** by the defence counsel, has deposed that what happened at the police station she has no knowledge. She is aware of the fact whatever told by the prosecutrix was written in the FIR. She had noticed some nail marks on the face of the prosecutrix.

PW-6 Abdul Hamid Parray (witness to support the testimony of prosecutrix) in his examination-in-chief deposed that accused and prosecutrix are known to him. Prosecutrix usually remained absent minded after the incident, but reason was not known to him. On enquiry from her she disclosed the whole story. She was taken to the court where her statement was recorded by the Magistrate under section 164-A Cr.PC. His statement was also recorded by the police. His statement under section 161 Cr.PC is correct, it bears his signature. **In cross-examination** by the defence counsel, has deposed that he was called through phone by the family of the prosecutrix where he came to know about the incident. The incident is of July 2015. Prosecutrix has lodged the FIR before police post Imam Sahib. After FIR, they went to home thereafter he and prosecutrix were called at police station where his statement was recorded. No further question was put to the witness.

PW-7 Mohammad Yousuf Bhat (witness to support the testimony of prosecutrix) in his examination-in-chief has stated that prosecutrix is his niece. PW5 is his Sister. He has no knowledge about the occurrence. He was called on phone where he came to know about the incident as the prosecutrix was very sad. Thereafter, she lodged the FIR before the police station. His statement was recorded by the police. **During cross-examination** by the defence counsel, he has deposed that his brother-in-law called him on phone. It is incorrect that prosecutrix narrated him that the accused master is resident of D.K.Pora, he told her that examination are commencing soon and accompany to him where he will provide books to her. On this pretext she accompanied him. Accused closed the door and windows and committed forcible rape upon her. She cried for help, but all in vain. Accused was also asking her for taking urine for pregnancy test. How much time was taken in the rape, he has no knowledge. His statement was recorded by the police. The school is situated in the village.

PW-8 Gh.Mohi-ud-Din Bhat (witness to support the testimony of prosecutrix) in examination-in-chief has deposed that accused is known to him. Accused is a government employee as teacher and presently posted at Government School D K Pora. He has given the statement before the police post Imam Sahib regarding the rape committed by the accused upon the prosecutrix. He has heard from the prosecutrix and from her family members about the incident. He has given the statement before the police

which bears his signature. **During cross-examination** by the defence counsel, has deposed that he has no relation with Mohammad Shafi but his daughter is wife of Mohammad Shafi's younger brother. His statement was recorded by the police. He has not seen the occurrence by his own eyes. He has given his statement on asking of villagers.

PW-10 Bisma Gulzar (witness to support the testimony of prosecutrix) in examination-in-chief has deposed that prosecutrix was studying in Government High School DK Pora. Accused is also known to her. She has no knowledge what happened with the prosecutrix, but one day when she entered in the class room she wept and told that accused is harassing her. She told the same to Umaira Qadir, Nargis Hamid and Sabi Showkat also. Her friends assembled there. She had given the same statement to the police. **During cross-examination** by the defence counsel, has deposed that accused is teaching history to the prosecutrix. Accused always sits next to the prosecutrix. Accused used to harass her. No other student was accompanying the prosecutrix when she told about the harassment to her. Prosecutrix used to laugh and cry in front of any teacher at any time.

PW-11 Umaira Qadir (witness to support the testimony of prosecutrix) in examination-in-chief has stated that prosecutrix is a student of 8th standard in Government School DK Pora. She is studying with her. She has no friendship with her, but she told about the occurrence to her. She has given the statement before the police. She simply stated that accused used to harass her. **During cross-examination** by the defence counsel, has deposed that she is studying in DK Pora since class 1st. Accused used to sit next to the prosecutrix. Accused is resident of her village. She does not remember after how many days she was called by the police. She is not eye witness to the occurrence. Same statement she has given before the police.

PW-12 Nargis Hamid (witness to support the testimony of prosecutrix) in examination-in-chief has stated that prosecutrix and accused both are known to her. She is her class mate. Presently they are in 9th standard. One day the prosecutrix was weeping in the class. She inquired from her about the weeping. She replied that accused is harassing her. Then she told her to disclose it to her family. She replied that accused has threatened her that if she discloses it, he will fail her. They encouraged the prosecutrix, then she told it to her family members and day after police came. She has given the same statement to the police. **During cross-examination** by the defence counsel, has deposed that they are class mates. Accused was harassing another student namely Bisma of 10th class and was following her. Bisma and Saba have told her about the same. Bisma of 10th class had not told about this action of the accused to any teacher. She has no knowledge that accused had committed any wrong with Bisma. Prosecutrix told her that accused has committed wrong with her. Police has recorded her statement. Prosecutrix has told the incident to her father after a lapse of 5/10 days. She is telling truth which she is disclosing today before the court. The family members of the prosecutrix came to the school. She has signed the statement which she has given before the police.

PW-13 Saba Showkat (witness to support the testimony of prosecutrix) in examination-in-chief has stated that last year she was student of 9th class and was studying in Government High School DK Pora. Accused and victim are known to her. She is her class mate and friend. During

school hours they discussed with each other. One day she cried and told her that accused used to harass her. Prosecutrix told her and other friends. Then they encouraged her to disclose the same to her parents. She was afraid of that. She has given the statement before the police which bears her signature. **In cross-examination** by defence counsel, has deposed that it is wrong to say that the accused used to sit next to the prosecutrix. They are not close friends. It is correct that prosecutrix was weak in her studies and used to be beaten by the accused. She has simply told her about the harassment. The same statement she has given before the police. This is the incident of golden test. Thereafter the accused did not come to teach them in the class. No arrangement was made by the school for studying social studies. She has given the statement at her home.

PW-14 Bashir Ahmad Ganai (Incharge Headmaster Government High School, D.K. Pora) in examination-in-chief has stated that he knew the accused. Last year he was posted in Government High School D K Pora as Incharge Headmaster. In the month of August police of Police post Imam Sahib came in the school. On that date Headmaster was on leave and he was the Incharge. Police asked about the tampering of Attendance Register. Firstly accused Maqbool Ganai was shown present in the register, however, by tampering in the register he was shown as absent on the day of occurrence. Attendance Register was seized by the police. Seizure memo was prepared, it bears his signature exhibited as EXPW-14. His statement was recorded by the police. The public came into the school and demanded that accused be removed from the school and be transferred to some other school. They told him that prosecutrix, who was reading in the school was raped by the accused. **In cross-examination** by the defence counsel, has stated that he has heard that accused had burnt the Quran, however, after enquiry it was established that there was dispute between two groups and it was proved that accused was innocent. When people came to school including the parents of the prosecutrix, they tried to burn the school due to the rape of the prosecutrix. He has no personal knowledge about the rape, but has heard. Public was demanding the transfer of the accused from the school. Bisma Maqbool was a student of 9th class.

PW-15 Mohammad Syed Shah (circumstantial witness) in examination-in-chief has stated that he is a resident of D.K. Pora and Teacher at D.K. Pora school. It was Thursday when mother of prosecutrix came to his home and told him that prosecutrix did not want to go to school as her teacher used to tease her. He enquired from a girl namely Saba about this. Saba told that accused neither beats them nor used to tease the girl students. He enquired her about the prosecutrix why she did not want to come to school, she replied that from the last two days prosecutrix is weeping and when she enquired her about her crying, she told her that accused used to tease her. I enquired from Saba whether she had herself seen the accused teasing the prosecutrix, who answered in negative. Thereafter I enquired from prosecutrix who replied that accused is teasing her. When he enquired from Saba, she got shocked and put her head down. Police has investigated the matter. His statement was recorded by the police which bears his signature. **In cross-examination** by the defence counsel, has stated that he is working in that school from the last two years. Prior to this no complaint was filed against the accused. He cannot say who did wrong with the prosecutrix. He has no knowledge about the incident. After 15 days his statement was recorded by the police.

PW-16 Dr. Waseem Rasool (presently posted at D.K.Shopian) in examination-in-chief on 16.05.2019 has deposed that on 24.08.2015 he was posted at D.H.Shopian on that day examined one Khushboo Shafi D/o Mohd Shafi Parray R/o D.K. Pora who was brought by SI Jazib. The patient was also accompanied by SPO Mst. Haseena and her father Mohd Shafi. He sought consent from father of the victim. **On examination he found that hymen was not intact, freshly torn. It admitted one finger. No sign of violence was found on her body.**

Q: If a rape victim who has been subject to rape almost one or two days ago, then in that eventuality, the doctor writes hymen freshly torn. It is so?

Ans: Of course recently torn hymen suggests recent intercourse/recent, interference with vaginal area. **It is true that rape victim of forty days cannot suggest hymen freshly torn. As he has mentioned freshly torn in his certificate, it means almost the occurrence is of 3/4 days (recent) rape or interference with vaginal parts.** No further question was put to the witness.

PW-18 SI Jazib Hamid in examination-in-chief has on 09.05.2019 has stated that in the year 2015 he was posted at Police Post Imam Sahib as Chowki officer. On 24.08.2015 he received an application from one Khushboo Jan D/O Mohammad Shafi Parray R/o DK Pora at 4 O'clock and thereafter on same day he lodged the FIR. The application is in the file and is exhibited as **EXPW-1**. It was evening time, therefore, he reached at the place of occurrence next day on 25.08.2015, prepared the site plan and wrote an application to the Medical Superintendent District Hospital Shopian for medical examination of the prosecutrix, and medical examination of the prosecutrix was done and final opinion has been reserved. On 10.09.2015 medical examination certificate was obtained. He got the DOB certificate of the prosecutrix. On 25.08.2015, he seized the school register from Headmaster Govt. High School DK Pora (from 03.04.2015 to 25.08.2015) and seizure memo was prepared, signatures of witnesses were taken. This is exhibited as EXPW-14. On 26.08.2015 accused was taken into custody at 1500 hrs and his relatives were informed about his arrest. This is on the file and is exhibited as EXPW-18. He prepared the arrest memo. During investigation accused was found committed offences u/s 506,376,342 RPC and charge-sheet was presented before the Court. **During cross-examination** by defence counsel, has stated that he was posted at Police Post Imam Sahib one year before the day of occurrence. He was IO in one case but he could not remember the name of the case. On 24.08.2015 application was submitted by prosecutrix. She was accompanied by her father. He remembers it that only prosecutrix and her father went to the police post. After receiving the application we send docket to P/S Shopian. He recorded the statement of prosecutrix and her father. Docket was sent to P/S through Sajad Hussain. He had not put the Sajad Hussain as witness. At 4 O'clock docket was sent to the police station and at 4.30 reached at P/S and FIR was lodged. He has sent also the prosecutrix to the police station at the time of sending of docket. No mark was put in the application. He had investigated the case from the beginning to end.

Q: Had you seen the record of the school at the time of obtaining the DOB certificate?

It is the job of School Headmaster. It is correct that prosecutrix has told that the occurrence took place on 16.07.2015, but it is true that on 24.08.2015 prosecutrix filed complaint and on 24.08.2015 FIR was

lodged. Medical examination of the prosecutrix was done on 24.08.2015. Occurrence is of 16.07.2015 and report was obtained on 24.08.2015 and due to lapse of too much time sample of semen on body was not sent for examination. Accused was taken into custody on 26.08.2015. Prosecutrix has not identified the accused. She had recorded in her statement that accused is her teacher and had done wrong with her. It is correct that name of the accused was not written in EXPW-14 seizure memo. It is correct that during remand accused had not confessed. Next day he went to the place of occurrence and prosecutrix identified the place of occurrence. One side of the place of occurrence is Jamia Masjid and on another side there is a street (Kocha). The house was closed in which occurrence took place. At the place of occurrence there were many houses. Houses are not near. Distance between the house where occurrence took place and school is about 100 feet. School teachers were arrayed as prosecution witness no.14 and 15 and students were arrayed as prosecution witness no.10, 11 and 12. Prosecutrix left from the school with the accused. Students register was not seized.

9. After closure of prosecution evidence on 31.07.2017, arguments in terms of section 273 Cr.pc were heard by the Ld. Trial Court. Thereafter, on the application of Ld. PP under Section 540 Cr.pc, in terms of Trial Court's order dated 26.02.2019, the statement of PW-5 Mst. Nishat Begum was recorded by the Trial Court, whereafter, the prosecution evidence was again closed on 22.03.2019. Accordingly, as the appellant could not be acquitted in terms of Section 273 Cr.pc, the statements of appellant/accused under the scheme of Section 342 Cr.pc were recorded on 10.04.2019. Incriminating evidence/circumstances appearing in the depositions of prosecution witness were put to the appellant who denied all the incriminating evidence, pleaded innocence and his false implication in the case and wished to examine witnesses in defence.

10. To demolish the prosecution evidence, appellant has examined himself as DW-1 alongwith his only one witness DW-2 Manzoor Ahmad Sheikh. The depositions of defence witnesses are summarized as under:-

DW-1 accused Mohammad Maqbool Ganai himself has appeared as a defence witness. He has stated that due to some personal reasons the complainant party had quarrelled with him and has falsely implicated him in the present case. He has not committed rape of the prosecutrix. He had no personal animosity with the prosecutrix. **In cross-examination** by Ld. PP, he has shown ignorance about the occurrence and has again stated that he is innocent and has not committed the rape of the victim.

DW-2 Manzoor Ahmad Sheikh has deposed, that accused is known to him. Complainant party is also known to him. The case has no truth and is based on surmises. In fact some two years before there was a dispute between accused and the complainant party with regard to any religious matter. Accused bears good moral character. The house in which occurrence is alleged to have been taken is located near the Masjid

Sharief. There are number of houses and Mosque located near the house and usually road remains busy with the people. **During cross-examination** by PP, the witness has deposed that he has good relations with both the parties. There is no truth in the case. My statement was not recorded by the police. He is not an eye witness to the occurrence and cannot say where he was at that time. I was called by the accused to depose before the court. I have a medicine shop and I have good relations with everyone. He has good relations with the accused and I usually go to the house of the accused.

- 11. The 1st argument** canvassed by Ld. Counsel for appellant/convict is, that occurrence of rape as attributed to the appellant in the FIR and by the deposition of victim/prosecutrix has occurred on 16.07.2015, whereas, FIR has been lodged in Police Station Shopian on 24.08.2015 after a delay of 38 days of the occurrence, victim/prosecutrix has not furnished any explanation regarding the inordinate delay, even I/O has not satisfactorily explained the delay which gives rise to a grave suspicion regarding the credibility and genuineness of the prosecution case.

It is apt to reiterate here, that as per the prosecution case, FIR No. 179/2015 for commission of offences under Sections 376(f), 342, 506 RPC was registered against the appellant in Police Station Shopian (Kashmir) on 24.08.2015 in regard to the occurrence of rape of 16.07.2015 by him upon the prosecutrix as disclosed in the FIR which has been lodged after a delay of 38 days. PW-1 (prosecutrix) in her deposition before the Trial Court has categorically put forth evidence, “that on 16.07.2015 she was reading in Govt. High School D.K. Pora, and after completing the golden test paper she was told by appellant that he will provide books to her, then the appellant took her in 2nd floor of his old house and forcibly raped her, but she told the incident to her family members after 48 days”. In her deposition before the trial court, prosecutrix has not tendered any explanation for the said inordinate (disproportionately large or excessive) delay. PW-18 SI Jazib Hamid (I/O) has even failed to satisfactorily explain the inordinate delay and has specifically deposed before the trial court that on 24.08.2015 at 4 o’clock he received an application and on the same day he lodged the FIR (EXPW-1).

In RAJESH PATEL—Appellant Vs. STATE OF JHARKHAND—Respondent (Cr. Appeal No. 1149 of 2008, decided by Hon’ble Supreme Court on 15.03.2013), relied by Ld. Counsel for appellant, Hon’ble Supreme Court of India while allowing the conviction appeal and setting aside the impugned judgment of conviction rendered against the appellant for commission of offence under Section 376 IPC by the trial court and

upheld by the High Court of Jharkhand, in paragraph 9 of the judgment held as under:-

9. Further, there is an inordinate delay of nearly 11 days in lodging the FIR with the jurisdictional police. The explanation given by the prosecutrix in not lodging the complaint within the reasonable period after the alleged offence committed by the appellant is that she went to her house and narrated the offence committed by the appellant to her mother and on assurance of Purnendu Babu – PW3, the mother remained silent for two to four days on the assurance that he will take action in the matter. **Further, the explanation given by the prosecutrix regarding the delay is that at the time of commission of offence the appellant had threatened her that in case she lodges any complaint against him, she would be killed. The said explanation is once again not a tenable explanation.** Further, the reason assigned by the High Court regarding not lodging the complaint immediately or within a reasonable period, it has observed that in case of rape, the victim girl hardly dares to go to the police station and make the matter open to all out of fear of stigma which will be attached with the girls who are ravished. Also, the reason assigned by the trial court which justifies the explanation offered by the prosecution regarding the delay in lodging the complaint against the appellant has been erroneously accepted by the High Court in the impugned judgment. In addition to that, further observation made by the High Court regarding the delay is that the prosecutrix as well as her mother tried to get justice by interference of PW3, who is a common friend of both of them and PW4, the Doctor with whom the prosecutrix was working as a Nurse. When the same did not materialize, after lapse of 11 days, FIR was lodged with the jurisdictional police for the offence said to have been committed by the appellant. Further, the High Court has also proceeded to record the reason that prosecutrix had every opportunity to give different date of occurrence instead of 14.2.93 but she did not do it which reason is not tenable in law. **Further, the High Court accepted the observation made by the learned trial Judge wherein the explanation given by the prosecutrix in her evidence about being terrorized to be killed by the appellant in case of reporting the matter to the police, is wholly untenable in law. The same is not only unnatural but also improbable. Therefore, the inordinate delay of 11 days in lodging the FIR against the appellant is fatal to the prosecution case.** This vital aspect regarding inordinate delay in lodging the FIR not only makes the prosecution case improbable to accept but the reasons and observations made by the trial court as well as the High Court in the impugned judgments are wholly untenable in law and the same cannot be accepted. Therefore, the findings and observations made by the courts below in accepting delay in lodging the FIR by assigning unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law.

Ratio of the judgment (Supra) makes the legal proposition manifestly clear, that inordinate delay in lodging FIR without any reasonable explanation is always fatal for the prosecution which makes the prosecution case improbable to accept. Ratio of the judgment (Supra) squarely applies to the facts of the case in hand, wherein, an inordinate delay of 38 days in lodging FIR by the prosecutrix without any explanation has made the prosecution case highly improbable. It is trite law, that the delay in lodging FIR has the effect of putting the court on it's guard to search if any explanation has been offered for such delay, and if offered, whether it is satisfactory or not, and if the prosecution fails to explain the delay, there is possibility of embellishments in the prosecution version on account of such delay which would be fatal to the prosecution making the prosecution case highly doubtful and concocted entitling the accused benefit of doubt leading to his acquittal. Per contra, Ld. Dy. AG for the respondent has relied upon a judgment titled **Satyapal—Appellant Versus State of Haryana—Respondent** [CRIMINAL APPEAL NO. 664 OF 2009, (Arising out of SLP (Crl.) No. 3855 of 2007)] wherein on the strength of law laid down, Ld. Dy. AG has vehemently urged, that in the said case as the rape victim was minor prosecutrix of 11 years and panchayat was held wherein the accused did not agree to tender apology, whereafter, FIR was lodged, the delay in lodging FIR was held by Hon'ble Supreme Court as satisfactorily explained and the conviction of accused was upheld. The facts of the case law (Supra) relied by Ld. Dy. AG are distinguishable and inapplicable to the facts of the case in hand. In the case in hand, as no panchayat was held, and the inordinate delay of 38 days in lodging the FIR by the prosecutrix has remained unexplained, the delay in lodging FIR has given rise to a grave suspicion regarding the credibility and genuineness of the prosecution story and the evidence adduced by the prosecutrix which is highly improbable, unworthy of reliance and inadmissible in evidence. Arguments articulated by Ld. Counsel for the respondent, therefore, are farfetched, repelled, rejected and discarded.

12. **The 2nd argument** portrayed by Ld. Counsel for appellant is, that there are glaring inherent inconsistencies in the deposition of the prosecutrix, and huge contradictions between the statement of prosecutrix and other prosecution witnesses which belies the prosecution story; it is argued, that as per deposition of prosecutrix PW-1 in examination-in-chief on the day

of occurrence on 16.07.2015 after completing the golden test paper accused called her and told that he will provide books to her, then accused took her in a room in 2nd floor of his house, and committed rape upon her and she told the incident to her family members after 48 days of occurrence, however, in **cross-examination** prosecutrix has suffered huge somersault and has totally demolished the very edifice of the prosecution case by tendering evidence before the trial court that on the day of occurrence on 16.07.2015 the exam started at 1pm and ended at 2pm, whereafter, her friends were discussing about the paper for about half an hour and it is wrong to say that on the day of occurrence after completing the paper and spending some time with her friends accused asked her to stop, whereafter, she alongwith her friends came to school compound and while walking they were discussing the paper and reached near a shop adjacent to Shrine and passing thereby she alongwith her friends went towards her home, she left her friends and proceeded towards her home, firstly, Saba Showkat proceeded towards her home and thereafter she proceeded towards her home and at about 2.30 pm she reached home took meals and did not returned back to school. *It is vehemently argued by Ld. Counsel for appellant*, that the self contradictory deposition of the prosecutrix to the extent that on the one hand she was subjected to forcible sexual intercourse by the accused after 2 pm on the day of occurrence of 16.07.2015, and on the contrary her deposition to the effect that after 2pm she accompanied her friends to her home and had meals with her family at 2.30pm completely demonstrates the flip flop/inconsistency in the deposition of the prosecutrix, which belies the very foundation of the prosecution case. *Ld. Counsel for appellant has further urged*, that glaring contradictions have emerged in the deposition of prosecutrix (PW-1) and the depositions of other prosecution witnesses viz; PW-10 Bisma Gulzar, PW-11 Umaira Qadar, PW-12 Nargis Hamid and PW-13 Saba Showkat who being the classmate friends of prosecutrix in one voice have deposed that the prosecutrix was weak in her studies and appellant/accused who was teacher in the school used to beat her, whereas, the prosecutrix only told them that the appellant use to harass her, but did not narrate that appellant committed rape upon her, which further shakes the very foundation of the prosecution case, makes it highly doubtful and concocted, thereby, entitling the accused benefit of doubt leading to his acquittal.

PW-1 Prosecutrix is the sole eye witness of commission of rape committed upon her by the appellant. In her examination-in-chief prosecutrix has categorically putforth evidence before the trial Court that on 16.07.2015 she was reading in a High School at D.K. Pora Shopian, after completing the golden test paper at 2pm accused raped her. The cross-examination of prosecutrix fully demonstrates that after completion of the paper at 2pm she alongwith her friends proceeded towards her home and at 2.30 pm she had lunch with her family members. The critical appraisal of the deposition of prosecutrix leads us to the firm conclusion that the story projected by the prosecutrix is far from reality for the reasons, that at the same time at 2pm or after it, prosecutrix cannot be

expected to be raped by the appellant and expected with her family at home, as it is humanely impossible for one person to be present at two (2) places at the same time.

PW-10 Bisma Gulzar (witness to support the testimony of the prosecutrix) in her deposition before the trial court has specifically stated that she has no knowledge what happened with prosecutrix, but on one day prosecutrix was weeping and told her that accused used to harass her. PW-11 Umaira Qadar (witness to support the testimony of the prosecutrix) has stated before the trial court that prosecutrix simply stated that accused used to harass her. PW-12 Nargis Hamid (witness to support the testimony of the prosecutrix) has put forth evidence before the trial court that prosecutrix told her that accused used to harass her. PW-13 Saba Showkat (witness to support the testimony of the prosecutrix) has testified before the trial court that prosecutrix is her classmate friend and told her that accused used to harass her. From the depositions of PWs 10, 11, 12 and 13 namely Bisma Gulzar, Umaira Qadar, Nargis Hamid and Saba Showkat who are the close classmate friends of the prosecutrix, it is amply clear, that on the day of occurrence on 16.07.2015 prosecutrix came back to her home in the company of her classmate friends aforesaid, therefore, the allegations attributed to the appellant that he committed rape upon the prosecutrix on 16.07.2015 after 2pm are farfetched, untrue, unworthy of reliance, which destroys the very foundation of the prosecution case, making it highly concocted and doubtful. When we test the version of the prosecutrix (PW-1) on the anvil of “sterling witness”, it is unfortunate that the prosecutrix has failed to pass any of the tests, as the sterling witness should be of a very high quality and caliber whose version should be unassailable. In the case in hand, there is total variation/inconsistencies in the version of the prosecutrix what she stated in her examination-in-chief and in cross-examination, in as much as, the prosecutrix and the material witnesses aforesaid have shown material/glaring contradictions in their depositions before the trial court, therefore, the testimony of the prosecutrix does not inspire confidence in the mind of this court to confirm the conviction imposed upon the appellant.

- 13. The 3rd argument** urged by Ld. Counsel for appellant is, that the medical evidence of PW-16 Doctor Waseem Rasool regarding the medical examination of the prosecutrix that she was raped 3/4 days (i.e. on

20.08.2015 or 21.08.2015) prior to the date of her medical examination on 24.08.2015 completely demolishes the ocular testimony of the prosecutrix (PW-1) that she was raped 38 days ago on 16.07.2015, which is a glaring/material contradiction in the “medical” and “ocular” evidence, which completely destroys the very edifice of the prosecution case.

In (2012) 8 Supreme Court Cases 21 [RAI SANDEEP ALIAS DEEPU—APPELLANT Versus STATE (NCT OF DELHI) AND OTHERS—RESPONDENTS], relied by Ld. Counsel for appellant/convict, Hon’ble Supreme Court of India, while acquitting the accused in a gang rape case falling under Sections 376(2)(g) IPC and observing that the solitary evidence of the prosecutrix was found to be not of sterling quality and contradictory to the medical evidence and FSL report, in paragraphs 19, 21, 22, 23, 26, 29, 31, 32 & 33 of the judgment held as under:-

19. Apart from the above version of the prosecution witnesses, when reference is made to the medical report relating to the prosecutrix as per Annexure P-4, there was an injury of abrasion on right side neck below her jaw and that there was no other injury either in the breast or her thighs. **The hymen was torn old, that there was no injury on the valva and that there was no bleeding in her vagina.** In the FSL report Exhibit PW-14/N, it is stated that there was no semen detected on the red colour socks. However, human semen was detected on the petticoat. **But there was no matching of the blood group noted on the petticoat vis-à-vis the blood group of the accused.**

21. The other discrepancies which are to be mentioned are the categorical statement of the prosecutrix (PW-4) herself that after the alleged forcible sexual intercourse by both the accused, she wiped of her private parts with a red colour socks which was lying in the house, though at another place it was stated that both the accused used the red colour socks to wipe of their private parts after the commission of the offence. **Assuming both the versions to be true, we find that the red colour socks sent for chemical examination revealed that it did not contain any semblance of semen in it as per the FSL report Exhibit PW- 14/N.** It was also pointed out that while according to her the socks was handed over to the police in the hospital when the petticoat and the socks were seized from her, according to the seizure memo the socks was recovered from the place of occurrence. She was a married woman and except the semen found in the petticoat, there is no other reliable evidence for implicating the accused-appellants to the crime alleged against them. In this background, when we refer to the oral version of the prosecutrix (PW-4), as pointed out by learned counsel for the appellant, very many facts which were not found in her

original statement were revealed for the first time before the Court.

22. 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 howsoever 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 every one 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.**

23. In the anvil of the above principles, when we test the version of PW- 4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the Court at the time of trial. There are material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence took place. The so-called eye witnesses did not support the story of the prosecution. The recoveries

failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants.

26. Applying the above principle to the case on hand, we find that except the ipse-dixit of the prosecutrix that too in her chief examination, with various additions and total somersault in the cross examination with no support at all at the instance of her niece and nephew who according to her were present in the house at the time of occurrence, as well as, the FSL report which disclosed the absence of semen in the socks which was stated to have been used by the accused as well as the prosecutrix to wipe of semen, apart from various other discrepancies in the matter of recoveries, namely, that while according to the prosecutrix the watch snatched away by the accused was 'Titan' while what was recovered was 'Omex' watch, and the chain which was alleged to have been recovered at the instance of the accused admittedly was not the one stolen, all the above factors do not convincingly rope in the accused to the alleged offence of 'gang rape' on the date and time alleged in the chargesheet.

29. As compared to the case on hand, we find that apart from the prosecutrix not supporting her own version, the other oral as well as forensic evidence also do not support the case of the prosecution. There were material contradictions leave alone lack of corroboration in the evidence of the prosecutrix. It cannot be said that since the prosecutrix was examined after two years there could be variation. Even while giving allowance for the time gap in the recording of her deposition, she would not have come forward with a version totally conflicting with what she stated in her complaint, especially when she was the victim of the alleged brutal onslaught on her by two men that too against her wish. In such circumstances, it will be highly dangerous to rely on such version of the prosecutrix in order to support the case of the prosecution.

31. When we apply the above principles to the case on hand, we find the prevaricating statements of the prosecutrix herself in the implication of the accused to the alleged offence of gang rape. There is evidence on record that there was no injury on the breast or the thighs of the prosecutrix and only a minor abrasion on the right side neck below jaw was noted while according to the prosecutrix's original version, the appellants had forcible sexual intercourse one after the other against her. If that was so, it is hard to believe that there was no other injury on the private parts of the prosecutrix as highlighted in the said decision. When on the face value the evidence is found to be defective, the attendant circumstances and other evidence have to be necessarily examined to see whether the allegation of gang rape was true. Unfortunately, the version of the so called eye witnesses to at least the initial part of the crime has not

supported the story of the prosecution. The attendant circumstances also do not co-relate to the offence alleged against the appellants. **Therefore, in the absence of proper corroboration of the prosecution version to the alleged offence, it will be unsafe to sustain the case of the prosecution.**

32. In the decision reported as **Krishan Kumar Malik v. State of Haryana (supra)** in respect of the offence of gang rape under Section 376 (2) (g), IPC, it has been held as under in paras 31 and 32:

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.” (emphasis added)

33. Applying the said principles to the facts of the case on hand, we find that the solitary version of the chief examination of PW-4, the prosecutrix cannot be taken as gospel truth for its face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellants.

Ratio of the judgment (Supra) makes it abundantly clear, that the solitary evidence of the prosecutrix is sufficient to hold accused guilty of commission of rape if the same inspires confidence, appears to be absolutely trustworthy, unblemished and is of sterling quality. Applying the ratio decidendi of the case law (Supra) to the facts of the case in hand, it is pertinent to mention here, that PW-1 (prosecutrix) in her testimony before the trial court has led evidence, “that on 16.07.2015 she was reading in a school at D.K. Pora, after completing the golden test paper accused called her and told her that he will provide books to her, then accused took her in an old house on its 2nd floor, he removed his clothes

and also removed her clothes, thereafter he forcibly raped her, after that he told her to clean the sperms from the private part, thereafter she went to home, she could not remember the date when her family members came to know about the incident, perhaps she has told them after 48 days of the incident". The testimony of prosecutrix makes it clearly evident that she was raped by the accused/appellant on 16.07.2015. As per FIR (EXPW-1) lodged in Police Station Shopian (Kashmir) on 24.08.2015, the date of occurrence is specifically mentioned as 16.07.2015. There is a delay of 38 days in lodging the FIR against appellant. PW-16 Dr. Waseem Rasool posted at D.H. Shopian on the relevant day of occurrence has conducted the medical examination of the prosecutrix (PW-1) on 24.08.2015 and has opined as under:-

"On examination he found that hymen was not intact, freshly torn. It admitted one finger. No sign of violence was found on her body.

Q: If a rape victim who has been subject to rape almost one or two days ago, then in that eventuality, the doctor writes hymen freshly torn. It is so?

Ans: Of course recently torn hymen suggests recent intercourse/recent, interference with vaginal area. It is true that rape victim of forty days cannot suggest hymen freshly torn. As he has mentioned freshly torn in his certificate, it means almost the occurrence is of 3/4 days (recent) rape or interference with vaginal parts. No further question was put to the witness".

The medical opinion rendered by PW-16 Dr. Waseem Rasool clearly confirms that the prosecutrix on her medical examination on 24.08.2015 was found to have freshly torn hymen, which means, that the prosecutrix was possibly subjected to rape one or two days (i.e. on 20.08.2015 or 21.08.2015) prior to her medical examination on 24.08.2015, meaning thereby, that the prosecutrix could not have been raped 38 days prior/ago from the date of her examination on 24.08.2015, which clearly belies the prosecution story and evidence tendered by the prosecutrix that she was subjected to rape by the accused on 16.07.2015. There is no allegation/evidence led by the prosecutrix against the appellant that he committed rape upon the prosecutrix one or two days prior to the date of her medical examination on 24.08.2015. The medical evidence of PW-16 Dr. Waseem Rasool is highly contradictory to the ocular evidence/testimony of the prosecutrix regarding the date and time of occurrence. The solitary evidence of the prosecutrix coupled with the medical

evidence does not inspire confidence, and appears to be absolutely untrustworthy and not of sterling quality, which goes to show that the evidence of the prosecutrix does not fall in the category to be relied upon for holding the appellant guilty of the offences. The prosecutrix's version narrated before the trial court cannot be taken as gospel truth on its face value, and in absence of supporting medical evidence, there is no scope to sustain the conviction and sentence imposed upon the appellant.

- 14. The 4th argument** canvassed by Ld. Counsel for appellant is, that as in the case in hand, there are glaring/material contradictions in the testimonies of ocular and medical evidence which render the prosecution version highly concocted and unworthy of reliance, no punishment/conviction can be rendered against the appellant merely on the apprehension of his indictment, as it is the fundamental principle of criminal jurisprudence that every case has to be decided by the courts strictly on merits in accordance with law and uninfluenced by outside moral pressures.

In RAHUL—Appellant Versus STATE OF DELHI MINISTRY OF HOME AFFAIRS & ANR.—Respondents” [CRIMINAL APPEAL NO. 611 of 2022], relied by Ld. Counsel for appellant/convict, Hon'ble Supreme Court of India while acquitting the appellants for commission of offences punishable under Sections 365/34, 367/34, 376(2) (g), 302/34, 201/34 IPC and observing that no conviction can be rendered against accused on apprehension or suspicion, in para 33 of the judgment held as under:-

33. Thus, having regard to the totality of circumstances and the evidence on record, it is difficult to hold that the prosecution had proved the guilt of the 33 accused by adducing cogent and clinching evidence. As per the settled legal position, in order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused only and none else. The circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. As demonstrated earlier, the evidence with regard to the arrest of the Appellants-accused, their identification, discoveries and recoveries of the incriminating articles, identity of the Indica Car, the seizures and sealing of the articles and collection of samples, the medical and scientific evidence, the report of DNA profiling, the evidence with regard to the CDRs etc. were not proved by the prosecution by leading, cogent, clinching and clear evidence much less unerringly pointing the guilt of the accused. The prosecution has to bring home the charges levelled against them beyond reasonable doubt, which the prosecution has failed to do in the instant case, resultantly, the Court is left with no alternative but

to acquit the accused, though involved in a very heinous crime. It may be true that if the accused involved in the heinous crime go unpunished or are acquitted, a kind of agony and frustration may be caused to the society in general and to the family of the victim in particular, however the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. **No conviction should be based merely on the apprehension of indictment or condemnation over the decision rendered. Every case has to be decided by the Courts strictly on merits and in accordance with law without being influenced by any kind of outside moral pressures or otherwise.**

Ratio of the judgment (Supra) fully applies to the facts of the case in hand. Appellant in terms of the judgment of the trial court dated 10.10.2022 has been found guilty, convicted and sentenced for commission of offences of rape upon the prosecutrix Under Sections 376(2)(f)/342/506 RPC and sentenced to rigorous imprisonment for 20 years, 1 year & 2 years respectively. The inordinate delay of 38 days in lodging FIR has remained unexplained by the prosecutrix as well as by the prosecution which has cast grave suspicion on the credibility and genuineness of the prosecution case. Glaring contradictions and inconsistencies have emerged in the depositions of prosecutrix and other prosecution witnesses aforementioned. Medical evidence of PW-16 Dr. Waseem Rasool has totally exonerated the appellant from commission of act of rape. As per ratio of the judgment of **“Rahul’s case”** (Supra) no conviction/punishment can be rendered upon an accused merely on the ground of apprehension and influenced by sentiments. On merits, we find that the prosecution case has been found wanting, as no cogent, conclusive and creditworthy evidence has been led by the prosecution to prove the guilt of appellant/convict.

- 15.** We, on the basis of the aforesaid evidence, hold that there is no legal evidence on record to prove that appellant has committed the rape upon the prosecutrix. The direct evidence/the circumstances as relied upon by the prosecution are not strong enough indicating the involvement of appellant/convict in the commission of crime. The witnesses examined by the prosecution, have not been able to putforth in their evidence a ring of truth, so as to inspire confidence in this court. Evidence of prosecution witnesses, is therefore, qualitatively and quantitatively, insufficient to bring nexus between appellant/convict and commission of the offences

indicted against him. This renders the entire story of prosecution as incredible and unbelievable in the manner projected by the prosecution.

16. On proper assessment, evaluation and estimation of the evidence adduced by the prosecution, we find that the evidence appears to be weak, fragile, lacking in credibility, does not prove connecting link between the accused and commission of offences. It would be highly dangerous and hazardous to hold the appellant/convict guilty of offences alleged against him on the basis of weak, shaky and unacceptable evidence. The whole case of the prosecution, therefore, becomes doubtful. For the foregoing reasons and discussion, we are of the considered view, that prosecution has miserably failed to prove the guilt of the appellant/convict beyond reasonable doubt for commission of offences Under Sections 376(2)(f)/342/506 RPC. The Criminal Conviction Appeal, therefore, deserves to be allowed and the same is allowed. Resultantly, the impugned judgment dated 10.10.2022 and order of sentence dated 17.10.2022 rendered by the Court of Ld. Principal Sessions Judge Shopian in file case No.69/2015/Sessions titled State Versus Mohd Maqbool Ganai based on surmises, assumptions and presumptions is unsustainable in the eyes of law and the same is set aside/quashed. Appellant/convict Mohd Maqbool Ganai S/O Mohd Anwar Ganai R/O D.K. Pora Harmain Shopian Tehsil & District Shopian, who is lying in Judicial custody in District Jail Pulwama (Kashmir), is therefore, acquitted of the charges leveled against him for commission of offences Under Sections 376(2)(f)/342/506 RPC and shall forthwith be released from the custody if not required in any other case. He shall stand discharged from his bail and personal bonds. Criminal conviction appeal is disposed of, and after due compilation under rules, shall be consigned to record. Record of the trial court be sent back forthwith alongwith copy of the judgment for information of the trial court.

17. Disposed of accordingly.

(Mohan Lal)
Judge

(Atul Sreedharan)
Judge

JAMMU
01.11.2023
Vijay

Whether the order is speaking: Yes
Whether the order is reportable: Yes