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Court No. - 13

Case :- CRIMINAL APPEAL No. - 1230 of 2005

Appellant :- Raju @ Hanuman

Respondent :- State of U.P.

Counsel for Appellant :- Mukul Rakesh, Ashutosh Kumar

Shukla, Praveen Kumar Yadav, Rajesh Kumar Singh

Chuahana, Ravendra Pratap Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Karunesh Singh Pawar, J.

1. The present Criminal Appeal under Section 374 of the Code of Criminal Procedure, 1973 has been filed by the appellant, **Raju @ Hanuman**, against the judgment and order dated 9.9.2005 passed by learned Additional Sessions Judge, F.T.C. No.-II, Lucknow in Sessions Trial No. 126 of 2004 : *State vs. Raju @ Hanuman*, arising out of Case Crime No.478 of 2003 under Sections 363, 366, 376 I.P.C., Police Station Thakurganj, District Lucknow, whereby the learned Additional Sessions Judge, F.T.C.-III, Lucknow, convicted and sentenced the appellant in the manner stated herein-below:-

- (I) under Section 363 I.P.C. to undergo 5 years' R.I and a fine of Rs.1000/- and in default of payment of fine to undergo 6 months' additional imprisonment;

- (II) under Section 366 I.P.C. to undergo 7 years' R.I. and a fine of Rs.1000/- and in default of payment of fine to undergo 6 months' additional imprisonment; and
- (III) under Section 376 I.P.C. to undergo 10 years' R.I. and a fine of Rs. 2000/- and in default of payment of fine to undergo one year's additional imprisonment.

All the sentences were directed to be run concurrently.”

2. Heard Shri Ehsan Kumar Gupta, learned counsel for the appellant and Shri Alok Tiwari, learned A.G.A. for the respondent State.

3. The prosecution case, as per the written report (Ext. Ka-1), is that the daughter of the informant (P.W.1-Satya Prakash Jaiswal), aged about 13 years went to school from home on 11.9.2003, however, when she did not return to home, then the informant (P.W.1) went to search her daughter but he could not trace her. On the same day, Raju (convict/appellant), who was his tenant, was also missing, therefore, the informant (P.W.1) believed that Raju has enticed her daughter away.

4. Thereafter, informant (P.W.1) got the written report scribed by a man of his locality, who after scribing it read it over to him and thereafter, he affixed his thumb impression on it. He then proceeded to Police Station Thakurganj and lodged it.

5. The evidence of P.W.3-1981 CP Jagannath Soni shows that on 20.09.2003, he was posted as Constable Moharrir at police station Thakurganj and on the said date, at 08:10 p.m. Satya Prakash (P.W.1) came and filed his written report on the basis of which he prepared the chik FIR (Ext. Ka.2).

6. A perusal of the chik FIR shows that the distance between the place of incident and Police Station Thakurganj was 1 kilometer. It is significant to mention that a perusal of the chik FIR also shows that on its basis, a case under Sections 363, 366 I.P.C. was registered against appellant.

7. The investigation of the case was conducted by S.I. Lakshsman Singh (P.W.4). In his examination-in-chief, he deposed before the trial Court that on 20.09.2003, in his presence, informant Satya Prakash Jaiswal lodged the FIR at Police Station Thakurganj, on the basis of which an offence punishable under Sections 363, 366 I.P.C. was registered. The investigation of the case was entrusted to him. During investigation, he recorded the statement of the Head Moharrir who prepared the chik F.I.R., informant (P.W.1), sister of the prosecutrix Km. Sarita. He, thereafter, inspected the place of incident and prepared the site plan (Ext. Ka-4). On 06.10.2003, on the basis of information of informer, he recovered the prosecutrix (P.W.2) from Lal Masjid, Hardoi Road, Lucknow under recovery memo (Ext. Ka-5) and also prepared site plan

(Ext. Ka-6), however, appellant managed to escape. He, thereafter, recorded the statement of the prosecutrix as well as Constable Sunita (P.W.5), Constable Basudev, Constable Ramesh Singh and on the basis of the statement of the prosecutrix, Section 376 I.P.C. was added. On 07.10.2003, he arrested the accused/appellant from Tahsilganj *Tiraha* (a junction of three road) and also recorded his statement. On 15.10.2003, he got the medical report. On 05.11.2003, the statement of the prosecutrix under Section 164 Cr.P.C. was recorded and on the said date, he handed over the prosecutrix to her parents and also filed charge-sheet (Ext. Ka-7) against the appellant in the Court.

8. The evidence of P.W.5-Sunita Singh shows that on 06.10.2003, she was posted as Constable at police station Thakurganj, district Lucknow and on the said date, at 10:00 a.m., the prosecutrix was recovered from Lal Masjid, Balaganj under recovery memo (Ext. Ka-5). She proved the recovery memo (Ext. Ka-5). She had brought the prosecutrix for medical examination at Woman Hospital, Lucknow.

9. The medical examination of the prosecutrix (P.W.2) was conducted on 06.10.2003, at 02:45 p.m., at Virangna Avantibai Woman Hospital, Lucknow by Dr. Madhumati Yadav (P.W.6) who found on her person injuries enumerated hereinafter :-

“Internal Examination

-a pinpoint black mole above clavicle 3 cm from head of clavicle.

-a scar mark 2 cm in length obliquely placed near Rt angle of mouth.

External examination

<i>Height 54 1/2"</i>	<i>breasts started developing</i>
<i>Wt-70lbs</i>	<i>axillary hair not developed</i>
<i>teeth 7+ 7</i>	<i>pubic hair – sparse</i>
<i>7+7</i>	

No mark of injury on any part of body externally. Internal exam Hymen old torn & healed. Vagina admits two fingers easily. Vaginal smear taken and sent for H.P. exam. No discharge on bleeding plv. present. No mark of injury on private parts.

Adv. X ray Rt elbow, Rt wrist & carpal bones Rt knee for age determination.

Vaginal smear exam for presence of spermatozoa and gonococci"

10. It is significant to mention that in her deposition in the trial Court, P.W.6-Dr. Madhumati Singh has not found any injury on the external or internal part of the body of the victim. Hymen was found old torn and healed wherein two fingers are admitted easily. No bleeding was found. She stated that x-ray report was not prepared in her presence. She has stated that x-ray report was prepared by Dr. Someshwar Puri. She is acquainted with the signatures and writing of Dr. Someshwar Puri and has proved Ext. Ka-8 (x-ray report). She has also proved the pathology report Ext. Ka-9. The victim was used to sexual intercourse.

11. The case was committed to the Court of Session in the usual manner where the appellant was charged on counts

mentioned in paragraph-1 hereinabove. He pleaded not guilty to the charges and claimed to be tried. His defence was of denial.

12. The prosecution, in support of its case, has produced seven witnesses i.e. P.W.1 Satya Prakash Jaiswal, the complainant and step father of the victim; P.W. 2 the victim; P.W.3 1981 C. P. Jagannath Soni, who has proved the chik F.I.R.; P.W.4 S.I. Lakshman Singh, the Investigating Officer; P.W.5 Sunita Singh, a lady constable, who has proved the recovery of the victim; P.W.6 Dr. Madhumati Yadav, who has medically examined the victim; and P.W.7 Rajesh Kumar Singh, Manager of the Maa Durga School, whose evidence has been discarded by the learned trial Court.

13. P.W.1- Satya Prakash Jaiswal in his examination-in-chief has deposed that ten months ago, his daughter (P.W.2) aged about 13 years, went to Jai Durga Maa School for study at 8.00 a.m. but she went missing and did not return to home from school. Raju @ Hanuman (accused/appellant), who lived in his house on rent, left his house one day before her daughter had gone missing and did not return to home. He got the written report scribed by a man of his locality on his dictation and after affixing thumb impression on it, he proceeded to the police station and lodged it. He has proved the written report (Ext. Ka-1). After the written report was lodged, the prosecutrix (P.W.2) met with him at the police station and was given her into his custody. He further

stated that his wife was already married. She had children. Both of them got married 10-12 years back. She was having two children from her first marriage. When he married with his wife at that time the children were 3-4 years old. His daughter (victim) was elder. He further stated that he was searching his daughter daily for 10-11 days and kept on informing the police inspector that victim has not been traced out.

P.W.1 further states that when the victim was recovered, then documentation was done at the Police Station. At that time, he was in home. He was called by the Inspector to take the victim (P.W.2). He then went to the police station and signed the report and brought the victim (P.W.2) home. He proved Ext.Ka-1. It is further stated that prior to written report, he has not put his thumb impression on any report.

14. P.W.2, the victim, in her examination-in-chief, has deposed that while she was going to Jai Durga Mandir school for study along with her brother and sister, Raju met her near the gate of the school and took her to a shop and put handkerchief on her face. She, thereafter, became unconscious. When she regained consciousness, she found herself in a room. She does not know the name of the village. He raped her without her consent. She was raped 2-3 times. She was kept for 12 days. He threatened her that if she does not go with him, he will kill her parents.

Appellant had forcibly taken her photographs and court marriage was also done by force.

In the cross-examination, P.W.2 had stated that the route of her school goes to a narrow lane and on both sides of the lane there are markets and shops and on that route the tea shop opens very early in the morning. Before the main road there is police station where police jeep is stationed and police personnel also used to move around and one *santri* is also standing. She does not know as to how she was abducted. She further stated that if an unconscious person would be taken away from such a narrow lane then he should be taken only in a rickshaw or by carrying him in his lap. She further stated that on that day she went to school without wearing the school dress. Prior to the date of incident Raju left her home and went somewhere. While she regained consciousness she realized that she was brought on rikshaw. The house where she regained consciousness was in a village. She would leave after having her meal in the morning and return by evening. The people in the vicinity/village did not inquire about them. They without any hindrance used to roam around. The place where Raju had kept her, took half an hour to reach Lucknow. In Lucknow Raju used to get snacks (*Paani patta*). She further stated that with Raju she got her photo clicked. Her photograph was taken after the marriage. Once it was taken near the court. She further stated that her younger

sister is three years younger than her. She then stated that police went to the house of Raju. From there she went home. The police has arrested Raju. The police brought both of them from the house of Raju. She identified the marriage agreement and her photographs and has stated that it was taken in the court. He also identified the signature on the marriage agreement. She further states that she was caught by the police. On the next day she went to the hospital. She further stated that they belong to Jaiswal caste. Raju is Gadariya by caste. She is not aware that Jaiswal caste is higher than Gadariya. She denied the suggestion that this was the objection in the marriage with Raju because he belongs to lower caste of Gadariya.

15. P.W.7-Rajesh Kumar Singh is the Manager of Jai Maa Durga Vidya Mandir. Although the summon was given to the Principal, however, in representative capacity he has appeared before the court whose evidence has been rejected by the trial court as possibility of antedating in the record and irregular maintenance of the record was found by the trial court.

16. The statement of the accused/appellant was recorded under Section 313 Cr.P.C. in which he took the defence that due to enmity and in the pressure of the police and in connivance with her father, the victim gave false testimony. He further stated that false testimony was given to support the fictitious investigation.

17. The learned trial Court believed the evidence of the informant (P.W.1) as also that of P.W.2-victim and the recovery effected on the pointing out of the informer and convicted and sentenced the appellant in the manner stated in paragraph-1 hereinabove.

18. As mentioned earlier, aggrieved by his convictions and sentences, appellant preferred the instant criminal appeal.

19. Learned counsel for the appellant submits that the victim, as per the statement of informant P.W.-1 Satya Prakash Jaiswal, was 16 years old and prior to the amendment in the Indian Penal Code, at the relevant time of the incident, the age of consent for sexual intercourse, was 16 years. Marriage has been admitted by the victim (P.W.2) and thus the age of consent for sexual intercourse with the married wife is 15 years and therefore, he could not have been convicted under Section 376 Indian Penal Code.

20. The second submission is that no offence under Section 363 Indian Penal Code and Section 366 Indian Penal Code is made out as according to the testimony of the victim, she on her own accord and free-will went away with the appellant. She remained with the appellant for a period of eight days without raising any alarm. The prosecution case is highly improbable. There is no public/independent witness. He submits that adverse inference ought to have been taken against the prosecution for

withholding the younger brother and sister, who are eye-witnesses of the incident. He submits that F.I.R. is ante- time and ante-dated. He further submits that there is no record to suggest that no special report at all was sent to the Magistrate concerned by the police.

21. Per contra, learned A.G.A. has opposed the prayer and has submitted that the victim was minor. The incident is admitted. According to him, the prosecution has successfully proved his case beyond reasonable doubt and delay in lodging the F.I.R. is immaterial as P.W.1/the informant was a rustic villager. He has further submitted that the statement of the victim inspired confidence and on the solitary testimony of the victim (P.W.2), which is of sterling quality, the accused/appellant can be convicted. There is no need of corroborative evidence nor there is need for the prosecution to examine the eye-witnesses and no adverse inference can be taken against the prosecution.

22. Having regard the submissions raised by the learned Counsel for the parties and going through the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statements of the appellant recorded under Section 313 Cr.P.C.; and the impugned judgment, it is required to be noted that the following questions arising for consideration before this Court :-

- (I) whether the prosecution story, as alleged, inspire confidence on the evidence adduced ?
- (II) whether the prosecutrix (P.W.2) is a witness worthy of reliance ?
- (III) whether the testimony of a prosecutrix who has been a victim of rape standing in need of corroboration and if so, whether such corroboration is available in the facts of the present case ?
- (IV) what was the age of the prosecutrix (P.W.2) ?
- (V) whether there was unexplained delay in lodging the F.I.R.?"

23. At this stage, it is pertinent to mention that at the relevant time i.e., in the year 2003 when the alleged offence of rape is said to have been committed, the age of consent was sixteen years and above. It was only vide an amendment made in the year 2013 that this has been increased to eighteen years.

24. Learned Counsel for the appellant has urged that there was inconsistency and contradictions in the determination of the age of the prosecutrix herein, which is apparent from the contents of the FIR as well as testimonies to the prosecution witnesses.

25. Let us first look at the FIR which contained the information first in point of time. Exhibit Ka-1 is the written report, wherein the informant (P.W.1) has stated that his 13 (thirteen) years' old daughter was missing. P.W.1 (Satya Prakash Jaiswal), in his examination-in-chief, before the trial Court has stated that the

victim was 13 years' old at the time of the incident, however, in the cross-examination, P.W.1 had deposed that his wife had already married and she had two children from her first marriage. The marriage between them took place 10-12 years back. At the time of marriage, both the children were 3-4 years old. The victim was the eldest and thus from this statement of P.W.1-Satya Prakash Jaiswal, it can be easily inferred that victim at the time of the occurrence was 16 years old.

26. The trial Court has discarded the educational record produced by P.W.7-Rajesh Kumar Singh, Manager of the School, as it suffers from various defects such as ante-dating, irregular maintenance of record/school register and so many other defects which have been discussed in detail by the learned trial Court in its impugned judgment, therefore, ossification test is the only ground on which the age of the victim can be assessed which according to P.W. 6- Dr. Madhumati Yadav is 10-14 years.

27. Hon'ble Supreme Court in the case of *"Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir & Ors."* : AIR 1982 SC 1296 has held that margin of error in age ascertained by radiological examination is to be taken as two years on either side. The appellant being accused is entitled to be given the benefit on higher side and therefore, the victim will be deemed to be 16 years of age at the time of incident.

28. In the case of *Shweta Gulati and another vs. The State Govt. of NCT of Delhi* reported in 2018 SCC OnLine Del 10448, Delhi High Court, in paragraphs 14,15 and 16, has held as under:-

"14. The settled principle is that the ossification test is not conclusive of age determination. It is settled that it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. The Supreme Court, in several decisions, has taken judicial notice of the fact that the margin of error in age ascertained by radiological examination is two years on either side.

15. Now the question that arises for consideration is as to whether the lower of the age or the higher of the age is to be taken. If benefit of doubt has to go to the accused then one would have to take the higher limit and if benefit of doubt has to go in favour of the prosecutrix then the lower of the two limits would have to be taken.

16. It is also settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused."

29. From the aforesaid propositions of law, it is crystal clear that ossification test is not conclusive of the age determination and margin of error in age ascertained by radiological examination is two years by either side and as per the settled law the benefit of doubt at all the stages goes in favour of the accused.

30. In the present case, since no document of the age has been proved, the trial Court had determined the age on the basis of ossification report by the P.W.6 Dr. Madhumati, which according

to her is 10-14 years and if 2 years benefit of doubt on the higher side is to be given to the accused, the victim's age came to 16 years on the date of occurrence.

31. In the case of *Mukarrab and others vs. State of Uttar Pradesh reported in (2017) 2 SCC 210*, Hon'ble Supreme Court, in paragraph 10, has held as under:-

"10. Age determination is essential to find out whether or not the person claiming to be a child is below the cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate. As juvenile in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted."

32. Prior to the amendment by Act no.13 of 2013 in the Indian Penal Code, a man is said to commit rape with or without consent of a woman when she is under 16 years of age. Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape. Prior to amendment Section 375 Indian Penal Code read as:

"375. Rape A man is said to commit "rape" who, except in the case hereinafter excepted. has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First-Against her will.

Secondly-Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent, when she is under sixteen years of age.

Explanation Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape Exception Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

33. P.W.2, the victim, in her examination-in-chief has stated that the appellant met her on the school gate and asked her to come with him so that he may buy her a copy and took her for half of the distance to the shop and put handkerchief on her face due to that she became unconscious and managed to sit in a vehicle. She remained with the appellant for 12 days. She visited the market with the appellant, in the civil court campus and also performed a court marriage.

34. The statement of P.W.2, victim reveals that consent of the victim is apparent from the fact that school was very strict on dress code and according to her statement, however, on that day

she did not went to the school in school dress. According to her statement, she was put in a room at some village where she used to go out with the appellant in the morning and return in the evening. There were also villagers, however, they did not inquire about them and without any hurdle, they used to roam around and no one objected their relationship. She used to go to Lucknow with the accused/appellant. She went on various public places such as court and also conducted court marriage, however, she never raised any alarm. This goes to show that she was a consenting party coupled with the fact that no injury has been found on the person of the victim in her medical examination either external or internal.

35. The statement of P.W.2 (prosecutrix) appears to be very improbable. According to her statement before the trial court, in her house she never met with Raju (appellant) and for the first time, when she was abducted, she met him on the gate of the school and on that day, when she met Raju, he asked her to come with him. However, without any resistance, she went with him, whereupon it has been alleged by the victim that she became unconscious due to handkerchief put by the Raju on her face and according to her own statement, route of the school was so congested that an unconscious persons can only be taken through rikshaw or by carrying in the lap. That being so, this Court is of the view that entire story narrated by P.W.2 Lalita

appears to be improbable as if the victim was unconscious and the accused carried unconscious girl on a rikshaw or in a lap in such a crowded area and through a narrow lane, then, definitely someone one could see the victim or the appellant, particularly the fact that it was a densely populated place bazaar and there were various shops which open early, prior to the opening of school gate. It is an admitted position that there is no witness to say that he/she saw the appellant, who took the victim away or that the victim (P.W.2) had raised alarm against the alleged offence committed by the appellant during the stay with the appellant. Thus, the statement given by the P.W. 2 clearly shows that she was a consenting party and she on her own accord, went away with the appellant.

36. Consent of the victim is also apparent from the fact that in her cross-examination, the victim (P.W.2) has stated that she belongs to Jaiswal caste, whereas the appellant is Garirya and she was not aware whether jaiswal is higher caste than Garirya. The victim (P.W.2) had also stated that she is not aware that in the marriage with the appellant, there was any objection to the effect that appellant is belonging to lower caste.

37. In the case of **S. Varadarajan Vs State of Madras**, 1965 AIR (SC) 942, the Apex Court has observed that where a minor girl, alleged to be taken away by the accused person, had left her father's protection knowing and having capacity to know the full

import of what she was doing and voluntarily joined the accused, it could not be said that the accused had taken her away from the keeping, of her lawful guardian within the meaning of Section 361 of the Indian Penal Code (Act XLV of 1860). Something more had to be done in a case of that kind, such as an inducement held out by the accused person or an active participation by him in the formation of the intention, either immediately prior to the minor leaving her father's protection or at some earlier stage. If the evidence failed to establish one of these things, the accused would not be guilty of the offence merely because after she had actually left her guardian's house or a house where her guardian had kept her she joined the accused, and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place.

38. Keeping in mind the aforesaid legal propositions coupled with the statements of the victim (P.W.2), this Court is of the view that since the victim, on her own accord, went away with the appellant, no offence under Sections 363 and 366 Indian Penal Code is made out.

39. This Court also find that while the victim was abducted, she was with her sister and brother. Her sister Sarita though is a witness in the charge-sheet, however, her sister Sarita was withheld by the prosecution and was not produced her in witness

box nor was her brother has been examined. Apparently, they were two important witnesses and they ought to have been produced by the prosecution so that they could have culled out the truth and true version of the prosecution case. However, it came out from the record that no reason has been assigned by the prosecution for not producing these two important eye-witnesses in regard to the abduction of the victim.

40. In the case of **Takhaji Hiraji vs. Thakore Kubersing Chamansing & Ors.:** (2001) 6 SCC 145, the Apex Court in paragraph-19 has held as under :-

“So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already

examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein. The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not pre-meditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused persons in which case non- explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular testimony so as to doubt, if at all, the correctness of the several findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-

examination of other witnesses does not cast any infirmity in the prosecution case.”

41. In view of the discussion made hereinabove, this Court has no hesitation to say that the testimony of the prosecutrix (P.W.2) is highly improbable and further though in view of the law laid down in the case of **Takhaji (supra)**, the prosecution should have produced the two important eye witnesses of the incident, however, withholding the two witnesses calls for taking adverse inference against the prosecution.

42. This Court has also find that P.W. 4, who is the Investigating Officer, has done a shady investigation. In the cross-examination, he has admitted that he has not tried to find out the real age of the prosecutrix in the school record. He has further stated that the statement recorded under Section 164 Cr.P.C. of the victim has not been entered into the case diary. He was also not aware according to his statement that the facts viz. when the victim was medically examined; whereabouts of the victim during the period of his missing, have not been entered by him in the case diary. He has also stated that he was also not aware which girl was taken for medical examination. He has not mentioned this fact in the case diary that any effort was made to procure public witness of recovery.

43. A perusal of the statement of P.W.1 further reveals that when the girl was recovered, he went to the police station and signed on the report and proved it as Ext. Ka-1 (written report). It means the recovery of girl was made on 6.10.2003 as per the recovery memo and as per the statement of P.W.1, he lodged the written report on 20.9.2003, which transpires that written report/F.I.R. is ante dated. Moreso, P.W.1 has further deposed that he had not put his thumb impression upon anything/report prior to putting his signature on the written report, which means that girl was recovered on 6.10.2003 and the written report and the F.I.R. as well as other things are ante-dated as it transpires that written report/F.I.R. was written on 6.10.2003 and not on 20.09.2003. Thus, on this count also, there is serious dent in the prosecution case.

44. It is trite law that the police had the statutory right and duty to 'register' every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report.

45. Learned Counsel for the appellant has submitted that non-compliance of Section 157 of the Cr.P.C. and not forwarding the

special report creates serious doubt. The occurrence is said to have taken place on 11.09.2003 and F.I.R. was lodged on 20.09.2003 at 08:10 p.m., therefore, there is delay of nine days in lodging the F.I.R. and further there is non-compliance of Section 157 of the Code of Criminal Procedure as there is no evidence with regards to forwarding of the special report to the Magistrate concerned, which creates serious doubt on the case of the prosecution.

46. In Alla China Apparao and other vs. State of A.P. reported in (2002) 8 SCC 440, the Apex Court has held as under :

"9. Learned counsel further submitted that though the occurrence is said to have taken place on 25.2.1993 at about 9.30 A.M. and first information report was lodged at 12 Noon, but it was received by the Magistrate at 6.00 P.M., as such there was inordinate delay in sending the first information report to the Magistrate on which ground alone the appellants were entitled to an order of acquittal in their favour. What is required under Section 157(1) of the Code of Criminal Procedure is that if from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, he shall, forthwith send a report of the same to a Magistrate empowered to take cognizance of such an offence upon a police report. The expression 'forthwith' used in Section 157(1) would undoubtedly mean within a reasonable time and without any unreasonable delay. In the case on hand, distance from the police station to Magistrate's court was about 20 to 25 Kms. PW.11 Constable was entrusted with the first information report by the then Sub-inspector of Police for being made over to the Magistrate. This witness stated that after handing over the first information report, the Sub-inspector of Police sent him to the place of occurrence where as per his instructions he stayed till 5 P.M. Later, the Inspector of Police made over the dead body

of the deceased to this witness with instructions to take the same to the Government Hospital, Guntur, and to hand it over to the hospital authorities and after handing over the dead body to the hospital authorities, he went to the Magistrate and delivered the first information report to him at 6 P.M. This witness further stated that there were only six constables attached to the police station on the relevant date which goes to show that at the concerned police station there was no full strength of constables. This apart, it is a matter of common experience that there has been tremendous rise in the crime resulting into enormous volume of work, but increase in the police force has not been made in the same proportion. In view of the aforesaid factors, the expression 'forthwith' within the meaning of Section 157(1) obviously cannot mean that the prosecution is required to explain every hour's delay in sending the first information report to the Magistrate, of course, the same has to be sent with reasonable despatch, which would obviously mean within a reasonable possible time in the circumstances prevailing. Therefore, in our view, the first information report was sent to the Magistrate with reasonable promptitude and no delay at all was caused in forwarding the same to the Magistrate. In any view of the matter, even if Magistrate's court was close by and the first information report reached him within six hours from the time of its lodgment, in view of the increase in work load, we have no hesitation in saying that even in such a case it cannot be said that there was any delay at all in forwarding the first information report to the Magistrate. Thus, we do not find any substance in this submission as, according to us, the first information report was promptly despatched to the Magistrate and received by him without any delay whatsoever. A question that now arises is that where first information report is shown to have actually been recorded without delay and investigation started on its basis, if any delay is caused in sending the same to the Magistrate which the prosecution fails to explain by furnishing reasonable explanation, what would be its effect upon the prosecution case. In our view, ipso facto the same cannot be taken to be a ground for throwing out the prosecution case if the same is otherwise trustworthy upon appreciation of evidence which is found to be credible. However, if it is otherwise, an adverse inference may be drawn against the prosecution and the same may affect veracity of the prosecution case, more so when there are circumstances from which an inference can be drawn that there were chances of manipulation in the first information report by falsely roping in the accused persons after due deliberations.

Reference in this connection may be made to decisions of this Court in the cases of Pala Singh vs. State of Punjab, (1972) 2 SCC 640, Sarwan Singh vs. State of Punjab, (1976) 4 SCC 369, State of Karnataka vs. Moin Patel, (1996) 8 SCC 167, Harpal Singh vs. Devinder Singh & Anr., (1997) 6 SCC 660, Shiv Ram vs. State of U.P., (1998) 1 SCC 149, Anil Rai vs. State of Bihar, (2001) 7 SCC 318, and Munshi Prasad & Ors., vs. State of Bihar, (2002) 1 SCC 351."

47. In Ram Lal Narang vs. State (Delhi Administration)

reported in (1979) 2 SCC 322, the Apex Court has held as under:-

"15. The police thus had the statutory right and duty to 'register' every information relating to the commission of a cognizable offence. The police also had the statutory right and duty to investigate the facts and circumstances of the case where the commission of a cognizable offence was suspected and to submit the report of such investigation to the Magistrate having jurisdiction to take cognizance of the offence upon a police report. These statutory rights and duties of the police were not circumscribed by any power of superintendence or interference in the Magistrate; nor was any sanction required from a Magistrate to empower the Police to investigate into a cognizable offence. This position in law was well established. In King Emperor v. Khwaja Nazir Ahmed(1), the Privy Council observed as follows:

"Just as it is essential that every one accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rules by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty

with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Courts, to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of Habeas Corpus. In such a case as the present, however, the Court's function begin when a charge is preferred before it and not until then..... In the present case, the police have under Sections 154 and 156 of the Criminal Procedure Code, a statutory right to investigate a cognizable offence without requiring the sanction of the Court.....

...

Ordinarily, the right and duty of the police would end with the submission of a report under Section 173(1) Criminal Procedure Code upon receipt of which it was up to the Magistrate to take or not to take cognizance of the offence. There was no provision in the 1898 Code prescribing the procedure to be followed by the police, where, after the submission of a report under Section 173(1) Criminal Procedure Code and after the Magistrate had taken cognizance of the offence, fresh facts came to light which required further investigation. There was, of course, no express provision prohibiting the police from launching upon an investigation into the fresh facts coming to light after the submission of the report under Section 173(1) or after the Magistrate had taken cognizance of the offence. As we shall presently point out, it was generally, thought by many High Courts, though doubted by a few, that the police were not barred from further investigation by the circumstance that a report under Section 173(1) had already been submitted and a Magistrate had already taken cognizance of the offence. The Law Commission in its 41st report recognized the position and recommended that the right of the police to make further investigation should be statutorily affirmed. The Law Commission said :

"14.23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting, the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent,

the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused".

Accordingly, in the Criminal Procedure Code, 1973, a new provision, Section 173(8), was introduced and it says:

"Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police Station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed, and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub section (2)".

48. In the instant case, from discussion made hereinabove, it transpires that the delay of 9 days in lodging the F.I.R. also creates a dent in the prosecution case. The scribe of the F.I.R. has not been examined. Improbable story of the prosecutrix makes the prosecution case doubtful although there were two eye witnesses i.e. brother and sister of the victim who saw the incident, however, the prosecution has withheld them coupled with the fact that the statement of P.W.2 further makes the recovery of the victim doubtful. As per the statement of P.W. 4 the victim was recovered on 6.10.2003 from the public place. Whereas as per the statement of P.W.2 police recovered both of

them from the house of Raju, the appellant and therefore the recovery memo of the prosecution become doubtful which shows recovery from a public place. It is also doubtful because there is no public witness of the recovery memo and neither any effort has been done by the prosecution to find out the independent witness for the recovery memo.

49. In the case of **Mohd. Ali Vs. State of U.P.** reported in (2015) 7 SCC 272, the Supreme Court has held as under:-

“29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon.”

(emphasised by me)

50. The Supreme Court in "**Kuldeep K. Mahato Vs. State of Bihar** reported in (1998) 6 SCC 420" in paragraph 11 (relevant part) has held as under:-

"The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of the neighbours from the said village. The medical evidence of Dr Maya Shankar Thakur, PW 5 also indicates that there were no injuries on the person of the prosecutrix including her private parts. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result that her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant."

51. The Hon'ble Supreme Court in Narendra Kumar versus State (NCT of Delhi) : (2012)7 SCC 171 has held that where the evidence of the prosecutrix is found suffering from inconsistencies and infirmities with other material, no reliance can be placed thereon. The relevant para 22 is reproduced as under :

"Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can

be placed upon her evidence. (Vide Suresh N. Bhusare v. State of Maharashtra (1999) 1 SCC 220)"

52. In Jai Krishna Mandal versus State of Jharkhand :

(2010) 14 SCC 534, the Hon'ble Supreme Court reiterated that the improbable statement of the prosecutrix cannot be believed. Relevant portion of para 4 is reproduced as under :

"4.....The only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

53. In Raju versus State of M.P. : (2008) 15 SCC 133,

Hon'ble Supreme Court held that no doubt, a false allegation of rape can cause equal distress, humiliation and damage to the accused as well and interest of the accused must also be protected. Relevant portion of paras 10 and 11 are reproduced as under :

"10..... that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."

"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..... 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."

*Similar view has been taken by Hon'ble Supreme Court in **Tameezuddin versus State (NCT of Delhi : (2009) 15 SCC 566.**"*

54. There are serious laches in the prosecution case. The recovery of the victim has been made doubtful by the statement of P.W.2 herself. Two eye-witnesses i.e brother and sister of the prosecutrix, who are the main witnesses, have been withheld by the prosecution. Moreso, it appears from the evidence on record that the prosecutrix/victim was a consenting party which is apparent from her statement itself, wherein the prosecutrix (P.W.2) herself had stated that she went away with the appellant and remained with him for 12 days. There was no sign of struggle when she was medically examined. She went to public places such as court for marriage, however, she never raised any alarm. The age of consent for sexual intercourse as per the unamended Section 376 Indian Penal Code prevalent at that time was 16 years.

55. In view of the aforesaid, I am of the opinion that prosecution has utterly failed to prove its case beyond reasonable doubt. It appears that this is the case of false implication.

56. The marriage of the P.W.2 with the appellant is admitted and thus being the wife if the victim was subjected to the sexual intercourse by the appellant she should not be less than 15 years of age and in this case the victim is easily 16 years old and

therefore no offence under Section 376 I.P.C. has been committed. No offence under Sections 363, 366, 376 I.P.C. is made out.

57. In view of the discussion made hereinabove and the law laid down by Hon'ble Supreme Court, the appeal is **allowed**.

The impugned judgment and order dated 9.9.2005 passed by learned Additional Sessions Judge (F.T.C. No.-II), Lucknow in Case S.T. No. 126/2004, State vs. Raju @ Hanuman, in Case Crime No.478 of 2003 under Section 363/366/376 I.P.C., Police Station Thakurganj, District Lucknow, is set aside.

The appellant is acquitted of all charges. The appellant is reported to be in jail. He shall be released forthwith, if not wanted in any other case.

58. Office is directed to transmit the lower court record along with a copy of the judgment to the Court concerned forthwith for information and follow up action.

Order Date :- 15.12.2023

Madhu