

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

Criminal Appeal No.21-SB of 2011

Date of Decision: October 14, 2015

Om Parkash

...Appellant

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. R.S.Mamli, Advocate,
for the appellant.

Ms. Tanisha Peshawaria, DAG, Haryana

Mr. Surender Singh Saini, Advocate,
for the complainant.

Amol Rattan Singh, J.

The appellant, Om Parkash, is in appeal against the judgment dated 22.09.2010 of the Additional Sessions Judge, Fatehabad, holding him guilty of the offences punishable under Sections 366 and 376 of the IPC and thereafter, sentencing him to rigorous imprisonment for a period of 5 years for the offence punishable under Sections 366 and for a period of 7 years for the offence punishable under Section 376 IPC, vide order dated 24.09.2010. Both the sentences were ordered to run concurrently. He was also imposed fines of Rs.5000/- and Rs.10,000/- respectively, for the commission of aforesaid two offences, in default of which, he is to undergo further imprisonment of 1¼ years and 1¾ years respectively. 4/5th of the fine imposed, is to be paid to the prosecutrix by way of compensation.

2. Criminal proceedings were initiated on a complaint filed by one

Subhash Chand, brother of the prosecutrix, on 11.12.1989, made before ASI Sish Ram of Police Station, Sadar Fatehabad. The complaint is stated to have been made at the Bus Stand of village Ayalki where the complainant met ASI Sish Ram and presented a written application (in Hindi), Ex.PB, on which the date has been corrected by hand from 10.12.1989 to 11.12.1989.

3. The complaint is to the effect that the complainants' sister, (to be referred to only as B hereinafter), aged 16 years, went on 08.12.1989 from the complainants' house to village Tamaspora, to pay obeisance at the temple of Shri Ramdev Ji at about 2:00 PM but had not returned till the filing of the complaint. The complaint also reads to state that the complainant, Subhash Chand is son of Kurara Ram, an agriculturist of village Phullan with his father being an aged man with eight children.

As per the complaint, despite the fact that the complainant and his family had looked for B for the past few days, she had not been traced. However, on the date of the complaint, one Tara Chand son of Khyali Ram, also of the same caste (Jaat) as the complainant, a resident of the same village, had told the complainant that his sister was seen in the company of the complainants' 'Seeri' (small share-holding worker), at Tamaspora temple on 08.12.1989. The complaint further states that upon enquiry, the complainant had found that his 'Seeri', Om Parkash son of Budh Ram (the present appellant), had also come not home since 08.12.1989 and as such, the complainant was fully "suspicious" that his sister had been enticed away by Om Parkash.

The complaint further states that B was wearing gold ear-rings and a gold necklace at the time that she left home.

Subhash Chand, the complainant, therefore sought that action be taken by the police.

4. Thereupon, initially, an FIR was registered at Police Station Fatehabad on 11.12.1989, making out offences punishable under Sections 363 and 366 IPC.

Thereafter, one Goru Ram of village Nagwara, Rajasthan, is stated to have gone to Police Station Chitwa, District Nagaur, Rajasthan and on 19.12.1989 informed HC Doongar Ram (later PW14) that his (Goru Rams') brother-in-law, Om Parkash (present appellant) had kidnapped a girl from Haryana and they were both present at Goru Rams' house. A Daily Diary Report is stated to have been recorded in this regard at Police Station Chitwa after which HC Doongar Ram went alongwith other Constables and Goru Ram to the latters' house at village Nagwara and "recovered" the appellant and B from there. HC Doongar Ram then is stated to have left for Fatehabad alongwith the appellant and B on 19.12.1989 itself, where he is stated to have been met at the Bus Stand by ASI Sish Ram and other police officials. The appellant and B were then handed over to said officials of the Haryana police, upon which a recovery memo, Ex.PK, was prepared, attested to by HC Doongar Ram and others.

It needs mention that subsequently Sish Ram deposed before the trial Court that the appellant and B were handed over to the police party of Haryana by HC Doongar Ram on 20.12.1989 (not 19.12.1989).

5. The prosecutrix and the appellant were then taken to Civil Hospital, Fatehabad and got medico-legally examined, after which B was entrusted over to her father in the Civil Hospital, Fatehabad, itself. Her clothes as were worn at the time she was handed over by the Rajasthan

police to the Haryana police, are stated to have been taken into possession, vide recovery memo, Ex.PJ and deposited with the Moharrar HC at Police Station Fatehabad.

6. The accused was produced before the Area Magistrate and police remand obtained, after which he is stated to have made a disclosure statement, Ex.PN, to the effect that he had hidden a .12 bore pistol and 2 cartridges with which he had threatened B and committed rape upon her, in a field near Shahadra (Delhi) and further that he had deposited the gold ear-rings worn by B, weighing about 1/2 a tola, worth about Rs.1020/-, with a jeweller whose name he did not know, at Renwal (Rajasthan) and the silver bangles worn by her, priced at about Rs.700/-, again with an unknown jeweller at Gurgaon. As per the disclosure statement, the appellant stated that he could get the same recovered but no recovery is stated to have been made pursuant to the statement.

The disclosure statement is shown to have been signed by the appellant as also one Atma Ram son of Nathu Ram, resident of Dhangar, as also by HC Subhash Chand and ASI Sish Ram of Police Station Fatehabad. (Later, the appellant is stated (by the IO), to have made another disclosure statement, leading to the recovery of a pistol).

7. On completion of investigation by ASI Sish Ram, a report was sent on 20.12.1989 itself to the Area Magistrate regarding the arrest of the appellant and the addition of the commission of an offence punishable under Section 376 IPC. The said offence is stated to have been added on the basis of a statement made by B herself.

8. A report under Section 173 Cr.P.C. having been submitted to the competent Magistrate, the case was committed to the Court of Sessions, vide order dated 25.05.1990, after which charges were framed against the

appellant by the learned Additional Sessions Judge, Hisar, for the commission of offences punishable under Sections 366 and 376 IPC, to which the appellant pleaded not guilty and claimed trial.

9. Fourteen prosecution witnesses and one defence witness testified before the trial Court.

The following documents and articles were exhibited:-

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| 1) MLR of Om Parkash | : Ex.PA |
| 2) Application regarding medical examination of Om Parkash | : Ex.PA/1 |
| 3) 'Ruqa' | : EX.PB |
| 4) FIR | : Ex.PB/1 |
| 5) Special Report | : Ex.PB/3 |
| 6) Disclosure statement of Om Parkash | : Ex.PC |
| 7) Seizure memo of Pistol and cartridge | : Ex.PD |
| 8) Sketch of Pistol | : Ex.PE |
| 9) MLR of B | : Ex.PF |
| 10) Report of FSL | : Ex.PG |
| 11) Scaled site plan | : Ex.PH |
| 12) Seizure memo of parcel | : Ex.PI |
| 13) Seizure memo of clothes | : Ex.PJ |
| 14) Possession memo of Om Parkash and B | : Ex.PK |
| 15) Copies of DDR | : Ex.PL, PL/1 and PL/2 |
| 16) Memo regarding handing over of girl B | : Ex.PM |
| 17) Disclosure statement of Om Parkash | : Ex.PN |
| 18) Birth certificate of Ram Bai | : Ex.PO |

10. PW1 was Dr. Narender Chakravarti, Medical Officer, General Hospital, Fatehabad, who testified that on 20.12.1989 he had medico-legally examined the appellant at 5:30 PM and that blood like stains were present on his vest and semen like stains on his underwear, both of which

were sealed into a parcel and handed over to the police. He identified the medico-legal report, Ex.PA. On cross-examination, the witness stated that he had not found any injury mark or scratches or bruises on the body of the appellant.

11. PWs 2,3,4 and 5 were formal witnesses, all police officials who testified with regard to the registration of the FIR, identification of the signatures of the SHO who presented the report under Section 173 Cr. P.C., handing over the special reports to various officers, the deposit of sealed parcels at the Malkhana of the Police Station and the FSL, Madhuban, respectively. Of these, PW5, MHC Hem Chander of Police Station Fatehabad, stated that ASI Sish Ram had deposited two sealed parcels with the seal of ASC alongwith the sample seal impression and one envelop to him. Both the sealed parcels were sent to FSL, Madhuban, through Constable Risal Singh, one of which had the seal of ASC and the other of Dr. Narender Chakravarti.

None of these witnesses were cross-examined by the defence.

12. PW6 was HC Subhash Chand who testified that on 24.12.1989 the appellant was in police custody in connection with the FIR in question and was interrogated by ASI Sish Ram in the presence of this witness (PW6), as also Surender Singh and Amarpal. The witness testified to the disclosure statement made by the appellant with regard to having concealed one country made pistol and live cartridges in the field of Anup Singh in the area of Ayalki.

The disclosure statement is stated to have also been used as evidence in another case registered under the Arms Act against the appellant and, as per this witness, the appellant actually led the police

party to the place of concealment and got recovered the pistol and live cartridges which were sealed in a parcel and taken into possession vide memo Ex.PD.

On cross-examination, PW6 stated that the Rajasthan police had handed over the prosecutrix, B to ASI Sish Ram in his presence. He gave the place of recovery (of the pistol and cartridges) to be about 6 Kms from the Police Station and about 2 Kms from village Ayalki. The pistol is stated to have been buried about 1/2 a ft. under the ground, amongst “Kikar” trees.

Of course, the witness denied that the recovery was simply foisted upon the appellant to strengthen the prosecution case.

13. Dr. Geeta Chaudhary, Medical Officer, Civil Hospital, Fatehabad, appeared as PW-7 and testified that on 20.12.1989, she had medico legally examined the prosecutrix at 6.00 p.m., when she was brought to the hospital by the police. She testified from the medico legal report Ex.PF, with regard to the examination, as follows:-

- “1. There was no external injury on her body and private parts.
2. Axillary and pubic hairs were moderately developed.
3. Hymen was torn. There was no pain, bleeding and swelling.
4. Cervix was nulliparous size. Uterus was retroverted and nulliparous in size.
5. Patient was menstruating for the last four years. Date of last menstruation period was 8th December.”

She further testified that the prosecutrix was referred for radiological examination to determine her age.

After the examination, the Doctor handed over to the police a sealed packet containing the following:-

“(i)two vaginal swabs,

- (ii) two vaginal smears,
- (iii) one underwear,
- (iv) one Salwar.”

She also handed over a sealed envelop bearing four seals, containing:-

- i) a carbon copy of the MLR;
- ii) a request for chemical analysis;
- iii) “police papers No.2” signed on each page and
- iv) a sample of her seal.

The witness further identified the carbon copy of the MLR in Court (Exhibit PF) to be the same as the one prepared by her, bearing her signatures. She also testified that the “salwar” and underwear taken out of a sealed parcel in Court, were the same as were worn by the prosecutrix on the date of the medico legal examination.

After seeing the report of the Forensic Science Laboratory, Exhibit PG, the witness further testified to state that B had undergone sexual intercourse.

In cross-examination, PW-7 stated that since the hymen of the prosecutrix was torn and there was no swelling on her private parts, she could say that she was habitual to intercourse and further, that two fingers could easily enter the vagina at the time of the medical examination. She further stated that there was no matting due to the presence of semen, nor were there any teeth bite marks on any part of the prosecutrix' body. The witness further stated in cross-examination, that she had not written the age of the prosecutrix on the MLR, as she was not sure of the same. She further admitted that the prosecutrix had told her her age at that time, but she could not (at the time of testimony) remember the same.

PW-7, lastly, denied knowledge of whether B was more than 20 years of age at the time of her examination, or not.

14. The prosecutrix herself testified as PW-8 and apart from giving the name of her father and his place of residence, stated that she had three brothers and that she was one of five sisters. She also stated that she knew the appellant and that about one year prior to her date of testimony (03.06.1991), he was employed as a 'Seeri' by her father. She further testified that she was married to Mohan Lal prior to her having been taken away by the accused and that the accused used to give her allurements in the form of 'toffees' and would induce her to have sexual intercourse with him. He also used to ask her to accompany him to Fatehabad and would get fine clothes stitched for her.

The prosecutrix further testified that the accused used to carry a pistol with him and would threaten her with it, saying that in case she disclosed with regard to his allurements and having had intercourse with her, he would kill her.

The testimony of PW-8 further reads to say that there is a temple of Ramdev in Village Tamespura and that the appellant took her there for the purpose of offering prayers, from where he took her on foot towards Fatehabad. She further testified that on the way he committed rape upon her in a field where cotton crop had been cultivated. As per the witness, she had raised an alarm but the accused had threatened to kill her with his pistol. Thereafter, he is stated to have taken her to Fatehabad and from there in a truck to Hissar. From Hissar, she further testified, that the accused took her to an empty compartment of a train stationed at the railway station where he again raped her. Thereafter, he is stated to have

taken her in a train to the village of his sister and brother-in-law, who told them both (the accused and the prosecutrix) to leave the house immediately. After that, as per the testimony, the appellant told the prosecutrix that he would take her to 'Vaishno Devi' to which she refused, upon which he again threatened her with a pistol. Hence, she accompanied him to 'Vaishno Devi' under fear. On the way there, as the testimony reads further, she was again raped by him. Before leaving for 'Vaishno Devi', he also took her to his other sister, who again asked them to leave the house immediately.

PW-8 further testified that after 'Vaishno Devi', the appellant took her to Rajasthan but on the way there, he sold her silver bangles and one ear ring at a village. Thereafter, the testimony further reads to say that the appellant left her at a bus stand in a town in Rajasthan, saying that he would go down and conceal his pistol somewhere. B further testified that she and the accused were arrested at the bus stand by the Rajasthan police and thereafter handed over to the Fatehabad police, after which she was medically examined at the Civil Hospital at Fatehabad and her clothes were taken into possession by the lady doctor.

The last part of the examination-in-chief of the prosecutrix reads to say that she narrated the entire occurrence to the Fatehabad police. She also stated that in her childhood she was called by the name of Ram Bai by her parents.

In her cross-examination, the prosecutrix stated that she was illiterate. She denied that the appellant was employed as a 'Seeri' with her father 2½ years earlier. She stated that the accused did not live in the fields of her father but was living at his own house in the village, which

was about 5/6 acres away from her parents house. She gave the distance of one of the fields of her father to be at a distance of 8 acres from their house and another field to be about 2 'kos' away. The house of the accused was stated by her to be in the middle of the village when going from her parents house to the field. PW-8 also stated in her cross-examination that the accused was the only "Seeri" employed by her father and that he had given her "toffees" on 5/7 occasions and had allured her during that period. She admitted that she had not told her family members about the same out of fear of the accused, who had threatened to kill her. She further stated that he sometimes gave her "toffees" while she was in fields and sometimes when she was returning from there to her house and that she used to also take other articles from him. She denied knowledge of the date on which she was taken by the accused to different places.

She also stated that no fair was held at the temple of Ramdev in Village Tamespura on the date that she was taken there, which was a "Dashmi day" and further stated that nobody was met by them at the temple, where she was taken at 2.30 p.m. Her cross-examination further reads to say that she was made to walk ahead of the accused as he had shown her a pistol from behind, while he followed her.

The prosecutrix denied knowledge of the distance of Village Tamespura from her own village but stated that she and the appellant gone there on foot and it took them about 20 minutes to reach there. She further testified that they had taken a 'katcha' path to Fatehabad, which went through fields on either side of it.

She first stated that there were other persons also working in the field at that time but thereafter stated that nobody met them on the way.

She further stated that she did not till the 'Pujari' "about it because I had no feeling that accused would rape me later on". She then stated that the field in which she was raped was about 8/9 acres away from the temple, where she was thrown down on the ground by the accused and her clothes were torn by him. She denied knowledge of whether there were bite injuries caused by the accused on her face and other parts of her body, because she became unconscious at that time. She further stated that when she regained consciousness, she noticed injuries behind her neck and that she was wearing a 'kurta' but her 'salwar' was torn and smeared with blood. She raised an alarm but because the accused threatened to kill her with his pistol, she followed him. The cross-examination further reads to say that she became perplexed and did not notice as to how many villages had come on the way while going to Fatehabad. She also stated that her clothes were smeared with blood while she was walking, though she was not fully conscious and therefore, could not say at what time that she and the accused reached Fatehabad. She next stated that she did not tell the people sitting in the truck, as she was unconscious and regained consciousness in the truck during night. She further stated that since she was made to sit in the rear of the truck, hence she could not talk to anybody. She could not also give the name of the place at which she was made to alight from the truck by the accused. The prosecutrix further stated in her cross-examination that she could not remember whether she was taken in a conveyance to the Railway Station at Hissar, or had gone on foot. She stated that there was no crowd at the platform of the railway station. She did not remember who had bought the tickets as she was not in her senses when she was taken by the accused in the train. Thereafter,

she stated that she regained consciousness when she reached the house of the sister of the accused.

As per the prosecutrix, the accused had stated before the police that he had taken her to village Bidhvashan. However, she stated that they did not stay even for a day in the said village, as they were asked to leave the village as soon as they reached there. As per her cross-examination, she had also told the police that after the accused asked her to go to village Bidhvashan, he raped her in the railway compartment of the train while it was running and that nobody else was present in the compartment.

She next stated that after Bidhvashan, she was taken to Delhi and that the accused had returned to the bus stand after sometime but she could not say in how much time. She next stated that she was left at the railway station at Delhi by the accused, where many people were present but the accused did not let her speak. She further stated that when he had left her at the railway station at Delhi, she did not tell anybody else about her being taken away by the accused as she was under fear and threat given by the accused. She admitted that she could identify police in uniform but at that time "I did not know the police people". She further stated that she came to know about the police only when she was arrested.

The cross-examination further goes on to say that from Delhi she was taken to "Vaishno Devi", though they did not stay at Delhi and that she had not told the police that they had stayed one night at Delhi. As per the prosecutrix she was forcibly taken to "Vaishno Devi" and many people were there at "Vaishno Devi" but the accused did not allow her to talk. In the train, she is against stated to have been raped by the accused. She further stated that she did not know as to how many days they stayed at

“Vaishno Devi” though she could not contradict that it was for 2/3 days. Thereafter, as per the prosecutrix, when they reached Rajasthan by train, they were apprehended by the police. She admitted to be correct that the accused had sold her ornaments for Rs.1025/-, while she was being taken to Rajasthan. She next stated that she had told the police that from there she was again taken to the house of the sister of the accused in village Nagwara, Rajasthan. However, she denied the suggestion that the brother-in-law of the accused had produced them before the police.

Thereafter, the prosecutrix gave the details of her family to say that her eldest brother was Sat Narain, after whom was her sister Guddi, then her brother Subhash and her sisters Savitri and Sharda. However, she could not give the age of any of these siblings. She further stated that after Sharda another daughter was born to her parents, who died, after which she was born. After her (prosecutrix), another sister was born, who also died. She next stated that she had a younger brother, Krishan, whose age she could not give. However, she stated that the youngest sister who had died was younger to her by 4 years. The prosecutrix denied the suggestion that the said sisters' name was Ram Bai, and gave her name to be Baby.

The witness denied the suggestion that after she was recovered by the police, she had again gone to the place where the accused was employed with one Suraj Parkash Kathuria. She also denied the suggestion that she was handed over to the police by the accused, or that the Panchayat had produced her before the police.

She next denied the suggestion that she had earlier been married in Village Faransi or that her eldest sister was married there. She also denied the suggestion that she was made to live with one Prabhu in Village

Bangaon by her father and further, that after about one month she was made to live with one Rajinder by her father. She further denied the suggestion that she was made to live with Mohan Lal (her husband) about two months earlier.

The prosecutrix next denied the suggestion that she had accompanied the accused of her own free will and also denied that she had taken any other articles from home except those which she already had with her. She denied her age to be 22 years or that she had illicit relations with the accused much earlier to the time in question.

The witness further denied the suggestion that she had been tutored by the police, on that date itself, to give her statement as she had given it.

She next stated that she had given her age to be about 15 years to the police but had not given her age to the lady doctor.

Lastly, the prosecutrix again denied the suggestion that her childhood name was not Ram Bai, and Ram Bai was, in fact, her youngest sister.

15. PW-9 was a formal witness, being Patwari Babu Singh, who had prepared the site plan at the instance of the prosecutrix. On being cross-examined, this witness denied the suggestion that he had, in fact, prepared the site plan at the instance of the police.

16. The next witness (PW-10) was the complainant, Subhash Chand son of Kurara Ram, i.e. the brother of the prosecutrix. His age is shown to be 23 years on the date of testimony.

This witness stated that he was one of three brothers and five sisters. He gave his sister, B' age to be 15/16 years and stated that in her

childhood she was called Ram Bai. He further stated that at the time of her birth, this was the name recorded with the Chowkidar of the village. The complainant testified that 1 ½ years earlier, his sister had gone to village Tamespura to offer prayers. The rest of the examination-in-chief of this witness is in tune with his statement before the police. He further stated that B was recovered after 10/12 days from the custody of the accused.

In cross-examination, the complainant, PW-10, stated that they had been living at their village since the time of his forefathers and that his own fathers' age is between 65 to 70 years. He stated that he owned 36 acres of land and that he and his two brothers cultivated the land jointly. He further stated that they had not constructed any "Dhani" in their fields. One of the fields belonging to his family was located about 20/25 acres away from their house, with the other located about 1 acre away. This witness also stated, as had the prosecutrix, that the house of the accused was situated on the way from their house to their fields. He further stated in cross-examination, that the accused had remained a "Seeri" with them for about one year and that he(accused-appellant) lived with his parents and brothers in the village.

PW-10 next gave details about his family, stating that his eldest brother, Sat Narain, also stayed with them and was aged about 28 years and was married at Village Dhodia. After Sat Narain, his sister Krishna was aged 26 years and that he was immediately younger to her by about 1 or 1½ years. After him was his sister Savitri, who was aged about 22 years and was one year younger than him. After Savitri was Sharda who was again one year younger. After her was his younger brother Krishan, again younger to Sharda by a year. As per PW-10, B was younger to Krishan by

one year, after whom was another sister, Baby, younger to B by 1 ½ years. However, according to this witness, only one sister had died, who was older to B, again by one year.

PW-10 denied the suggestion that B was 22 years of age but admitted that she was married to Mohan Lal and that the marriage was performed about 2/3 years earlier. He further stated that she had not gone to live with Mohan Lal as her “Muklawā” ceremony had not been performed. He stated that Sharda was married at village Faransi (which B had denied) and that Sharda was married about 3-4 years earlier. According to PW-10, Sharda's “Muklawā” ceremony was performed at the time of her marriage. He denied that B was married to the younger brother of Sharda's husband.

In his cross-examination, PW-10 stated that B had never informed him that the accused had allured her with “toffees” or that he was harassing her. He admitted that the accused used to visit their house but that B had not informed them that she was going to Village Tamespura, which was about 2 k.m. away, to offer prayers. According to this witness, a big fair was held on “Dashmi” day, though he had not gone to visit the fair. He denied the suggestion that his sister accompanied the accused of her own accord as his family had wanted her to marry her somewhere against her wishes.

This witness also denied the suggestion, as had the prosecutrix, that she had been made to live with Prabhu of their village. He also denied that B was married to Mohan Lal only about 2 months earlier.

17. The father of the prosecutrix, Kurara Ram son of Pat Ram, aged 66 years, appeared as PW-11 before the trial Court and stated that he had

five daughters and three sons. He also stated, like the prosecutrix and the complainant PW-10, that B was known as Ram Bai in her childhood and that her name was, in fact, recorded as such with the village "Chowkidar" when she was born. As per this witness, B was 15 ½ years old on the day that he testified.

PW-11, while testifying in his examination-in-chief, identified the accused, stating that he was a resident of his village and was employed as a "Seeri" with him. Thereafter, he too testified with regard to B having gone to village Tamespura and not having returned back and about a search having been made to trace her out and thereafter, a complaint being lodged on the 3rd day, with the police. He further stated that the police had come to his village and recorded his statement and that B was recovered by the police 11/12 days thereafter.

The next part of his testimony relates to B being examined in the Civil Hospital and her clothes being taken into possession by the doctors vide recovery memo Exhibit-PI, subsequently taken into possession by the police in a sealed parcel, vide memo Exhibit-PJ.

In his cross-examination, the prosecutrix's father also stated that they had been living at their village since the time of their forefathers. He and his brother owned 65 acres of land, cultivated separately by them. Thereafter, he gave details of his own life stating that his first wife had died three years after their marriage, from whom one daughter was born who had also died and that all the children were from his second wife and though he did not remember his age when he married again, he stated that it was about 30 years ago and his eldest son, Sat Narain, was about 27 or 28 years of age and the next child, Krishana, was 2 ½ years younger and

married at village Dhanjar. His son, Subhash (PW-10), was younger to Krishna by about 3 years, after whom was Savitri, again younger by 3 years. He stated that the next daughter, Sharda, was younger to Savitri by 2 ½ to 3 years and that his son Krishan was 2 ½ years younger than Sharda.

PW-11 then stated that after Sharda was Ram Bai @ B, after whom was his youngest daughter, Baby, whose age was 13 years. He stated that he had got recorded his childrens' names with the village Chowkidar at the time of their birth. This witness also stated that there was one daughter elder to B who had died 3-4 days after her birth. He denied the suggestion that a daughter of his was aged about 8/9 years when she died. He further denied the suggestion that B was 20/22 years.

Like his son, PW-10, this witness also stated that a fair is held at the Sati Mandir on "Dashmi" day and that village Tamespura was about 2 furlongs away from his village. As per PW-11, it was not possible to go to Fatehabad from village Tamespura on foot through a "katcha" path, though one could come there through the fields on foot. He stated that many villages fall on the way and that village Tamespura was 7 "kos" from Fatehabad through the fields, though he could not state how many kilometers make one "kos".

As per PW-11, his daughter, B, was married to Guddu 3 years earlier in Village Faransi and Sharda was also married to the younger brother of Guddu. He stated that the "Muklawar" ceremony of B had not been performed so far and that B had not obtained any divorce. However, thereafter, he corrected himself to state that she had, in fact "through the Court", obtained a divorce after she was taken away by the accused but had not been re-married thereafter.

He denied that she had resided in village Bangaon.

According to this witness, B was not residing with Mohan Lal at the time of his testimony.

This witness, unlike the prosecutrix and the complainant, i.e. his children, denied that the accused was working with him as a “Seeri” when he had taken B with him (thereby implying, in view of his earlier statement, that he had left his employment by then). He, however, also stated, like PW-10, that B had never informed him that the accused had been alluring her with “toffees”.

He denied the suggestion that after B was recovered, she again left the house of her own accord in the month of April, 1990 and that the Panchayat had restored her to him.

Finally, PW-11 denied the suggestion that B had gone of her own accord with the accused and that she was having illicit relations with him much earlier and that the accused had not threatened her with his pistol.

18. PW12 was the Investigating Officer, Sish Ram, who, though was an Assistant Sub Inspector of police at the time of occurrence and investigation, appeared as a witness as a Head Constable.

He testified that on 11.12.1989, while posted as an Assistant Sub Inspector in Police Station, Fatehabad, he was present with other police officials at the Bus Stand of Ayalki, where the complainant (PW10) presented his written application, which was registered as a formal FIR, after which, during investigation, this witness recorded the statement of Kurara Ram (father of the prosecutrix) and one Tara Chand, under Section 161 Cr.P.C. Despite search at different places, he further testified, the prosecutrix and the appellant were not found but on 20.12.1989, when he

(PW12) and HC Subhash Chand, Atma Ram and Vijay were present at Bus Stand Fatehabad, HC Doongar Ram of the Rajasthan Police (Police Station Chitwa) met them and produced the appellant and B.

Thereafter, the testimony is with regard to having the prosecutrix medico-legally examined, taking into possession her clothes etc. and handing over her custody to her father.

As per this witness, the appellant also made a disclosure statement, Ex.PN, on 20.12.1989, however, leading to no recovery and the addition of an offence punishable under Section 376 IPC.

The next part of the testimony is with regard to the interrogation of the accused in the Police Station and his subsequent disclosure statement, Ex.PC, on 24.12.1989, leading to the recovery of a country made pistol of .315 bore and two live cartridges from under a “Kikar” tree near the field of Anup Singh, in area of village Ayalki.

The testimony further describes the recovery of the said pistol and cartridges and registration of an FIR under the Arms Act against the appellant.

19. In cross-examination, PW12 stated that the complainant, Subhash, had met him at 7:30 AM (on 11.12.1989).

He denied knowledge of whether the aforesaid Atma Ram (in the presence of whom the prosecutrix and the appellant were stated to have been “presented” to the police party on 20.12.1989), was a relative of Kurara Ram, or not. He also stated that other than Atma Ram and Vijay, nobody went in search of the appellant and the prosecutrix.

He next gave details of going in a four-wheeler to recover the pistol at about 11:00 AM and having reached the spot of recovery at about

1:00 PM, where he dug out the earth upto about six inches (and thereby discovered the pistol and cartridges).

He denied that the offence under Section 376 IPC was registered only to humiliate the accused.

20. PW13 was Baldev Singh Malik, a Statistical Assistant in the office of the CMO, Hisar, who produced birth certificate, Ex.PO, which shows the name of a new born child on 22.04.1974, as Ram Bai, with the name of the parents given as Kurara Ram and Phoola.

This witness was not cross-examined.

21. The last prosecution witness (PW14) was HC Doongar Ram of the Rajasthan Police, who testified that on 19.12.1989 he was posted at Police Station Chitwa, District Nagaur and on that day, Goru Ram, brother-in-law of the present appellant, came to the police station and informed the police that the appellant (who PW14 identified in Court) had kidnapped a girl called B from Haryana.

PW14 testified that he recorded a Daily Diary Report in that regard, Ex.PL and that he alongwith Goru Ram and some police officials, went to village Nagwara and “recovered” the appellant and B from the house of Goru Ram.

As per the witness, Goru Ram also told him that the Haryana Police had come to search for the appellant, after which he (PW14) left Police Station Chitwa for Fatehabad, alongwith the appellant and B and handed them over to ASI Sish Ram and other police officials, at Bus Stand, Fatehabad. He testified to the recovery memo, Ex.PK, having been prepared in this regard and further stated that his departure from Police Station Chitwa for Fatehabad was recorded as Ex.PL/1 in the daily diary of

Police Station Chitwa, which he stated that he had brought alongwith.

In cross-examination, he stated that he had not recorded the statement of the prosecutrix.

22. The Public Prosecutor is recorded to have given up Pirthi Singh and Tara Singh as prosecution witnesses, being unnecessary.

22-A. In his statement under Section 313 Cr.P.C., the appellant stated that he cultivated the land of Kurara Ram, as a 'Seeri', for about two and half years and that on 08.12.1989, he received a message from his sister, Badamo, from Nagwara, after which he informed Kurara Ram that he is leaving for the said place.

The appellant further stated that the prosecutrix's father wanted to sell her to an old person but her mother was against it and therefore, the mother of the prosecutrix asked him to take B away for 10/15 days, so that she could convince her husband in the meantime. Thus, according to the appellant, he took B away at the instance of the latter's mother but never committed rape with her at any stage, during the period that she stayed with him at Nagwara.

According to him, the complainant, Subhash and Kurara Ram had lodged a false report against him, and after four months of registration of the case, they sent B to the house of one Om Parkash Punia, resident of village Bangaon, who was an old man whose house B left and thereafter, came to live with him (appellant) at Fatehabad, when he was employed as a driver with one Suraj Parkash.

He, lastly, stated that, in fact, he himself had produced B in the police station.

23. The appellant produced Devender Kumar, a Teacher in the

Government High School, Phool, as the sole defence witness (wrongly recorded as witness No.1 for the prosecution, in the English version of the lower Court record).

This witness testified that he had brought the record of the school from April 1964 to August 1985. As per the witness, B daughter of Kurara Ram, resident of Phool, was never admitted in the school as a student as per the entries in the school record. However, other children of Kurara Ram had studied in the school, including Krishan, Sat Narain, Subhash, Krishna and Savitri Devi. They had all studied in the school in the aforesaid period (between April 1964 to August 1985). DW1 further testified that Krishan Kumar was admitted in the school on 20.07.1981 and his date of birth was recorded as 04.01.1972. He left the school on 17.02.1986. Krishna Devi, as per this witness, was also admitted on 20.07.1981, her date of birth being 02.12.1975. Savitri Devi was stated to have been admitted on 18.07.1970, with her date of birth being recorded as 11.03.1964, Sat Narain is stated to have been admitted on 07.05.1969, with his date of birth being recorded as 26.01.1962. Subhash Chand (complainant) was stated by this witness to have been admitted on 07.05.1969, with his date of birth being recorded as 05.05.1963.

DW1 lastly stated in his examination-in-chief that the date of birth of a child is recorded at the instance of the natural guardian who accompanied the ward at the time of admission to the school.

In cross-examination, DW1 stated that he joined Government service in 1981 and he is a resident of village Phool. He further stated that there are 300 houses in his village and that only two persons by the name of Kurara Ram lived in the village.

He further stated that in the school register the fathers' name of Kurara Ram has not been mentioned. DW1 next stated that the admission forms had not been brought by him in Court though the register was prepared on the basis of entries in the admission form.

This witness gave his own date of birth to be 28.09.1958.

24. Before going on to the arguments raised by Mr. Mamli, learned counsel for the appellant, it is necessary to notice that the FIR in this case is dated 11.12.1989, but the date of decision of the learned trial Court is 22.09.2010, i.e. almost 21 years after the date of registration of the FIR. A perusal of the trial Court record shows that at the time of commitment of the case to the Sessions Court, on 25.05.1990, the appellant was on bail and continued to remain on bail, during the course of the trial, when the prosecution witnesses were examined and the appellants' own statement under Section 313 Cr.P.C. was recorded on 10.04.1992. Thereafter, he was also present in Court, on bail, on 08.07.1992, when the statement of the defence witness was recorded, but thereafter, from 05.08.1992 onwards, he absconded and was eventually declared to be a proclaimed offender by the trial Court, vide order dated 31.01.1994. After that, he is stated to have been re-arrested in the year 2010 and the trial re-commenced from 23.08.2010, eventually, leading to the conviction of the appellant on 22.09.2010.

25. An appraisal of the testimonies of various witnesses, specifically PWs10 and 11 and the prosecutrix herself, i.e. PW8, as also of DW1, shows that the age of the prosecutrix is in doubt. As per the complainant, PW10 Subhash Chand, i.e. the brother of the prosecutrix, in cross-

examination he stated that his eldest brother, Sat Narain was about 28 years old, after which came his sister, Krishna, aged about 26 years and thereafter he himself was younger to Krishna by about 1 year to 1½ years, thus making him to be about 24½ years of age on the date of his deposition before the trial Court, on 04.06.1991. However, his age, as recorded by the trial Court on that date, was shown to be 23 years.

As per PW10, immediately younger to him was his sister Savitri, aged about 22 years and she was stated to be one year younger, thereby making the age of Subhash Chand to be actually 23 years rather than between 24-25 years. Next to Savitri, PW10 further testified, his sister Sharda was again one year younger (to Savitri), thereby making her to be 21 years of age, after whom was his brother Krishan, also younger by one year to Sharda, thus making him 20 years of age on 04.06.1991. B, i.e. the prosecutrix, was then stated by PW10 to be the next child of his parents, also again younger by one year to Sharda, thereby making her to be 19 years of age. The youngest child was stated to be Baby, one and half years younger to the prosecutrix, thus making her to be about 17½ years of age on 04.06.1991.

However, thereafter, PW10 stated that one sister, elder to the prosecutrix by one year, had died. Obviously, unless that sister was a twin to the brother, Krishan, which is not stated, there is a discrepancy in the statement, because both Krishan and the sister who died could not both have been one year elder to the prosecutrix, unless Krishan and that sister were twins.

As already seen earlier, PW10 had further stated that B was married to one Mohan Lal about 2-3 years prior to the date of testimony

though her “muklawā” ceremony (send-off from parental home) had not been performed.

If the testimony of this witness is accepted to be correct, then on the date of occurrence, i.e. one and half years prior to 04.06.1991, the prosecutrix should have been about 17 and half years old, or if she was actually two years younger than Krishan then about 16 and half years old, which at that time, was above the age of consent.

26. Opposed to this, is the testimony of the father of the prosecutrix, i.e. PW11 Kurara Ram, who gave the ages of his first three children approximately the same as given by the PW10, i.e. Sat Narain 27-28 years of age, Krishna 25/26 of age and the complainant, Subhash Chand, to be about 22-23 years of age. Of course, the age of Subhash Chand differs slightly, inasmuch as, Subhash Chands' own statement would work his age out to be about 23 to 24½, whereas his father is stated it to be 22 or 23 years of age.

Thereafter, however, as per PW11, the age of Savitri would work out to be 19 or 20 years, as he stated that Savitri was younger to the complainant, Subhash Chand, by three years, whereas Subhash Chand himself stated that Savitri was younger to him by one year. Again, as regards as Sharda, PW11 stated that she was 2-3 years younger to Savitri, thereby making her to be about 16 to 18 years of age, whereas she was about 22 years of age as per PW10. PW11 gave the age of his son Krishan to be 2½ years younger than Sharda, thereby making him to be about 14 to 15 years of age, whereas as per PW10s' statement, Krishan would be about 20 years of age. PW11 did not give the age difference between Krishan and the prosecutrix, whose name he gave as Ram Bai rather than B (itself

not being the same name given by the complainant in his complaint, Ex.PB, the two names being completely different, but Ram Bai stated to be the alias by which B was also known). Thereafter, as per PW11, his youngest daughter, Baby, was 13 years old. Hence, if Krishan was 14 to 15½ years old and Baby 13 years old, then even taking Krishan to be 15 to 15½ years of age and Baby to be 13 years old, it would mean that the prosecutrix, on 04.06.1991, i.e. the date of the deposition of PW11 also, could not have been more than 14 to 14½ years old. This calculation, however, breaks down with the next sentence recorded in the cross-examination of PW11, to the effect that one daughter was born to him and his wife, who was elder to B, but died within 3-4 days of her birth. If that were so, then it is not understood as to what would be the age gap between Krishan, the prosecutrix and the youngest daughter Baby. Therefore, the testimony of PW11 is not wholly believable in this regard.

27. PW8 herself gave the same order of children born before her, as given by her father, uptill her sister, Sharda, (substituting the name of Krishna Devi, i.e. second eldest child, with, presumably, a pet name-Guddi). Thereafter, as per the prosecutrix, there was a sister who was elder to her who died and another sister younger to her who also died. She described Krishan to be her younger brother. She also stated that it was incorrect that the younger sister who had died was called Ram Bai. In fact, as per the evidence recorded, the prosecutrix stated that the younger sister who died was Baby.

Obviously, this is in complete contradiction to what her father, PW11, stated, thereby creating a huge doubt as to the age of the prosecutrix.

On the other hand, DW1, i.e. Devender Kumar, the Teacher from the Government High School, who produced the records with regard to the dates of birth of the children, did not give the dates of birth of Sharda, the prosecutrix and Baby. He specifically stated that the prosecutrix had never been admitted in the school as per record. However, further confusion has been created by him by showing the date of birth of the second eldest child, i.e. the eldest daughter, younger to the eldest child Sat Narain, to be 02.12.1975, thus making her eventually younger to the prosecutrix herself. The date of birth of Krishan Kumar, i.e. the brother immediately elder to the prosecutrix, was stated to be born on 04.01.1972, as per this witness.

28. Hence, though as per the testimony of the complainant, the age of the prosecutrix would be well-over 16 years, it was only about 14 years as per PW11 and not determinable as per the school records produced qua the date of birth of her siblings.

Learned counsel for the State however, had pointed to Ex.PO, wherein the date of birth of Ram Bai, daughter of Kurara Ram and Phool, is shown as 22.04.1974. As already noticed earlier, as per all the prosecution witnesses, Ram Bai was the alternate name of the prosecutrix, by which she was known as a child. Ms. Peshawaria, DAG, further pointed to the judgment of the trial Court, wherein this is accepted to be the correct birth date of the prosecutrix by that Court, thereby holding her to be less than 16 years of age as in December 1989, i.e. the period of occurrence.

The trial Court eventually held the appellant guilty both, in view of the testimony of the prosecutrix and other witnesses, as also on the ground that being below 16 years of age, she was incompetent to give any consent for sexual intercourse.

29. At this stage, it is necessary to notice, that even though there is no additional evidence led with regard to the age of the prosecutrix, however, Mr. Mamli, learned counsel for the appellant has pointed to the affidavit of the prosecutrix dated 03.04.2012, annexed as Annexure A-2 with Criminal Miscellaneous Application No.19422 of 2013, which was filed on 28.03.2013, seeking suspension of the sentence of the appellant, during the pendency of the appeal.

30. In that application, one ground for seeking suspension of sentence was that the prosecutrix herself, has stated as follows:-

“AFFIDAVIT

I, B wife of Mohan Lal (daughter of Kurda Ram), aged 43 years, am resident of Phulla, at present village Sarwarpur, Tehsil and District Fatehabad, and do hereby solemnly affirm and declare as under:-

1. That the deponent has lodged an F.I.R. No.561 dated 11.12.1989 under Sections 366/376 I.P.C. at Police Station Sadar, Fatehabad against Om Parkash son of Shri Budh Ram, resident of village Phulla, Tehsil and District Fatehabad and also gave statement in the Court that due to pressure of my family and relatives, I have given statement against Shri Om Parkash.
2. That the deponent has no objection if Om Parkash is released.

R.T.I. B, Deponent

VERIFICATION:

Verified that the above statement is true and correct to my knowledge and nothing has been concealed therein.

Dated: 03.04.2012

R.T.I. B, Deponent”

The original affidavit, in Hindi, is also present in the record of this Court, duly attested by the Oath Commissioner, Fatehabad, on

03.04.2012. In fact, the English translation is grammatically incorrect and the correct translation of the last part of paragraph 1 of the affidavit, would be (after the word 'Fatehabad'), to the effect that:- “..... and also testified against Om Parkash in Court, which testimony was given by me, under pressure from my family and relatives.”

Thus, other than the main contents of the affidavit, if the age of the prosecutrix is calculated from the aforesaid affidavit, though it is not a document proved as evidence, inasmuch as the prosecutrix has not been produced in this Court to testify with regard to the above, yet, if the age of the prosecutrix is given correctly in the affidavit (which is shown to bear her right thumb impression), then 22 years and four months earlier to the date of the affidavit, in December 1989, she would be about 21 years of age. Even given the fact that she is an illiterate woman, and possibly the age given in the affidavit is not correct, it does lend credence to the contention raised by the learned counsel that, in fact, the age of the prosecutrix, as given by her brother, i.e. PW10, was correct and therefore, one and half years prior to his testimony, she would be at least 17 and half years of age, which though would still be below the age of consent today, after the amendment to Section 375 of the IPC w.e.f. 03.02.2013, however, at the time of occurrence in December 1989, was above the age of consent, which at that time was 16 years.

31. Next, even in relation to the age of the prosecutrix, whether she was also known as Ram Bai in her childhood, as testified to by herself, her father and her brother, or whether Ram Bai was another sister, born after her and who died, is something which again this Court needs to turn its attention to.

The trial Court accepted the date of birth of the prosecutrix to be 22.04.1974, accepting Ram Bai to be B, despite the fact that, admittedly, she was known as B at the time of the occurrence. This Court, however, cannot accept that as a proved fact, in view of the contradictory testimonies of PWs8,10 and 11, i.e. the prosecutrix, her brother and father respectively, with regard to whether both, an elder and a younger sister had died, or only an elder sister died.

As per the prosecutrix, one sister older and one sister younger to her died. In his cross-examination, PW10 stated that only one sister of his had died, who was one year older than the prosecutrix. The same was stated by his father, PW11 also. However, as already discussed, the difference of age given by PW11, between his youngest daughter, Baby, the prosecutrix, the daughter who died (immediately older to the prosecutrix), and his son Krishan, does not add up in any manner, with the age given by him, of his youngest daughter, who he stated was 13 years of age on the day that he testified in Court, i.e. on 04.06.1991.

Again, as per PW10, the child who died was older than prosecutrix, as was stated by his father. Yet the age of prosecutrix, as deducible from the testimony of PW10, is about three to four years older than her age as deducible from the testimony of PW11.

The reference by the prosecutrix, to her younger sister who died, as Baby, whereas Pws10 and 11 referred to the youngest living child as Baby, further creates a large doubt as to whether the prosecutrix and PW11 were only trying to ensure that the age of the prosecutrix is shown to be below 16 years of age, whereas actually she may have been older, during the period of occurrence.

32. Thus, with a doubt on whether the prosecutrix was of consenting age or not, in December 1989, what necessarily needs to be considered is whether she went with the appellant willingly, or he forced her to come alongwith him, i.e. where her version of the chain of events, is believable or not.

Admittedly, she stated that even prior to him having taken her, allegedly at gun point, one or two days before 11.12.1989, she had been lured by him with toffees, and sexual intercourse had taken place between them. Thereafter, when he took her to the fair at village Tamasapura, without a doubt she was taken by different means to different public places such as the town of Fatehabad, the Railway Station at Hisar, Vaishno Devi temple in J & K, the Railway Station at Delhi, then to Rajasthan, where she is stated to have been “recovered” at the instance of the brother-in-law of the appellant, by the Rajasthan Police. Though the statement of the prosecutrix is to the effect that the entire journey to different places over a period of about ten days, was under threat by the appellant, it is not possible for this Court to believe that, in view of both, the fact that she admitted to have had sexual intercourse with the appellant even before she went with him (or was taken by him to village Tamasapura) to different places, as also because, for him to have constantly threatened her at gun point, including at public places such as crowded Railway Stations and the Vaishno Devi temple, sounds too far fetched a story. It cannot be discounted, of course, that if she was a young child less than 16 years of age, a psychological fear may have been built into her, making her unable to speak against the appellant. Yet, with her age not fully determinable in the light of different testimonies, and in the entire chain of circumstances

narrated above, especially her admission to having been “lured into sexual intercourse”, simply by enticement with “toffees”, her testimony is difficult to believe and accept. This is especially so, because allurement to sexual intercourse, to an at least 15 year old girl, with toffees, is difficult to accept.

33. Next, the version of the occurrence, as testified to by the prosecutrix, is further put into doubt, because as per the IO (PW12) & HC Doongar Ram (PW14), she was recovered from the house of Goru Ram in village Nagwara (Rajasthan) at Goru Rams' instance. As per the prosecutrix, she and the appellant were arrested at the bus stand of a town in Rajasthan.

Thus, her entire story, in view of both, this part of her testimony, as also because it is not fully believable that she was taken to different crowded places at the point of a gun, becomes doubtful, lending credence to the argument that it was a case of a consensual relationship.

34. Be that as it may, if the allurement was at a period when she was below the age of 16 years, then obviously, any consent given by her, for any reason, is immaterial, and sexual intercourse even with her consent, would amount to statutory rape.

Hence, this Court was initially inclined to invoke jurisdiction under Section 391 of the Cr.P.C., to summon the prosecutrix to testify again by way of additional evidence, in support of her affidavit or otherwise, (dated 03.04.2012), annexed as Annexure A-2 with the Crl. Misc. Application No.19422 of 2013. However, Mr. Mamli, learned counsel for the appellant submitted that the appellant already having undergone more than five years of actual imprisonment, even if his

sentence was suspended, during the period that additional evidence was taken by this Court, it would mean that a sword of Damocles would continue to hang on his head, which in the entire circumstances enumerated hereinabove, would compound his misery, 25 years after the event, even more than the sentence pronounced. He, therefore, prayed that in case, without taking additional evidence, this Court is not inclined to grant benefit of doubt, then the sentence of the appellant be reduced to the period of imprisonment already served by him, including during the period of trial.

In this regard he submitted that, though after the amendment to Section 376 of the IPC w.e.f. 03.02.2013, the minimum sentence to be imposed upon a convict found guilty is 7 years, as has been awarded by the trial Court, however, prior to such amendment to Section 376 of the IPC, the proviso to the said Section, allowed a lesser sentence than seven years imprisonment, for adequate and special reasons to be given in the judgment. Learned counsel further submitted that as the offence is stated to have been committed in December 1989, the amendment made w.e.f. 03.02.2013, abrogating the proviso to Section 376, would not apply to the case of the appellant. In this regard, he relied upon a judgment of the Supreme Court, in **Ravindra v. State of Madhya Pradesh** 2015 (2) RCR (Criminal) 124, wherein the Apex Court, despite the appeal having been decided in 2015 itself, invoked the said proviso to Section 376(2) of the unamended provision, to award a lesser sentence than the one stipulated in Section 376(2), the offence in that case having taken place on 24.08.1994. In that case also, the special reason given for awarding a lesser sentence (in terms of the now repealed proviso to Section 376), was that more than 20

years had gone by since the occurrence, with the prosecutrix and the accused married to different people and having entered a compromise.

35. In the present case, though it is not known whether the appellant is married, but the prosecutrix is, admittedly, married and is shown to have sworn an affidavit stating that she has no objection if the appellant is released.

Of course, her affidavit actually completely exonerates the appellant of having committed the crime at all, to the extent that it is stated that she testified against him under pressure of her parents and relatives.

However, as already said earlier, that affidavit cannot be taken at face value without the testimony of the prosecutrix, in support of it (or otherwise), by way of additional evidence. Yet, keeping in view the chain of circumstances as discussed in detail, with the prosecutrix having actually travelled to different places with the appellant and having admitted to sexual intercourse even prior to that, why this Court has not summoned her to testify, is because what would still need to be determined, even if she testified in favour of the appellant, is whether at the time of the occurrence, she was above or below 16 years of age, in December 1989.

Even if this Court, after summoning her, put her through ossification and dental tests to try and determine her age and accordingly calculate her approximate age in December 1989, the result would still not be fully conclusive because such determination, by these tests, is with a margin or error of two years. Thus, unless she is actually shown to be about 43 years of age today, as is stated in the affidavit, in which case she

would be about 21 years of age in December 1989, (thereby making her about five years above the age of consent as in 1989 and even about three years above the present age of consent, with the no room for error factored in), it would still be a matter of doubt whether she was above or below the age of consent, at the time of occurrence.

Hence, that course is not being adopted by this Court, as I agree with Mr. Mamli that, in the circumstances, it would actually amount to travesty of justice to keep the sword of Damocles hanging upon the appellants' head, more than 25 years after the occurrence and after he has already undergone more than five years of actual imprisonment. As per the custody certificates on record in this case, the last one dated 23.03.2015, he is shown to have undergone actual sentence of four years, eleven months and nine days, on that date.

36. Therefore, in view of the fact that the occurrence is about 26 years earlier and the prosecutrix is admittedly married and further, keeping in view the fact that she had travelled with him to different places and even before that agreed to sexual intercourse with him simply, allegedly, on the allurements of "toffees" and in view of the contradiction with regard to her age at the time of occurrence, this appeal is allowed to the extent that the sentence of imprisonment of the appellant, in respect of commission of both the offences that he was charged with, is reduced to the extent already undergone by him.

Consequently, he is ordered to be released from custody forthwith, if not required in any other case.

October 14, 2015

vcgarg/dinesh

(AMOL RATTAN SINGH)
JUDGE