

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA No. D-721-DB of 2014 (O&M)

Date of decision: 06.10.2015.

A

....Appellant.

Versus

State of Haryana and another

.... Respondents.

CORAM : HON'BLE MR. JUSTICE S.S. SARON

HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Chanderhas Yadav, Advocate for the appellant.

S.S. Saron, J.

This appeal has been filed by the prosecutrix against the judgment and order dated 04.03.2014, passed by the learned Sessions Judge, Rewari, whereby Nitin Kumar (respondent No.2) has been acquitted of the offences punishable under Sections 376, 363 and 506 of the Indian Penal Code ('IPC' - for short).

We have heard learned counsel for the appellant and with his assistance perused the trial Court record that was requisitioned.

The prosecutrix filed an application (Ex.PI) to the In-charge, Police Chowki Dahina, Police Station Khol, District Rewari on 13.08.2013 submitting therein that she was a resident of village Lishan and did household work. Her husband was serving with the I.T.B.P. (Indo Tibetan Border Police). In their neighbourhood at village Lishan there lived a boy named Nitin Kumar (respondent No.2). About 2-2½ months earlier to her submitting the application (Ex.PI), Nitin (respondent No.2) forcibly gave her a mobile sim No.8397879448 and from phone No. 8397879449 started

having obscene conversations with her on the phone. He also held out threats that in case she disclosed about this to anyone, then he would kill her. The prosecutrix due to fear, never disclosed about this to anyone.

The prosecutrix then received a phone call from Nitin Kumar (respondent No.2) during the night on 12.08.2013 at about 11:00 p.m., forcing her to run away from home. He again called her in the morning on 13.08.2013 at about 03:30 a.m. and asked her to run away from home. The prosecutrix got her luggage, money and ATM card, besides, her child was with her. Nitin Kumar (respondent No.2) took the prosecutrix with him from outside her house and left her at the boundary of village Jhadoda. Then he asked her to meet him at the IFFCO crossing, Gurgaon and he would come there behind her. His phone call was received in the morning on 13.08.2013 at about 10:00 a.m. asking as to where she was and that he was coming. However, as she was not found at home in the morning at about 06:00 a.m., her in-laws got to know and they started searching for her. Then they informed the Police Post Dahina.

The in-laws of the prosecutrix suspected Nitin (respondent No.2), the son of Shri Surinder Master. The police called the boy. The police officials of Police Chowki Dahina got the husband's elder brother ('jeth') namely Satish of the prosecutrix and Nitin with them and reached Gurgaon. As had been informed by Nitin (respondent No.2), the prosecutrix was found standing at the IFFCO 'chowk'. She then came to lodge a report and legal proceedings were asked to be initiated against Nitin (respondent No.2) aforesaid.

Police proceedings Ex.PI/1 were recorded by ASI Anil Kumar, Police Post Dahina (PW9) on 13.08.2013 at 07:40 p.m. He recorded that

he was present at the Police 'chowki' when the prosecutrix along with the family members of her husband came to the Police 'chowki' and submitted the aforesaid application (Ex.PI). From the contents of the application, a case for the offences under Sections 294 and 506 IPC was made out. For registration of a case (FIR), the application was sent to the police station through EASI Suresh Kumar. Its number was asked to be informed. ASI Anil Kumar (PW9) along with the complainant and others who were present proceeded to the place of occurrence.

At the Police Station, case FIR No.196 date 13.08.2013 (Ex.PJ) for the offences under Sections 294 and 506 IPC was registered by ASI Hari Singh (PW6).

ASI Anil Kumar (PW9) conducted investigation in the case. Mobile (Ex.P11) with sim No.8397879448 was produced by the prosecutrix, which was taken in possession vide recovery memo Ex.PQ. The memo was attested by the prosecutrix and Satish Kumar, the husband's elder brother of the prosecutrix. The statement of Satish, supplementary statement of the prosecutrix; besides, statement of Ram Kumar were recorded. The offence under Section 363 IPC was added by ASI Anil Kumar (PW9). The accused was arrested and statement of EASI Suresh Kumar was recorded. On the next day i.e. 14.08.2013 the accused was produced in Court and was released on bail.

The prosecutrix along with her husband then appeared before the Superintendent of Police, Rewari and submitted an application dated 16.08.2013 (Ex.PN) praying for taking legal action against Nitin (respondent No.2) who had forcibly committed wrong acts with her, besides, held out threats to her life. It was submitted that she was resident

of village Lishan, Tehsil and District Rewari and her husband was employed with I.T.B.P. (Indo-Tibet Border Police). She had a fourteen months old child and she was residing with her mother-in-law and father-in-law but separate from her husband's elder brother ('jeth') and his wife ('jethani').

It is further stated that about three months earlier from her submitting the application (Ex.PN) at about 4.00 am in the morning she as per her daily routine went from her house to the plot where cattle were kept by them. There Nitin Kumar (respondent No.2) all of a sudden came from behind and gagged her mouth. He said that if she raised an alarm he would kill her by pressing her neck. He then forcibly took her to a room that was there and forcibly committed wrong acts with her. While leaving he held out a threat that in case she disclosed this to anybody, he would kidnap her child and get him killed.

After this incident, many a times, Nitin (respondent No.2) finding her alone at home or when she went to the plot to tether the cattle in the morning, he committed wrong acts with her. The last time, he committed a wrong act was at the plot on 10.08.2013 in the morning at about 04:00 a.m. It is further mentioned that Nitin had given her a mobile and a sim. The number of which was 8397879448. Nitin then made a phone call on 12.08.2013 at about 11:00 p.m. during the night and said that they were to go to Gurgaon at 04:00 a.m. in the morning and in case she did not come, he would get her child killed. Then he on the phone called her downstairs in the morning on 13.08.2013 at about 04:00 a.m. He left her and her son at the boundary of village Jhadoda and said that she should proceed to Gurgaon and he would follow her so that nobody

suspects her in the village. The prosecutrix due to fear from Nitin, reached IFFCO crossing at Gurgaon. After she came, her in-laws lodged a report with the police of Police 'chowki' Dahina to the effect that she was not traceable. The police on the basis of suspicion questioned Nitin and he disclosed the entire story to the police. Nitin then came to IFFCO 'chowk' Gurgaon at about 02:00 p.m. and said that the police had got to know and it was just reaching there. She was asked to give only that statement which he would tell her to give and he had spoken with the police.

It is further stated by the prosecutrix that on reaching police 'chowki' Dahina due to fear of Nitin and fear for her child being killed, besides, the social stigma, she wrote whatever the police wanted her to write. Now, she had disclosed whatever had happened with her to her husband and his family. Therefore, it was requested that a case be registered against Nitin for committing sexual abuse and holding out threats to life and legal proceedings be started immediately for which she would be grateful.

ASI Anil Kumar (PW9) on getting information about the application (Ex.PN) moved by the prosecutrix before the Superintendent of Police reached the SP Office, Rewari. Lady Constable Mamta (PW7) was called there. He along with the lady constable took the prosecutrix to the Court Complex at Rewari and an application Ex.PR was filed for recording the statement of the prosecutrix. Smt. Lalita Patwardhan, the learned Judicial Magistrate 1st Class, Rewari on 16.08.2013 recorded on oath the statement (Ex.PO) of the prosecutrix. She levelled the same allegations as had been made in the application (Ex.PN). Certified copy Ex.PK of the statement that was recorded was supplied to ASI Anil Kumar

who sent it to the police station through EHC Dhanraj (PW4) for further necessary action.

On the said application (Ex.PN), the Superintendent of Police asked the SHO Police Station Khol proceed under Section 164 of the Code of Criminal Procedure ('Cr.P.C.' - for short), besides, sections be added and re-arrest be made.

ASI Hari Singh (PW6) on receiving certified copy (Ex.PK) of the statement of the prosecutrix at the police station through HC Dhanraj (PW4) added the offence under Section 376 IPC and DDR No.16 dated 16.08.2013 was recorded in this regard. Special report of the case was sent to the Illaqa Magistrate and the higher police officials through HC Dhanraj (PW4).

ASI Anil Kumar (PW9) along with the Lady Constable Mamta (PW7) took the prosecutrix to General Hospital, Rewari for her medical examination. Dr. Renu Verma, Medical Officer, General Hospital, Rewari (PW1) conducted the medico-legal examination of the prosecutrix. The doctor after conducting her medical examination handed over to ASI Anil Kumar a sealed parcel containing the swab and underwear of the prosecutrix along with sample seal and paper. The parcel and papers were taken in possession vide recovery memo Ex.PM. ASI Anil Kumar then went to the place of occurrence at village Lishan and prepared a rough site plan Ex.PS of the place where the incident had occurred. The statements of Sunil i.e. the husband's elder brother of the prosecutrix and Lady Constable Mamta (PW7) were recorded. The statement of EHC Dhanraj (PW4) was also recorded. On return to the police station, the case property was deposited with the MHC.

ASI Mahesh Kumar (PW3) on 24.08.2013 prepared the scaled site plan of the place of occurrence. His statement was recorded. The accused was rearrested on 14.09.2013. He was taken to General Hospital, Rewari for his medical examination and his medical examination on police request Ex.PG was conducted by Dr. Yogesh Sanwariya, Medical Officer, General Hospital, Rewari (PW5). The doctor handed over to ASI Anil Kumar a sealed parcel with the seal of 'DV' containing the underwear of the accused along with sample seal and papers. These were taken in police possession vide memo Ex.PS. The case property on return to the police station was deposited with the MHC. The statements of MHC Manoj and Constable Krishan were recorded.

After completion of investigation, police report was prepared by Sub Inspector/SHO Narender Singh (PW2) and filed in the Court of the learned Judicial Magistrate 1st Class, Rewari on 03.10.2013. The learned Magistrate from perusal of the documents and material on record was of the view that prima facie case for the offences punishable under Sections 294, 506, 363 and 376 IPC was made out. Since the offence punishable under Section 376 IPC had been alleged to be committed, it was observed that the said offence was exclusively triable by the Court of Session, the case was committed to the learned Sessions Judge on 08.10.2013.

The learned Sessions Judge, Rewari vide order dated 15.10.2013 framed charges against respondent No.2 on the allegation that firstly on 12.08.2013 and thereafter in the area of village Lishan respondent No.2 forcibly committed sexual intercourse with the prosecutrix and thereby committed an offence under Section 376 IPC. Secondly on 23.08.2013 in the area of village Lishan, he kidnapped the prosecutrix with an intent that

she would be forced to illicit intercourse and thereby committed an offence under Section 363 IPC and thirdly on the same dates and place he criminally intimidated the prosecutrix and thereby he committed an offence under Section 506 IPC. The respondent No.2 heard and understood the charges and pleaded not guilty and claimed trial.

In order to establish its case, the prosecution examined as many as nine witnesses. Dr. Renu Verma, Medical Hospital, General Hospital, Rewari (PW1) medico-legally examined the prosecutrix. She had seen the FSL report (Ex.PA) after the medical examination of the prosecutrix and in her opinion, the possibility of forceful penetration could not be ruled out. Sub Inspector Narender Singh, SHO, Police Station Khol (PW2) prepared the police report under Section 173 Cr.P.C. and he deposed in this regard. ASI Mahesh Kumar (PW3) prepared the scaled site plan (Ex.PE) on the demarcation of the prosecutrix and he also deposed in this regard. Head Constable Dhanraj (PW4) was examined. He stated that he took the prosecutrix and got her statement recorded under Section 164 Cr.P.C. before Smt. Lalita Patwardhan, learned Judicial Magistrate 1st Class, Rewari on 16.08.2013. Besides, he got Nitin (respondent No.2) medico-legally examined at General Hospital, Rewari. Dr. Yogesh Sanwariya, Medical Officer, General Hospital, Rewari (PW5) was examined. He conducted the medical examination of Nitin (respondent No.2) and gave opinion that there was nothing to suggest that he was incapable of performing sexual intercourse. ASI Hari Singh (PW6) stated that he recorded the FIR (Ex.PJ) on 13.08.2013. Besides, on receipt of the copy of statement (Ex.PK) of the prosecutrix recorded by the learned Judicial Magistrate Ist Class, Rewari under Section 164 Cr.P.C. on

16.08.2013, he added the offence under Section 376 IPC. Lady Constable Mamta (PW7) was examined. She had accompanied the prosecutrix for her medico-legal examination. The prosecutrix (PW8) was examined and she deposed regarding the allegations that she had levelled. ASI Anil Kumar (PW9) deposed regarding the investigation conducted by him in the case. Besides, documents including the FSL report (Ex.PA) were tendered in evidence.

The statement of Nitin (respondent No.2) in terms of Section 313 Cr.P.C. was recorded. He stated that he was innocent and had been falsely implicated in the case after due deliberations. Initially, the FIR registered against him for the offences under Sections 294 and 506 IPC. Thereafter, Section 363 IPC was added on the basis of a false complaint. He was granted bail in respect of the offences under Sections 294, 506 and 363 IPC. Thereafter, Section 376 IPC was wrongly added against him. He had never raped the prosecutrix. He had never done anything wrong with her. It is further stated that she desperately fell in love with him although she was married and quite mature. She was forcing him to elope with her and she left her house at her own sweet will along with her articles. She had been constantly calling him from mobile Nos. 8397879448 and 9467639842 on his mobile Nos.8397879449 and 9034876274 at her own sweet will from mid 2012. The call details of the said numbers would substantiate this fact. After the conduct and feelings of the prosecutrix were exposed before her in-laws, a false case had been registered against him by the prosecutrix at the instance of her in- laws. In defence, Nitin (respondent No.2) got exhibited the call details (Ex.DB) of mobile No.8397879449 and the call details (Ex. DC) of mobile No.8397879448.

The learned trial Court in terms of its impugned judgment dated 04.03.2014 considered the question whether respondent No.2 committed rape on the prosecutrix and whether respondent No.2 had criminally intimidated and kidnapped her. After considering the evidence and material on record, the learned trial Court acquitted respondent No.2 of the offences for which he was charged. Aggrieved against the same, the prosecutrix has filed the present appeal.

Learned counsel for the appellant has contended that the learned trial Court has failed to appreciate the statement of the prosecutrix made in Court, in which she clearly states that respondent No.2 had committed rape by threatening her.

We have given our thoughtful consideration to the matter. The prosecutrix while appearing as PW8 submitted on the lines of her complaint. She *inter alia* stated that the accused was her neighbour. He had forcibly given a mobile handset with sim No.8397879448 about 2½ months before the incident. He told her that she should not disclose this to anybody. He used to talk to her on the mobile given to her from his No. 8397879449. The prosecutrix out of fear would respond whenever he called. He called her on her mobile on 12.08.2013 at about 11:00 p.m. and forced her to leave her house. Then he again called her at 03:00 a.m. on 13.08.2013 and asked her to accompany him. On his asking, she took cash, the ATM card and her son with her. The accused met her outside her house. He dropped her and her son on his bike on the outskirts of village Jadhoda. He directed her to reach Gurgaon stating that he would join her there later at IFFCO 'chowk' so that the villagers may not suspect him. Then he called her on the mobile at 10:00 a.m. and asked as to where she

was. She told him that she had reached IFFCO 'chowk' Gurgaon. He said that he would be reaching there soon. When her family members noticed her absence at about 06:00 a.m., they lodged a report with the Police Post Dahina. They suspected that the accused (respondent No.2) had a role to play. The accused was called by the police. The police officers from Dahina Police Post along with the brother-in-law ('jeth') of the prosecutrix came to IFFCO 'chowk' Gurgaon at about 02:00 p.m. The accused (Nitin respondent No.2) approached her at IFFCO 'chowk'. He was followed by the police officers and her brother-in-law ('jeth'). He told the prosecutrix that the police was coming behind him and that she was to make a statement as per his directions failing which she would be killed. Immediately thereafter the police officers and her brother-in-law ('jeth') came there. They brought them to Police Post Dahina where she moved an application (Ex.PI). On reaching home, she disclosed everything to her mother.

The prosecutrix then appeared before SP Rewari on 16.08.2013 and moved an application (Ex.PN). The document being exhibited was objected to on the ground that the subsequent signed statement would be hit by Section 162 Cr.P.C. The objections was kept open to be decided on merit at the time of arguments. The prosecutrix was produced before the learned Judicial Magistrate 1st Class, Rewari where her statement (Ex.PO) was recorded. She stated in detail everything that had happened with her.

It is further stated by the prosecutrix (PW8) that in fact about three months before August, 2013 when she was going to feed the cattle, the accused (respondent No.2) came and dragged her inside a room at the plot. There he forcibly committed sexual intercourse with her. He after

raping her, held out a threat that if she disclosed this to anybody he would get her child kidnapped and get him killed. Due to fear, she did not tell anything to anybody. Thereafter, when she would be alone at her house or at the plot, he would come and have sexual intercourse with her. This happened on 9/10 occasions. Last time it had happened was on 10.08.2013 at about 04:00 a.m., when she had gone to the plot to feed her cattle. Even then he was throwing slips in her house whenever she was alone. These slips were Ex.P2 to Ex.P10 on which she identified the handwriting of the accused. She was medico-legally examined.

In cross examination the prosecutrix *inter alia* stated that she was a graduate and had written the application (Ex.PI) at Dahina Police Post in the evening on 13.08.2013. This was written by her out of fear as the accused had threatened her. He had told her not to state the truth as he had already spoken to the police. This was why she did not narrate the truth in the application Ex.PI and narrated everything later to her mother. The application (Ex.PI) did not contain the complete details. The portion 'A' to 'A1' in Ex.PI, it is stated, was not what the accused had directed her to state and she had stated this on her own. The said portion 'A' to 'A1' of Ex.PI is to the effect that about 2½ months earlier Nitin had forcibly given her a mobile sim No.8397879448 and had started having obscene conversations with her on her phone from phone No.8397879449. He further said that in case she disclosed this to anybody then he would kill her. It is further stated by the prosecutrix that the portion 'B' to 'B1' in Ex.PI was not what the accused had directed her to state and she had also stated this on her own. Portion 'B' to 'B1' is to the effect that on 12.08.2013 during the night at about 11:00 p.m. Nitin had called her on phone and he

forced her to run away from home. Then he telephoned and asked her to run away from home on 13.08.2013 at about 03:30 a.m. She then got her luggage, money and ATM card. She voluntarily stated that these portions were stated by her in response to the questions put by the police officer as to from where she got the sim etc. She had written the complaint (Ex.PI) on the asking of the police official. The police officers had simply asked her as to under what circumstances had she left and then immediately she was asked to write the complaint. At that time, none from her family was present there in the room although her brother-in-law ('jeth'), her husband and father-in-law were present in the police post outside that room. She had not stated in Ex.PI that out of fear she used to respond to the accused whenever he called her on the mobile. She had not stated in Ex.PI that she was forced by the accused to leave home.

At the said stage, the learned trial Court noticed that the next question could not be completed and the prosecutrix blurted out 'no'. She was advised to first hear the question and then respond. It is stated that she had in Ex.PI stated that the accused had told her to take cash and ATM card along with her while leaving the house.

The son of the prosecutrix was sleeping with her on 13.08.2013. Her husband had gone to visit her maternal uncle at village Mundiya Khera. Apart from No.8397879448, she did not have any other mobile. She voluntarily stated that there was another mobile at her residence. It had a BSNL sim. She did not remember its number. Her family members used to talk to her on that BSNL mobile number and not on No. 8397879448. Her brother-in-law ('jeth') and his wife ('jethani') were present at the house downstairs on 13.08.2013. She had her room on the

first floor. Her mother-in-law was in the old house, which was about 1/2 minutes walk from their house. She did not remember where her father-in-law was on that day. In routine, her father-in-law used to stay in the fields. She could not recollect how many times she had called the accused from mobile No.8397879448. She voluntarily stated that the phone remained with her for about 20/22 days. At times he would take it back and would again hand it over to her. She could not recollect the dates when he gave it to her or took it back or again gave it back. She may have called him on 15/16 occasions. At times he would call her, she would take his call but the moment anybody came around she would discontinue the talk and keep the mobile without switching it off. On some occasions, she would forget to re-continue the talk and he would come and signal to her to pick up the phone. It is stated as wrong to suggest that she had made not less than 300 to 400 calls to the accused from mobile No.8397879448. At the said stage, the counsel for the accused asked the prosecutrix about mobile No.9467639842 and she replied that it was the mobile being used at her residence. She voluntarily stated that there was another mobile No.9466586087 also. It is stated as correct that sim No.9467639842 was in the name of her mother Rajesh Devi. She was not aware as to who was using sim No.9034876274. She never talked from mobile No.9467639842 to mobile No.9034876274. It is stated as wrong to suggest that she had been calling from mobile No.9467639842 to mobile No.9034876274 since September, 2012.

She further states that even before 13.08.2013, her in-laws had suspected relations between her and the accused. Her husband never beat her on this issue. There was no dispute/quarrel between her and her

husband. Prior to the incident, her family and family of the accused were on visiting terms, which stopped after 13.08.2013. Apart from the ATM card, she had carried her purse, one suit and a suit for her son. No villager saw her leaving the village on 13.08.2013. She at least did not encounter anybody. She was covering her face with a 'chunni' when she left home. At Jhadoda the accused made her board a jeep which took her to IFFCO 'chowk' Gurgaon. There were two-three other boys in that jeep. She did not know who owned the jeep. She did not even know the number of the jeep or the identity of its driver. She could not recollect the time when she reached IFFCO 'chowk'. It may be 09:00 or 10:00 a.m. She may have made two-three calls to the accused from IFFCO 'chowk'. The police had come to IFFCO 'chowk' in a vehicle. Her brother-in-law ('jeth') was accompanying the police officer in that vehicle. The accused had approached her about ten minutes before the police vehicle came there. He had come on foot. She did not know on which vehicle had he come. Till the date of her deposition, she was unaware whether the accused had come to IFFCO 'chowk' in a police vehicle or in some other vehicle. She had not seen the missing report lodged by her in-laws. She made no effort to lodge a complaint with the police from Dahina at IFFCO 'chowk'. Immediately on arrival of the police they left IFFCO 'chowk' for Police Post Dahina. She did not notice anybody informing her family members about her recovery. She went to her parental home from the police post on 13.08.2013 and from there she came straightway to the Court on 16.08.2013. Her father had taken her from Police Post Dahina. It is stated that after disclosing the entire facts to her mother on 13.08.2013 she made

a telephone call to her husband and disclosed everything to him on 13.08.2013 itself. The police officers at Dahina Police Post had told them that her statement would be recorded before the DSP the next day but they did not receive any information and then they came to Rewari on their own on 16.08.2013. It is stated as wrong to suggest that her father-in-law used to sleep at the plot where they tethered their cattle. She did not know whether anybody ever observed or saw the accused visiting that plot or her house. Whenever the accused came, he would stay there for hardly five to seven minutes within which he would have sexual intercourse with her. Once she had sustained injuries on her side. It was an abrasion. Her husband was not residing there, therefore, there was no chance of his having noticed that injury. Her husband may have visited their village on vacations/holidays totalling about 1½ months in 2013. She did not remember the dates on which the accused had sexual intercourse with her. When he committed sexual intercourse with her on 10.08.2013, she did not sustain any injury. It is stated as wrong to suggest that the accused never had sexual intercourse with her. It is stated as wrong to suggest that the accused had not committed any wrong with her at any point of time. It is stated as wrong to suggest that she had desperately fallen in love with the accused and was forcing her to elope with him. It is stated as wrong to suggest that she had left her home at her own. It is also stated as wrong to suggest that after her antecedents were exposed, she had introduced a coloured version after due deliberations under pressure from her in-laws. It is also stated as wrong to suggest that she was deposing falsely.

The call records (Ex.DB and Ex.DC) that have been tendered in evidence would show that there had been frequent exchange of calls and

SMS between the appellant and respondent No.2. The call details (Ex.DB) run into about sixteen pages printed on both side and the call details (Ex.DC) are on 14 pages also printed on both sides. The exchange of calls are from both the sides i.e. from respondent No.2 to the appellant and also from the appellant to respondent No.2. The learned trial Court with respect to the call details has held it to be proved that on 12.08.2013 there were 23 calls exchanged between the prosecutrix and the accused starting from 03:58 till 23:57 hours. All these calls were made by the prosecutrix from mobile No.8397879448. Then there were fifteen calls exchanged between mobile Nos.8397879448 and 8397879449 on 13.08.2013. The starting point was 01:29 hours and the last call was at 11:57 hours. From that point of time till 03:07 hours all but one call were made from mobile No.8397879448 to mobile No.8397879449. The first call exchanged between these numbers after 03:07 hours was at 04:45 hours followed by a call at 04:46 hours. Both these calls were made from mobile No.8397879448 to mobile No.8397879449. The first call made by the accused from mobile No.8397879449 to mobile No.8397879448 after 01:56 hours was at 04:47 hours. Many calls made between 12.08.2013 (03:58 hours) and 13.08.2013 at 03:07 hours were of long duration. Even between 04.08.2013 from 21:37 hours and 11.08.2013 till 23:32 hours there were only two outgoing calls from mobile No.8397879449 i.e. of Nitin (respondent No.2) to mobile No.8397879448 of the prosecutrix against more than 200 incoming calls. It was observed by the learned trial Court that such large number of calls could not have been made by a person who was under fear. It was also observed that the allegation that

the accused had called her on 12.08.2013 at 11:00 p.m. and then on 13.08.2013 at 03:00/04:00 a.m. to force her to leave her matrimonial home was not substantiated inasmuch the only outgoing call from mobile No.8397879449 of Nitin (respondent No.2) to mobile No.8397879448 of the prosecutrix between 12.08.2013 at 03:58 hours and 13.08.2013 at 03:07 hours was at 01:56 hours and the duration of the said call was hardly 3 seconds. It was held that apart from falsifying the allegations of the prosecutrix, the call details record proved that it was she, who was in regular touch with the accused (respondent No.2). Therefore, the defence that she was pressing upon the accused to help her in eloping was probable.

The call details which have been mentioned and considered by the learned trial Court indeed go to show that the prosecutrix had been frequently calling respondent No.2. Besides, it is to be noticed that the husband of the prosecutrix was serving in the I.T.B.P. and he used to come home during holidays/vacations for a month or so. There is nothing to show that the prosecutrix was under any kind of fear from the accused (respondent No.2) to go with him. Besides, when she left her matrimonial home, she took with her not only her luggage and ATM card but also her minor child. This indeed give an insight into the mind of the prosecutrix that she intended to leave the home for good and be with respondent No.2.

As regards the medical evidence Dr. Renu Verma (PW1) in her deposition in Court states that she had seen the FSL report (Ex.PA) and her opinion was that possibility of forceful penetration could not be ruled out. The medical examination of the prosecutrix was conducted by Dr. Renu Verma (PW1) on 16.08.2013. She gave her report (Ex.PD) in this

regard. On the basis of the said report, she deposed an affidavit (Ex.PD) on 03.12.2013 which was tendered in evidence by her while appearing as PW1. In the affidavit (Ex.PC), it is *inter alia* stated:

“On examination no mark of fresh injury seen on any part of the body. Breast were pendulous. No injury seen. The LMP on 15.08.2013. LD-14 months back. Per abdomen soft. P/V-Vagina admits two fingers easily, uterus normal in size. Retroverted cervix upward fornix were free. Menstrual blood were present over gloves during PV examination. Sample taken and handed over to police.”

An opinion was given that the possibility of forceful penetration could not be ruled out and that final opinion would be given after FSL report. The FSL report (Ex.PA) examined the following articles:

“Sealed cloth parcel containing exhibit-1a to 1c stated to be of _____ (the prosecutrix).

Exhibit-1a. Four microscopic glass slides;

Exhibit-1b. Two cotton wool swabs on sticks each kept in separate glass test tube described as swab;

Exhibit-1c. One dirty green underwear;

Sealed cloth parcel containing exhibit-2 stated to be of Nitin.

Exhibit-2. One dirty blue underwear.

LABORATORY EXAMINATION

Laboratory examinations were carried out to detect the presence of semen on the exhibits performing

chemical test and microscopy. Based on these examinations, the results obtained are given below:-

1. Semen could not be detected on any of the exhibits mentioned above.”

A perusal of the FSL report (Ex.PA) shows that it does not in any manner help the prosecution case; however, the final opinion that has been given by Dr. Renu Verma (PW1) after seeing the FSL report was to the effect that possibility of forceful penetration could not be ruled out. In fact, the earlier opinion given in the medical examination report (Ex.PD) and reiterated in the affidavit (Ex.PC), does not mention as to on what basis it was opined that possibility of sexual forceful penetration could not be ruled out especially when there was no mark of injury seen on any part of the body and the uterus is mentioned normal in size; besides, the retroverted cervix upward fornix was seen. These do not indicate any forceful penetration. A final opinion was to be given from the FSL report. In the FSL report (Ex.PA) there is nothing to indicate forceful penetration.

It may be noticed that in the first version given by the prosecutrix in the application (Ex.PI), she makes no mention of any forcible sexual intercourse with her. The learned trial court observed that initially there was no allegation of rape and the said allegation was levelled three days after registration of FIR. The prosecutrix has deposed that she was recovered at Gurgaon and was brought to the Police Post Dahina. From there she straightway went to her parental home and remained there till 16.08.2013. Then she went to the Court complex Rewari and got the complaint (Ex.PN) typed. She had disclosed the entire facts to her mother and also made telephone calls to her on 13.08.2013.

The facts and circumstances of the case would show that the offences for which respondent No.2 was charged are not made out. Call details (Ex.DB and Ex. DC) that have been placed on record show that respondent No.2 and the prosecutrix were regularly in touch with each other from 15.06.2013 to 13.08.2013. Some of the calls were of long durations of thirty minutes and there were reciprocal calls made by one of them to the other. In fact more calls are shown to have been made by the prosecutrix to Nitin (respondent No.2). The prosecutrix in her cross examination accepts that she made calls to him. Therefore, it cannot be said that the mobile sim was forcibly given by respondent No.2 to the appellant. Besides, the call details between the prosecutrix and Nitin (respondent No.2) discredits the prosecution case that the prosecutrix was forced or pressurized to leave her matrimonial home at the behest of Nitin (respondent No.2). The prosecutrix was also found alone at IFFCO 'chowk', Gurgaon when the police had reached there. She at that time had a mobile phone, which was given to her by Nitin (respondent No.2) who was then not with her and even otherwise was not with her throughout. At that time she could have called anybody including her husband but for reasons best known she did not. This also discredits the prosecution case that the prosecutrix was under a threat to leave her home. The prosecutrix in fact had not only collected cash, ATM card etc. for leaving her home but she also had her child with her. This would indeed shows that the allegation of threat being given to her by Nitin (respondent No.2) to leave her home or else she would be killed is not made out.

The learned trial Court also observed that a question which arose was as to what held back the prosecutrix from 13.08.2013 to 16.08.2013

for lodging a report when she had already disclosed everything to her mother and her husband. It was observed that the prosecutrix had tried to introduce a new version that the police officer at Dahina had told them that her statement would be recorded before the DSP on the next day but when no information was received, she along with her family members came to Rewari on her own on 16.08.2013. The inference to be drawn from this was that on 13.08.2013 itself at the very first instance after recording the FIR, the prosecutrix was informed by the police that her statement would be recorded before the DSP on the next day and even if that was so, nothing stopped her on 13.08.2013 itself from disclosing the fact of rape being committed on her. It was noticed that it appeared that the allegation of rape was not levelled in the first instance and it was levelled after three days. It was observed that from the call details (Ex.DB and Ex.DC), it had been proved that there had been regular exchange of calls between the accused (respondent No.2) and the prosecutrix and by no stretch of imagination could such be the position in case of force/coercion.

It is to be noticed that the prosecutrix is a graduate, she was mature and married. Her husband was working in ITBP. She had been living with her parents-in-law. Her husband had been coming on long leave. In these circumstances, if she claims that she left home under the fear of the accused, her stand is not liable to be accepted especially in view of the call details on record. By referring to the call details between the parties the learned trial Court did not accept the prosecution case and this was rightly so as it was the correct position.

After going through the judgment and order of learned trial Court, there is nothing to dislodge the findings that have been arrived at.

In the circumstances, we find no merit in the appeal and the same is accordingly dismissed.

(S.S. Saron)
Judge

06.10.2015
manoj/A.Kaundal

(Amol Rattan Singh)
Judge

This is one of some cases received by me from my learned brother on 06.01.2018. It is being signed by me even now, despite him having demitted office after 'retirement', the detailed judgment being in consonance with what was pronounced by us in Court when his Lordship was very much holding office. In fact, it needs to be stated that in the other cases received, where I have agreed with the judgment of my brother, an identical separate order (as this one) has been passed by me, there being no reason to pass different orders in identical situations, where on merits I agree with his judgments (in each separate case).

Thus, the detailed judgment in fact giving effect to what was pronounced, it would be unfair, in my opinion, to put the matter up for rehearing, especially in view of what has been held first by the Privy Council in **Firm Gokal Chand Jagan Nath v. Firm Nand Ram Das-Atma Ram** AIR 1938 PC 292 and subsequently by the Supreme Court in **Surendra Singh and others v. State of Uttar Pradesh** AIR 1954 SC 194 and **Iqbal Ismail Sodawala v. The State of Maharashtra and others** (1975) 3 SCC 140.

In *Firm Gokal Chand*, it was held by their Lordships as follows:-

“A further point was raised by the appellants. They urged that the judgment of the High Court appealed from was not a valid judgment because it failed to comply with Order 41, Rule 31, Civil Procedure Code. The relevant facts on this issue are that the hearing in the High Court was before two Judges, Harrison and Agha Haider JJ., and was actually delivered by the former Judge, the latter agreeing. The judgment was delivered on 22nd February 1933, but Harrison J. went on leave before signing the judgment, which was signed by Agha Haider J., the Deputy

Registrar appending a note that Harrison J. had gone on leave before signing the judgment he delivered. Order 41, Rule 31 requires that the judgment of the Appellate Court shall be in writing and shall state various matters, and “shall at the time that it is pronounced be signed and dated by the Judges or by the Judges concurring therein.”

8. The Rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed the Rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The Rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required; to comply with for that object. No doubt in practice Judge do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity. But in truth the difficulty is disposed of by Sections 99 and 108. Civil Procedure Code section 99 provides that no decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. That Section comes in the part dealing with appeals from original decrees. But Section 108 applies the same provision to appeals from appellate decrees and it is always in the discretion of the Board to apply the principle on appeal to His Majesty in Council. In their Lordships' judgment the defect here was an irregularity not

affecting the merits of the case or the jurisdiction of the Court, and is no ground for setting aside the decree.”

That of course was a matter pertaining to a civil case, but the judgment in *Surendra Singh* was in the case of a criminal appeal before the Allahabad High Court. In that case, after having signed the draft of a judgment that had been reserved and sending it to the other member of the Division Bench, the hon'ble Judge who had sent the draft (Bhargava, J.) unfortunately died before the judgment was pronounced.

In such a situation, their Lordships of the Supreme Court held that the judgment subsequently pronounced by Kidwai, J. could not be held to be a valid judgment and therefore the death sentence upheld in the case of one of the appellants and the sentences for lesser periods for different offences in respect of the other appellants, could not be held to be operative and that hence, the appeals would have to be reheard by the High Court. Thus, in that case the judgment was never actually pronounced by Bhargava, J. before he died and what was signed and sent by him to Kidwai, J. was a draft judgment. Therefore, it was held that it could not be presumed that Bhargava, J., (had he remained alive), could not have changed his mind before pronouncing the judgment.

In the present case the judgment having been duly pronounced in Court, to the effect that the appeal of the appellant is dismissed, the situation as existed in *Surendra Singhs'* case (supra) is not applicable.

In *Sodawalas'* case (supra), it was not a judgment in appeal that was in question but the judgment of the trial Court itself, which had been pronounced in Court but had not been delivered after signature and transcription, to the accused.

Referring to the judgment in *Surendra Singhs'* case as also to *Firm Gokal Chand*, it was held that the learned Sessions Judge not appending his signatures to the judgment at the time it was pronounced, due to it not having been transcribed, was a procedural irregularity which would not vitiate the conviction of the accused.

In the present case, though there is no issue of any transcription from one language to another, but nonetheless, the judgment drafted by my learned brother being, to repeat, in elaboration of and giving reasoning for what was pronounced in Court, in my opinion, it would be appropriate to issue the judgment formally even now, though a very long time has elapsed since its pronouncement.

It needs to be noticed here that in **Vinod Kumar Singh v. Banaras Hindu University and others** (1988) 1 SCC 80, it was held by the Supreme Court that a judgment which has been pronounced but not signed, can be even modified, if there are adequate reasons for the same, in which situation, the matter should be placed for further consideration, upon notice to parties.

That situation does not arise in the present case as the detailed judgment is not different to the order pronounced in Court on 06.10.2015.

Consequently, I agree with the judgment of my learned brother
S.S. Saron, J.

(AMOL RATTAN SINGH)
JUDGE

January 18, 2018
dinesh