

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.376 of 2015

Arising Out of PS.Case No. -87 Year- 2013 Thana -MAUZAHDIPUR District- BHAGALPUR

SUMIT KUMAR @ SUMIT KUMAR MANDAL, SON OF SRI SITA RAM SINGH, RESIDENT AT VILLAGE- BADI DHANKAR, P.S.- SABOUR, DISTRICT- BHAGALPUR.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

Appearance:

For the Appellant/s : Mr. S.K. Lal, Adv.
Mr. Alok Kumar, Adv.
Mr. Birendra Kumar Singh, Adv.
For the State : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 29-11-2017

Sole appellant Sumit Kumar @ Sumit Kumar Mandal has been found guilty under Section 376 IPC and sentenced to undergo R.I. for ten years as well as to pay fine appertaining to rupees two lacs and in default thereof to undergo S.I. for two years additionally by the Third Additional District & Sessions Judge, Bhagalpur in Sessions Trial No.530/2014 vide judgment of conviction dated 22.05.2015 and order of sentence dated 23.05.2015.

2. On 23.06.2013 Md. Allauddin Ansari (PW.8) filed written report disclosing therein that his minor daughter (Name withheld) has been kidnapped on 17.06.2013 near Exchange Office. It has also been disclosed that she was employed at S.A.P. Company, having office at mohalla-Sikandarpur. She used to return at her house after office hour. When she did not return on 17.06.2013 then thereafter, he gone in search of her, inquired



from other employees of the company who have not answered satisfactorily. It has further been disclosed that one Enamul Sheikh who was regular visitor at the company office and who provided training to the employees at Patna and for that purpose accompanied the employees who were given training by Max Rupa Health Insurance Company, Frazer Road, Patna. It has further been disclosed that during course of search out, they have seen one mobile no.9122017342 scribe in a copy belonging the victim to whereupon he dialed and then, came to know that it belongs to Usha Devi, wife of Late Vijendra Chaudhary, resident of mohalla-Gariwan, Bari Nagla, P.S.-Malsalami, Patna, but her sons Rohit Chaudhary and Ravi Chaudhary were using the same. It has also been disclosed that conduct of Enamul Sheikh also not been found above board as, he had snapped photo of his daughter and was seen by many others. In the aforesaid background, the informant had alleged that these three persons are responsible for kidnapping of his daughter.

3. On the basis of the aforesaid written report Mojahidpur P.S. Case No.87/2013 was registered under Section 366A of the IPC and during course thereof, the victim was recovered, her statement under Section 164 was recorded and during course thereof, she had put allegation solely against the appellant who, at the relevant time, was manager whereupon, the charge sheet was submitted against the appellant alone exonerating the others whereupon, trial commenced and concluded meeting with ultimate result, subject matter of instant appeal.



4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 Cr.P.C is that of complete denial. However, neither oral nor documentary evidence has been adduced on behalf of appellant.

5. In order to substantiate its case prosecution had examined altogether ten PWs, PW.1-Putul Ghosh, PW.2-Md. Asharaf Karim, PW.3-Kanchan Devi, PW.4-Vikash Kumar Mandal, PW.5-Bibi Rani, PW.6-Farhad Jaha, PW.7-Rukhashar Vilki, victim (name withheld), PW.8-Md. Allauddin Ansari, PW.9-Dr. Seema Sinha, PW.10-Mukeshwar Prasad along with exhibits, Ext.1 Series-Signature of respective witnesses over seizure list as well as signature of victim over statement under Section 164 Cr.P.C. Ext.2-Written report, Ext.3-Injury report, Ext.4-Seizure list, Ext.5-Formal FIR. Defence though had not produced oral evidence but had exhibited Sanha No.45/2013 of Isakchak P.S. as Ext.A having on the basis of information furnished by the victim at an earliest.

6. It has been submitted on behalf of learned counsel for the appellant that from the evidences available on the record, it is apparent that the version of prosecution suffers from so many improbabilities infirmities and on account thereof, did not justify the finding having been recorded by the learned lower court. In order to substantiate its case, it has been submitted that day of occurrence happens to be 17.06.2013 while the case has been registered on 23.06.2013 and the delay, is not at all properly explained. In criminal case delay in institution of a case happens to be always subject to close scrutiny. After having such exercise,



it is apparent that this case has purposely been filed in order to grapple the appellant for undesired advancement.

7. Furthermore, it has also been submitted that occurrence is of dated 17.06.2013. If the version of the victim is taken into consideration, then in that circumstance, its reliability goes away. She had stated that she was kidnapped in the evening of 17.06.2013. The prosecution party that means to say the informant as well as her Mausi, PW.6 who also was employed at the same office, had visited the office, found the appellant in his office. None of them had said that appellant became absent from his office. That being so, the assertion of the victim that she was confined at the Bhagalpur itself in a rented house and then was taken to Sahebganj and then was taken to Patna and during midst thereof, she was raped at the end of the appellant is found with no substance. In likewise manner, it has also been argued that none other than PW.7 is witness against the appellant. None had seen the appellant taking away the victim although, victim had said that she along with Nandni (Not examined) left the office, covered some distance and then both two parted with towards their respective houses, and at that juncture appellant was there with motorcycle who directed to sit and victim accordingly obeyed. The aforesaid incident occurred near the house of the victim and on account thereof, might have been seen by the local inhabitants but, prosecution happens to be completely silent on that very pretext.

8. It has also been submitted that from the evidence of the victim, it is evident that victim was taken away by the



appellant on the pretext of some official work which was to be discharged at his office but instead thereof, both of them gone to resident of the appellant which was at the upper floor occupied by so many tenants while at ground floor itself landlord PW.3 as well as PW.4 were residing. She remained there for four days. She availed all kinds of facility. Had there been any kind of deception at the end of the appellant, then in that event, victim would not have allowed herself to accompany him to his rented house instead thereof, would have raised alarm, protested the activity and at least, the other co-tenants, landlord, land lady must have been informed who, would not have allowed a stranger that too a girl being kidnapped and kept at there place. In likewise manner happens to be the activity of the victim while she was taken to Sahebganj on motorcycle, from Sahebganj to Patna and then Patna to Bhagalpur where, she boarded down from a jeep and gone to Isakchak Police Station where she narrated her woe fingering her Mausai and others. However, after having company of her parents she changed herself and dragged the appellant. Even for a moment, considering the appellant to be responsible for the same, the conduct of the victim itself suggest that being major she was a consenting party and that being so, she enjoyed company of the appellant voluntarily out of her free will whereupon, no offence is made out.

9. The learned Additional Public Prosecutor while refuting the submission made on behalf of appellant has submitted that females still are not so confident in order to confront and tackle the situation once she is found under the grip



of her kidnapper. She virtually surrenders and that happens to be reason behind that activity of appellant was not at all protested at the end of the victim and in likewise manner, even during her stay with the appellant. That does not mean that victim was a consenting party. Moreover, when the victim comes in court and depose that she was not a consenting party, then the court, as provided under Section 114A of the Evidence Act will presume that she was not a consenting party unless and until duly substantiated at the end of the accused. Accordingly, the judgment of conviction and sentence impugned is fit to be confirmed.

10. PW.9 is the doctor who had examined the victim on 30.07.2013 and found the following:

“There is no evidence of physical or chemical injury on any parts of the body including the private parts. Two sealed vaginal swab sent to the department of Pathology J.L.N.M.C.H., Bhagalpur for the detection of spermatozoa and urine test for pregnancy. Also sent to the department of Radiologist JLN MCH, Bhagalpur for the X-ray at lateral view of wrist elbow pelvis for age determination and usb of lower abdomen to exclude pregnancy.”

There is no evidence of physical or chemical injury on any part of the body including the private part. Vaginal swab taken out and sent for chemical examination. For ascertainment of age, she was also sent to ossification test and after getting the same she had opined that there was no dead/alive spermatozoa



found in the vaginal swab. Urine test discloses, pregnancy test negative and according to ossification report she happens to be more than eighteen years. So she concluded that there was no evidence of recent intercourse as well as she happens to be more than 18 years of age. The aforesaid finding has not been challenged at the end of both the parties whereupon, the victim is found and held to be major.

11. From the evidence available on the record, it is evident that none other had claimed to be an eyewitness to occurrence. That means to say, what have they deposed against the appellant happens to be on the basis of disclosure having been made by the victim. That being so, first of all the evidence of victim is to be seen.

12. PW.7 had deposed that the occurrence is dated 17.06.2013. She was working at S.A.P. Company of which, Sumit Kumar was the Manager. She used to go office at 09:00 AM and returned back at 06:00 PM. On 17.06.2013 she along with Nandni, another employee were coming on barefoot. After covering some distance, they both parted with. Nandni moved towards her house while she towards her house. When she reached at Gorhatta Chowk, Sumit Kumar came on motorcycle and instructed her to sit over which, she inquired. Then, Sumit Kumar disclosed that there happens to be urgent work at the office. She disclosed that she has to go to house. Evening has fallen over which, Sumit said that he will accompany. He had also disclosed that whether she has got trust over him or not whereupon, she sat over motorcycle and gone along with him. He taken her to his



residence where she stayed for 4-5 days. He used to rape her in night. He used to administer something and then, left for office after closing the door. He used to threaten even to the extent of causing murder. After 4-5 days Sumit taken her to Sahebganj where she stayed for 10-12 days. Then thereafter, Sumit had taken her to Patna on four wheeler where she stayed in a hotel for two days. Then he took back to Sahebganj and then Sahebganj to Isakchak Police Station where he instructed to go to Police Station. She accordingly gone to Police Station. Police inquired. She is not remembering what she had disclosed to the police. Her statement was recorded in court under Section 164 Cr.P.C. Accused has committed rape even at Patna. Identified the accused in dock. During cross-examination at para-4 had stated that the chamber of accused Sumit Kumar was away from their place of sitting. In para-5, she had stated that Sumit Kumar had not directed her to come leaving her sit at any earlier time. In para-6, she had stated that she met with Sumit Kumar. On 03-07-2013 on query made by the Officer-in-charge of Isakchak Police Station she had made statement but she is unable to say whether Sanha No.45/2013 was registered thereupon. In para-9, she had stated that she knew Farhad Jaha who happens to be her *Mausi*. She was also working at the office along with her. In para-8, her attention has been drawn up regarding her statement which she made before Officer-in-charge, Isakchak whereupon Sanha No.45/2013 was registered. In para-9, she had stated that from Isakchak Police Station she was sent to Mujahidpur Police Station along with lady constable. In para-10 she had stated that she had



not gone to the residence of Sumit Kumar since before. It lies at a distance of half kilometer from the office. It was on upper floor. There was two rooms. In para-12, she had stated that the room in which she was kept had a window. She is not knowing whether people were residing adjoining to the aforesaid tenanted portion. She had further stated that she is not knowing whether the doors of the window could be open from inside. Both two rooms were not interconnected rather they have got separate identity. Two independent doors were affixed. In para-13, she had stated that latrine, washroom was outside the aforesaid two rooms. There was no ventilation in the latrine as well as wash room. In para-15, she had stated that she use to go to latrine, washroom after arrival of Sumit Kumar. She remained there for 4-5 days. She was not knowing whether kitchen was there or not but, he had provided the food stuff after bringing from outside. In para-16 she had stated that as she was confused as such, she had not raised alarm nor she made any kind of protest, even failed to knock the door for her help after departure of Sumit who used to visit from office twice or thrice a day. In para-17, she had stated that within half an hour she reached at Sahebganj. During midst thereof, she had not tried to jump from the motorcycle nor had raised alarm. In para-18, she had stated that she stayed at Sahebganj for 10-11 days. The building wherein they stayed had got a courtyard. She is unable to say whether tenants were residing in the building or not. They were occupying two rooms. How many rooms were there, she was unable to say. In para-12, she had stated that she had not met with any outsider at Sahebganj. There was a window in a



room wherein she was staying but, she had not opened the same. In para-20, she had stated that latrine, washroom was in courtyard at a distance of five steps from the room wherein she was. She is unable to say whether it was a common wash room, latrine. In para-21, she had stated that at the time when she was boarding in a vehicle, she had not raised alarm. She was taken to Patna. In the midst of way she had not raised alarm. She had not tried to escape. She had not indulged in grappling with the accused. In para-22, she had stated that she stayed at Patna in a hotel for two days. She met with the Manager, Waiter, Sweeper but she had not spoken anything to them. She had not tried to escape from the hotel. They used to take meal. In para-24, she had stated that she had not sustained injury. They both returned from Patna on four wheeler. While returning from Sahebganj over motorcycle, she had not raised alarm.

13. PW.8 is the Md. Allauddin Ansari, the informant, father of the victim. He had stated that on the alleged date i.e. 17.06.2013 his daughter had gone to her office. She used to return at 06:00 PM. When she had not returned then at 07:00 PM he dialed Sumit. He disclosed that she was to reach at her house as all the staff had gone. Then he contacted Nandni who disclosed that she along with victim jointly returned from the office. Then, thereafter, she gone to her house while victim had proceeded towards her house. Then thereafter, he began to search. On 18.06.2013 he had informed the Mujahidpur P.S. After 3-4 days of the occurrence he had gone to the office of his daughter where found Sumit. He made query from him whereupon he said that he



will also search. After 14-15 days he received telephonic call from Mojahidpur P.S. disclosing that his daughter has been traced out please come to P.S. Then thereafter, he came to P.S. On query police officials had said that after statement of the victim she will be handed over. Then his daughter was taken from Mujahidpur P.S. to court where her statement was recorded. She was medically examined then thereafter, they got the victim. On query she disclosed that Sumit took her away on the pretext of some official work and kept her in a house by the side of office for 2-4 days where she was raped. Then thereafter, she was taken to hither and thither and then to Patna where she was also raped. She was threatened that in case of disclosure she will be murdered. Exhibited the written report. During cross-examination at para-3 he had stated that he met with his daughter at the police station but could not talk. When his daughter was taken to court he had accompanied. In para-4, he had stated that first of all his daughter reached at Isakchak Police Station. He is unaware with the fact that any kind of statement of victim was recorded by the Isakchak Police Station. Then thereafter, there happens to be reference of the aforesaid Sanha and contents thereof. In para-5, he had stated that none had seen the accused taking away the victim.

14. PW.6 is the Farhad Jaha who happens to be *Mausi* of the victim and was also one of the employees of S.A.P. Consultant Pvt. Ltd. Where victim was also employed. She had stated that on 17-06-2017 she had not gone to office. She had further stated that she along with victim used to come to office



together but on the alleged date, she had gone alone. When she did not return up to 06:30 PM then her mother came to her and disclosed that the victim has not come as yet over which, she talked with Sumit who disclosed that victim along with Nandni had already gone. Then thereafter, she talked with Nandni who also disclosed that she along with victim left the office together. After covering some distance, she moved towards her house while victim moved towards her house. Then thereafter, the family members of the victim became perplexed, they gone in search of the victim but could not traced out her. Then thereafter, they have gone to office which was locked. Then they returned back. Again she talked with Sumit and said victim has not come whereupon he disclosed that kindly continue with search. When they insisted that they want to visit his place, whereupon he said that coming to his place will serve no purpose. Meet tomorrow at office and then the action plan will be sorted out. Then thereafter they have gone to police station. Then they returned back. After fifteen days, they received information from Mujahidpur P.S. that victim has come whereupon they have gone there. She remained for 2-3 days and then thereafter she met with her. On query she disclosed that Sumit taken away to his residence where she stayed for 3-4 days then to Patna and then to Sahebganj. She disclosed that she was raped but, she had not disclosed how she had come to police station. At para-4 of her cross-examination she had stated that no occurrence took place in her presence. She had further stated that she had not seen residence of Sumit. She had further stated that victim had disclosed to her that Sumit had taken her away to



Patna on four wheeler. They stayed in a hotel where Sumit had introduced her as his wife. In para-5, she had stated that victim had not disclosed to her that she had tried to free from the clutch of appellant. In para-7, she had stated that she had gone to office on 19-06-2013. Then thereafter she had not gone. On 19.06.2013 only the victim as well as Ashutosh was absent. All the remaining staffs were present. Then there happens to be suggestion relating to the activity incorporated in Sanha No.45/2013. In para-11 she had admitted that she met with Sumit on 19.06.2013 in the office. She had not perceived any abnormal activity. In para-12, she had stated that after seeing Sumit in the office she had informed brother of victim and further requested to come.

15. PW.5 is the mother of the victim. She had stated that on the alleged date her daughter had gone to office. When she does not return then thereafter they began to search. When they could not found then contacted with manager Sumit who disclosed that victim had left office at about 06:00 PM. Even after hectic search when they could not traced out then thereafter instant case has been registered against Sumit on suspicion. After two weeks victim was found near Isakchak Police Station. After coming to house she disclosed that Sumit took her away at his residence and committed rape. She had also disclosed that after administering sedesive Sumit took her away to Patna. She failed to identify the accused in dock as she had not seen him since before. During cross-examination at para-3, she had stated that date of birth of her daughter happens to be 01-01-1994. She had further stated that she had not seen the occurrence. In para-5, she had



stated that her daughter had disclosed that Sumit took her away on train. She had further stated that her husband had lodged case against so many persons.

16. PW.4 is the seizure list witness. He happens to be landlord of Sumit. He had further admitted that police had searched his room in his presence and had seized comb, mirror and cloth. During cross-examination, he had stated that Sumit was residing alone. PW.3 happens to be his wife, another seizure list witness who had stated that police had conducted raid in the room occupied by Sumit as her tenant and nothing was found therefrom.

17. PW.2 is Md. Asharaf Karim who happens to be maternal uncle of the victim. He had stated that his cousin (victim) joined a private institution about 38-40 days ago. She used to return back at 06:00 PM. When she had not returned on 17.06.2013 on account thereof, they all gone in search of her and during course thereof, they also met with Sumit Kumar, Manager of the company who had disclosed that she left at about 06:00 PM. 2-5 days thereafter Sumit called Allauddin Ansari (father of the victim, PW.8) and handed over one letter. He was also accompanying him. After receiving of the letter Allauddin Ansari said to Sumit that kindly inform if anything new comes to his knowledge whereupon, Sumit also disclosed that he on his own will take sincere effort. On the second day, Sumit had informed his brother-in-law Allauddin Ansari and said that a dead body of a girl is lying at village-Jagdispur so kindly go and see. They have requested Sumit to accompany them but he refused. Then



thereafter, they have gone to Jagdishpur but could not found the dead body. Then thereafter, they came to Mujahidpur P.S. and instituted a case. 14-15 days thereafter they received information from Mujahidpur P.S. with regard to recovery of the victim whereupon they have gone there. Then the police officials disclosed that she is coming from Isakchak Police Station. She came after 10:00 AM. After her examination in the court they got the victim. On query she had disclosed that on the pretext of some official work, Sumit took her away to his house and where he gave some sedative and then raped her. Sumit kept her at that place for four days and thereafter, Sumit took her away to Patna. He returned back to office. House of Sumit lies adjacent to the office. Then had stated that out of fear the victim could not escape. During cross-examination at para-4 had admitted that his sister Farhad Jaha was also employed there. In para-5, he had stated that his sister and the victim used to go together. In para-8, he had stated that he had not seen the occurrence. In para-9, he had further stated that case was initially registered against Enamul Sheikh, Rohit Chaudhary and Ravi Chaudhary. In para-18, he had stated that he had visited the office twice. At first occasion all the staffs were present while at second occasion, only Sumit was present.

18. PW.1 is Putul Ghosh who had not claimed identification of Sumit nor substantiated tenancy of Sumit and so was declared hostile.

19. PW.10 is the I.O. who had stated that after registration of Mojahidpur P.S. Case No.87/2013 he was



entrusted with the investigation. He had recorded further statement of the informant, visited the place of occurrence which happens to be the building of Anand Shukla lying at mohalla-Sikandrapur. He further identified the boundary as North-House of Akhilesh Kumar Sinha, South-Road, East-Dristy Medical Hall as sweet shop, West-has not been mention in CD. Then had disclosed with regard to inadmissible piece of evidence with regard to collection of material confidentially regarding marriage of Sumit since before. Then had disclosed that O/c of Isakchak Police Station had informed that victim has come to police station. He had gone there and then took the victim along with lady police constable. Recorded her statement. Got her examined under Section 164 Cr.P.C. As pointed out by the victim he had gone to the place where she was confined. He had recorded statement of the landlord and his wife. Conducted search of the tenanted portion. Then thereafter, there happens to be statement with regard to Vikash and his wife PW.2 and 3. He had further recovered note book, identify card, admit card of I.Sc., photocopy of mark sheet, provisional certificate, registration number, kept in a bag and had exhibited the seizure list (but seized articles were not produced in court). He had also gone to Sikandarpur and recorded statement of Santosh, Putul Ghosh whether Sanjeet Kumar lived as tenant. Then had received confidential information regarding apprehension of accused whereupon he gone there and took possession. Accordingly, submitted charge sheet under Section 366A, 376 of the IPC. In para-2, he had stated that he reached at Isakchak Police Station on 03.07.2013 at about 09:20



AM, victim had arrived at Isakchak Police Station on the same day. He is not aware whether victim had given any kind of statement before the Isakchak Police Station nor with regard to registration of any kind of Sanha. In para-6, he had stated that there was common entrance door of the place where victim had alleged her confinement by Sumit. Landlord as well as other people were residing adjacent to the said room.

20. From the evidence as discussed hereinabove it is crystal clear that victim happens to be major one. It is further evident from the evidence of the victim that she enjoyed company of appellant /accused Sumit for such long duration without any resistance protest as well as without any effort to come out from his grip. Not only this, she gone along with Sumit over motorcycle, covering long distance and even then, no step was taken at her end either to escape or to create obscene situation attracting the mass, facilitating her release. Even her stay at a hotel at Patna where Sumit introduced here as his wife, was without any protest at her end. Not only this, victim as happens to be silent that during course of her company or any time enjoying his company she was coerced, threatened or was shown any kind of weapon endangering her life or was ever assaulted. The most peculiar feature is that she had narrated the whole incident causing minute to minute detail even, admitting her presence at Isakchak Police Station, making query by the police official, statement having been given by her but with regard to contents of the statement she changed herself by stating that she is not remembering what she had stated. It relevancy happens to be on



account of she being alone, and as per her evidence, she was left by the appellant near about police station without having any scope of tutoring/influence either from her parents or from the appellant. The aforesaid statement is under Sanha No.45/2013 of Isakchak Police Station wherein she had arrayed her Mausai to be the main culprit who along with Farhad Jaha kidnapped her. Had there been genuine conduct of the victim, then in that circumstance, there should have been an admission at her end with regard to contents of the aforesaid Sanha with some sort of explanation be adverse to her or to the Sumit Kumar, the appellant.

21. In ***Narender Kumar v. State (NCT of Delhi)*** reported in (2012) 7 SCC 171, it has been held:

“20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, *if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (sic circumstantial), which may lend assurance to her testimony.* (Vide *Vimal Suresh Kamble v.*



Chaluverapinake Apal S.P. (2003) 3 SCC 175 and Vishnu v. State of Maharashtra(2006) 1 SCC 283.)

22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, the prosecutrix making deliberate improvement on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide *Suresh N. Bhusare v. State of Maharashtra(1999) 1 SCC 220.*)

23. In *Jai Krishna Mandal v. State of Jharkhand(2010) 14 SCC 534* this Court while dealing with the issue held: (SCC p. 535, para 4)

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

24. In *Raju v. State of M.P. (2008) 15 SCC 133* this Court held: (SCC p. 141, para 10)

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

The Court however, further observed: (*Raju case (2008) 15 SCC 133, SCC p. 141, para 11*)

“11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication ... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

25. In *Tameezuddin v. State (NCT of Delhi) (2009) 15 SCC 566*, this Court held as under: (SCC p. 568, para 9)

“9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the



appreciation of evidence in a criminal matter.”

22. In ***Rai Sandeep v. State (NCT of Delhi)***, reported in **(2012) 8 SCC 21**, it has been held:

“**22.** In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars



in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

23. In ***Deepak Gulati v. State of Haryana*** reported in ***AIR 2013 SC 2071***, it has been held:

“Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to



misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance”. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, *unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.*”

24. In ***Abbas Ahmad Choudhary v. State of Assam*** reported in **(2010) 12 SCC 115** the Apex Court has held:

“Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1”

25. According to **Jowitt’s Dictionary on English Law** consent means:

“Consent supposes three things, a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind.”

26. In ***Kaini Rajan v. State of Kerala*** reported in **2013 AIR SCW 5455** the Apex Court has held:

“**12.** Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender,



because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. “Consent” is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression “consent”. Section 90, though, does not define “consent”, but describes what is not consent. “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. [See *State of H.P. v. Mango Ram* (2000) 7 SCC 224: (AIR 2000 SC 2798 : 2000 AIR SCW 3095)]”

27. From the evidence as referred hereinabove it is crystal clear that save and except victim none happens to be an eyewitness to occurrence even to kidnapping and whatever they deposed, happens to be on the basis of the disclosure made by the victim, PW.7. Now coming to the evidence of PW.7, less said is better. Staying for such long period along with appellant without any resistance, without any alarm, without any sincere effort to get rid of, without protest without having threatening or facing endanger of her life coupled with the fact that she intentionally



withheld the contents of Ext.A is a circumstance, in the background of her status to be major, with regard to her uncreditworthiness and that being so, the judgment of conviction and sentence recorded by the learned lower court did not find favour. Consequent thereupon, is set aside. Appeal is allowed. Appellant is on bail, hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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