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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 8th May, 2018
Pronounced on: 22nd May, 2018

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CRL.A.20/2018 & CrI.M.(B)No.27/2018

HARISH @ HUNNY

..... Appellant

Through: Mr. A.K. Padhy and Mr G.P.
Thareja, Advocates.

versus

THE STATE GOVT. OF NCT OF DELHI

.....Respondent

Through: Mr.Kewal Singh Ahuja, APP
for State.

AND

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CRL.A.125/2018 & CrI.M.(B)No.234/2018

GAURAV

.....Appellant

Through: Mr. Ajay Burman, Senior
Advocate with Ms.Tanya
Harnal and Mr. Sahil Verma,
Advocates.

versus

THE STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP
for State.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

JUDGMENT

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Dr. S. Muralidhar, J.:

1. These appeals are directed against judgment dated 14th November 2017 passed by the learned Additional Sessions Judge-1, Shahdara in Sessions Case No.240/17 arising out of FIR No.44/12 registered at PS Jyoti Nagar convicting the Appellants for the offences under Sections 363/342/323/376(2) (g) read with Section 34 Indian Penal Code ('IPC') and the order on sentence dated 27th November 2017 whereby:

- (i) For the offence under Section 376(2) (g) read with Section 34 IPC: Gaurav (A-2) was sentenced to rigorous imprisonment for life with fine of Rs.50,000/- and in default of payment of fine, to undergo simple imprisonment for 6 months; and Harish (A-1) was sentenced to rigorous imprisonment for 10 years with fine of Rs.50,000/- and in default of payment of fine, to undergo simple imprisonment for 6 months.
- (ii) For the offence under Section 363 read with Section 34 IPC: both A-1 and A-2 were sentenced to rigorous imprisonment for 5 years with fine of Rs.20,000/- and in default of payment of fine, to undergo simple imprisonment for 6 months.
- (iii) For the offence under Section 342 read with Section 34 IPC: both A-1 and A-2 were sentenced to rigorous imprisonment for 6 months with fine of Rs.1,000/- and in default of payment of fine, to undergo simple imprisonment for 10 days.
- (iv) For the offence under Section 323 read with Section 34 IPC: both A-1 and A-2 were sentenced to rigorous imprisonment for 6 months with

fine of Rs.1,000/- and in default of payment of fine, to undergo simple imprisonment for 10 days.

Charges

2. The charges framed against A-1 and A-2 were that at around 2:15 pm to 3:45 pm on 9th February 2012, both of them along with Deepak (juvenile in conflict with law-‘JCL’) formed a common intention to kidnap the minor girl (PW-1), aged about 13 years, and in furtherance of their common intention,

(i) took her from the lawful guardianship of her parents without their consent thereby committing an offence under Section 363 read with Section 34 IPC;

(ii) secondly, that both the accused along with the JCL wrongly confined PW-1 in a room and thereby committed an offence punishable under Section 342 read with Section 34 IPC;

(iii) thirdly, both the accused along with the JCL voluntarily caused hurt to PW-1 at the aforementioned time place and date thereby committing an offence under Section 323 read with Section 34 IPC; and

(iv) fourthly, in furtherance of their common intention, both the accused along with JCL committed gang rape upon PW-1 thereby committing the offence punishable under Section 376 (2) (g) IPC.

The FIR

3. The case of the prosecution is based on the evidence of PW-1. In her first statement to the police on 9th February 2012 as stated in the First Information Report (FIR) she stated that she was studying in a school in the 8th grade. She stated that on 9th February 2012, at around 2:15 pm, she was walking to the house of a friend in connection with some school work. As she was passing by a water tank, a silver coloured Santro car came and stopped to the right of where she was. A tall boy got down from the driver's seat and asked her to sit in the car. She got frightened. He then threatened her to sit in the car or else he would kill her. He then pulled her by her hand and pushed her into the car. In the car, there was another boy who was sitting who pulled her inside. When she screamed for help, the tall boy told the other boy whom he called Hunny to beat her. The boy, who was then sitting inside the car, hit her on the head with an iron lock and she lost consciousness. When she came to her senses, she realized that she was on the rear seat of the car. The car then suddenly stopped. Both the boys then caught hold of her and took her inside the house and into a room therein where another boy was already present. A bed sheet was put on the mattress which was already on the floor. The tall boy then asked his associates to wait outside the room.

4. The car was parked alongside the door of the room so as to block anyone from coming in. The tall boy then locked the door of the room from inside. He then pushed her on the mattress, stripped her of her clothes and also stripped off his own clothes. He then forcibly raped her. When she tried to scream, he closed her mouth and then slapped her. He threatened to kill her

if she shouted. After some time, there was a knock on the door asking the tall boy to come out. The tall boy, however, again pushed her on the mattress and again committed rape on her.

5. When there was again a knock on the door and a shout from outside, the tall boy left her and began to get dressed. The tall boy smelt of alcohol. She quickly dressed up, opened the door and ran outside. She came out crying. When she reached near the gate, the tall boy, who was driving the car with his two associates again blocked her way with the car and told her that they would drop her back. At that time, she noticed a police officer on a motorcycle coming and she signalled to him to stop. Seeing the police officer, the three boys in the Santro car ran away. She sat on the pillion of the motorcycle of the police officer and they chased the Santro car. Near the Durgapuri Chowk, they managed to catch up with the Santro car. The three boys were then arrested. She came to know subsequently that the names of the three boys were Gaurav (A-2), Hunny (A-1) and Deepak (JCL). She then rang up her mother and told her what had happened.

Arrests and medical examination

6. The statement of PW-1 was noted down by SI Rano Devi (PW-21). She noted in the *tehrir* that at around 4:15 pm, she was asked by Inspector Investigation Malkit Singh to proceed to Agrasen Gate, Jyoti Nagar where she met SI Puneet Bharti (PW-24), Constable Devender (PW-14) and Woman Constable Mukesh (PW-20) along with PW-1 and her mother (PW-18). She also found the Santro car having registration number DL-8CS-1252 (silver colour). A-1, A-2 and the JCL were also present there. The *tehrir*

records the time of recording of statement of PW-1 as 7:20 pm and the *rukka* (Ex.PW-1/A and PW-23/A) being sent to the PS for registration of the FIR.

7. According to PW-21, Neetu Joshi (PW-4) of the Angeja Foundation was called and the crime team was also called to the spot. Thereafter, PW-21 along with PW-1 and PW-18 went to the house at West Jyoti Nagar and prepared a site plan (Ex.PW-1/DC) on pointing out of PW-1. The three accused were arrested and the disclosure statement of A-2 (Ex.PW-14/B) and of A-1 (Ex.PW-14/C) got recorded. Their arrest memos were Ex.PW-1/C and Ex.PW-1/D respectively. From the room at the house at West Jyoti Nagar where the rape allegedly took place, the police team got recovered a bed sheet, one blanket, some hair, 5-6 beads in bottles, one ID card of PW-1 and one empty quarter bottle of whiskey.

8. Both of the above steps are stated to have taken place at around 4:15 pm and the documents drawn out bore the signatures of PW-1. However, the arrest memo of A-2 shows the time of arrest as 10:30 pm whereas the arrest memo of A-1 (Ex.PW-1/D) does not show any time at all. PW-1 was thereafter taken for the medical examination only at 11:00 pm, i.e. more than 7 hours after she is supposed to have met PW-24. The MLC (Ex.PW-1/G and Ex.PW-3/DA) runs into several sheets.

Medical examination

9. The time of the medical examination of PW-1 at the Guru Teg Bahadur ('GTB') Hospital, as noted in her MLC, is 12 midnight. The MLC shows that she was accompanied by her mother (PW-18). It noted that there was an

alleged history of sexual assault by two boys (identity unknown) in a silver coloured Santro car “after being hit by a lock on the head on the right side”. It is further stated therein “Pt. was taken to an unknown room somewhere nearby and joined by a third guy in the same room.” Further, there were no external injuries noticed. There was a small tear of 0.5 cm along the midline in the posterior fourchette and it was noted that the hymen was ruptured. Samples were taken, including a clipping of the pubic hair, vaginal secretion, washings from vagina, oral swab, blood collection, etc. There is a further document as part of the MLC which again notes that there were no external injuries seen.

10. It also appears that A-2 was also medically examined at 4:00 am on 10th February 2012. It was noted in his MLC that he had no external injuries and observations on local examination of the male genitalia were also noted down. Two of these observations are significant. One is the observation that there was “no smegma present” and the other is that “no signs of injury on male genitalia” were found. While the opinion was that there was no evidence to suggest that the patient was incapable of sexual intercourse, it was also noted that A-2 was “not able to present semen sample.” His underwear, pubic hair and blood samples were also taken.

11. PW-24, in his deposition, stated that A-1 had made a disclosure statement and taken them near Jyoti Nursing Home where he had pointed out the place where he had thrown the lock wrapped in a shirt. A lock of ‘Harrison’ make was recovered. The shirt was minutely perused and one piece of hair and one small star like object was also found affixed in the

shirt. Separate parcels were made of all these objects and then sealed.

Statement of PW-1 under Section 164 Cr PC

12. On 10th February 2012, the statement of PW-1 under Section 164 Cr PC was recorded. In this statement, she made certain important departures from the statement earlier give by her to the police. She states that she did not go to school in the morning of 9th February 2012 so as to prepare for her exams. Instead she had gone to her school at 2:00 pm to find out about homework and the results of her practical examination. As she was returning from the school, near Dilshad Garden Chowk, a Santro car came very near her, forcing her to get on to the pavement. The driver of the car got down and asked her to sit inside the car. She told him that she did not know him and, therefore, was afraid of getting into the car. As she moved forward, the said person, who had a lock in his hand, hit on her on the head with it. It hit her on the side of her head and she became faint at which point he lifted her and put her into the car.

13. About 5-6 minutes later, when she became fully conscious, she noticed that there were two people in the car. The one driving was the one who had spoken to her earlier and next to him was another boy. She noticed that the car was climbing a bridge and she tried to open the door but it was locked. She asked the boys in the car to set her free. The person driving the car asked her to keep quiet otherwise they would kill her. The smell of alcohol was very strong in the car. The person driving the car then received a call. He asked whether the place was cleaned up. After about 5-6 minutes, both the boys took her near a house. When the car stopped, the person driving the

car forcibly pulled her and pushed her into the house. There was no one nearby. She was taken to a room in which there was already another boy. That boy left as soon as she arrived there. The person driving the car then closed both the doors in that room. There was already a mattress and a sheet on the floor. There were 3-4 water bottles. The person driving the car pushed her onto the mattress.

14. PW-1 more or less stuck to her version about the tall boy having raped her twice but further elaborated on it. She added that the boy who raped her offered to drop her back and said, "I am sorry." She then opened the door and ran away. She was again stopped by the boys in the car offering to drop her. By this time, SI Puneet Bharti (PW-24) came there. At this point, she made a noticeable departure by stating that PW-24 first took her to the house where the alleged rape occurred and when they found nobody there, she told him about the registration number of the car and also informed him that it had been parked nearby. Thereafter, PW-1 and PW-24 are stated to have chased the car upon seeing it. They eventually caused the car to stop. The two boys who had taken her away emerged from the car. She did not name any of the boys in her statement under Section 164 Cr PC although she had named them in her statement under Section 161 Cr PC.

Trial

15. At the end of the investigation, a charge sheet was filed. By an order dated 12th September 2012, charges were framed against both the accused in the manner indicated hereinbefore. Twenty five witnesses were examined on behalf of the prosecution.

16. In his statement under Section 313 Cr PC, A-2 denied all the incriminating circumstances put to him. He claimed that he was brought from his house at around 2 to 2.30 am on 10th February 2012 and all the memos relating to him and the car were prepared in the PS in the early morning hours. The car, according to him, was brought from his house. He also maintained that PW-1 had not given any statement before the learned MM and it was in fact recorded as told by the mother (PW-18) and the police officials. PW-1 simply signed the statement. He claimed to have been falsely implicated.

17. As far as A-1 is concerned, he too denied the incriminating circumstances and claimed that he had been falsely implicated. He maintained that he was not present in the car on the alleged date and time and that he was not apprehended from that car. A-1 also denied having hit PW-1 with a lock or any other article. A-1 claimed to have been lifted from his house on the intervening night of 9th/10th February 2012. He referred to an RTI reply which showed that the story of returning of PW-24 from the Karkardooma Court at the alleged time and date was false. He maintained that the lock and the shirt are planted pieces of evidence and no recoveries were made at his instance.

18. When asked about the seizure of articles by the police, A-1 replied as under:

“I do not know about other *jamatalashi* articles. However, in my *jamatalashi* some visiting cards, a mobile phone, purse etc. have been taken by the police officials. The visiting cards contain the number of my two mobile phones. One mobile

phone was seized by the police and another mobile phone was taken by Ct. Devender which he did not return me till date. The call details of these two phone numbers will disprove the prosecution story of my apprehension at Jyoti Nagar red light from the said car and that is why the police did not furnish or collect those call details which would have disproved the prosecution case. The prosecution has withheld the vital evidence.”

19. When asked as to why the prosecution witnesses had deposed against him, A-1 stated as under:

“Police officials are interested witnesses and the police officials had falsely implicated me after lifting me from my house when I did not fulfil their illegal demand of money. The prosecutrix had deposed against me in the court at the instance of police officials.”

20. No defence witnesses were examined.

Impugned judgment of the trial Court

21. In the impugned judgment, the learned trial Court came to the following conclusions:

(i) As regards doubts surrounding PW-24’s presence at the relevant time, it was observed that the documents exhibited did not show that after attending the Court and coming back to the PS, he had gone nowhere else. Even as regards SI Rano Devi (PW-21), while there was some discrepancy in the entry regarding her leaving the PS, it was not to the extent that created doubt about her presence at the spot.

(ii) PW-3, who medically examined PW-1, stated in her cross examination that no injury was found on the head of the victim.

Dr. Abhinav, who examined her in the casualty ward, also did not notice any external injury. In this regard, a question did arise as to whether the victim's testimony was believable considering her claim of being hit on the head with a lock had received no corroboration.

(iii) The depositions of PWs 1, 14 (HC Devender), 21 and 24 were consistent that the accused were brought back to Agrasen Gate and the statement of the victim was also recorded there and they all left to the PS from there. Even PW-18 categorically stated that she had reached Agrasen Gate where PW-1 and police officials met her there. Therefore, to say that no one visited Agrasen Gate and the story on that behalf was false was without merit.

(iv) The discrepancy about PW-1 returning from home on foot from school whereas in her cross-examination she stated that it was the birthday of her brother and, therefore, she did not go to the school was a minor inconsistency and no importance could be attached to it.

(v) The recovery of the articles from the room stood proved from the evidence of PWs 14 and 24. The recovery of the school ID card of the victim and other articles from the room were doubtful particularly since she had not gone to school on the date of the incident. However, it was proved that the mattress and blanket had been identified by the victim and were lying in the room.

(vi) On the question of victim girl being able to understand what was meant

by 'rape' and whether it was the same as what she meant by using the words 'galat kaam', the trial Court held that it was satisfied that the victim was aware of what rape is and the medical evidence which shows a small tear of 0.5 cm along the midline in the posterior fourchette, slight fresh active bleed and ruptured hymen coupled with the victim's statement under Section 164 Cr PC corroborates the version of the victim. It was further held that the word 'unknown' used in the MLC based on the victim's narration only pertained to the previous relationship between the victim and the accused. Since the victim had remained with the accused persons for quite some time and had a good opportunity to see them, there was no need to have a TIP. She further came to know of the names initially at the PS itself.

(vii) The "version of prosecution of conducting all the proceedings at Agrasen Gate" appeared "to be concocted by the police, who were over zealously investigating the case and making recovery." The prosecution had also failed to establish the recovery of the lock at the instance of the accused (A-1). There were also doubts about the recovery of other articles from the room. The presence of PWs 21 and 14 was inconsistent with the documents produced, but it did not establish conclusively that they were not present.

(viii) The testimony of the victim was corroborated by PW-18 and further by her statement under Section 164 Cr PC. Consequently, the trial Court concluded that the prosecution had been able to prove that pursuant to their common intention, the Appellants had kidnapped PW-1 aged about 13 years; wrongfully confined her in a room, voluntarily caused hurt to her and A-2 committed rape on her with the help of A-1, who was outside the room.

(ix) As regards the defence of the accused, as suggested to PW-1 in her cross-examination, that she knew a boy named Tarun and would go out with him, PW-1 had consistently denied all these suggestions. Only Anu (PW-13) had stated that she had let out her room to a boy named Tarun. She was, however, declared hostile by the prosecution. Even otherwise, from the testimony of PW-13, it was not proved that the Tarun she was talking about is one and the same person. Tarun ought to have been examined by the defence if they wanted to substantiate this plea.

22. For all of the aforementioned reasons, the Appellants were held guilty for the offences with which they were charged and sentenced in the manner indicated hereinbefore.

Submissions on behalf of A-1

23. Mr. A.K. Padhy and Mr. G.P. Thareja, learned counsel appearing for A-1, submitted as under:

- (i) An application was made under the Right to Information Act, 2005 ('RTI') to which the reply was given by the Deputy Commissioner of Police regarding movements of PW-24 on the date of the incident. This document (Mark Ex. ZX) which was the photocopy of the duty roster of PWs 14, 24 and 21 showed that they could not have been present at the scene at the time claimed by the prosecution.
- (ii) The trial Court itself noticed in para 45 of the judgment that the presence of recovery witnesses, Puneet Bharti (PW-24) and Devender Adhikari (PW-14), was inconsistent with the documentary evidence. PW-1 did not know A-1 from before and therefore could not have

named him. A TIP ought to have been conducted. Instead, A-1 was shown to her in the Court while she was deposing.

- (iii) The arrest memo did not give any time of arrest of A-1. He was later arrested, and not from Durga Puri Chowk as claimed by the police. This too was done after he failed to meet the illegal demand of money made by the police.
- (iv) Inconsistent statements were given by PW-1 at various stages. She is supposed to have confided to her mother (PW-18) about the incident at around 5 pm, when clearly she did not name A-1. Her statement to the police under Section 161 Cr PC formed the basis of the FIR. In it she only stated that she came to know of the names of the accused. However, if this is taken to be true then she ought to have named A-1 before the doctor at 11 pm at the time of her medical examination. However, she did not name the accused even then. Even in her statement under Section 164 Cr PC, PW-1 did not name the two accused. This is inconsistent with her presence at the time of their arrest and signing of the arrest memo as a witness.
- (v) There were also inconsistency about which of the two accused hit the head of the victim with the iron lock. The mere recovery of the iron lock will not help the prosecution since no external injuries were found by either the doctor who first examined PW-1 or even the gynaecologist who examined her at 12 midnight. There was, therefore, no clarity as to which of the two accused hit her with the lock, if at all such a thing happened.
- (vi) Even if all the allegations of the prosecution are taken to be true, A-1 at best could be said to have abetted the offence of kidnapping but not

for the offence of commission of gang rape. There was no clear cut evidence of the role attributed to A-1 in that offence.

Submissions on behalf of A-2

24. On behalf of A-2, Mr. Ajay Burman, learned Senior counsel, highlighted the numerous inconsistencies in the statements of PW-1. He further argued that the alternative theory that the criminal proceedings against A-2 were initiated at the instance of PW-1 with the purpose of avoiding the repayment to A-1 of the debt owed by her friend, Tarun, and to escape the embarrassment that she might have faced if her relationship with Tarun was revealed, was not considered by the trial Court with the seriousness it deserved.

25. Apart from adopting some of the arguments advanced on behalf of A-1 including the improbability of the presence of PWs 24, 21 and 14 at the scene, Mr. Burman pointed to the fact that the trial Court itself made an observation that the version of the prosecution about conducting all the proceedings at the Agrasen Gate appears to have been concocted by the police. A comparison of the statements of PWs 1 and 18 also brought out the various inconsistencies.

26. Mr. Burman focussed his submissions on the truthfulness of the deposition of PW-1 and her description of the offence. He contended that her examination in Court revealed that she did not actually understand what constituted the act of rape. He pointed to the fact that the absence of injury on the male genital area of A-2 rendered the version of PW-1 highly improbable and this was confirmed by Dr. Anurag Badhani (PW-2) who

examined A-2. Reference in this context was made to the decisions in ***Rahim Beg v. State of UP (1972) 3 SCC 759*** and ***Daya Shankar v. State of Delhi 2011 (2) JCC 1249***. Reference was also made to the decision of this Court in ***Virender v. State NCT of Delhi*** (decision dated 29th September 2009 in Criminal Appeal No. 121 of 2008) and ***State v. Rajender Madan @ Mama 2011 (2) JCC 1495***.

27. Mr. Burman pointed out that no TIP was conducted in respect of A-2 despite PW-1 stating that she did not know him earlier to the date of incident. He submitted that the evidence of PW-1 did not inspire confidence and therefore, the Court ought not to proceed to uphold the conviction of the accused. In this regard, reference was made to decisions in ***Radhu v. State of MP (2007) 12 SCC 57***; ***Virender v. State (supra)***; ***Tameezuddin @ Tammu v. State (2009) 15 SCC 566***; and ***Gautam Khanna v. State (2016) III AD (Delhi) 547***. Reference was also made to the decision in ***Pardeep @ Sonu v. State (2011) 2 JCC 1031***.

28. Mr. Burman submitted that the evidence of PW-18, the mother of the victim, was pure hearsay. A perusal of the evidence of PW-1 would reveal that the narration of the statement under Section 164 Cr PC was in fact by PW-18 and not PW-1, thus rendering the entire statement inadmissible in evidence. He further pointed out that PW-18 stated that she received a telephone call from the police at some point between 3 and 3:15 pm whereas according to PW-14, PW-1 herself was found near the gate at around 3:20-3:25 pm and it was only thereafter that a call was made to PW-18.

29. Mr. Burman pointed out that PW-5, the father of PW-1, was declared

hostile by the prosecution after he stated that he had received a call from his wife (PW-18) at around 2:30 pm informing him that PW-1 had been raped by some persons. This contradicted PW-18 who said that she received a call from the police at around 3:00-3:15 pm. What makes it even more improbable is that, according to PW-1, she was abducted at around 2:15 pm, taken in a car to the room in West Jyoti Nagar, and then raped and that all of this took more than 40 minutes.

30. Mr. Burman submitted that the delay in taking PW-1 for medical examination has not been explained. As for DD No.26A in the *roznamcha*, PW-1 had left the police station by 4:45 pm along with PW-21 and Constable Manbhari (PW-17). According to these entries, PW-1 and PW-21 were present in the PS at around 4:45 pm whereas the case of the prosecution is that the statement of PW-1 was recorded at the Agrasen Gate between 4:15 and 7:20 pm and throughout this period, PW-1 and PW-21 were present at Agrasen Gate.

31. Even the time of the registration of the FIR was in grave doubt according to Mr. Burman. According to PW-5 (the father of PW-1), police had recorded the FIR in his presence at around 9:00 pm on 9th February 2012. Although the prosecution claims that the *tehrir* of PW-1 was sent by PW-21 from the Agrasen Gate at around 7:20 pm on 9th February 2012 through PW-14 and the FIR was registered at 7:30 pm, in fact, the *tehrir/rukka* was never sent and all documents were prepared in the PS itself. Therefore, per the submission of Mr. Burman, the FIR was ante timed. With the accused being named in the FIR, the subsequent noting in the MLC that the identities of the

alleged assailants were “unknown” is improbable and unnatural. Further, in her cross examination dated 21st December 2012, PW-1 admitted that she identified the accused for the first time in the Court. Mr. Burman argued that this by itself showed that the FIR was ante timed and no *tehrir/rukka* was sent by PW-21 at 7:20 pm on 9th February 2012, as claimed by the prosecution.

32. No finger prints were lifted from the car, particularly since the car was not seized at the alleged time and place as made out by the prosecution. The testimony of PW-13, the land lady of the house where the crime took place, to the effect that she had let out her house to a boy named Tarun probablised the case of A-2 that PW-1 went to the house voluntarily with Tarun who was in fact the tenant. The failure to fully investigate this aspect must inure to the benefit of A-2. The trial Court itself noted that the recovery of the alleged lock at the instance of A-1 was unbelievable.

33. It is further pointed out that despite PW-21 admitting that Agrasen Gate is a crowded place, no public witnesses were examined. The trial Court did not seriously consider the defence evidence which was critical in the present case. Reference was made to the judgment in *Atender Yadav v. State 2013 (4) JCC 2962*. According to Mr. Burman, the entire case was fabricated and, therefore, the conviction ought to be set aside.

Submissions on behalf of the State

34. Mr. Kewal Singh Ahuja, learned APP, first submitted that the testimony of the victim was consisted on the core aspect of having been raped twice by A-2 with the assistance of A-1 and Deepak who were standing guard outside

the room where the offence took place. He further states that the victim's statements were also consistent on the aspect of being hit by a lock and her noting of the registration number of the silver coloured Santro car as well as on the aspect of PW-24 meeting her at Agrasen Gate and her explaining to him what had happened to her. The learned APP also took this Court through a timeline of events and steps taken by the police, all of which, he argues, were backed by the documents on the record.

35. Mr. Ahuja further submitted that in the present case, the victim was 13 years old and there was, therefore, no question of her giving her consent to sexual intercourse with the accused. The medical evidence also supported her case and showed that there was a fresh active bleeding from a small tear of 0.5 cm along the midline of the posterior fourchette and that the hymen was ruptured.

36. Mr. Ahuja pointed out that in the Court, PW-1 correctly identified both the accused. The recovery of the lock at the instance of A-1 was another circumstance that stood corroborated by the documents on the record. PW-1 had also consistently denied the alternate version of events about her being involved with a boy named Tarun. Moreover, in her statement under Section 161 Cr PC, she categorically described the act committed on her by A-2 as rape.

37. As far as the report of the FSL was concerned, Mr. Ahuja pointed out that human semen was detected on the underwear of the accused. On the question of non-examination of Dr. Abhinav, i.e. the doctor who prepared

the MLC of PW-1, PW-6 had identified his handwriting and there was no suggestion to him that he was deposing falsely.

Events at 2:15 pm on 9th February 2012

38. First, the Court would like to discuss in detail the sequence of events according to PW-1. The Court picks up for comparison the statements attributed to PW-1 as recorded in the FIR, the statements made by her as recorded in the MLC, her statement under Section 164 Cr PC, her deposition in Court – both her examination-in-chief and the cross-examination.

39. In the FIR it was recorded that:

“On 9.02.2012 at around 2:15 PM in the afternoon, I was going alone to my friend’s house with respect to some school work, near the water tank.”

40. In her statement under Section 164 Cr PC, PW-1 stated:

“On 09.02.2012 at around 2 PM in the afternoon I went to school to know about homework and practical results. While I was returning from school a Santro car stopped just near her at Dilshad Garden Chowk.”

41. In the MLC it was noted that she had stated that she:

“...had gone to her friend’s house near her school. While returning back at around 2:15 PM/09.02.2012 she was abducted by 2 boys (identity unknown) in a silver coloured Santro car after being hit by a lock on her head on the right side....”

42. In her examination-in-chief in Court, she stated that “on 09.02.2012, after the noon time, I was returning my home from school on my foot...”, thereby implying that she had gone to attend school whereas she has stated elsewhere that she did not even attend the school on the date of the incident.

This further emerges from her cross-examination where she stated as under:

“My school closes at around 1:30 noon. When I went to the school the school was already closed. I had met my friends in the school. Name of my friend is A. I had told the police officials about my meeting with A. I have told the name of my friend A during investigation by police officials when my statement was recorded. Confronted with the statement Ex. PW- 1/A where it is not so recorded.”

43. Further, in her cross-examination, PW-1 stated as under:

“I had not stated to the police that I was going to the house of my friend. Confronted with the statement Ex. PW- 1/A portion A to A where it is so recorded.”

44. The above contradictions become significant from the point of view of the accused being charged with having kidnapped PW-1.

At the time of the alleged kidnapping

45. How exactly the incident happened is again riddled with contradictions.

In the FIR, it is noted that PW-1 stated:

“The tall boy pushed me inside the car and the other boy sitting inside the car pulled me. As I shouted for help (Bachao Bachao), the tall boy instructed the other boy sitting in the car to hit me (Hunny ise maar) and he hit me with an iron lock on my head because of which I became unconscious.”

46. In her statement under Section 164 Cr PC, PW-1 stated as under:

“As I started heading forward on the pavement, the man (driver who had got out of the car) hit me on the head with the lock in his hand.”

47. In the MLC, it is noted that she stated as under:

“...she was abducted by 2 boys (identity unknown) in a silver coloured Santro car after being hit by a lock on her head on the

right side.”

48. In the examination-in-chief, she stated as under-

“Tall boy said to me sit inside the car quietly otherwise he will beat me. In the mean time, another boy came out of the car from another side and forcibly pushed me inside the car He hit me with something on my head due to which I became unconscious. He had hit me immediately after pushing me inside the car.”

49. In the cross-examination, she stated as under:

“I was hit with the lock on rear side of my head. I was struck with great impact that is why I became unconscious...The doctor had examined me thoroughly. I had told the doctor that I was hit on my head with a lock. I had also told the doctor the location on my head where I was hit on my head. The place where I was hit on my head was swollen and was causing pain at the time of my medical examination....

I was just near the car outside when I was hit by lock. I do not remember which of the accused had hit the lock on my head. I had become unconscious outside the car itself.”

50. In her initial statement, PW-1 stated that she was hit by the lock inside the car by “the other boy” (implying A-1). At the second instance, she said she was hit outside the car by the tall boy (implying A-2). At the third instance, she stated that both boys came out of the car and she was hit by A-1 after being pushed inside the car. At the fourth instance, she stated that she was hit outside the car but did not remember who hit her.

Being hit on the head with an iron lock

51. PW-1 claimed that she had specifically stated that she was hit on her head by the lock with a great impact. In the MLC, she stated that she had

been hit by the lock on the right side of her head whereas in her cross-examination she stated that she was hit on the rear side. She claimed to have also shown the doctor where she was hit. However, Dr. Priyadarshini Nanda (PW-3), in her cross-examination, has expressly stated that no external injuries were found on PW-1 or even on her head. In fact, the trial Court appears to have noticed this by observing that “except for the injury on her head by lock, there is no infirmity in her testimony which appears to be exaggerated by the victim in the Court where she stated that there was swelling on her head.”

52. This, however, is not a minor contradiction. It must be remembered that according to PW-1, it is only on account of her being hit by the lock that she became faint and could not resist being pushed into the car by the accused. If there was no other person in the car, this was improbable. Therefore, the portion of PW-1 being hit on the head with an iron lock was important for fixing the presence of the second person.

53. From the manner in which PW-1 has described the incident, if the car pulled up alongside her when she was walking and the person on the driver’s seat had to get down, then he had to walk around the car and come onto the pavement in order to compel her to get into the car. This would have given her sufficient time to resist and run away, but for the presence of another person to help A-2. This is perhaps why A-1 was introduced into the narrative. However, there is confusion as to whether it was A-1 or A-2 who hit her with the lock on her head.

54. In any event, the medical evidence does not support PW-1's version about being hit on the head with a lock.

Other contradictions in the evidence of PW-1

55. The contradictions do not stop there. In the FIR PW-1 stated as under:

“When I regained consciousness, I found myself in the backseat of the car and suddenly the car had stopped near a house and before I could fully regain consciousness I was dragged by the two boys in a room where another boy was already there.”

56. In her statement under Section 164 Cr PC, PW-1 stated as under:

“I had regained consciousness within 5-6 minutes, post which I saw 2 people (tall boy, with whom she had talked and the other boy) sitting in the front seats of the car and the car was on a "pull" (Bridge/Flyover)." I even tried to open the car but it was centrally locked and I requested the boys to spare me but the boy driving the car asked me to sit quietly otherwise they will kill me. The car had the smell of alcohol and the boy driving the car got a call and started talking to someone and asking if the place is all clean. After 5-6 minutes we reached near a house. After getting out from the car, the boy who was driving the car dragged in inside a house from the back gate of the said house.”

57. In her examination-in-chief and in her cross-examination, PW-1 stated as under:

“The tall boy came out of the car and showed me something kept in his pocket threatening me that he will kill me and took me inside the room.”

xxx

“I had regained my senses about 5 minutes before arrival at the place where I was taken by the accused persons.”

58. In the FIR, there is no mention of the conversation that took place inside the car, the smell of alcohol, or the central locking. In the statement under Section 164 Cr PC, it is only the tall boy who drags her inside the house from “a back gate” into a room and not both boys as mentioned in the FIR.

59. In the FIR it is noted that she stated that “the boy already present in the room laid a mattress and a bed sheet over it and the tall boy sent the other two boys outside the room.” This was denied by her in her cross-examination as under:

“I had not stated that someone else had spread the mattress and bed sheet in the laid room in my presence... One mattress was already lying before my being taken in the said room. There was one bed sheet also on the said mattress.”

What happened inside the room?

60. The FIR notes that PW-1 stated:

“The tall boy pushed me on the mattress, slapped me several times (*Kai Thappad Jhade*) and forcefully (*zabardasti*) removed my clothes and removed his clothes also.”

61. Whereas, in her statement under Section 164 Cr PC, she states:

“He lied over me forcefully and did *kheencha taani*...When I tried to stop him he pulled my hair and gave me a tight slap (*kheen ch kar muje chante maare*).”

62. The victim was supposed to have been wearing a pair of jeans and a top. Therefore, the forcible removal of the clothes by A-1 himself would not have been feasible without some resistance or physical injury. No torn clothes of PW-1, broken buttons, etc. have been seized. In the FIR, she stated that her mouth was tied whereas she denied it in cross-examination. In

her statement under Section 164 Cr PC, she mentioned being slapped several times by the accused but the MLC reveals no abrasions or marks on the cheeks.

The commission of rape

63. The FIR notes that PW-1 stated that the accused removed clothes, lied over the prosecutrix and forcefully did "*Galat Kaam*" with her. Later, it was also stated that the "accused forcibly committed rape upon her (*zabardasti balatkar kia*)."

64. However, in her cross-examination, PW-1 stated that she was not aware what the words '*balatkar*' or '*galat kaam*' meant. In her examination-in-chief, she stated:

"The accused forcibly pushed his male organ inside my female organ and also kissed me so that I cannot raise my voice or cannot cry."

65. Dr. Anurag Badhani (PW-2), who examined A-2 on 10th February 2012 at 4 am, deposed that he did not notice any injuries on the male genitalia of A-2. PW-2 in his cross-examination stated:

"It is correct that if the girl is aged 13-14 years and penovaginal penetration takes place then there is likelihood of having injuries on the male organ. On examination there were no signs of injury on the male genitalia."

66. In this context, the following observation in ***Rahim Beg v. State of UP*** (*supra*) is relevant:

"According to Dr. Katiyar, Medical Officer of District Jail Rae Bareli, if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No

injury was, however, detected by the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innocence.”

67. This Court, in *Daya Shankar v. State of Delhi* (*supra*), observed as under:

“No doubt that absence of the injury on the genitals of an accused in a rape case by itself cannot always be a reason to presume the innocence of the accused, provided other reliable evidence leading towards the guilt of the accused is available. In the instant case, in view of the circumstances noted above, the version of the prosecution witnesses appears to be doubtful. Therefore, the absence of the injury on the male organ of the Appellant is a factor which further compounds the doubt.”

68. The following question and answer in the cross-examination of PW-1 is also relevant in this context:

“Ques: Did you tell the police that accused forcibly pushed his male organ inside your female organ at first instance?

Ans: Yes, I have told this fact to the police.” She was confronted with her statement Ex.PW- 1/A where it is not so recorded. However, in her statement on the basis of which the FIR was recorded she had merely stated *Mere Sath Zabardasti Galat Kaam Karne Laga.*”

69. The victim’s understanding of the term ‘*galat kaam*’ is crucial to the present case and when asked about this during cross-examination, PW-1 stated, “I know if a boy kisses a girl it is called *galat kaam*.” The Court also finds it pertinent to note the following exchange during the cross-examination of the victim:

“Ques: I put it to you that if the boy does anything forcibly against the girl, touches and catches hold of the girl, is it called

rape? On request of the witness, question has been again put. When the boy lies over the girl, kisses and holds her, is it called rape?

Ans. Yes.

Court question: The witness has been asked what does she mean by the term “rape”?

Ans. I do not know.”

70. According to the trial Court, the victim became irritated by this line of questioning and had “therefore given such answers.” While this may be a correct observation as regards what transpired in Court, the fact remains that the terminology used by the prosecution to describe rape is extremely limited. In a similar instance, in *Virender v. State of Delhi* (*supra*), this Court observed as under:

“Commission of an offence under Section 376 certainly requires some evidence with regard to the acts which were committed by an accused person to establish the ingredients of the offence. The statement which has been recorded in court does not at all enable any conclusion to be derived as to what was the comprehension of the prosecutrix as to what are the relations between a husband and wife. In any traditional and conservative Indian family, any act from mere touch to the ultimate intimacy of sexual intercourse between persons not married to each other would, in common parlance, would be covered within the gamut of acts which could be labelled as *galat kaam* or *gandi harkatein*. This range would also cover the intimacies shared by a married couple...

The testimony of the prosecutrix does not reflect as to what is her understanding of the physical intimacy which a married couple shares...

Having regard to the well settled principles laid down by the

courts and in several judicial pronouncements of the Apex Court, the acts alleged by the prosecutrix would not by themselves be sufficient to invite a finding of guilt for commission of an offence under Section 376 of Indian Penal Code. This is not to say that such conduct is permissible or acceptable. However we are concerned with a finding of guilt for a serious charge of rape in the instant case...

It needs no elaboration and has been repeatedly held that whatever be the nature of evidence oral or documentary, direct or circumstantial, it is essential for the prosecution to prove the necessary ingredients of the offence. In view of the above discussion, it may not be proper to return a finding of guilt against the appellant for the commission of an offence under Section 376 based on the deposition of the prosecutrix, oral evidence or the medical evidence which has been led by the prosecution."

.....

As soon as the tall boy opened the door of the room, I stepped out, started crying and walking towards my home."

71. In *State v. Rajender Madan* (*supra*), this Court observed as under:

"Thus, the prosecutor had described the act of Respondent to be "wrong act" as the Respondent had put his hand on the private parts, which resulted into bleedings per vagina. Unfortunately, the law as it stands now does not cover the offence within the definition of rape as defined in Section 375 IPC. In *Sakshi v. Union of India* AIR 2004 SC 3566, the Supreme Court observed that all forms of penetration such as penile/ vaginal penetration, penile/ oral penetration, penile/anal penetration, finger/ vaginal and finger/anal penetration and object/vaginal penetration could not be interpreted to include within the provisions of Section 375 IPC. On the basis of the observations of the Supreme Court in *Sakshi v. Union of India*, the Criminal Law (Amendment) Bill 2000 has been prepared, which is pending consideration before the Parliament. Thus, the trial court rightly concluded that there was insufficient evidence to find that the Respondent had committed the offence of rape, as alleged by the

prosecution. The trial court rightly convicted the accused for the offence of indecent assault punishable under Section 354 IPC.”

What happened next?

72. The FIR notes that PW-1 stated:

“As soon as the tall boy opened the door of the room, I stepped out, started crying and walking towards my home.”

73. Further, according to PW-1, the tall boy and his two companions again stopped their Santro car in front of her and offered to drop her home. In the meantime, she noticed PW-24 approaching on his motorcycle. The FIR notes that she stated that she told PW-24 that the “accused persons are harassing me and he made me sit on his back on his motorcycle and followed the Santro car.” Thereafter, in the FIR, it is stated that the three accused were stopped and caught at the Durga Puri Chowk.

74. In her statement under Section 164 Cr PC, PW-1 stated that only one of the accused, i.e. the driver in the Santro car, came to her and offered to drop her home and he left when she declined the offer. Another major contradiction is that in her statement under Section 164 Cr PC, she stated that PW-24 (the police officer) first took her back to the house where the incident took place and later went to search for the car, whereas in the FIR, they immediately followed the Santro car and caught the three persons. In her statement under Section 164 Cr PC, only two persons were caught by PW-24 whereas in the FIR, she in fact names the three accused.

Naming the accused

75. It is evident from the FIR that PW-1 mentioned three accused and

further stated that their names were revealed to her subsequently. However, the names are mentioned in the FIR itself. Moreover, according to the prosecution, all the three accused persons were arrested near the Durga Puri Chowk itself and their arrest took place in the presence of PW-1, who then signed the arrest memos as a witness. So, therefore, even at that stage, i.e. sometime between 4:15 and 7:30 pm, when the *tehrir* was sent for registration of the FIR, she was already aware about the names of the accused persons. However, in her cross-examination, PW-1 stated as under:

“I was not aware of the names of the accused when I had gone to the hospital. I came to know the name of accused Gaurav while coming to the court. I came to know the name of accused Gaurav from my mother.”

76. In fact, in the MLC prepared at 11:00 pm, it was again noted that the identity of the accused persons were “unknown.” PW-5, father of PW-1, stated in his cross-examination that it was wrong to suggest that his daughter did not know the accused prior to the incident. According to PW-5, PW-1 told him the name of A-2. This was a serious contradiction.

77. In this context, it must also be noticed that the statement under Section 164 Cr PC may have been recorded on the basis of facts disclosed and narrated to the learned Magistrate by the mother of the victim, i.e. PW-18 and the police officials. It is pertinent to note that in her cross-examination dated 21st December 2012, PW-1 stated as under:

“I was not aware of the name of the accused when I had gone to the Hospital. I came to know the name of accused, Gaurav, while coming to the court. I came to know the name of the accused, Gaurav from my mother when the judge had told the name of accused. I do not remember the date when I came to

know the name of accused in court. I do not know who else was present at the time when my mother told the name of accused Gaurav in the court. Besides lady police officials others were also present in the court at the time. At that time all the facts were disclosed to the judge by my mother and police officials. The facts narrated to the Ld. Judge were recorded by him. I had signed on the said statement.”

78. PW-1 further stated as under:

“My mother had told all the facts to the police officials before I was taken to the Hospital...”

79. Thus, both the FIR as well as the statement under Section 164 Cr PC appear to have been recorded on the basis of what was narrated by PW-18 and not PW-1 herself. This brings about an entirely different perspective to the case.

Place of recording statements

80. PW-1’s statement was supposed to have been recorded at the Agrasen Gate prior to 7:20 pm. However, in her cross-examination she stated:

“The police officials had made enquiry from me and my mother at the PS after the incident.... I have never seen Agrasen Gate. I have also not gone to Agrasen Gate in connection with this case. I have no knowledge about Agrasen Gate.”

81. PW-18 further added that “all statements were recorded at the PS only.” This has been denied by PWs 21 and 24.

Presence of PW-24 at Agrasen Gate

82. It does appear that there are numerous contradictions surrounding the aspect of all these statements being recorded at the Agrasen Gate. To begin

with, PW-14, who was supposed to be on duty at Corporation Bank at 9:30 am, stated in his statement under Section 161 Cr PC that he was “on duty at Agrasen Gate.” In his examination-in-chief, he stated, “On 09.02.2012, I was posted at PS Jyoti Nagar as constable from 9:00 am to 6:00 pm in Corporation Bank near Agrasen Gate.” However, as rightly pointed out by Mr. Burman, Corporation Bank and Agrasen Gate are two different beats at two different locations, as is evident from the site plan. When this was confronted to PW-14, he stated as under:

“I do not remember the beat number in which Corporation Bank is located. It might be located in beat No. 2. It is correct that Agrasen Gate is located in beat no. 3 which is shown correctly at point Y in mark DW 14/A. I had stated to the police in my statement under Section 161 of the CrPc Ex. PW- 14/DA that my duty was at Corporation Bank near Agrasen Gate (Confronted with statement Ex. PW- 14/DA where Corporation Bank is not mentioned).”

83. The Corporation Bank is in the opposite direction to Agrasen Gate, as revealed in the site plan (Mark PW-14/A), the correctness of which PW-14 has admitted. Corporation Bank is on the 100 ft Road going from Durga Puri Chowk to Maujpur and is not in the vicinity of Agrasen Gate. It appears extremely doubtful that PW-14 was present at the Agrasen Gate. PW-1 stated that the accused were caught by PW-24. She did not mention the presence of PW-14.

Law relating to the evidence of a rape victim

84. The law in relation to appreciation of the evidence of a rape victim requires the Courts to accept such statement unless there are gaps and discrepancies which make it highly improbable that the incident took place

in the manner spoken to by the victim. In ***Radhu v. State of MP*** (*supra*), it was observed as under:

“The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place.”

85. This Court in ***Virender v. State*** (*supra*) observed as under:

“It is to be noted that the embarrassment, and reservations of those concerned with the proceedings including the prosecutrix, witnesses, counsel may result in a camouflage of the trauma of the victim's experience. The judge has to be conscious of these factors and rise above any such reservations to ensure that they do not cloud the real facts and the actions which are attributable to the accused persons.”

86. In ***Tameezuddin @ Tammu v. State of NCT of Delhi*** (*supra*), this Court observed as under:

“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.”

87. In ***Gautam Khanna v. The State (NCT of Delhi)*** (*supra*), it was observed as under:

“In the instant case, considering the vital discrepancies, contradictions and infirmities in the statements of the prosecution witnesses, it is not safe to convict the appellant on the sole uncorroborated testimony of the prosecutrix. The appellant deserves benefit of doubt. The appeal is allowed. Conviction and sentence awarded by the Trial Court are set aside. Bail bond and surety bond of the appellant stand

discharged.”

No corroboration by medical and forensic evidence

88. In the present case, the evidence of PW-1 does not inspire confidence. When looking for corroboration of the version of PW-1, which at first glance appears unconvincing, the Court has to first observe that the medical evidence is not fully supportive of the case of the prosecution. The medical report does show that the hymen was ruptured, but the manner in which the victim describes rape having been committed twice by A-2 and the absence of any injury his genitalia gives rise to doubts whether he was in fact the rapist. It, therefore, cannot be said that the medical evidence fully corroborates the version of the victim.

89. In this context, learned counsel for A-2 is right in his submission that the trial Court has failed to appreciate the evidence of PW-3 who stated in her cross-examination that there could be numerous reasons why the hymen may be ruptured, such as participation in athletic activities or use of sanitary pads. In her cross-examination, PW-1 admitted that she does play sports such as badminton, football and basketball in the school. She could also ride a bicycle and she in fact did do so regularly. The failure by PW-1 to correctly describe what she meant by ‘*balatkar*’ or ‘*galat kaam*’, compounds this problem further.

90. There was also no corroboration by the forensic evidence. Although semen was detected on the underwear of A-2, that *per se* is not of much

significance. The fact remains that no semen could be found on the vaginal swab of the victim. This was completely overlooked by the trial Court and this seriously raised doubts about the veracity of the victim's version. The FSL reports (Marks E and F) were, in fact, not exhibited by the prosecution, but could not have been ignored by the trial Court. According to PW-1, A-2 smelt of alcohol and yet neither his MLC makes any such noting nor his blood sample revealed the presence of alcohol. Blood was detected on samples drawn from the T-shirt of A-2 but the blood grouping could not be found. DNA profiles could also not be generated.

91. What is also important here is that the strands of hair picked up from the room do not appear to have matched with that of the victim. In that regard, the FSL report dated 6th July 2012 reads as under:

“Regarding query No.(III) of the forwarding Authority's letter, it is opined that exhibit '1a' i.e. strands of hair, on visual, physical examination appears to be (Scalp hair) comparatively long and thin with that of exhibits '1b' and '7' and such are not comparable. On morphological and microscopical studies from random sampling of the hairs found in exhibit '1b' i.e. strands of hair and exhibit '7' i.e. strands of hair were found to be Human in origin. However, the hairs found in exhibit '1b' were found to be dissimilar in most of their morphological and microscopical characteristics with that of hairs found in exhibit '7'.”

92. A further report dated 6th July 2012 also stated that the strand of hair found in Ex.11 was of human origin but no opinion could be given on similarities/dissimilarities with that of Ex.7 in view of “very limited in nature of Ex.11.”

93. It may be recalled that the investigating team picked up a strand of hair from the room and if there indeed was any struggle during the commission of the rape resulting in the hair being pulled, as alleged by PW-1, this could have confirmed that fact. The failure of such confirmation by forensic evidence attains significance in view of the inconsistent and unreliable statements made by PW-1 at various points in time. The net result is that PW-1's inconsistent testimony has received no corroboration from the medical and forensic evidence.

Contradictions in the testimonies of other public witnesses

94. The evidence of the mother of the victim (PW-18) and her father (PW-5) also contribute to the further weakening of the prosecution case. As already noticed, PW-5 was declared hostile as he failed to support the prosecution on several crucial aspects. According to him, he received a telephone call from PW-18 at around 2:30 pm informing him that PW-1 had been raped by some persons. PW-18 herself states that she received a call from the police informing her of the same at around 3:00-3:15 pm. According to PW-1, she was abducted at around 2:15 pm; taken in a car; kept inside a room; raped there and ultimately managed to escape after about 40 minutes. Therefore, it was not plausible that PW-5 could have been informed at 2:30 pm by his wife about the rape of PW-1.

95. Further, according to PW-5, after he had received the call, he went to the PS where PW-18 and PW-1 met him. In his cross-examination, he stated that he immediately reached Agrasen Gate where his daughter and wife met him. This makes the testimony of PW-5 as well as the testimony of PW-18

unreliable. According to PW-5, the police obtained PW-1's signature in his presence and in the presence of PW-18 at around 7:00-8:00 pm. However, HC Sunil Kumar (PW-23) states that PW-1 was taken to the hospital for medical examination at 4:55 pm. As per Entry No.26A in the *roznamcha*, PW-1 had left the PS at 4.55 pm along with PW-21 and Constable Manbhari (PW-17). Therefore, PW-1 and PW-21 were present at the PS at around 4.55 pm. On the other hand, we have the evidence of PWs- 21 and 24 who state that the statement of PW-1 was recorded at the Agrasen Gate between 4:15 and 7:20 pm.

96. PW-5 further discredits himself by stating that the FIR was registered in his presence at about 9:00 pm on 9th February 2012. The record shows that the *tehrir* (Ex.PW-21/A) was sent by PW-21 at 7:20 pm from the Agrasen Gate through PW-14 and the FIR was registered at 7:30 pm. This only shows that the *tehrir* was not drawn up at the time stated therein, and definitely not at the Agrasen Gate.

97. The mother of the victim (PW-18) has stated that she had received a telephone call from police at around 3:00-3:15 pm, whereas according to PW-14, he met PW-24 at Agrasen Gate at around 3:20-3:25 pm and later caught hold of the accused persons. It is PW-18 who is supposed to have spoken to the police persons and pointed out to PW-1 herself the name of A-2.

98. Then we have Anu (PW-13), the landlady of the house where the incident occurred, who expressly stated in her examination-in-chief that, "I do not know any person in the name of Gaurav. I let out my house to a boy

named Tarun.” It is not understood why this part of the evidence was not further investigated by the prosecution. Even the trial Court appears to have overlooked this aspect.

99. Therefore, the testimonies of the other public witnesses have not aided the prosecution at all in establishing the guilt of the accused. In fact, their evidence has only served to add further doubts to the already unconvincing case of the prosecution.

Testimonies of police witnesses

100. With the public witnesses failing to support PW-1, if one turns to the evidence of police witnesses, they have performed no better. In the first place, Entry No.21 in the *roznamcha*, i.e. the police diary (Ex.PW-21/DC), shows the departure entry of PW-14 for Corporation Bank at 9:30 am. He also admitted that the Agrasen Gate beat was a different one and that he was not on that beat. How he came to be present at Agrasen Gate which is in the opposite direction from Corporation Bank has not been explained. Consequently, the presence of PW-14 at Agrasen Gate appears to be extremely doubtful. Even according to PW-1, the accused persons were caught by PW-24. She does not mention the presence of PW-14 at all.

101. The return entry in the police diary was Entry No.51 (Ex.PW-14/DX) where what PW-14 did between 9:30 am and 6:00 pm on 9th February 2012 is described elaborately. That entry does not reflect anything about the case in hand or about the apprehension of the accused. Further, in his cross-examination, PW-14 stated that after registration of the FIR, he reached the

spot again at 8:25-8:30 pm and produced the *rukka* and copy of the FIR before the IO, i.e. PW-21. However, there is no corresponding entry in the police diary to show that PW-14 left the PS for the spot.

102. Further, according to the prosecution, the *rukka* was handed over to PW-14 at 7:20 pm by the IO and he reached the PS at 7:30 pm and got the FIR registered. In his cross-examination PW-14, however, stated:

“The accused persons were apprehended at about 3:30-4 PM. Within 5-7 minutes we had reached at Agrasen Gate in the car. I remained at Agrasen gate till 7:30 pm... I brought *rukka* along with the copy of FIR at J-6, West Jyoti Nagar at about 8:30 PM where crime team and other police staff were also present.”

103. According to him, the accused persons were arrested between 4:00-4:30 pm, whereas the time of arrest of A-2 is shown as 10:30 pm and there is no time mentioned in the arrest memo of A-1. Although, according to PW-14, public persons were present at the spot at the time of arrest, “none of them were made witnesses.”

104. In the FIR, it is written that PWs 1 and 18 were already present at Agrasen Gate before PW-21 reached there. PW-14, in his examination in chief, stated that PW-21 was already present along with the victim (PW-1) and her mother (PW-18) when he and PW-24 reached Agrasen Gate and all the three accused persons were produced along with the car before her. However, in his cross examination, he denied narrating this fact in his original statement under Section 161 Cr PC. Similarly, PW-24 states in his examination-in-chief that SI Rano Devi only arrived at Agrasen Gate some time after he and PW-14 had reached along with the three accused.

However, in the cross examination of this witness, he states that SI Rano Devi (PW-21) was already present at Agrasen Gate when they reached there.

105. These contradictory versions of events by the police witnesses themselves are wholly inconsistent with the case of the prosecution. If, according to the prosecution, PW-1 was accompanying the police officers at the time of arrest of the accused persons, it is impossible that she and her mother (PW-18) would already be present at the Agrasen Gate when PWs-14 and 24 brought the three accused there. An added twist is that Neetu Joshi (PW-4) of the Angeja Foundation states that she was called by PW-21 on phone between 2:00 and 3:00 pm on 9th February 2012, which was even before the commission of the offence.

106. The Court is unable to understand why PW-1, the victim of rape, was not immediately taken to the hospital after she met a police officer. In the present case, according to prosecution, PW-24 met PW-1 soon after the incident at around 3:30 pm whereas she was taken for her medical examination only at 11 pm in the night. This is contrary to the directions issued by this Court in ***Delhi Commission for Women v. Delhi Police*** (order dated 23rd April 2009 in W.P. (Crl.) No. 696 of 2008). Therein, when discussing the responsibilities of the police, the Court has stated that “after making preliminary inquiry/investigation, the Investigation Officer along with the lady police official/officer available shall escort the victim for medical examination.”

107. PW-21, the other main police witness, is also inconsistent about what exactly happened. In her examination-in-chief, she states that from Agrasen

Gate, she along with PWs- 1 and 18 went to the place where the crime was committed and prepared the site plan. However, PW-18 has nowhere mentioned in her testimony that she ever went to the scene of crime. Then PW-21, in her cross-examination, stated that A-2 was taken for medical examination from the Agrasen Gate. However, Constable Chaman Singh (PW-11) stated that at 3:30 am on 10th February 2012, A-2 was taken to the hospital from the PS.

108. PW-21 denied that the memos and writing work, including the recording of statement of PW-1, was done at the PS only. According to her, she did not visit the PS during the period intervening 4:15 pm on 9th February 2012 and 1:00-1.30 am the next morning. However, as already pointed out, it is highly doubtful that this happened. PW-18 has stated that “all statements were recorded at the police station only.” Furthermore, PW-1 stated:

“The police officials had made enquiry from me and my mother at the PS after the incident... I have never seen Agrasen Gate. I have also not gone to Agrasen Gate in connection with this case. I have no knowledge about Agrasen Gate.”

109. The presence of PW-24 at the spot also appears to be highly doubtful when one carefully examines the entries in the police diary. DD No.12A (Ex.PW-24/DZ1) shows that PW-24 left the PS for Karkardooma Court for attending a bail matter at 9:00 am. The return entry (Ex.PW-21/DB) shows that he reached back from Karkardooma Courts to the PS at 2:10 pm. In his cross-examination, he stated, “At about 9-9:15 AM on 9.02.2012, I had gone to Karkardooma courts from the PS. I remained in the court till 11:30 AM or 12 Noon.”

110. However, the entire prosecution story is that while he was returning from Karkardooma Court on his motorcycle and when he reached near Agrasen Gate, PW-24 saw PW-1. In his cross-examination PW-24 stated:

“I had given statement to the police under Section 161 Cr PC. I had stated in my statement to the police that I was returning from the court on my motorcycle from the court which I have stated in my statement to the police I meant Karkardooma Courts. I have also stated in my statement in this court that I was returning from the court on motorcycle. I reached Agrasen Gate at 3:15-3:20 PM.”

111. If indeed PW-24 had left from Karkardooma Court at 12 noon, it would not have taken him three hours to reach Agrasen Gate. If he had actually been busy with the proceedings of this case, he could not have made an entry in the PS about returning from Karkardooma Court at 2:10 pm. According to PW-14, PW-24 took him on his motorcycle and they followed the Santro car. In his examination-in-chief, however, he stated that PW-24 reached Agrasen Gate on his motorcycle and he was sitting on the pillion. According to PW-24, he made PW-1 sit on his motorcycle and chased the Santro car and while the chase was ongoing, PW-14, who was also on duty at Corporation Bank joined them. According to PW-14 his statement under Section 161 Cr PC was recorded at the scene of crime, whereas in the Court, he changed his stand and stated that the statement was recorded at Agrasen Gate. All this only serves to add to the confusion about where the statement of the victim was recorded.

Seizures not proved

112. As already noticed, the trial Court itself disbelieved the seizure of the lock; the seizure of the ID card, uniform, etc. from the room. If indeed PW-1

did not go to school wearing her uniform on that day, the recovery of those articles from the room was doubtful. However, the trial Court appears to have brushed this aside as being immaterial. The Court disagrees with this approach.

113. With the police having found liquor bottles inside the room where the rape took place, it is surprising that no finger prints or chance prints were lifted from them. Likewise, not lifting chance prints from the car from where the accused were purportedly apprehended also appears to be inexcusable.

Arrests not proved

114. The arrest of the accused at Agrasen gate when they were in the Santro car has also not been convincingly proved by the prosecution. Saurav Singh (PW-25), the brother of A-2 and the owner of the car failed to support the prosecution. According to him on 9th February 2012 he had gone to his village Banwari Pur in District Bulandshahr, U.P. by the said Santro car for bringing his grandmother to Delhi. He claimed to have returned only at about 8:30 pm. According to him, in the intervening night of 9/10th February 2012 at about 2 to 2:30 am, the police of PS Jyoti Nagar came to his house and asked him about A-2. They asked him about the car, which at that time “was parked at my house.” Thereafter, the police took A-2 to the PS in the police vehicle. He stated: “I had also gone to the police station in my car along with one police official. My car was seized there.”

115. Apart from the fact that PW-25 was unable to be discredited in his cross-examination by the APP, he also probablised the defence of A-2 that

he was arrested from his house at around 2 to 2.30 am on 10th February 2012 and not at around 4 pm at the Agrasen Gate. Significantly, in the arrest memo of A-2, the time of arrest is shown as 10.30 pm which contradicts even what the police witnesses have said. The arrest memo of A-1 gives no time of arrest. When this is viewed in conjunction with the fact that the time of conduct of MLC of both A-1 and A-2 at the GTB Hospital is shown as 4 am on 10th February 2012, it becomes apparent that their arrest did not take place at Agrasen Gate at 4 pm as claimed by the prosecution. It is inconceivable that they would have been sent for their medical examination 12 hours after their arrest.

116. It also emerges from the evidence of PW-25, to whom incidentally the Santro car was released on *superdari* since he was its owner, that the Santro car was with him at the time the police are supposed to have arrested the accused in that very car. If the car was indeed recovered only at 2.20 am on 10th February 2012 from the house of PW-25, the entire story of the prosecution about the accused being arrested when they were in the Santro car near Agrasen gate after a chase, stands falsified.

Conclusion

117. In the present case, not only have the public witnesses not supported the prosecution case, the evidence of even the police witnesses is riddled with inconsistencies. As already mentioned, neither the medical evidence nor the FSL report connects the accused with the crime.

118. While the possibility of PW-1 having been subjected to sexual assault

or statutory rape cannot be entirely ruled out, the prosecution has not been able to prove beyond reasonable doubt that it was, in fact, the Appellants who were responsible for it. The prosecution has not been able to prove, beyond reasonable doubt, that the Appellants pursuant to their common intention kidnapped PW-1 from the lawful guardianship of her parents, voluntarily caused her hurt, confined her in a room and that A-2 repeatedly raped her in that room while A-1 and the JCL waited outside,

119. In ***Pardeep v. State*** (*supra*), this Court observed as under:

“Though, the sole testimony of the victim can be sufficient in some cases, for inculcating an accused, however, if there are inherent contradictions in the testimony of the victim and her parents and a very relevant witness is not examined, sole testimony cannot be made the basis for establishing the case of the prosecution beyond reasonable doubt.”

120. While in the present case the trauma that PW-1 underwent is perhaps undeniable, the prosecution has to convince the Court that it was indeed the Appellants who committed the crime. In ***Atender Yadav v. State*** (*supra*), this Court observed as under:

“.... in a case of rape, evidence of prosecutrix must be given pre-dominant consideration and in certain cases even without any corroboration, testimony of prosecutrix should be given due credence and weightage, as in all rape cases prosecutrix suffer great stress, trauma, humiliation and due to that factor alone many cases of rape were not even reported by victims.

Moreover at same time it could not be denied that false allegation of rape are not uncommon and could cause equal damage, humiliation, embarrassment, harassment, disgrace and agony to accused.”

121. The obvious lapses in investigation, that have been discussed hereinbefore, have defeated the case of the prosecution. There were unexplained inordinate delays at every stage of the investigation. Despite the prosecution showing that the crime took place, it has failed to bring the criminals responsible for it to book.

122. This case presents an opportunity for the Court to reiterate the guidelines issued in its decision in April 2009 in ***Delhi Commission for Women v. Delhi Police*** (*supra*), some which were not observed in their true spirit in this case. In particular, the victim was not provided prompt medical assistance. Also, barring two or three dates before the trial Court, PW-1 was not represented by a legal aid counsel as mandated by the Supreme Court in ***Delhi Domestic Working Women Forum v. Union of India*** (1995) 1 SCC 14 and reiterated by this Court in ***Khem Chand v. State of Delhi*** 2008 (4) JCC 2 497. The Court reiterates the above guidelines and further directs that the Delhi State Legal Services Authority (DSLISA) shall ensure that hereafter every rape victim in Delhi, unless she is able to arrange a private lawyer, is offered the services of a panel lawyer of the DSLISA and counselling services from the earliest stage of the case, i.e. even at the stage of recording of her statement under Section 164 Cr PC and thereafter throughout the trial. This may have to continue even thereafter till the conclusion of the appeal, if any.

123. In the present case, for the reasons aforementioned, the Court is not satisfied that the prosecution has been able to prove the guilt of either A-1 or A-2 for the offences with which they have been charged. The impugned

judgment and the order on sentence of the trial Court are hereby set aside and the Appellants are acquitted for the offences with which they were charged. The Appellants shall, unless wanted in some other case, be set at liberty. Each of the Appellants will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest.

124. By the impugned order on sentence, which stands set aside, the two Appellants were directed to pay fine amounts and also compensation of Rs. 10 lakhs to the victim in the ratio of 50:50. The trial Court further directed that if the compensation amount was not so paid within three months, the DLSA Shahdara District would pay it under Section 357 A Cr PC and in terms of the Delhi Victims Compensation Scheme 2015 and thereafter recover it from the Appellants in the ratio of 50:50. The Court clarifies that while the compensation and fine amount if any paid by the Appellants shall stand refunded to them consequent upon their acquittal, the compensation amount if any, paid to PW-1 by the DLSA Shahdara District pursuant to the order of the trial Court shall not be asked to be refunded by her or recovered from the Appellants.

125. The appeals are allowed in the above terms. The applications are disposed of. The trial Court record be returned together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 22, 2018/‘anb/rd’