

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 18th April, 2018

Date of decision: 06th September, 2018

CRL.A 977/2017

BHAGWAN DAS @ RAHUL @ TUNTA Appellant

Through Mr. Naveen Chandra, Adv.

versus

THE STATE GOVT. OF NCT OF DELHI Respondent

Through: Mr. Raghuvinder Varma, APP
for the State with IO SI Satish
Bhati, PS Kalkaji.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The appellant/applicant Bhagwan Das @ Rahul @ Tunta s/o Sh. Girdhari Lal vide the present Criminal Appeal No. 977/2017 assails the impugned judgment dated 31.08.2017 and impugned order on sentence dated 13.09.2017 of the Court of the learned Additional Sessions Judge – Special Fast Track Court (South East), Saket Courts, New Delhi whereby the accused i.e. appellant herein, was convicted for the commission of the offence punishable under Section 376 of the Indian Penal Code, 1860 in relation to FIR No. 1107/14, registered at PS Kalkaji, under Sections 376/506 of the Indian Penal Code, 1860 and vide the impugned order on sentence, was sentenced to undergo Rigorous Imprisonment for a period of 7 years and to pay a fine of

Rs.50,000/- and in default thereof to undergo Simple Imprisonment for a period of 6 months for the offence punishable under Section 376 of the Indian Penal Code, 1860 and was given the benefit of reduction of the period of detention already undergone under Section 428 of the Code of Criminal Procedure, 1973 with the direction that the fine after the expiry of the period of appeal be released to the prosecutrix and apart from the same appropriate compensation under Section 357A of the Code of Criminal Procedure, 1973 was also directed to be awarded to the prosecutrix by the Delhi Legal Services Authority, South District, New Delhi in terms of Section 357A(1) of the Code of Criminal Procedure, 1973.

2. The accused i.e. appellant herein is in custody and was produced on 18.04.2018 from the Tihar Jail. As per the nominal roll dated 10.03.2018 received from the Superintendent, Central Jail No. 3, Tihar, New Delhi, the accused i.e. appellant herein as on the said date had undergone 1 year and 7 days of incarceration having earned 25 days of remission.

3. Arguments were addressed on behalf of the accused i.e. the appellant herein by counsel Mr. Naveen Chandra and on behalf of the State by the learned APP for State Mr. Raghuvinder Varma assisted by the Investigating Officer from PS Kalkaji.

PROSECUTION VERSION

4. The facts as put forth in the FIR as detailed in the impugned judgment are to the effect that the prosecutrix had been living in the jhuggi at Giri Nagar, Govindpuri for about two weeks prior to the date

of the registration of the FIR i.e. 26.11.2014 along with her two daughters since her husband Sonu was in jail and that earlier, they used to live near Bhairon mandir and she used to run her livelihood by running a shop near Bhairon mandir every Saturday. Rahul @ Tunta, i.e., the appellant herein used to live near the Aggarwal Dharamshala, Kalkaji. He knew her husband for a long time. He had asked her why her husband was in jail. He told her that he would get her husband released from the jail on bail. On 20.11.2014 morning, he came to her at the Shamshan Ghat and asked her to go with him to the Saket Court. There, she came to know that her husband did not have a date on that day.

5. Rahul @ Tunta thereafter, asked her to accompany him to meet an Advocate and took her to a vacant flat behind Apollo hospital i.e., room no.8 of which he had a key and opened the room and took her inside. Although, she refused but he told her that they would wait for the advocate there. He told her that he would get her husband released on bail. He then committed sexual intercourse with her against her wishes. He threatened her that he had strong links and he would get her husband killed in the jail. He then asked her not to tell the same to anyone and dropped her near the Bhairon mandir. He again asked her to accompany him on 24.11.2014, when her husband Sonu would be produced in the Court. Due to fear, she did not tell about this to anyone. On 24.11.2014, he came to her and started taking her to the Court after giving her threats and started making attempts to take her to Apollo again but she realized his intention and got down at Modi Mill. She was afraid of him. She then mustered courage and went to

the police station and made the complaint.

6. The chargesheet indicates that the Investigating Officer SI Ekta got the prosecutrix counselled by a counselor Sushma of an NGO and obtained the counselling report and thereafter the prosecutrix was got medically examined through Lady Ct. Manisha No. 3048/SE at the AIIMS Hospital and the medical examination was conducted vide MLC No. 17793/14 and Lady Ct. Manisha handed over 7 sealed envelopes and one seal sealed with the seal of CMO AIIMS, which were all seized by the Investigating Officer vide a seizure memo and an attempt thereafter was made by the Investigating Officer to trace out the accused Bhagwan Das @ Rahul @ Tunta i.e., the appellant herein. The prosecutrix on enquiry stated that the accused i.e. the appellant herein could be available in the morning hours near the Prajapati Dharamshala near the Kalkaji Temple and thus the Investigating Officer along with the complainant and staff at about 8.00 a.m. reached the Kalkaji Temple and then on seeing the person coming near the Prajapti Dharamshala, the complainant identified him as being the person named Bhagwan Das @ Rahul @ Tunta, who was then apprehended by the police and inquiries were conducted from him and his search was conducted but nothing was recovered from him. The disclosure statement of the accused i.e., the appellant herein was thereafter recorded and he made a disclosure statement of having raped the prosecutrix and gave his name as being Bhagwan Das and led the Investigating Officer to House No. 10/27, Gali No. 2, Chauhan Mohalla and he took out a key and opened his room from where a quilt, bed sheet and underwear were seized and the Investigating

Officer prepared the site plan and the accused i.e. appellant herein was sent through Ct. Sajjan for his medical examination. It is also mentioned in the charge sheet that the supplementary statement of the complainant was also recorded. The Investigating Officer also made enquiry from Pratap Singh, the owner of the said house, who informed that the accused i.e. appellant herein for about 20-25 days had earlier taken the said premises on rent and had also given photocopies of his Aadhar Card and Voter ID card. As per the charge sheet, Ct. Sajjan came to the police station from the hospital with a plastic container containing blood in gauze and sample seal and MLC No. 17809/14 whereafter the accused i.e. appellant herein was taken into custody and thereafter the statement under Section 164 of the Code of Criminal Procedure, 1973 of the prosecutrix was recorded by the Ld. MM/Mahila Court/SED, Saket Court vide which the prosecutrix affirmed the version put forth in the FIR. The statements of the witnesses were also recorded under Section 161 of the Cr.P.C. 1973.

7. The exhibits were sent to the CFSL, CBI, CGO Complex, Lodhi Road, New Delhi vide RC No. 126/21/14 dated 15.12.2014. The FSL result was submitted vide application dated 23.09.2015 by the Investigating Officer SI Ekta of PS Kalkaji.

8. The prosecutrix through her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 reiterated the averments made in the FIR and through the said statement under Section 164 of the Code of Criminal Procedure, 1973 recorded on 27.11.2014 stated that the accused i.e. appellant herein Rahul @ Tunta had taken her on the 20th to the Court to Room No. 509 while saying that it was the date

of hearing for her husband, who was in custody in a dacoity case and thereafter on coming to the Court, she learnt that there was no such date of hearing of the case of her husband that day and the accused i.e. appellant herein took her in an auto and took her to the building behind Apollo and told her that he would get a lawyer whom he knew well, arranged for her spouse in Rs.2,000/- to Rs.3,000/- and that on opening the lock of the room, she asked the accused i.e. appellant herein as to where was the lawyer to which the accused replied that he was coming and she should sit comfortably and told her that Sonu her husband was his friend and he would any how get him released. Her younger daughter was with her. She further stated that the accused made her sit on a folding bed and bolted the room though she asked him to keep the door open, to which the accused i.e. appellant herein allegedly stated that when the lawyer would come he would open the door and the accused i.e. appellant herein stuck behind the prosecutrix and when she refused to do any intercourse, he threatened her with dire consequences about her family members and told her that if she did not indulge in the act with him then he would get her husband killed in the jail.

9. As per the statement of the prosecutrix under Section 164 of the Code of Criminal Procedure, 1973 the accused committed rape forcibly on the prosecutrix and left her at the corner of the Nehru Place and threatened her that if she told anyone then he would see her husband. The prosecutrix stated through her statement under Section 164 of the Code of Criminal Procedure, 1973 that on Thursday she went back to her house and out of fear she did not inform anyone and

on Monday she along with the accused i.e. appellant herein had gone to meet her husband at the jail where the accused i.e. appellant herein had gone to meet some person known to him and she had accompanied him out of fear though she could not get inside the jail as she did not have any proof and she could not enter. The accused i.e. appellant herein also did not enter the jail and again attempted to take her back to the room but she made an excuse that she had to get some treatment for her daughter and she got down at the Modi Mill where she could not find Baba and from there she went to her mother's house. The prosecutrix further stated through her statement under Section 164 of the Code of Criminal Procedure, 1973 that the accused i.e. appellant herein called her again on Tuesday after threatening her. She further stated that on Monday she had first gone to the Court and from the Court to her mother's house and that her lawyer told her that they would have to take some action and thus she had gone to her mother's house and slept there but did not tell her mother anything but the lawyer informed the police as a consequence of which the police called the person known to her husband named Aman and that person Aman took her to the park and asked her everything and she told him everything and then Aman took her to the police station whereafter she was got medically examined and she sought that the accused i.e. appellant herein be arrested.

10. The age of the prosecutrix as per the statement under Section 164 of Code of Criminal Procedure, 1973 was indicated to be above 20 years. The salwar of the prosecutrix had also been seized.

PROCEEDINGS DURING TRIAL

11. The charge of allegations was framed against the accused i.e. appellant herein on 22.01.2015 for the alleged commission of the offence under Section 376 of the Indian Penal Code, 1860 to which the accused i.e. appellant herein had pleaded not guilty and claimed trial.

12. The impugned judgment indicates that 12 prosecution witnesses were examined. The statement under Section 313 of the Code of Criminal Procedure, 1973 of the accused i.e. appellant herein denied that the prosecutrix was married to Sonu and claimed that the prosecutrix and he were involved in physical relations even before the date of the alleged incident and stated that the physical relations with the prosecutrix were with her consent and rather stated that even the rent of the room on the third floor in a vacant room behind Apollo Hospital where No. 8 was written on the door was paid by the prosecutrix herself to the landlord and that the prosecutrix had herself taken the room where she used to go with him. The accused i.e. appellant herein also denied having made any disclosure statement and denied that any article i.e. a quilt / rajai **Ex.P2** and underwear **Ex.P4** and bed sheet **Ex.P1** were seized from the third floor, house of Moolchand Chauhan, Chauhan Mohalla, Gali No. 2 wherein room no. 8 was mentioned on the door, which was opened and categorically stated that he never wore the underwear **Ex.P4** and stated that the prosecutrix had given a false statement and that all evidences had been created to falsely implicate him in the case and stated that **Ex.PW11/C** was a matter of record and when confronted with the queries that the

semen was detected on the rajai **Ex.1a** and salwar of the prosecutrix **Ex.2** and DNA profile generated from the male fraction DNA obtained from the source of exhibits 1a and 2 was found to be consistent with DNA of the accused i.e. appellant herein profile (source of **Ex.10**) blood stained gauze and the report was proved by **PW12**, the accused i.e. appellant herein stated that it was a matter of record and that the physical relations between him and the prosecutrix were consensual. He further stated that he has been falsely implicated in the present case as he refused to cooperate the police in an investigation of a murder case and that the police has falsely implicated him in a rape case with the help of **PW1**.

13. The accused also led evidence in defence in the form of his own testimony recorded under Section 315 of the Code of Criminal Procedure, 1973.

14. Through her statement as **PW1** the prosecutrix had stated that she was married in the year 2010 with Sunder Singh and that she has two daughters from this wedlock and Sunder Singh has left her on 14.08.2014 and thus he married Sonu on the same day and started living with him and that in the month of November, 2014, her husband i.e. Sonu was sent to jail in some criminal case probably in relation to a theft case and that the accused i.e. appellant herein was residing near the Kalkaji Dharamshala and that her husband had been arrested on Sunday that she did not recall the date but it was the month of November, 2014 and that on the next date i.e. Monday in between 8.30 – 6.00 a.m., she along with one lady whom she used to address as Chachi was sitting outside Satyam Cinema and accused i.e. appellant

herein came and told her that her husband is being produced in Saket Courts and he can take her there to meet him and that the accused i.e. appellant herein had also called somebody on his mobile and had got her speak with her husband and that the accused i.e. appellant herein had brought her to Saket Court at 11.00 a.m. and that when they had gone to Court No. 509, it was revealed that the accused i.e. the spouse of the prosecutrix had already been sent to lock-up (kharje me chala gaya) and that she the prosecutrix / **PW1** had spotted her husband boarding in the police bus and that since the bus had stopped at that time, she had a talk with him for about 2-3 minutes. She stated that the accused i.e. appellant herein was with her at that time and from the Saket Courts, the accused i.e. appellant herein had dropped her at Bhairon Mandir where she used to work. She further stated that when they were in the Auto, the accused i.e. appellant herein had told her that her husband would be produced in the Court on 20.11.2014 and also told her that he had acquaintances with some good lawyers and he would get her husband released on bail and she stated OK to the accused i.e. appellant herein and stated that from Bhairon Mandir, she had gone to the jhuggi of her mother at Chandiwalla Metro Station.

15. The prosecutrix had further stated that on 20.11.2014 while she was sitting at the Shamshan Ghat, the accused i.e. appellant herein had met her and told her to accompany him to Saket Courts as he had already told her that her husband would be produced in the Court and when she went to the Saket Court along with the accused i.e. appellant herein and enquired from the Court staff, she came to know that her husband was not being produced on that day in the Court and there

was no date for his remand on that day and that the accused i.e. appellant herein had told her that he would take her to a good lawyer and introduce him to her and that since the accused i.e. appellant herein was helping her, she believed him and accompanied him and the accused i.e. appellant herein had taken her to a third floor vacant flat situated behind Apollo Hospital and number 8 was written on the door of the flat. The accused i.e. appellant herein had opened the flat with the key which he was having with him and asked her to sit there comfortably and told her that the lawyer is known to him and will come there in a short while and that after some time the accused i.e. appellant herein bolted the door from inside and said to her that he would open the same when the said lawyer would come there and thereafter the accused i.e. appellant herein had sexual intercourse with the prosecutrix forcibly without her consent and that when she resisted the said act of the accused i.e. appellant herein at that time her younger daughter aged about two years was also with her. She further stated that she was very afraid of the incident and did not tell the incident to her mother. She further stated that after 2-3 days, the accused i.e. appellant herein had again met her at Bhairon Mandir and had asked her to accompany him to Tihar Jail to meet her husband and that when she refused to accompany him, he threatened her that he would even teach a lesson to her mother with whom she was residing and that she, the prosecutrix accompanied the accused i.e. appellant herein to Tihar Jail but she could not meet her husband Sonu for want of any of her ID proof and that the accused i.e. appellant herein had hired an auto at Tihar Jail and had asked her to accompany him to

Nehru Place and that when she reached Modi Flyover, she got suspicious that the accused i.e. appellant herein was again taking her to the said flat for committing rape with her and that she pretended to the accused i.e. appellant herein that she had to meet with a Pir Baba at the Okhla Mandi and got down from the auto and at that time her younger daughter aged about 2 years was also with her and that the accused i.e. appellant herein also left the auto and when she proceeded to Okhla Mandi to meet the said Baba, the accused i.e. appellant herein followed her and that the Baba was not there at the Mandir and someone told her that he was available under the Modi Flyover and when she went there, the accused i.e. appellant herein again followed her and when she asked the accused i.e. appellant herein that her elder daughter is not feeling well, he dropped her at Bhairon Mandir and went away. She further stated that as she was threatened by the accused i.e. appellant herein, she did not narrate the incident to anyone and gradually she mustered courage and thought that if she would not make a complaint against the accused i.e. appellant herein, he would repeat the same thing with her. She further stated that finally after two days, probably on 26.11.2004, she went to the PS Kalkaji to lodge a complaint against the accused i.e. appellant herein and that the police recorded her statement **Ex.PW1/A** whereupon she appended her thumb impression at point-A. She was medically examined by the police at AIIMS Hospital vide MLC **Ex.PW1/B** and also appended her thumb impressions at point A and that she had also narrated the incident to the doctor who had examined her and her statement under Section 164 of the Code of Criminal Procedure, 1973 was also

recorded i.e. **Ex.PW1/C**. She further stated that before lodging the present complaint, Aman who is her Munh Bola Devar had come to the jhuggi of her mother and when her mother had gone out to fetch water, she shared the incident with Aman and he told him that she should have told the incident immediately after it happened and further motivated her to make a complaint against the accused i.e. appellant herein. The prosecutrix testified that Aman also accompanied her to the PS for making a complaint against the accused i.e. appellant herein but he remained outside the PS when her statement was recorded. She also stated that on the bed on which the accused i.e. appellant herein had committed rape with her, a mattress and bedsheet was lying and that the accused i.e. appellant herein had also used a pink color quilt (rajai) and that she had handed over her salwar which she was wearing at the time of the incident to the police vide seizure memo **Ex.PW1/D** and on the next day of lodging her complaint, the accused i.e. appellant herein was arrested from near Prajapati Dharamshala, Kalkaji at her instance vide arrest memo **Ex.PW1/E** and a personal search memo **Ex.PW1/F**. She further stated that her husband was released from jail. The exhibits seized were identified by the prosecutrix in her testimony. During the course of her examination in chief, the prosecutrix produced a photocopy of a letter stating that it was given by the accused i.e. appellant herein to her husband who was in Tihar Jail at that time for handing it over to her but the original of the same got damaged during rain.

16. Through the cross-examination of the prosecutrix the factum of the physical relations between the prosecutrix and the accused i.e.

appellant herein on the date of the incident in the room behind Apollo Hospital has not been challenged. The accused i.e. appellant herein however through the cross-examination of the prosecutrix of the prosecutrix has sought to assert that the physical relations with the accused i.e. appellant herein were established by the prosecutrix with her free will and that she has previously been married to someone else before her marriage to Sonu and that Sonu had put only sindoor on her parting as a formality of marriage and she knew Sonu since her childhood and that she was brought to Delhi by her mother in her childhood and they started residing at Bhairon Mandir, Nehru Place and that after her marriage with her former husband, they shifted to his house at NOIDA and that when she got married with Sonu, she came to know that he was released from jail a year before. In her cross-examination, she has stated that she knew Aman as her husband considered him to be his brother and that first of all, she narrated the incident to Aman after seven days of the occurrence and then Aman took her to the police post. She admitted that there was a dispute between Aman and accused Bhagwan Dass and also admitted that Aman had a dispute with the father of the accused but denied that she had falsely implicated the accused i.e. appellant herein at the instance of Aman in connivance with the police. She further stated that she is not aware if the accused i.e. appellant herein is working as an informer of the police.

17. As detailed in the impugned judgment, the witnesses of the prosecution examined were **PW1** i.e. the prosecutrix and **PW2** Dr. Rashmi Pilania, Sr. Resident, Department of Obs and Gyne, AIIMS

Hospital, New Delhi, who testified to having prepared the MLC **Ex.PW1/B** of the prosecutrix, who examined the prosecutrix on 26.11.2014 who was brought to her by the police personnel WCt. Manisha, No. 3048/SE. In the sexual assault history sheet, it was recorded to the effect that the prosecutrix was raped by one Rahul Tunta on 20.11.2014 at about 2 p.m. and he took her to his house saying he will help her getting her husband out of jail and will meet a lawyer at his home but there he raped her behind the Apollo Hospital, Sarita Vihar, though the exact place was not known.

18. **PW-3** examined was HC Narender Singh, No. 787 SE, Duty Officer PS Kalkaji on 26.11.2014, who registered the FIR at 11.15 p.m. on being produced rukka of this case before him by WSI Ekta.

19. **PW-4** examined was Pratap Singh s/o Moolchand Chauhan, who stated that on 27.11.2014, the accused i.e. appellant herein had come to his house along with a lady whom he had introduced to him to be his wife for taking a room on rent and that he had taken a one room set on rent on the third floor of the premises bearing no. B-8 and Rs.3,500/- was agreed to be paid by the accused i.e. the appellant herein though no agreement was executed between them and after 3-4 days of taking possession of the room by the accused i.e. appellant herein, he had handed over to him the copy of the Aadhar Card and voter I card and proof of his ID and that the accused i.e. appellant herein had stayed at the said premises as a tenant only for 15/20 days and for that reason, he could not get his tenant verification done and after this incident, the accused i.e. the appellant herein had left the premises and he did not pay anything on account of the said stay as he

had already given him one month rent in advance and that he had given the copies of the Aadhar Card and voter ID of the accused i.e. appellant herein to the police vide seizure memo **Ex.PW4/A** and stated that the copy of the Aadhar Card and voter I card of the accused i.e. appellant herein are **Ex.PW4/B** and **Ex.PW4/C**. He also stated that the accused i.e. appellant herein has a shop at Kalkaji mandir and that **PW4** had given the said fact in writing **Ex.PW4/D** with his signatures at point-A. *Inter alia* the **PW-4** stated that the accused i.e. appellant herein had stayed in his house along with that lady.

20. On being cross-examined by the learned counsel for the accused i.e. appellant herein, it was stated by **PW4** to the effect : -

“It is correct that the said lady had also accompanied the accused when he met me for taking room on rent. Accused had introduced her to be his wife. After two days, accused and said lady brought their belongings for shifting in the said room”

21. **PW-5** examined was Ct. Sajjan Singh, No. 3461/South East, who testified that he along with the prosecutrix, Investigating Officer SI Ekta, lady Ct. Manisha and other staff on 27.11.2014 at about 8.00 a.m. reached at Prajapati Dharamashala near Kalkaji Mandir and after sometime one person was seen coming towards Dharamshala and on the pointing out of the prosecutrix, he was apprehended, whose name was revealed as Rahul @ Tunta and he was arrested vide memo **Ex.PW1/E** with his personal search memo **Ex.PW1/F** and the disclosure statement of the accused i.e. appellant herein **Ex.PW5/A**. This witness further testified to the effect that the accused i.e.

appellant herein led them to a house at Chauhan Mohalla, Gali no. 2, Asola Village i.e. the place of the incident and that on the pointing out of the accused i.e. appellant herein, one quilt, one bed sheet and one underwear were recovered from the third floor of the said house and that all were kept in a plastic bag and sealed with the seal of PK and were seized vide seizure memo **Ex.PW5/B**. The witness testified further that the Investigating Officer had prepared the site plan and he had taken the accused i.e. appellant herein to AIIMS on the direction of the Investigating Officer and thereafter he along with the accused i.e. appellant herein came to the police station and handed over the MLC of the accused i.e. appellant herein and the exhibits in a sealed condition with the sample seal of the hospital to the Investigating Officer, which were seized vide seizure memo **Ex.PW5/C** by the Investigating Officer. *Inter alia* this witness identified the seized articles vide seizure memo **Ex.PW5/B**.

22. On being cross-examined, the witness stated that the departure entry was made by the Investigating Officer on 27.11.2014 but he did not remember the mode of transport used by him in going to Prajapati Dharamshala, Kalkaji and the accused i.e. appellant herein had met them at Ram Pyau where several public persons were present near the Ram Pyau and that the Investigating Officer had not joined any public person in the investigation at Ram Pyau and no statement of any public person was recorded by the Investigating Officer and they remained at the spot of the arrest for about 5-7 minutes and after the arrest of the accused i.e. appellant herein, the accused i.e. appellant herein was medically examined at the AIIMS hospital and thereafter

the accused i.e. appellant herein was brought to the PS and was taken to Jasola after his medical examination.

23. **PW-6** examined was Ct. Manisha, No. 3048/SE, who testified to having taken the prosecutrix to AIIMS on 26/27.11.2014 at about 12 mid night and stated that she was medically examined and the examining doctor had sealed the exhibits with the sample seals of the hospital and she handed over all the sealed exhibits with the sample seals and the MLC to the Investigating Officer and that on the next day i.e. on 27.11.2014 at about 8.00 a.m., she along with the Investigating Officer SI Ekta, Ct. Sajjan Singh and other staff of the police reached near Prajapati Dharamshala at Kalkaji mandir and that the accused i.e. appellant herein reached and that they waited for some time and after some time, the accused i.e. appellant herein was coming towards Dharamshala and on the pointing out of the prosecutrix, the accused i.e. appellant herein was apprehended and interrogated and arrested and the accused i.e. appellant herein revealed his name as Rahul @ Tunta and then led them to the place of the incident and on the pointing out of the accused i.e. the appellant herein, the exhibits were seized. This witness also identified the seized articles. **This witness in her cross examination admitted that the Investigating Officer did not record the statement of the prosecutrix in her presence but denied that the accused i.e. appellant herein himself had surrendered in the police station. This witness stated that the Investigating Officer had recorded the statement of the landlord of the house and admitted that the Investigating Officer did not record the statement of the land lady though the land lady was**

present when they reached there. She further stated that she did not remember the storeys of the building and she did not know if there were any tenants in the building. She denied that she did not go there or that she did not join any investigation and denied that she signed the documents in the police station.

24. **PW-7** examined was HC Bhim Singh, No. 1241/SE and stated that on 27.11.2014 WSI Ekta had deposited some exhibits sealed with the seal of AIIMS and seal of PK in the malkhana and he had made an entry in register no. 19 at serial no. 3250 and the copy of the entries is **Ex.PW7/A** and on 28.11.2014 WSI Ekta had deposited some exhibits sealed with the seal of PK in the malkhana and he had made an entry in register no. 19 at serial no. 3252 and the copy of the entry is **Ex.PW7/B**. **PW-7** testified further that on 15.12.2014 exhibits were sent to the CFSL, Lodhi Colony, New Delhi through Ct. Sajjan who after depositing the exhibits returned to the police station and handed over copy of the receipt and acknowledgement to him as **Ex.PW7/C** (colly) and further stated that on 16.07.2015 the exhibits with CFSL results in sealed conditions were received in the malkhana and that the exhibits were deposited in the malkhana and the results were handed over to the Investigating Officer and he also made an entry at point-A in **Ex.PW7/A** and that so long as the exhibits remained in his custody, the same were not tampered with in any manner.

25. **PW-8** Ms. Shivani Chauhan, the learned MM (Mahila Court), South East, testified to having recorded the statement under Section 164 of the Code of Criminal Procedure, 1973 of the prosecutrix **Ex.PW1/C** on 27.11.2014 in accordance with law and testified to the

effect that she had also appended the certificate to this effect at point C to C on the statement **Ex.PW1/C** and after recording the said statement, the copy of the statement was supplied to the Investigating Officer on her request vide application **Ex.PW8/A**. The testimony of this witness was not challenged by the accused i.e. appellant herein.

26. **PW-9** examined was Ms. Sushma, CIC Counsellor, DCW, Delhi who stated that the prosecutrix was present in the police station on 26.11.2014 and she had made an inquiry from the prosecutrix and had given her counseling and prepared a report **Ex.PW9/A**. On being cross-examined this witness stated that the mother of the prosecutrix was not present at the time of her counseling.

27. **PW-10** Dr. Piyush Shrama, Sr. Resident, Department of Forensic Medicine and Toxicology, AIIMS, New Delhi, testified to having examined the accused i.e. appellant herein Rahul @ Bhagwan Das brought by the police for medical examination vide MLC **Ex.PW10/A** and opined that there was nothing found to suggest that the accused i.e. appellant herein is incapable of performing sexual intercourse under ordinary circumstances and that he had preserved the blood of the accused i.e. appellant herein in gauze, sealed with the seal of the hospital and handed over the same to the police with the sample seal.

28. **PW-11** examined was SI Ekta, the Investigating Officer, who testified to having recorded the statement of the prosecutrix **Ex.PW1/A** on 26.11.2014 at the police station Kalkaji and stated that she had sent information to NGO and the prosecutrix was counselled and the report is **Ex.PW9/A**. She i.e. the Investigating Officer had

made an endorsement on **Ex.PW11/A** and got the case registered vide FIR **Ex.PW3/A** and had sent the prosecutrix with the lady constable Manisha to the hospital for her medical examination and the prosecutrix was examined as per the MLC **Ex.PW1/B** and the lady constable handed over the sealed exhibits of the prosecutrix vide memo **Ex.PW6/A** and she deposited the exhibits in maalkhana and she, the Investigating Officer made enquiries from the prosecutrix as to where the accused would be. On 27.11.2014, she along with the staff went to the Dharamshala at Kalkaji Mandir and the prosecutrix pointed out towards the accused and she apprehended and arrested the accused i.e. the appellant herein and conducted the personal search and interrogated the accused i.e. appellant herein and she recorded the statement of the prosecutrix under Section 161 of the Code of Criminal Procedure, 1973 and had taken the accused i.e. the appellant herein to the place of the incident at Asola Gaon and they had gone to the third floor, house of the Moolchand Chauhan, Chauhan Mohalla, Gali No. 2, Room No. 8 and that the key of the room was near the window and the room was opened and a razai (quilt), an underwear and bed sheet were seized and she prepared pullandas and sealed them with the seal of PK and seized vide seizure memo **Ex.PW5/B** and sent the accused i.e. appellant herein to the hospital through Ct. Sajjan, who after examination handed over the MLC and the sealed exhibits of the accused i.e. appellant herein along with a sample seal which she had taken into possession vide memo **Ex.PW5/C**.

29. She *inter alia* stated that she had deposited the exhibits in the maalkhana and thereafter she had taken the prosecutrix to the Court

for recording her statement vide application **Ex.PW8/A** and the statement of the prosecutrix is **Ex.PW1/C**. The Investigating Officer also stated that she also prepared the site plan of the spot **Ex.PW11/B** and stated further that on 28.11.2014, the prosecutrix came to the police station and produced a salwar and stated that she was wearing the salwar at the time of the incident, the Investigating Officer prepared a pullanda and sealed it with the seal of PK and seized vide memo **Ex.PW1/D**. The Investigating Officer further stated that she recorded the supplementary statement of the prosecutrix and she had sent the exhibits to the CFSL and collected the CFSL result exhibited as **Ex.PW11/C** and so long as the exhibits remained with her, their seals were intact. She further identified the case property seized by her during the investigation.

30. On being cross-examined, the Investigating Officer stated that she had gone to the police station Kalkaji on the directions of the SHO and that she did not remember if she recorded this fact in the roznamcha and that the prosecutrix was alone when she reached the police station and no public witness was joined when the accused i.e. appellant herein was apprehended or the recovery was effected and denied that she did not arrest the accused i.e. appellant herein from the place stated above. She has further denied that on 27.11.2014, Ct. Arun had brought the accused i.e. appellant herein in the police station but that she did not remember how many storeys were there in the house and she cannot say if there were 13-14 rooms in the house and whether in every room tenants had been living and that she did not record the statement of any tenant and denied having recorded the

statement of the landlady or her son and stated that she cannot say if at the ground floor a tuition centre was being run and that she denied that she intentionally did not record their statements or that she did not conduct the investigation fairly. She further stated that she did not identify the prosecutrix from the landlord / landlady and denied that she intentionally did not get the prosecutrix identified from them.

31. **PW-12** examined was Dr. D.K. Mahapatra, SSO-1, Biology, CFSL, Lodhi Road, New Delhi, who testified to having examined the case property and stated that the seals were intact and tallied with the specimen and he de-sealed the parcels before examination and carried out the biological examination as per the query and testified to his report as **Ex.PW11/C**. The report **Ex.PW11/C** indicates that the DNA profile generated from the male fraction DNA obtained from the source of exhibits – 1a (razai) & 2 (salwar) stated to be of the prosecutrix was found to be consistent with the DNA profile of Rahul @ Tunta accused i.e. appellant herein with the source of exhibit – 10 being the blood stained gauze of the accused i.e. appellant herein. No blood was however detected from one khakhi colored underwear Ex.1c allegedly seized from the spot.

32. Through his statement under Section 313 Code of Criminal Procedure, 1973 (already adverted to), the accused, i.e., the appellant herein denied that the prosecutrix was married to Sonu on 14.8.2014 after her previous husband Sunder Singh, to whom she was married in the year 2010 and with whom she has two daughters, left on that day. It was rather stated by the accused, i.e., the appellant herein that the prosecutrix had not married Sonu and after she was left by Sunder

Singh, she came to her mother's house at Bhairon mandir and started living with her mother. The accused, the appellant herein, further stated that he knew the prosecutrix before and he used to meet the prosecutrix at Bhairon mandir.

33. The accused, i.e., the appellant herein, in response to a query No.3 put during the course of the statement under Section 313 Code of Criminal Procedure, 1973 which reads to the effect:

“Q 3 It is further in evidence against you that in November, 2014, on the next day of arrest of husband of PW1 i.e. on Monday between 8:30 to 9 a.m., PW1 and her chachi were sitting outside Satyam cinema. You came there and told her that her husband would be produced in the Court at Saket and you can take her there. You thereafter took her to Saket Court. From court no.509, it was revealed that her husband was taken to the Kharja. Thereafter they went to the police lock up where PW1 spotted her husband boarding the vehicle. She talked to him for 2-3 minutes in your presence and from the Saket Court, you dropped her at Bhairav mandir where she used to work. When you and PW1 were in the auto, you told her that her husband would be produced in the Court on 20.11.2014 and that he knows some lawyers and he would get her husband released on bail. From Bhairav mandir, she went to the jhuggi of her mother at Chandiwalla Metro Station. What have to say?”

the accused admitted the evidence led therein and respondent

“Ans. It is correct:

34. The evidence put through query No.4 to the accused, i.e., the

appellant herein, was to the effect that on 20.11.2014 when the prosecutrix was sitting at the Shamshan Ghat, he, the accused, i.e., the appellant herein, met her and asked her to accompany him to the Saket Court and later on the prosecutrix at Saket Court came to know that her husband would not be produced on that day and he, i.e., the appellant herein, told the prosecutrix that he would take her to a lawyer and she believed him and accompanied him, to which the accused responded through his statement under Section 313 Code of Criminal Procedure, 1973 to the effect that he had not called the prosecutrix and rather it was the prosecutrix who had called him.

35. The accused through his statement under Section 313 Code of Criminal Procedure, 1973 qua query No.5 which reads to the effect:

“Q 5 It is further in evidence against you that on the said date, you took her to the third floor in a vacant flat behind Apollo hospital where number 8 was written on the door. You opened the flat with the key and asked PW1 to sit there comfortably telling that the lawyer would be come there in a short while. After sometime, you bolted the door from inside and when she asked why you were doing so, you told her that you would open it when the lawyer would come and you thereafter committed sexual intercourse with her forcibly without her consent. There was a bed in that room on which mattress and bedsheet were lying. You had used pink colour quilt/rajai. What have you to say?”,

denied the evidence so led and categorically asserted that it was the prosecutrix herself who had taken the room, i.e., the room No. 8 in a

vacant flat behind Apollo Hospital and claimed that the prosecutrix used to go with him and it was she who had paid the rent to the landlord.

36. To query No.6 in the statement under Section 313 Code of Criminal Procedure, 1973 which reads to the effect:

“Q 6 It is further in evidence against you that when she resisted your act and said “tum meri majburi ka phayda kyon utha rahe ho”but you did not desist from your act. At that time, her younger daughter aged 2 years was with her and weeping. You gave her chips to eat. You thereafter threatened PW1 that you would get her husband killed in the jail as you know many persons in the jail. What have you to say?”

it was responded by the accused, i.e., the appellant herein, as under:

“It is incorrect. We knew each other from before and were physically involved even before. My physical relations with the prosecutrix were with her consent.”

whereby the accused, i.e, the appellant herein, categorically reiterated that the prosecutrix and he knew each other from before and were physically involved even before and his physical relations with the prosecutrix were with her consent.

37. He further denied the evidence led against him to the effect that after the incident he dropped the prosecutrix at the Bhairav mandir from where she went to the mother of Madhav but she did not tell the incident since she was frightened and from where she went to the

jhuggi of her mother but did not tell the incident due to fear and due to nervousness.

38. The accused, i.e, the appellant herein in response to query No.8 which reads to the effect that:

“Q8 It is further in evidence against you that after 2-3 days, you again met her at Bhairav mandir and asked PW1 to accompany you to Tihar Jail to meet her husband. When she refused, you threatened her to teach a lesson to her mother. She then accompanied you to Tihar jail but could not meet her husband for want of ID proof. What have you to say?”

responded to the effect:

“ It is incorrect.”,

thus affirming that he on two-three days, i.e., after 20.11.2014 met the prosecutrix again and asked her to accompany him to Tihar Jail to meet her husband whereupon she refused and the accused, i.e., the appellant herein, threatened her whereupon she accompanied him to Tihar Jail but could not meet her husband for want of ID proof which aspect is affirmed to be correct by the accused, i.e., the appellant herein but the accused categorically denied that he ever threatened the prosecutrix in any manner when she refused to accompany him to the Tihar Jail.

39. Query Nos. 9,10, and 11 which read to the effect:

“Q9 It is further in evidence against you that you hired an auto at Tihar jail and asked PW1 to accompany you to Nehru place. At Modi mill flyover, she got suspicion that you would take her

in the same flat for committing rape, she pretended that she has to meet pir baba at Okhla mandi and she got down from the auto with her two year old daughter. You also left the auto. What have you to say?

Q 10 it is further in evidence against you that PW1 then proceeded to Okhla mandi to meet the baba. You followed her. Baba was not in the temple. Someone told her that he would be under the flyover. She went there and you again followed her. She then told you that her elder daughter is not there, you dropped her at Bhairav mandir and went away. What have you to say?

Q11 It is further in evidence against you that since you had threatened PW1, she did not narrate the incident to anyone. She met her muh bola devar Aman who came in the jhuggi of her mother. PW1 shared the incident with Aman who motivated her to lodge a complaint. She after mustering courage thinking that you would do it again, after two days i.e. on 26.11.2014, she went to the police station kalkaji with Aman and gave the statement Ex.PW1/A to PW11. What have you to say?"

were all denied by the accused, i.e, the appellant herein, who responded to each of the queries to the effect:

" Q9 It is incorrect.

Q 10 It is incorrect

Q 11 A false complaint was lodged against me."

and thus claimed that a false complaint had been lodged against him.

40. The accused, i.e., the appellant herein also denied that on 27.11.2014 he was apprehended and arrested at the pointing out of the prosecutrix at Dharamshala at Kalka Ji Mandir and rather stated that he was lifted from his house where he was sleeping. The accused, i.e., the appellant herein also denied having made any disclosure statement **Ex.PW-5/A** and denied that he had taken the police at the place of the incident at Asola village i.e. third floor, house of Moolchand Chauhan, Chauhan Mohalla, Gali No.2, Room No.8 and the key of room was near the window and the room was opened. The accused, i.e., the appellant herein further denied that a quilt/rajai (**Ex.P2**), an underwear (**Ex.P4**) and a bedsheet (**Ex.P1**) were sealed from the spot and were sealed with the seal of PK vide seizure memo **Ex.PW-5/B** and rather categorically stated that he never wore the underwear **Ex.P4**.

41. The accused, i.e., the appellant admitted the factum that he having been medically examined was found capable of performing sexual intercourse under normal circumstances and affirmed of his blood samples having been taken. The accused, i.e., the appellant herein through his query further in response to query No.19, testified to the effect that he had given his ID to the landlord.

42. *Inter alia*, the accused, i.e., the appellant herein through his Statement under Section 313 Code of Criminal Procedure, 1973 has stated that all the evidences have been collected to falsely implicate him in the instant case.

43. To query No.24 which is to the effect:

Q24. It is further in evidence against you that

PW11 got sent the exhibits to CFSL through PW5 vide RC Ex.PW7/C. It has come in the evidence of PW5 and PW7 that the exhibits during their possession were not tampered with. PW7 collected the CFSL report Ex.PW11/C and as per PW11 the exhibits during her possession were not tampered with. As per the CFSL report, blood was detected in your blood in gauze Ex.10. Semen was detected on the rajai 1a and salwar of the prosecutrix Ex.2 and DNA profile generated from the male fraction DNA obtained from the source of exhibits 1a and 2 was found to be consistent with your DNA profile (source of Ex.10) blood stained gauze and the report was proved by PW12 who did biological examination of the exhibits. What have you to say?

it was responded by the accused, i.e., the appellant herein, categorically to the effect:

“It is a matter of record. Rather relations were consensual.”

44. The accused, i.e., the appellant herein denied that the prosecutrix had produced a letter Mark ‘A’ be given by him to her husband when he was Tihar Jail. *Inter alia*, the accused, i.e., the appellant herein stated that it was a false case got registered against him and that the police was aware that he had relations with **PW1** and as he did not cooperate with the police in investigation of a murder case that the police had falsely implicated him in the rape case with the help of the prosecutrix. It was further submitted by the accused/ i.e. the appellant herein that he had enmity with Sanjay Aggarwal and

he knew the police and **PW1** was induced by Sanjay Aggarwal to make a complaint against him. *Inter alia*, the accused pleaded innocence and claimed that he had been falsely implicated.

DEFENCE EVIDENCE LED

45. In support of his plea of innocence, the accused, i.e., the appellant Bhagwan Dass S/o Girdhari Lal herein put forth himself in the witness box on oath to disprove the charges made against him before the learned Trial in terms of Section 315 of the Cr.P.C. He stated that he was a washerman, aged 35 years and that he knew the prosecutrix for about 15 years prior to his testimony and further stated that the prosecutrix was earlier married in the colony at Palam and in 2014, she had come at Kalkaji Temple after leaving her husband and had called him i.e. DW1 at Bhairon mandir. He, the accused, i.e., the appellant herein, stated that the prosecutrix told him that she had left her husband after a quarrel asked him to arrange a room for her and told him that she wanted to live with him and asked him to bear her expenses. The accused/ appellant stated that he did not arrange the room for 2/3 months and then the prosecutrix started living with a boy named Sonu and after sometime he was arrested in a case and the prosecutrix again asked him to arrange a room and on 25.10.2014, he arranged a room for her in Asola with the help of Bhura and he paid Rs.3000/- as an advance rent to the landlord and the rent was Rs.4000/- per month. It was further submitted that from 2.11.2014, he and the prosecutrix started living in the said room and Bhura got arranged some articles/utensils for them to live and the accused also

gave proof to the landlord and also paid Rs.200 for police verification. It was further submitted that for some days he did not go there but he used to go there often and meet the landlord and lived there as husband and wife and that this fact was also informed to the landlord while taking the room on rent. The accused, i.e., the appellant herein also stated that the landlord was also resident in the same building. As per the statement of the accused, i.e., the appellant herein, under Section 315 Code of Criminal Procedure, 1973, the accused stated that the prosecutrix called him on the mobile phone No. 9582074918 and 9873795548 on 23.11.2014 and 24.11.2014 in the night and in the morning hours to meet Sonu Kalia in Tihar Jail and on 24.11.2014, he took the prosecutrix to Tihar Jail to meet Sonu. The accused, i.e., the appellant herein further stated that Aman s/o Sanjay Aggarwal used to live in a shop near Kalkaji Mandir Ram Pyau and he, i.e. the accused/appellant herein had some dispute with Aman and his father Sanjay Aggarwal and the prosecutrix knew Aman as his father was a friend of Sonu Kalia and that the prosecutrix used to visit Aman on a regular basis and claimed that the prosecutrix had falsely implicated him in the said case at the instance of Sanjay Aggarwal and Aman with whom he had a dispute.

46. The accused i.e. the appellant in his testimony on oath on being cross-examined by the learned APP categorically denied that on 20.11.2014 he brought the prosecutrix at the Saket Court saying that Sonu was being produced in the Court and stated that it was the prosecutrix who had brought him to the Saket Court. He admitted that on that day Sonu was not brought in Court and that he knew that his

TIP was to be conducted and denied that he told the prosecutrix that he knew a good lawyer in Saket Court and would introduce her to him and denied that he induced the prosecutrix to go with him to the flat behind Apollo Hospital and rather he volunteered and stated that the prosecutrix had willingly gone with him to the flat. The accused/appellant herein denied that he opened the lock and told the prosecutrix that the lawyer would come very soon. The accused, i.e., the appellant herein denied that he thereafter bolted the room from inside and committed rape upon her and rather voluntarily submitted that they had physical relations from before and the relations were consensual. He further denied that he threatened the prosecutrix to get her husband killed in the jail since he knew several persons in the jail. The accused, i.e., the appellant admitted that the prosecutrix could not meet Sonu Kalia in Jail for want of ID proof. The accused, i.e., the appellant herein denied that after visiting the jail when he was taking the prosecutrix to the flat, the prosecutrix got down from the auto at Okhla Mandi and rather volunteered and stated that they both went to the flat at Asola and denied that he had testified falsely and claimed that he had been falsely implicated by the prosecutrix in the instant case at the instance of Sanjay Aggarwal and his son Aman and he further denied that he had testified falsely in order to save himself and denied that he had kept the prosecutrix in a room against her wishes and made physical relations with her and denied that they never lived there as husband and wife.

CONTENTIONS OF THE APPELLANT

47. Through the appeal and through oral submissions made by the learned counsel for the appellant, it was contended that the appellant has been falsely implicated and that the physical relations between the appellant and the prosecutrix were in existence prior to the date of the alleged incident i.e. 20.11.2014 and it was submitted that though the sexual intercourse had taken place on 20.11.2014 between the appellant and the prosecutrix at the Asola flat, i.e., room no.8, it was the contention of the appellant that the relations between the prosecutrix and the accused i.e. the appellant were wholly consensual. The appellant further contended that he had been made an escape goat in the instant case at the instance of the complainant as he refused to cooperate with the police in the investigation of a murder case in collusion with one Aman and Sanjay Aggarwal, with whom the appellant had previous enmity.

48. On behalf of the appellant, it was further claimed that the Trial Court had failed to appreciate the fact that the appellant had actually helped the prosecutrix in good spirit because even before the alleged date of incident, i.e., on 20.11.2014, he had taken the prosecutrix to the Saket Court to meet Sonu where she also met him and even talked to him, and the appellant had again taken her to Tihar Jail on 24.11.2014 to meet Sonu, however, she could not meet him for want of ID proof. *Inter alia*, the appellant, i.e., the accused herein claimed and pleaded that had his intention been bad, he would have certainly not taken the prosecutrix to Tihar Jail on 24.11.2014 but would have taken her directly to the alleged place of incident to fulfill his sexual

desire and further submitted that the learned Trial Court failed to appreciate that the landlord of the premises had deposed that the accused had come to his house with a lady for taking a room on rent and introduced that lady as his wife and further that both of them had gone there with their belongings and settled at the said premises.

49. The appellant further submitted through the written submissions that the Trial Court failed to appreciate the fact that the prosecutrix had admitted and deposed in the Court that the prosecutrix was earlier married to one Sunder Singh and had parted with him in the year 2014 and came to her mother's residence at Bhairon mandir, Kalkaji and started living with one Sonu and after sometime, when he was arrested in some case she asked the appellant to arrange a room on rent and to bear her expenses and when the appellant showed his inability to bear her expenses after sometime, as admitted by the prosecutrix, in the Court, he, i.e., the appellant herein had a dispute with one Aman and his father Sanjay Aggarwal and the prosecutrix had falsely implicated the accused, i.e., the appellant herein at their instance.

50. The appellant further submitted that as the prosecutrix had admitted that he had an enmity with Aman and his father Sanjay Aggarwal who had a pivotal role in the instant case, the factum that Aman inspired and motivated the prosecutrix to lodge a complaint and even accompanied her to the police station against the appellant cannot be overlooked and it has been submitted on behalf of the appellant that significantly and surprisingly, the said Sanjay Aggarwal and Aman have not been made prosecution witnesses to support the case.

51. It was also admitted by the appellant that the learned Trial Court had failed to appreciate that there was delay in lodging the report and that the delay in lodging the report of the alleged crime to the police has the inherent risk of fabrication and the entire story put forth in the FIR is concocted and non-joining of Aman and Sanjay Aggarwal as prosecution witnesses is fatal to the prosecution case.

52. It was also submitted on behalf of the appellant that there were various short comings and gaps in the prosecution case which prove the falsity of the case inasmuch as the Investing Officer SI Ekta, examined as **PW11** has testified before the Court that she had neither recorded the statement of any tenant living adjacent to the room where the alleged incident took place nor recorded the statement of the landlord/landlady or her son and that she has not even got the prosecutrix identified by the landlord. The appellant thus reiterated the submission that the learned Trial Court failed to appreciate that the prosecutrix had willingly gone with the appellant and their relations were consensual and that the prosecutrix had lived with the appellant of her own free will and consent under a live-in relationship and made physical relations with him of her own wishes when Sonu was put behind the bars for some offence.

53. The appellant further submitted that the learned Trial Court failed to appreciate that the MLC of the prosecutrix did not show any injury on her person and had there been any resistance on the part of the prosecutrix, it would have resulted into injury on her person. *Inter alia*, the accused, i.e., the appellant herein, reiterated that the prosecutrix knew the appellant from before and was physically

involved with him and their relations were consensual.

54. The accused, i.e., the appellant further submitted that the learned Trial Court failed to appreciate the fact that the prosecutrix had cooked up a false story to implicate the appellant in the present case, as there were contradictions in the statement of the prosecutrix in as much as she deposed before the Court that Aman came to her Jhuggi and when her mother went out to fetch water, she told the incident with Aman and on the other hand, in her statement under Section 164 Code of Criminal Procedure, 1973, the prosecutrix stated that Aman had called her to a park where she disclosed the alleged incident to him.

55. *Inter alia*, it is reiterated on behalf of the accused, i.e., the appellant herein, that there were some material contradictions and infirmities in the statements of the witnesses and the learned Trial Court has failed to appreciate the fact that the prosecution has not been able to prove its case against the appellant beyond a reasonable doubt and there were various loopholes in the case of the prosecution and that there is not much credible evidence on record to show that the appellant had committed any crime.

56. The appellant thus sought the setting aside of the impugned judgment convicting him and also of the impugned order on sentence.

57. During the course of oral submissions made on behalf of the appellant by the learned counsel for the appellant, the submissions made through the appeal were reiterated and it was submitted that the factum that the public witnesses and the adjacent tenants and neighbours of the premises at room No.8, behind Apollo Hospital,

Jasola, had not been joined into the investigation was deliberate and crucial. *Inter alia*, it was submitted on behalf of the appellant that whereas, the prosecution version through the charge sheet was to the effect that the appellant had produced the key of the room No.8, situated in the house of Moolchand Chauhan, Chauhan Mohalla, Gali No.2, i.e., the place of the alleged incident, but in her testimony on Oath, SI Ekta-**PW-11**, the Investigating Officer of the case stated that she had taken the accused to the place of incident at Asola and **PW11** stated that they went to the third floor house of Moolchand Chauhan, Chauhan Mohalla, Gali No.2, room No.8 and the key of the room was near the window and the room was opened.”

58. It was thus submitted on behalf of the appellant that if the appellant had committed any such offence as alleged against him there was no question of the appellant having placed the key of the room near the window to make it accessible to all and sundry.

59. It was also submitted on behalf of the appellant that as per the prosecution version, the appellant was arrested on 27.11.2014 at Kalkaji mandir, which is a place where there is a 24 hours buzz of persons and despite the same no member of the public was joined into the investigation by the Investing Officer which thus casts grave doubts on the veracity of the prosecution version. It was further submitted on behalf of the appellant that though the incident was allegedly of the date 20.11.2014, the FIR is indicated to have been registered on 26.11.2014 and there was no explanation for the delay in registration of the FIR with the arrest of the appellant having been taken place on 29.11.2014 at about 8 a.m. *Inter alia* the appellant

submitted that though the prosecutrix was living with her mother, strangely she did not inform about the incident to her mother and narrated the same to Aman and the said Aman is one who instigated her to register the FIR in as much as he had enmity with the appellant. It was submitted on behalf of the appellant whilst placing much reliance on the testimony of **PW4** Pratap Singh, the owner of the house situated at 10.27 Asola Village, Gali No.2, Chauhan Mohalla, to the effect that room No. B-8 on the third floor of the said rooms which was a one room set had been agreed to be taken on rent by the accused/appellant who had come to the said room along with a lady whom he had introduced to be his wife and that a sum of Rs.3500/- had been agreed to be paid as rent by the accused i.e. the appellant herein though no agreement was executed between them and that after three or four days the accused, ie., the appellant herein handed over to him the copy of his Aadhar Card and voter I Card and proof of his ID and that the accused had stayed at the said premises as tenant only for 15/20 days and for that reason he could not get his verification done and after this incident the accused left the premises and did not pay any rent as the accused had already given him one month's rent in advance. This witness had *inter alia* stated that he had given the copies of the Aadhar Card and voter ID of the accused to the police vide seizure memo **Ex.PW-4/A** bearing his signatures at Point 'A' and stated that the accused also appended his signatures on the document. **PW-4** further stated that the accused had told him that the accused had a shop at Kalkaji mandir and had also given the said fact in writing which is **Ex.PW4/D**. *Inter alia*, it was stated by the witness that the

accused had stayed in his above said house along with that lady. It was stated by the witness :

“It is correct that the said lady had also accompanied the accused when he met for taking room on rent. Accused had introduced her to be his wife. After two days, accused and said lady brought their belongings for shifting in the said room.”

60. It was thus submitted on behalf of the appellant that the factum that the accused/appellant was accompanied by the prosecutrix when the room had to be taken on rent and that the accused had introduced the prosecutrix to be his wife and that Pratap Singh, the owner of the house had categorically stated that after two days, the accused, i.e., the appellant herein, and the said lady had brought their belongings for shifting in the said room and the factum that she had been introduced as his wife, all make it apparent and clear that the physical relations between the appellant and the prosecutrix were in existence from much prior to the date of the alleged incident and that the allegations levelled against the appellant of his committing rape on the prosecutrix on 20.11.2014 were wholly false and erroneous and cannot be believed.

61. It was thus reiterated on behalf of the appellant that the entire available record brought forth the existence of a live-in relationship between the prosecutrix and the appellant. It has been submitted on behalf of the appellant further that the falsity of the allegations levelled against the petitioner are brought forth through **Ex.PW-11/C**, the Biological Examination & DNA Profiling Report dated 25.5.2015

prepared by the Central Forensic Science Laboratory (CBI) which showed the absence of any semen on Exhibit-1c, the alleged Khaki coloured underwear seized from the spot allegedly belonging to the accused/appellant.

CONTENTIONS OF THE STATE

62. On behalf of the State it was contended that the testimony of the prosecutrix as **PW-1**, her statement which forms the basis of the registration of the FIR, i.e., **Ex.PW-1/A** and her statement under Section 164 Code of Criminal Procedure, 1973, **Ex.PW-1/C**, are all consistent in relation to the material particulars qua the commission of the offence punishable under Section 376 Indian Penal Code, 1860, of rape having been committed by the appellant against the victim Ms.X on 20.11.2014 and it has been submitted on behalf of the State that the FSL result **Ex.PW-11/C** also shows vide this result of examination to the effect:

“8. Results of Examination:

8.1

8.2

8.3

8.4

8.5. *DNA profile generated from the male fraction DNA obtained from the source of exhibits-1a (Razai) & 2 (Salwar) was found to be consistent with DNA profile of Rahul @ Tunta (Source of exhibit-10: Blood stained gauze).”,*

which thus corroborates the statement of the prosecutrix of the commission of sexual intercourse on 20.11.2014 at the spot of the

occurrence between the prosecutrix and the accused, i.e., the appellant herein and it has been submitted on behalf of the State that the testimony of the prosecutrix is cogent and categorical in relation to the commission of the said act and of the sexual intercourse being in violation of the consent and wishes of the prosecutrix. It has also been submitted on behalf of the State that the entire prosecution version is corroborated through the testimony of the prosecution witnesses, **PW-1** to **PW-11** who have been examined and that the plea of innocence of the accused/appellant herein put forth through his statement under Section 313 Code of Criminal Procedure, 1973 and through his statement as defence witness under Section 315 Code of Criminal Procedure, 1973 cannot assist the accused, i.e., the appellant in any manner in as much as they are self created testimonies created by the appellant himself.

ANALYSIS

63. The FIR in the instant case is indicated to have been registered on 26.11.2014 in relation to the incident of stated rape on 20.11.2014. The complainant prosecutrix after the incident on 20.11.2014 has stated that she went to the mother of Madhav but did not tell her about the incident as she was frightened and thereafter went to the jhuggi of her mother but did not tell her also about the incident due to fear, she was nervous and when she went to sleep her mother asked her why she had gone to sleep during day time to which she replied that she was not feeling well. The prosecutrix has also stated that she met the appellant thereafter after two-three days again when the accused, i.e.,

the appellant herein, asked her to accompany him to Tihar Jail to meet her husband and when she refused to accompany him, the accused, i.e., the appellant herein, threatened her to teach a lesson to her mother with whom she was residing whereafter she accompanied the accused to the Tihar Jail but could not meet her husband Sonu for want of her ID proof and on that day the accused, i.e., the appellant hired an auto and asked her to accompany him to Nehru Place and that when she reached Modi Flyover, she got suspicious that the accused would again take her to the said flat where he had committed rape previously and would commit rape with her and she pretended that she had to meet with a Pir Baba at Okhla Mandi and along with her daughter she got down from the auto and went to meet the Pir Baba and the accused i.e. the appellant also followed her and the Baba was not there at the mandir and someone told her that he would be available under the Modi Flyover. It is stated by the prosecutrix that when she went there the accused again followed her and when she told him that her elder daughter is not feeling well, the accused dropped her at Bhairon mandir and went away. It is further stated by the prosecutrix that since she was threatened by the accused, she did not narrate the incident to anyone and gradually mustered courage and thought that if she would not make a complaint against the accused, he would repeat the same thing with her and thus after two days on 26.11.2014 she went to the police station to lodge the report. The prosecutrix has also stated through her examination-in-chief that before lodging the complaint, Aman, her 'muh bola devar' came to the jhuggi of her mother and when her mother had gone out to fetch water, she shared

the incident with Aman who told her that she should have told the incident immediately after it had happened and motivated her to make a complaint against the accused i.e. the appellant herein and that Aman also accompanied her to the police station for making a complaint against the accused but he remained outside the police station when her statement was recorded.

64. As per the FIR **Ex.PW-3/A**, there is no mention of any Aman in the FIR. The charge sheet also makes no mention of any such Aman to whom the complainant disclosed the alleged commission of the offence by the appellant. Through her statement under Section 164 Code of Criminal Procedure, 1973, the prosecutrix stated before the learned Link MM concerned that she had gone back to her mother's house after the incident and she went back home and slept and did not tell anything about the incident to her mother out of fear. Through her statement under Section 164 Code of Criminal Procedure, 1973, also the prosecutrix stated that she informed because of the lawyer having spoken to the police, the police called the person known to her husband and the prosecutrix thus spoke and told everything to Aman in the park. **The said Aman is not cited as a prosecution witness nor examined by the State.**

65. As observed herein above there are several inconsistencies in the testimony of the prosecutrix i.e. in relations to the FIR in question and the statement under Section 164 of the Code of Criminal Procedure, 1973 as also in her statement before the Court, of which the variations are in relation to material aspects at the stage of commission of the alleged rape by the appellant.

66. Vide the impugned judgment the learned Trial Court observed to the effect that the delay in lodging the FIR was of no consequence in the facts and circumstances of the case observing to the effect:

“(II) Delay in lodging the FIR - Delay in reporting a crime to the Police has the inherent risk of fabrication and that is precisely why the Courts are extra cautious whenever there is delay in lodging of an FIR. Unexplained delay can be fatal to prosecution case. However, not all delays are looked upon with suspicion by the Courts, especially the one related to a crime against women, like the alleged rape in the present case. The Courts are alive to the social realities of Indian society where the women find it very difficult to come out of the closet and report such matters to Police for fear of humiliation. If the delay is well explained. Court will accept the same and not attach any significance to the same.

In this case, the prosecutrix has stated in her complaint itself that she was threatened by the accused against reporting the matter to anyone or else he would harm her. She maintained this stand throughout. It is not hard to imagine the pitiable plight of a woman who is burdened with responsibility of running the household with two minor daughters. When such a woman is raped, she will take more than usual time to come to terms with the mental and physical trauma before gathering courage to fight out the accused. It is quite difficult for a woman to broach such a topic with anyone, be it her husband or her parents.

More importantly, the accused had threatened the prosecutrix that he has contacts with the lawyers and that he would get her husband killed in the jail if she would tell it to anyone. She was scared of him. Poor economic condition is a great anathema and bane to the quest for justice in any system. Same holds true for the prosecutrix in the present case. It took her a couple of days to discuss with Aman and then to report the matter to the police.

The delay in lodging the FIR is thus of no consequence.”

67. Placed on record of the Trial Court is the counselling report **Ex.PW-9/A**, the testimony of Ms. Sushma, Counsellor, Sahyog Charitable Trust, dated 24.11.2016 i.e., the date when the FIR was registered. Through this report **Ex.PW9/A**, it has been reported by the counsellor that she had counselled the prosecutrix who was a resident of a footpath, whose husband was in jail who informed the counsellor that her husband's friend Rahul i.e., the appellant on 20.11.2014 had come to her and told her that it was her husband's date and that he would get arranged that she meets him and on that she trusted him and in good faith she accompanied him. The accused, i.e., the appellant herein, first allegedly took her in Court where no hearing took place and thereafter the accused told her that he would get an Advocate and she needed to pay Rs.1000-2000 only and he would contribute the remaining amount and thereafter she went to his house and after she went to his house, Rahul @ Tunta, threatened her to make physical relations with him or else her spouse in jail would be got beaten and

thus out of fear she had physical relations with the accused i.e. the appellant herein and thereafter he threatened her not to tell anyone or else she would see what he will do and thereafter he kept threatening her and that he knew an Advocate and that she even took an advice from an advocate who stated that she need not worry and that she should get the case registered and so the prosecutrix got the FIR registered at the Police Station Kalkaji. The Investigating Officer **PW-11** W/SI Ekta also sent the victim for the medical examination. Through **Ex.PW-9/A** in the report submitted by the counsellor it has been stated to the effect that she stated that the prosecutrix had voluntarily of her own accord had physical relations with Rahul @ Tunta and had got the case registered on the advice of an advocate and the counsellor also reported that the husband of the prosecutrix was in jail and it may be because of this concern that she had live-in relations with the accused, i.e., the appellant herein.

68. This is so in as much as through her statement dated 26.11.2014 made to the Investigating Agency which forms the basis of the registration of the FIR, the prosecutrix had alleged that she had stated that the accused, i.e., the appellant herein had taken her to the flat from the Saket Court on 20.11.2014 where she had been taken to by the accused/appellant so that she could meet her husband as it was his Court date, but on reaching the Court, she learnt that her husband had no date of hearing thereafter the accused/appellant had taken her to his house where he had physical relations with her forcibly despite her refusal to do so, and that the accused/appellant on her refusal to do so had threatened to get her husband killed as he had a lot of

acquaintances in the jail and he also asked the prosecutrix not to tell anyone of the same, in her statement under Section 164 of the Code of Criminal Procedure, 1973 to the learned Metropolitan Magistrate on 27.11.2014, the prosecutrix stated that the accused i.e. the appellant herein after taking her to the house behind the Apollo Building, had made her sit on a folding bed and put the latches of the room and when she asked him about the latch, he stated that he would open it when the lawyer came, when her daughter had slept whilst eating chips, the accused/appellant had come and stuck himself from behind and that she asked him not to do so he had threatened her with dire consequences for her spouse and that he would get him killed in the jail through his persons and that he would also get her murdered, through her statement before the learned Trial Court on 31.03.2015 as **PW1** she stated to the effect:

“After some time accused bolted the door of the flat from inside and when I asked why he has bolting the door from inside, he said to me that he would open the same when the said lawyer would come there. Thereafter, accused committed sexual intercourse with me forcibly without my consent. When I resisted the said act of the accused and asked him, 'tum meri majburi ka fayda kyun utha rahe ho' but accused did not resist from the said act. My younger daughter aged about 2 years was also with me at that time and was weeping. Accused had also given chips to her. Thereafter, he threatened me that he could get my husband killed in the jail as he knows several persons in the Jail.”

69. Through her statement which forms the basis of the FIR, i.e.,

Ex.PW-1/A before the Investigating Officer, and through her statement **Ex.PW-1/C** i.e., the statement under Section 164 Code of Criminal Procedure, 1973, and through her statement before the Trial Court, there is no specification made by the prosecutrix as to how force had been utilized in the commission of sexual intercourse with her by the accused/appellant. The report of the counsellor **Ex.PW-9/A** has not been challenged by the State in any manner which report of the counsellor states categorically to the effect that it appeared to her that the relations between the prosecutrix and the accused/appellant in commission of the act were consensual.

70. The statement of **PW-4**, Pratap Singh, the owner of the room no 8 of house No.10/27 Asola Village Gali No.2, Chauhan Mohalla, New Delhi states categorically that the prosecutrix had accompanied the accused/appellant when he met him for taking the room on rent and had introduced that lady, i.e., an apparent reference to the prosecutrix to be his wife and after two days, the accused i.e. the appellant herein and the said lady came with belongings for shifting to the said room. Significantly the Investigating Officer stated that she could get the prosecutrix identified by the landlady. The Investigating Officer however denied that it was revealed during the investigation that the prosecutrix used to go to the room and that she had a live in relationship. **The key of the room was stated to be near the window with which the room was opened.** All these factors cast grave doubts on the veracity of the prosecution version, in as much as the testimony of **PW-4**, Pratap Singh, that the accused/appellant had come along with a lady to take a room on rent and had introduced that lady to be

his wife and that lady and the accused had brought their belongings for shifting to the said room and that the accused, i.e., the appellant herein had stayed in that house along with that lady, coupled with the factum that the Investigating Officer chose not to get the prosecutrix identified from the landlord nor landlady and coupled with the factum that despite the premises where the room No.B-8 being situated on the third floor with apparently persons available including the landlord to be joined into the investigation at the time of seizure conducted on 27.11.2014 of a quilt, an underwear and a bed sheet from the said room, the landlord was not joined at the time of the said recovery, coupled with the factum that the key to the room was allegedly recovered from the window of the room with which the room was opened as testified by the Investigating Officer and the said key was not even taken into police possession by the Investigating Officer and on the contrary, Constable Sahil Singh, who accompanied the Investigating Officer on 27.11.2014 to the room in question stated that the Investigating Officer might have brought the keys and that he was not aware from where the keys were obtained, coupled with the statement under Section 313 Code of Criminal Procedure, 1973 of the accused, i.e., the appellant herein who denied having taken the police to the room in question, coupled with the factum that there is no cross-examination conducted of the accused/appellant as **DW-1** in relation to this testimony recorded as a defence witness under Section 315 Code of Criminal Procedure, 1973 on oath wherein he had stated that he had got the room arranged on 25.10.14 at the behest of the prosecutrix and started living with the prosecutrix in the said room and

had arranged some article/utensils etc. through one Bhura and that the landlord had also been informed at the time of taking the room on rent that the accused/appellant herein and the prosecutrix were living in the room as husband and wife, coupled with the factum that there is no cross-examination conducted by the State in relation to the statement made by **DW-1** that the prosecutrix called him on his mobile phone Nos. 9582074918 and 9873795548 on 23.11.2014 and 24.11.2014 in the night and in the morning hours to meet Sonu Kalia at Tihar Jail and on 24.11.2014, he had taken the prosecutrix to the Tihar Jail - all bring forth that the allegations levelled against the accused/appellant herein of having committed rape on the prosecutrix on 20.11.2014 cannot be held to have been established beyond a reasonable doubt and much less to the hilt and rather the contention raised on behalf of the accused/appellant that physical relations between the appellant and the prosecutrix were consensual - cannot be over looked in the facts and circumstances of the instant case.

71. On behalf of the appellant reliance has been placed on the verdict of the Hon'ble Supreme Court in **Narinder Kumar v. State (NCT of Delhi)**: Crl.Appeal Nos. 2066-67 of 2009 wherein it has been observed to the effect:

“16. It is a settled legal proposition that once the statement of 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. 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, which may lend assurance to her testimony. (Vide: **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.**, AIR 2003 SC 818; and **Vishnu v. State of Maharashtra**, AIR 2006 SC 508).*

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

18. In **Jai Krishna Mandal «& Anr. v. State of Jharkhand**, (2010) 14 see 534, this Court while dealing with the issue held:

"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."

19. In **Rajoo & Ors. v. State of Madhya Pradesh**, AIR 2009 Se 858, this Court held that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. The court however, further observed:

" 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. "

20. In **Tameezuddin @ Tammu v. State (NCT of Delhi)**, (2009) 15 see 566, this Court held has 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."

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23. *The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.*

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is

*entitled to the benefit of every reasonable doubt. (Vide: **Tukaram & Anr. v. The state of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).***

24. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.”

72. It is essential to observe that the facts of the instant case make it apparent that the accused and the prosecutrix were known to each other much before the date of incident, i.e., 20.11.2014. According to the accused/appellant he knew the prosecutrix for 15 years and there has been no cross-examination conducted of this statement of the

appellant. The prosecutrix also in her statement as **PW-1** had stated that the accused/appellant was known to her as he used to reside near the house of Sanjay Aggarwal who she and her husband used to consider as 'muh bole papa' and meet him at the shop at Kalka ji Dharamshala where the accused i.e. the appellant also used to meet them.

73. Significantly through **Ex.PW-1/A** the statement made by the prosecutrix which forms the basis of the registration of the FIR, the prosecutrix stated that on 24.11.2014 the accused i.e. the appellant came to her and threatened her and frightened her to take her to Tihar and took her there and brought her back and when she sensed the intentions of the accused, she got down mid way, through her statement 164 Code of Criminal Procedure, 1973 **Ex.PW-1/C** the prosecutrix stated that on Monday she along with Tunta i.e. accused went to meet her spouse Rahul @ Tunta at the jail, the appellant had gone there to meet someone and she had to accompany him out of fear, coupled with the testimony of the prosecutrix that after two-three days of 20.11.2014 the accused again met her at Bhairon Mandir and asked her to accompany him to Tihar Jail to meet her husband and when she refused to accompany him he threatened her that he would teach a lesson even to her mother with whom she was residing bring forth apparent improvements and variations in the testimony of the prosecutrix. That the prosecutrix despite the incident of 20.11.2014 accompanied the accused/appellant on 24.11.2014 to meet her spouse, does not appear to be a reasonable prudent act. The contention that the prosecutrix so accompanied the appellant out of fear, is also set at

naught through the inconsistent version put forth by the State in relation to material particulars. That she lodged the complaint on 26.11.2014 with the police because of her being assisted through one Aman is not even stated in her examination-in-chief in Court though she so categorically asserts that it was Aman, a person known to her spouse, to whom she disclosed everything and he took her to the police station for her complaint, the FIR **Ex.PW-1/A** and the testimony of the prosecutrix in Court do not reflect the mustering of courage by the prosecutrix to lodge a complaint due to the assistance of Aman and the said Aman has not even been joined as a witness during the course of investigation of FIR No. 1107/14, PS Kalkaji, under Sections 376/506 of the Indian Penal Code, 1860 and it was only on cross examination on behalf of the accused/appellant that she stated that she first narrated the incident to Aman after seven days of the occurrence and that then Aman took her to the police post and the factum that she admitted that there was a dispute between Aman and Bhagwan Dass i.e. the accused/ the appellant herein and Aman also had a dispute with the father of the accused, cannot be overlooked.

74. The contention of the appellant that had the intention of the appellant been bad he would not have taken the prosecutrix to the Tihar jail on 24.11.2014 and would have taken her to the place of the incident to fulfill his sexual desire cannot be ignored and cannot be brushed aside.

75. In ***Rajoo and Ors. V. State of M.P.***; AIR 2009 SC 858, it has been laid down by the Apex Court whilst advertng to the verdict in ***State of Punjab v. Gurmit Singh and Ors.***; 1996 Cri L J 1728 1996 to

the effect:

“ 6. We have heard the learned counsel for the parties and gone, through the record. It is true that rape is one of the most heinous and reprehensible of crimes that can be committed on a woman and it is for this reason that courts have leaned heavily in favour of such a victim. [See: [State of Punjab vs. Gurmit Singh & Ors.](#) (1996) 2 SCC 384]. In this matter this Court allowed the State appeal against acquittal and while convicting the accused under [section 376](#) of the IPC, observed thus:

“Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great

responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

7. The Court also observed that the alarming frequency of crimes against women had led Parliament to make some special laws in the background that rape was a very serious offence and that this was another factor which was to be kept in mind while appreciating the evidence in such matters.

8. The observations in Gurmit Singh's case were reiterated in *Ranjit Hazarika vs. State of Assam*(1998) 8 SCC 635 in the following terms:

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with

doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set

of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. 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, particularly where a large number of accused are involved. **It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but 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. Reference has been made in Gurmit Singh's case to the amendments in 1983 to [Sections 375](#) and [376](#) of the India**

Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

(Emphasis Supplied)

76. Vide the verdict dated 10.3.2015 in *Mohammad Ali @ Guddu v. State of U.P.*: 2015 CrI.L.J 1967 it has been laid down by the Hon'ble Supreme Court that the sole testimony of the prosecutrix if it is unimpeachable and beyond reproach can certainly result into a conviction and that the grammar of law permits the testimony of the prosecutrix to be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an

injured witness, but, a pregnant one, when a Court on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony and where the testimony of the prosecutrix does not inspire confidence and the circumstantial evidence remotely do not lend support to the same, the conviction of the accused on the basis of the same will be erroneous.

77. The verdict of the Division Bench of this Court in **Rohit Bansal v. State** ; CrI.A.660/1999, **Balbair @ Balli v. State** ; CrI.A.661/1999, **Anil Rawat & Ors. v. State** ; CrI.A.677/1999, **Mukesh @ Bittoo v. State** ; CrI.A.678/1999 and **Parveen Kumar v. State**; CrI.A.692/1999 dated 29.5.2015 states the test laid down for reliance on the sole testimony of the prosecutrix in **Rai Sandeep @ Deepu v. State of NCT of Delhi**: (2012) 8 SCC 21 wherein it has been laid down to the effect:

“15. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber 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 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 everyone 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 similar such tests to be applied, it can 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.”

78. The verdict of the Apex in **Krishan Kumar Malik v. State of Haryana**; (2011) 7 SCC 130 lays down to the effect:

“ 31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary

evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed there are several significant variations in material facts in her S.164 statement, S.161 statement ([Cr.P.C.](#)), FIR and deposition in Court.

32. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. Record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant.”

79. The verdict of Hon’ble Supreme Court in ***State of Rajasthan v. Babu Meen***; (2013) 2 SCALE 479 lays down to the effect

“8. We do not have the slightest hesitation in accepting the broad submission of Mr. Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is

committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.

9. In the background of the aforesaid legal position, when we consider the case in hand we are of the opinion that the statement of the prosecutrix is not at all reliable or in other words wholly unreliable. No other evidence has been led to support the allegation of rape. Hence, it shall be unsafe to base the conviction on her sole testimony. In her evidence she had stated that she was subjected to rape at 12.00 noon when her sister Jitendra, the wife of the accused had gone to purchase milk. However, during the course of investigation she alleged that she was subjected to rape at 06.30 A.M. When confronted with the aforesaid contradiction in the cross-examination, she could not explain the aforesaid discrepancy. Her statement that she shouted for help when she was subjected to rape also does not find support from the evidence of Ramchandra Salvi (PW-11), the owner of the house where the incident is alleged to have taken place. Dr. Smt. Sushila (PW-12), has also not supported the allegation of rape as also the Forensic Science Laboratory Report. In the face of what we have observed above, the evidence of the prosecutrix cannot be said to be wholly reliable.”

80. The verdict of the Apex Court in ***Ram Dass and Others v. State of Maharashtra***; (2007) 2 SCC 170 lays down to the effect:

“ Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact. ”

81. Vide the verdict in Rohit Bansal (supra) vide para-49 it was observed to the effect:

“Keeping in mind the above cited judgments, the testimony of the prosecutrix has to be consistent and natural in line with the case of the prosecutrix and traces from infirmities which inspire confidence in the Court. It cannot be presumed that the statement of the prosecutrix is always true or without any embellishment”.

82. The verdict of the Division Bench of this court in **State (Govt. of NCT of Delhi) vs. Jitender Kumar & Anr.** in CrI.L.P. No. 364/2017 dated 6.7.2017 reiterates the observations of the Division Bench of this Court in **Rohit Bansal and Anr. vs. State** 2015(VI) AD Delhi 566 wherein it has been observed to the effect that :

“ There is no doubt that rape causes great distress and humiliation to the victim of rape but at the same time false allegation of committing a rape also causes great distress and humiliation to the victim of rape but at the same time false allegation of committing a rape also causes humiliation and damage to the accused”

83. Vide this verdict the settled proposition of law is that equal weightage and treatment should be attached to the evidence of defence witnesses as laid down in **Dudh Nath Pandey vs. State of U.P.** (1981) 2 SCC 166. Vide this verdict in CrI. L.P. No. 364 of 2017 it has been laid down to the effect that:

“ 46. From the foregoing, it is clear that the court must not be blind to the rights of the accused. A false accusation of rape may be as damning to an accused as to a victim of rape. The

accused may be shunned in the society and by his own family, spouse and children for no fault of his own only because one woman has levelled false allegations of rape in pursuance of her evil design. Present case seems to be no different when the sole purpose of the prosecutrix and PW-6 seems to extract revenge against the respondents.”

84. Undoubtedly, the accused through his statement under Section 313, Code of Criminal Procedure, 1973, admitted that there was sexual inter course between him and the prosecutrix on 20.11.2014 but stated on oath that the same was consensual between him and the complainant and that there were physical relations in existence between the appellant and the prosecutrix even before the date 20.11.2014, in as much as, it has been stated by him that the prosecutrix used to accompany him to the room and it was she who paid the rent to the landlord. DW1 also states in his statement as DW-1 that he had arranged a room for the prosecutrix in Asola Village with the help of Bhura as it was the prosecutrix who had asked him to arrange for a room which he had got arranged on 25.10.2014 and that from 2.11.2014, he and the prosecutrix had started living in that room and that Bhura had arranged some articles/utensils etc. for them to live and he, i.e., accused i.e. appellant herein had also given the proof to the landlord and had paid Rs.200/- for police verification and that for some days he had not gone there and that he used to go often and meet the landlord and that they were living as husband and wife and this fact was informed to the landlord while taking the room on rent and the landlord was also residing in the same building.

85. It is essential to observe that as laid down by the Apex Court in *Nagaraj v. State Represented by Inspector of Police Salem Town, Tamilnadu*, : 2015 (4) SCC 739

“15. In the context of this aspect of the law it is been held by this Court in *Parsuram Pandey v. State of Bihar* (2004) 13 SCC 189 that Section 313 Code of Criminal Procedure is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. *It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem*, as explained in *Arsaf Ali V. State of Assam* (2208) 16 SCC 328....”

Emphasis supplied.

86. The verdict of Apex Court in *Manu Sao v. State of Bihar* (2010) 12 SCC 310 observed vide para 14 to the effect:

“14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry of trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. *In other words, the use is permissible*

as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution....”

87. It is thus apparent that though the statement given by the accused under Section 313 Code of Criminal Procedure, 1973 can be utilized for the purpose of appreciation of evidence and may also be used for corroboration of the prosecution evidence, the same does not absolve the prosecution from discharging the burden of proof played on it to prove the allegations against the accused beyond reasonable doubt.

88. In the instant case though the accused i.e. the appellant herein admits through his statement under Section 313 Code of Criminal Procedure, 1973 the existence of sexual relations between him and the prosecutrix on 20.11.2014 as observed herein above, he categorically states that the said relations were consensual. The factum that the prosecutrix and the accused, i.e., the appellant herein were known to each other from before is apparent even from the bare perusal of the FIR and the testimony of the prosecutrix also.

89. The statement under Section 315 Code of Criminal Procedure, 1973 of the accused which is a testimony on oath has to be tested on the same parameter as the testimony of any other witness would be gauged. The said testimony in the instant case of the accused, i.e., the

appellant herein, examined as DW-1, is in support of the plea of his innocence.

CONCLUSION

90. On a consideration of the entire available record, it is held that the testimony of the prosecutrix in the facts and circumstances of the case does not inspire confidence, nor is the delay in lodging of the FIR in relation to an incident which is stated to have taken place on 20.11.2014 with the FIR having been registered on 26.11.2014 been explained. This is so in as much as the prosecutrix chose not even to apprise her mother at whose place she stayed after the alleged commission of rape on her and the version set forth through the FIR and through her statement under Section 164 and her testimony on oath as to when her friend Aman was informed by her of the incident, in the absence of Aman having been examined by the prosecutrix, the version put forth by the prosecution is rendered wholly infirm in view of the testimony of Pratap Singh, **PW-4**, the landlord of the room where the alleged incident is stated to have taken place i.e. Room at third floor, B-8, 20/27, Asola Village, Gali No.2, Chauhan Mohalla, in as much as this witness is categorical in his cross-examination that the prosecutrix had accompanied the accused when he met him for taking the room on rent and that the accused had introduced the prosecutrix as being his wife and after two days, the accused and the said lady i.e, the prosecutrix had brought their belongings for shifting in the said room. **As observed elsewhere herein above, the State had not chosen to cross-examine Pratap Singh, in relation to the**

contention that the prosecutrix had lived along with the appellant at the said premises.

91. Taking the totality of the facts and circumstances of the case into account, it is held that there is no sufficient evidence against the accused/appellant and he is thus acquitted of the alleged commission of the offence punishable under Section 376 Indian Penal Code, 1860. Intimation to the said effect be sent to the Superintendent, Jail, Tihar, to release the appellant in the instant case in relation to FIR No.1107/14, PS Kalkaji in SC No.5/15.

ANU MALHOTRA, J

SEPTEMBER __, 2018/mk/sv