

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.A. 479/2003

Reserved on : 26.03.2019

Date of Decision : 29.05.2019

IN THE MATTER OF:

STATE

..... Appellant

Through : Ms. Radhika Kolluru, APP for State

versus

NARESH KUMAR & ORS.

..... Respondents

Through : Mr. Harish Khanna, Advocate

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

MANOJ KUMAR OHRI, J.

1. The present proceeding has been instituted to challenge the acquittal of the respondents vide the impugned judgment dated 25.02.2000 in Sessions Case No.82/1995 arising out of FIR No.431/1990, P.S. Punjabi Bagh.

2. The leave to appeal, in the present case, was granted vide order dated 16.07.2003.

3. The facts of the prosecution, as noted by the trial court, are:

“The case of the prosecution, as disclosed from the police challan, is that on 3.11.1990 complainant Mange Ram

moved an application to the incharge, P.P., Madipur on which said incharge passed an order for registration of the case u/s. 363/366 IPC and investigation of the case was handed over to ASI Ram Dutt. The application was to the effect that gold weighing 15 tolas and cash of Rs.10,000/- were kept in the house of the complainant and his daughter was missing since 11.30 P.M. of the previous night when he and his wife were away with their elder daughter to the hospital and on return they found that younger daughter was not at the house nor the gold and cash was at the house and prayed for search of his daughter and his neighbourer Naresh Kumar r/o. WZ-868, Village Madipur, was suspected in the commission of the crime. Said ASI Ram Dutt apprehended the prosecutrix Rachna and accused Naresh on 4.11.90 near Petrol Pump, Kapesehra border on the pointing out of the complainant and got the prosecutrix and Naresh examined medically.

4. Initially, the case was investigated under the supervision of SI Harpal Singh, Incharge, Police Post, Madipur. On 4.11.1990, a statement of the prosecutrix was recorded under S.161 Cr.P.C. Thereafter, on a complaint filed by the father of the prosecutrix against SI Harpal Singh, the investigation was transferred. During the investigation conducted later, the statement of the prosecutrix under Section 164 Cr.P.C. was recorded on 09.11.1990 which reads as:-

“I along with my parents, three brothers and a sister live at WZ-566, Madipur, Delhi. On 3.11.90, my parents had taken my sister to Ganga Ram Hospital for treatment. In the evening of 3.11.90, I along with my mummy, papa and brother had taken my sister Kavita to nearby Dr. Tyagi, where one Naresh, who was our neighbour was already there. Dr. Tyagi had advised for taking Kavita to the hospital. My mother advised me to stay at home whereas she with my father and brother took my sister to Ganga Ram Hospital. I was watching T.V. at about 10.30 p.m. when there was a call bell. I opened the door and found Naresh standing. He told me that there was a

telephone call from my father, who had desired me to accompany him to hospital alongwith total of cash lying inside the almirah. I opened the almirah and Naresh also came near me. I gave total of the cash, which was in the denomination of Rs.50/- and Rs.100/- to Naresh. I did not count the money. Thereafter, Naresh picked up some items of jewellery, which was lying in the box, which in the front in the almirah. On my asking, he said that it may also be required as there may be some emergency. I believed him. I got panicky on hearing also that my father had desired money and me also. I was also worried about condition of my sister. I got perplexed. I accompanied. Outside our gate there was a white Maruti car standing, wherein Jai Parkash was found sitting at the driver seat. I knew Jai Prakash as he was our neighbour. We both sat on the back seat of Maruti car as was planned by Naresh. The car was driven for quite sometime and then I asked about the hospital. On my repeatedly asking, I was threatened by Naresh and Jai Prakash to be killed if I made a noise or did not accompany them quietly. I got frightened. They took me to a place, where it was quite dark. I was taken inside the room by Naresh, which was locked from outside by Jai Prakash. I did not know as to what place it was. We reached there at about 12:30 night. (Now at this stage, she says that when she was asking about the hospital while in the case, her mouth, feet and hands were tied by the cloth by Jai Prakash and Naresh). In the room, I was made to lie on jute bory, which was already lying there. Naresh, who had already been drinking while in the car was drunk. He put off my salwar kameez, underwear and bra. Before putting off my clothes, he threatened me that I shall be killed if I resisted. I was weeping but I could not resist as I was frightened. Then, he forcibly against my wishes did bad work with me while coming over my body. (By the bad work, she means sex which she has explained as intercourse). He repeated the sex with me after sometime in the same night. Next day night, he again did sex with me forcibly and against my consent. Next day, the police came there and by breaking open the lock from outside arrested us. I did not accompany Naresh of my own but under an inducement and later under threat and pressure. I never

consented to sex with hem, which he did forcibly and without my consent.”

5. Later, the investigation were transferred to the special staff of Tagore Garden, West District, where, on 23.11.1990, another statement of prosecutrix under S. 161 Cr.P.C. was recorded by SI Chander Bhan to the following effect:-

“That she was residing alongwith her parents and was a student of 8th class of Govt. Girls Sr. Secondary School, Punjabi Bagh and her date of birth is 8.2.75 She had three brothers and one sister. On 2.11.90 when the parents had taken her elder sister Kavita at 8.30-9.00 P.M. to Ganga Ram Hospital she was at house and after sometime Naresh s/o. of his uncle/Tau rang bell of his house and she opened the door and Naresh informed that there was a telephonic call of her father who has called for money at the hospital. She then went inside the house to bring money and Naresh also followed her and when she opened the almirah Naresh was standing near her and she collected the entire money which was in the form of currency notes of Rs.100/- & Rs.50/- and handed over to Naresh who also opened the box kept in the almirah and finding ornaments therein he also picked up that box and both of them came out of the house and she found a maruti car standing there in which Jai Parkash was sitting. Naresh handed over cash and jewellery box to Jai Parkash accused. It was about 10.30 P.M. at that time and she & Naresh sat on the rear seat of the car whereas Jai Parkash started the car and after sometime she enquired for the hospital, whereupon she was threatened by them and when she wanted to raise alarm they tied her mouth and the hands and she could not raise the noise. They took her to some lonely place in a room and Jai Parkash left all the cash and jewellery box and Naresh confined her in the room and bolted it from inside. There was an empty gunny bag lying in the room. Naresh was under the influence of liquor and he removed her clothes by force and also threatened her that if she resisted she would be killed. She was weeping and

extremely frightened and Naresh committed rape on her many times night.

It is further in her statement that on 4.11.90 at about 8.30 P.M. Jai Parkash knocked the door which was opened by Naresh and Jai Parkash told to Naresh to leave her at the place from where she was brought otherwise he would be entangled in some case and Naresh took her at the Dhaba near Petrol Pump and while they were there her father came there in his car and police took them to the P.P.”

6. After the investigation, the challan was filed in the concerned Court and the charges were framed against the respondents on 16.07.1992. The respondent No.1/Naresh Kumar was charged under Section 420 and 376 IPC. He was also charged alongwith respondent no.2/Jai Parkash under Section 366 r/w S.34 IPC.

7. During the trial, the prosecution examined 18 witnesses. Besides the prosecutrix, the prosecution also examined Mange Ram (PW-5), the father of the prosecutrix and Santosh Yadav (PW-7), the mother of the prosecutrix. Additionally, the prosecution also relied on the testimonies of Vijay Singh (PW-8), who had last seen the prosecutrix in the company of the respondents and Kirpa Ram (PW-10) to corroborate the testimony of Vijay Singh. However, during the trial, Vijay Singh did not support the case of the prosecution and the testimony of Kirpa Ram was of no use, being hearsay.

8. Ms. Radhika Kolluru, learned APP for the State contended that the impugned judgment is perverse and is primarily based on the inconsequential contradictions in the statement of the prosecutrix, made before the Police and the Court. According to her, the testimony of the prosecutrix is wholly reliable and trustworthy.

9. Mr. Harish Khanna, the learned counsel for the respondents on the other hand, contended that the testimony of prosecutrix (PW-1) was wholly unreliable, being contrary to her earlier statement recorded on 04.11.1990. It was contended that in her above earlier statement, she had stated that on 03.11.1990 at about 6:30pm., she had gone with Naresh Kumar to Pataudi, Gurgaon, on her own volition.

Analysis:

10. The law, so far as the scope of interference in an appeal against an order of the acquittal is well defined. Reference in this regard is made to the decision of the Supreme Court in Ghurey Lal V. State of U.P., reported as **(2008) 10 SCC 450**, wherein it was held:-

"70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

11. It is thus clear that an order of acquittal passed by the trial court can be interfered only if the impugned judgment is found to be perverse, illegal and if there are very substantial and compelling reasons.

AGE OF THE PROSECUTRIX

12. The prosecutrix, during her deposition in Court, stated her date of birth as 23.03.1975. During the cross-examination, she denied the suggestion that on the day of the incident she was above 18 years. Both, Mange Ram and Santosh Yadav, during their deposition stated that the prosecutrix was born on 23.03.1975 and at the time of the incident, she was a student of 8th standard. During their cross-examination, no suggestion was given disputing the above fact. The prosecution had also examined Naresh Kumar, Sub-Registrar, Birth and Death, MCD, as PW 13, who stated that in the original register of Birth and Death, duly maintained in the office of the MCD, entry at Sl. No.168 was with respect to the birth of the prosecutrix on 23.03.1975, showing the name

of the prosecutrix as well as her father and mother. The witness was not cross examined by the respondents. It, thus stood proved that the prosecutrix was a minor, being less than 16 years, on the date of the incident.

CREDIBILITY OF THE PROSECUTRIX

13. The learned counsel for the respondents doubted the credibility of the prosecutrix by heavily relying on her statement dated 04.11.1990. It was contended that her subsequent statements, recorded during the investigation as well as the trial, were contradictory to her first statement.

14. The learned counsel for the respondents argued that as per her statement dated 04.11.1990, the prosecutrix stated to have gone with the respondents on 03.11.1990, of her own volition. He further contended that as per the said statement, the prosecutrix went with Naresh Kumar, on a two-wheeler scooter bearing No. DAF 2156 to Pataudi and thereafter, came back on 04.11.1990 with Naresh Kumar and his brother-in-law. The two, after reaching near the border of Delhi, handed over the prosecutrix to the police.

15. Learned counsel for the respondents also argued that there were material contradictions in the statement of the prosecutrix recorded under Section 164 Cr.P.C. as well as her deposition made before the Court. In the statement recorded under Section 164 Cr.P.C., the prosecutrix stated that the police came at her place of confinement and arrested the respondents after breaking open the lock from outside. On the other hand, in the deposition before the Court, she gave a different version and rather stated that they came in the car to a *dhaba* near petrol pump, where

police had reached along with her father and thereafter, they were brought to P.P. Madipur.

16. Learned counsel for the respondents argued that the above two statements were contradictory and irreconcilable. He also drew the attention of this court to paragraph nos. 30, 31 and 32 of the impugned judgment, where discrepancies and contradictions were held to be fatal. For the sake of felicity, the paragraph nos. 30 to 32 of the impugned judgment, are reproduced below:-

“30. It has been pointed out and vehemently argued that in the instant case statement of the prosecutrix is contradictory and there are no independent public witnesses, though it was possible for the prosecution to procure and produce such witnesses and that the investigation has not been conducted fairly and impartially so as to bring home the charge. It is further contended that the story put forth by the prosecutrix Rachna has not been supported by any independent witness though she stated that while she was leaving the house along with accused Naresh she was soon boarding the car by one Vijay Bhai Sahib. No doubt said Vijay PW has been examined by the prosecution as PW8 but he totally denied having seen the prosecutrix going with the accused and in this regard another witness PW Kirpa Ram stated having been informed by said Vijay Singh that the daughter of Mange Ram had been kidnapped is of no use as the same is in the nature of hearsay. Most important aspect in the statement of the prosecutrix however, appears to be regarding the factum of her recovery from the possession of accused persons.

31. In her statement as PW1 Rachna prosecutrix was confronted with her earlier statement under Sec. 164 Cr.P.C. wherein she stated before the learned M.M. that she was recovered from lonely house by breaking open the lock from outside and then she was arrested. If this was the state of affair that she was recovered from a lonely house where the crime of

rape was committed by breaking open the lock of the room, she would have stated to in her statement in the Court also. She, however, in this regard put up entirely a different new story that she was taken from that lonely place to the Dhaba near petrol pump from where police party and her father recovered her. These two statements are not reconcilable. It thus, appears that the version of the prosecutrix is self-contradictory and this casts a question mark on the veracity and acceptability of the story as put forth by this witness. Moreover, the prosecutrix has failed to produce any eye witness regarding factum of recovery of Rachna from the Dhaba as alleged. It is nobody's case that no public witness was available at the said Dhaba at the time of recovery of the girl and there is no explanation for not joining any public witness at that time.

32. *As regards the factum of the prosecutrix being taken from her house, the complainant PW5 Mange Ram had stated in his statement that tenant Jagdish had informed him that he had seen the girl being taken on the previous night at about 11.00 p.m. while stating that she was going to hospital. If in fact this person had seen the girl, while leaving the house, he would have also seen the accused persons along with her and could easily depose about this fact in this court but for the reasons best known to the prosecution this person was never cited as a witness who could very well support the prosecution case and further no reason whatsoever has been given by the complainant Mange Ram as to why this witness was not cited as a witness. This tantamounts to suppression of material witness. All the witnesses produced are police officials and no public witness who could support the case of the prosecution, has been cited except the two namely Vijay and Kirpa Ram whose testimony has already been discussed above is of no avail to the prosecution. When the statement of the prosecutrix herself is self-contradictory there is no question of conviction of the accused persons for the offence of rape and kidnapping”.*

17. As noted above, the first statement of the prosecutrix was recorded on 04.11.1990 at P.P. Madipur, P.S. Punjabi Bagh, when the case was

investigated under the supervision of SI Harpal Singh who was the Incharge, Police Post Madipur. The same is evident from the statement of ASI Ram Dutt (PW-18). A perusal of the trial court record reveals that on 06.11.1990, Mange Ram, the father of the prosecutrix, moved an application before the court, against SI Harpal Singh. In the application, it was alleged that SI Harpal Singh, was trying to destroy the evidence as he was related to respondents. During the testimony of Mange Ram, the said application was exhibited as Ex.PW-5/D.

18. Inspector Mir Singh (PW-12) deposed that on 9.11.1990, he was posted at P.S. Punjabi Bagh and the investigation of the case was withdrawn from ASI Ram Dutt and handed over to him. Thereafter, on 23.11.1990, the investigation of the case was handed over to SI Chander Bhan (PW-15).

19. From above, it is clear that initial investigation conducted at the behest of SI Harpal Singh was clouded under suspicion, which forced the father of the prosecutrix to move an application immediately after the statement of the prosecutrix was recorded on 04.11.1990.

20. The prosecutrix, during her deposition, unequivocally stated that she was induced to go with Naresh Kumar as he had told her that her father needed the money and the jewellery in the hospital, where her sister was undergoing treatment. She deposed that she was taken in Maruti car No. DNH 5247, which was driven by Jai Prakash. She also deposed that in the car, when she asked Naresh Kumar about the hospital, she was threatened. Naresh Kumar tied her mouth with a *handkerchief* and her hands with a *chunni*. She further deposed that Naresh Kumar had consumed liquor in the car and took her to a deserted

built-up room where she was made to sit on a gunny bag lying there. While Jai Prakash went out after bolting the door from the outside, Naresh Kumar remained inside the room. After sometime, Jai Prakash came with the bedding and again went away after locking the door of the room from outside. Thereafter, Naresh Kumar removed all her clothes and committed rape upon her without her consent. She further deposed that on the next day, i.e., on 03.11.1990, Naresh Kumar, again, committed rape on her during the day as well as in the evening. In the evening, Jai Prakash brought meals and handed over the same to Naresh Kumar. Thereafter, he went, after locking the door from outside.

21. On 04.11.1990, Jai Prakash again came and told Naresh Kumar that the father of the prosecutrix had reported the matter to the police and his name had also been mentioned in the FIR. The prosecutrix also deposed that Jai Prakash had claimed to be known to the chowki in-charge. Thereafter, they had driven the prosecutrix in a car and brought her to a *dhaba*, where she was recovered by the police.

22. During her cross-examination, the prosecutrix confronted with various portions of her statement dated 4.11.1990 (Ex.PW1/D1). She was also confronted with her statement recorded under Section 164 Cr.P.C., where she denied to have stated that police had recovered her from a lonely house after breaking open the lock. She clarified that although she had stated about the role of Jai Prakash in her statement on 04.11.1990, but the same was not recorded by the police.

23. The prosecutrix was medically examined on 04.11.1990 at Deen Dayal Upadhyaya Hospital. The MLC of the prosecutrix was proved by Dr. D.K. Gupta (PW-11). The MLC mentioned the alleged history of

sexual assault. The prosecution examined J.C.Vashist (PW-16), the record clerk, DDU Hospital to prove the handwriting and signature of Dr. Aneeta as well as her endorsement (Ex.PW16/A). Dr. Aneeta was working as a Gynecologist and had examined the prosecutrix. As per the MLC, superficial perineal tear was present. Hymen was found torn, posteriorly. As per the CFSL Report (Ex PX), human semen was detected on the two micro slides, prepared from the vaginal smear of the prosecutrix.

24. Mange Ram deposed that on 02.11.1990, his elder daughter (the elder sister of the prosecutrix) was not well and he had taken his elder daughter for a checkup in the clinic of Dr. Tyagi, where Naresh Kumar was also present. On being referred by Dr. Tyagi, his daughter was admitted in the Ganga Ram Hospital on the same day. Mange Ram deposed that when he came back to his house in the morning on 03.11.1990, the prosecutrix was missing. He found that the cash as well as the gold ornaments were also missing. Mange Ram suspected Naresh Kumar, as he was living in the neighborhood and was also missing. He also deposed that on 04.11.1990, he had gone with the investigation officer to village Kapashera, where Naresh Kumar and his daughter were recovered. The testimony of Santosh, the mother of the prosecutrix, is cumulative to the testimony of Mange Ram. Both the witnesses were confronted with their earlier statements where the factum of going to Dr. Tyagi's clinic and refence to Ganga Ram Hospital were not mentioned.

25. To support his argument that the testimony of the prosecutrix was full of material contradictions, hence not credible, the learned counsel for the respondents has placed reliance on the decisions in Ajit Kumar Vs.

State reported as **1998 [1] JCC 36**, Abbas Ahmad Choudhary Vs. State of Assam reported as **I (2010) SLT 762**, Naravan @ Naran Vs. State of Rajasthan reported as **2007 [2] JCC 1202**, State Vs. Radhey Shyam Mishra reported as **257 (2019) DLT 235** and State Vs. Vinay Kumar **207 (2014) DLT 783**.

26 In Ajit Kumar Vs. State (*Supra*) the accused was acquitted as the testimony of the prosecutrix failed to inspire confidence. It was observed that there were material contradictions not only with respect to the person who accompanied the prosecutrix in the train journey but also qua the place where the incident of rape occurred. At one place, it was mentioned as Hapur and at other place it was mentioned that the accused met her outside Delhi Railway station. Further, it was also observed that the railway chart, exhibited on record, showed that the train never stopped at Hapur. In Abbas Ahmad Choudhary (*Supra*) the accused was acquitted as the prosecutrix in her statement did not attribute any allegation of rape on the accused. The allegations of rape were made against the co-accused persons. In Naravan @ Naran (*Supra*) the accused was acquitted as there were material contradictions in the statement of the prosecutrix and also because the material witness had not supported the case of the prosecution. In Radhey Shyam Mishra (*Supra*) the facts were that in her first statement, the prosecutrix did not name the accused despite the fact that accused was already known to her. In the FSL examination, the DNA of the prosecutrix did not match with the DNA of the accused. In Vinay Kumar (*Supra*) the prosecutrix did not mention the name of the accused in the first statement and the allegation of rape was levelled for the first time while deposing in the court. As a result, none of the fact situations in above decisions were akin to the facts in the present case

and as such the decisions in the captioned cases are of no help to the respondents.

27. In the present case, we do not find the contradictions to be material and fatal to the prosecution case. On the contrary, we find that the testimony of the prosecutrix was consistent *qua* the factum of rape and the MLC corroborates her testimony. In this regard, reference is made to the decision of the Supreme Court in The State of Himachal Pradesh Vs. Manga Singh **2018 SCC Online SC 2886**:

“11. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contradictions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.

12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the ‘probabilities factor’ does not render it unworthy of credence. As a general rule, there is no reasons to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.”

28. In our view, the testimony of PW-1 is credible and trustworthy. Even in her first statement dated 04.11.1990, she had mentioned that Naresh Kumar had committed rape upon her against her will. Her subsequent statements, recorded under Section 164 and 161 Cr.P.C., also mentioned in detail the incidence of rape repeatedly committed by Naresh Kumar on her. During the deposition, on the aspect of rape, the testimony of the prosecutrix has remain unshattered. The inconsistencies or contradictions, as pointed out by the learned counsel for the respondents, is immaterial and inconsequential. It has been repeatedly held that “courts should find no difficulty to act on the testimony of a victim of a sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable”. [Ref : State of Punjab v. Gurmit Singh and Ors reported as **1996 (2) SCC 384** and re-affirmed in Manga Singh (supra)].

29. The learned counsel for the respondents, in reference to the MLC of Naresh Kumar, argued that no injuries were found on the male organ of Naresh Kumar. According to him, this circumstance points towards the false implication of the respondents. In this regard, reliance was placed on the the decision of the Supreme Court in Rahim Beg & Another vs. State of U.P. reported as **1972 SCC (Crl.) 827**. In the captioned case, the hymen of the prosecutrix was not found torn, and as such, the above decision is of no help to the respondents.

30. The learned counsel for the respondents also argued that in the charge framed on 16.11.1992, the date of the incident was referred as 03.11.1990. Subsequently, after the initial deposition of the prosecutrix on 03.02.1993, the charge was illegally amended on 12.03.1993, by

altering the date of incident to 02.11.1990. He argued that, in her first statement, the prosecutrix had mentioned about going on 03.11.1990. However, in her subsequent statement, the alleged date of going with the respondents was changed to 02.11.1990 only because of the circumstance that the FIR was lodged on 02.11.1990.

31. We have already noticed the attending circumstances in relation to the recording of the statement of the prosecutrix on 04.11.1990. In all her subsequent statements, she had described the period of her confinement spread over a period of two nights and three days. In her statement recorded under 164 Cr.P.C., though she had mentioned the date as 03.11.1990, however, a reading of her statement would show that the incident was spread over a period two days. The relevant portion of the statement is reproduced below:-

“In the room, I was made to lie on jute bory, which was already lying there. Naresh, who had already been drinking while in the car was drunk. He put off my salwar kameez, underwear and bra. Before putting off my clothes, he threatened me that I shall be killed if I resisted. I was weeping but I could not resist as I was frightened. Then, he forcibly against my wishes did bad work with me while coming over my body. (By the bad work, she means sex which she has explained as intercourse). He repeated the sex with me after sometime in the same night. Next day night, he again did sex with me forcibly and against my consent. Next day, the police came there and by breaking open the lock from outside arrested us. I did not accompany Naresh of my own but under an inducement and later under threat and pressure. I never consented to sex with hem, which he did forcibly and without my consent.”

32. In her statement recorded under S. 161 Cr.P.C. on 23.11.1990, she stated the date as 02.11.1990. Even in her deposition, she mentioned the date of going with Naresh Kumar as 02.11.1990. We may also profitably reproduce the order dated 12.03.1993, wherein the learned counsel for the respondents gave his consent for altering the date in the charge:

“12.3.93

Present : Both the accused on bail with counsel Sh. S.P. Yadav, Advocate

APP for the State

On the last hearing, an application was made by ld. APP requesting for amending the charge regarding the date of the institution. It was asserted by him that instead of 02.11.1990 the date has been shown as 3.11.90 and similarly regarding the intervening night, the date shown as 3.11.90 and 4.11.90 stands for 2.11.90 and 3.11.90. The ld. Defence counsel Sh. Yadav says that he has no objection in case the charge is amended in regard to the date of the institution. Instead of framing a new charge, the original charge itself is corrected since the correction is needed only regarding the date of incident. Charge corrected accordingly.”

Conclusion:

33. The trial court, while passing the impugned judgment, primarily took into account the contradictions in the statements of the prosecutrix with respect to the factum of her recovery from the possession of the accused person; absence of any public witness at the time of her recovery and the non-examination of one Jagdish, a tenant, who had informed Mange Ram about the prosecutrix leaving the house on the night of 02.11.1990. We are not in conformity with the judgment passed by the

trial court. The judgment passed by the trial court is manifestly unjust and unreasonable as it had based its conclusion on immaterial contradictions in the statements of the prosecutrix. As held above, on the date of incident, the prosecutrix was a minor, being less than 16 years of age. The prosecutrix, in all of her statements, was consistent with respect to the factum of rape committed upon her by Naresh Kumar. Her testimony is both credible and trustworthy as well as corroborated by the medical evidence in the form of her MLC. In so far as, the role of Jai Prakash is concerned, she had deposed that during the period of her confinement in the room he used to come intermittently with the meals and while going out, used to lock the room from outside. She has consistently stated about the role of both Naresh Kumar and Jai Prakash in kidnapping her.

34. We do, however, agree with the trial court only to the extent that the prosecution failed to bring any evidence on record so far as the charge under Section 420 IPC was concerned. Consequently, the appeal filed by the State is allowed to the extent that the respondent No.1/Naresh Kumar is held guilty and convicted for an offence under Section 376 IPC for which he is directed to undergo a sentence of 10 years with fine of Rs.10,000/- and in default, to undergo SI for 6 months. Both the respondents are also held guilty and convicted under Section 366 r/w 34 IPC for which they are directed to undergo a sentence of 7 years with fine of Rs.5,000/- and in default, to undergo SI for 1 month. Both the convicts will get the benefit of S. 428 Cr.P.C. The sentences awarded to respondent no.1/Naresh Kumar are directed to run concurrently. The bail bonds of both the respondents are cancelled. Both

the respondents are directed to surrender before the concerned court within one week from the date of passing of the judgment.

35. We note that, despite repeated cautions by the Supreme Court and in complete ignorance of S. 228A IPC and S.327 (2) & (3) Cr.P.C., the trial court judgment is replete with the name of the prosecutrix. [Ref: State of Punjab v. Gurmit Singh and Ors. reported as **AIR 1996 SC 1393**; Lalit Yadav v. State of Chhattisgarh reported as **(2018) 7 SCC 499**]. A copy of the judgment be placed before the learned Presiding Officer for perusal.

36. The trial court record be sent back along with a copy of this judgment.

(MANOJ KUMAR OHRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 29, 2019/na