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

+ **CRL.A. 1284/2014 & CRL.M.A.13864/2015**

SHIVA @ CHANDRIKA

..... Appellant

Through: Mr. Pramod Kumar Dubey,
Adv. (DHCLSC) with Mrs.
Pinky Dubey, Mr. Saurabh
Kumar and Ms. Harpreet Kalsi,
Advs.

versus

STATE

..... Respondent

Through Ms. Meenakshi Chauhan, APP
for State with SI Surender
Singh, PS Sector-23, Dwarka,
Delhi

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

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J U D G M E N T

01.07.2019

1. This appeal, at the instance of the accused Shiva @ Chandrika, calls into question judgment, dated 24th March, 2014, passed by the learned Additional Sessions Judge (hereinafter referred to as “the learned ASJ”), convicting the appellant under Sections 344/376/376D/323/506 of the Indian Penal Code, 1860 (hereinafter referred to as “the IPC”), as well as the consequent order, dated 29th March, 2014, whereby the learned ASJ has sentenced the appellant to (i) 3 years’ rigorous imprisonment (RI) with fine of ₹ 5000/–, for the offence under Section 344, IPC, with default sentence of 1 month’s

imprisonment, (ii) 1 year's RI for the offence under Section 323, IPC, (iii) 10 years' RI for the offence under Section 376, IPC, with fine of ₹ 25,000/–, with default sentence of 6 months imprisonment, (iv) 20 years' RI for the offence under Section 376D, IPC, with fine of ₹ 25,000 and default sentence of 6 months' RI and (v) 2 years' RI for the offence under Section 506, IPC, with the further stipulation that the sentences (i), (ii), (iii) and (v) would run concurrently, whereafter the running of the sentence under (iv) would commence. Effectively, therefore, the appellant has been sentenced, by the learned ASJ, to 30 years' RI, apart from the stipulations regarding fine and default sentence.

Case of the Prosecution

2. The case of the prosecution, as set out in the chargesheet, dated 18th June, 2013, filed before the learned Additional Chief Metropolitan Magistrate (ACMM), may be summarised thus.

3. Consequent to, and in compliance of, the directions issued by the superior officers on 23rd March, 2013, Woman Sub Inspector (SI) Parmila (PW-7) made DD Entry No. 17A and proceeded to House No. 303, Bharthal Village, where she was informed by the prosecutrix (PW-1), that a “wrong act” had been committed with her, and that she had been injured as she was beaten. She expressed her desire to have herself medically examined, whereupon SI Parmila, accompanied by SI Lokesh Kumar (PW-4), reached the DDU Hospital, where the prosecutrix was examined *vide* MLC No. 7025/13. The statement of

the prosecutrix was recorded under Section 161 of the Code of Criminal Procedure (Cr.P.C.), wherein she deposed that (i) her marriage had taken place thirteen years earlier, and she had three children, (ii) earlier, she used to work in Raebareli, (iii) the appellant, who used to work in the same premises, had an evil eye on her, (iv) on 15th June, 2012, while she was travelling from Kanpur to Raebareli, and went to the bathroom, the appellant, who was present there, threatened to kill her, and her husband and children, and covered her mouth with a handkerchief, (v) she did not recollect what happened thereafter; however, when she regained consciousness, she found herself in a room which, she later learnt, was in Delhi, (vi) the appellant did not allow her to leave the house, and used to administer intoxicating drugs to her, whereafter he used to commit wrong acts with her, (vii) he also established unnatural contact with her, (viii) he used to torture her, mentally and physically, (ix) while leaving the house, he used to lock her inside, and take the key with him, (x) on 22nd March, 2013, at 9:00 PM, the appellant, after reaching home, left the house and returned at about 11:00 PM with two of his friends, whom she did not know, (xi) the said two persons had covered their faces and were wearing black caps, (xii) one of the said persons was wearing a black trouser and a white check shirt, while the other was wearing a sky-blue shirt and a cream-coloured trouser, (xiii) after entering the room, they closed the door and switched off the lights, (xiv) the appellant raised the volume of the TV, whereafter he threw her on the bed, and held her hands, (xv) when she began to shout, the appellant covered her face with a cloth, after which he told his friends to commit “wrong act” with her, (xvi) thereafter, the said two friends

of the appellant removed her clothes and, after wearing condoms, committed wrong act with her, and left, (xvii) after they had left, the appellant beat her severely, and committed “wrong act” with her, (xviii) the appellant threatened her that, in case she disclosed what had transpired and refer to any one, he would kill her, (xix) after that, at about 11:00 AM, she managed to somehow leave the house, and dialled “100” from a place near the Bijwasan Railway Station, and (xx) thereafter, the Police took her to the hospital for medical examination. She requested that legal action be taken against the appellant and his two friends, who committed wrong acts with her, against her will, and also tortured her mentally and physically. In view of the aforesaid statement of the prosecutrix, SI Parmila (PW-7) prepared a *tehrir*, as offences appear to have been committed, by the appellant, under Sections 323/342/328/366/376D/ 377/506/34, IPC. The *tehrir* was sent, with SI Lokesh Kumar (PW-4), to the Police Station, where FIR was registered. SI Parmila (PW-7) also had the prosecutrix medically examined, *vide* MLC No.7025/13, at the DDU Hospital. The sealed exhibits, provided by the doctors at the Hospital, were taken into custody by the Police. The appellant was, thereafter, arrested and his disclosure statement was recorded. The appellant’s medical examination was also conducted at the DDU Hospital, *vide* MLC No. 6992/13. Exhibits, found at the scene of crime, were also taken into custody by the Police, and Site Plan was prepared. On 24th March, 2013, the appellant was produced before the learned ACMM, and one day’s Police remand was obtained. The prosecutrix was sent to Nari Niketan. On 25th March, 2013, the appellant was remanded to judicial custody, and the statement of the prosecutrix, under Section

164, Cr.P.C., was recorded by Ms. Swati Katiyar, the learned MM (PW-8). The exhibits were sent, on 2nd April, 2013, for obtaining expert opinion, to the Forensic Science Laboratory (FSL), *vide* Road Certificate (R/C) No. 5/21/13. Considerable efforts were undertaken, to trace the two other accused persons, as per the version of the prosecution, but no information was received from anyone.

4. On the date of the aforementioned chargesheet 18th June, 2013, the result of the MLC of the prosecutrix had not yet been received, and the report from the FSL was also awaited.

5. The facts disclosed by the prosecutrix, it was alleged, made out a case of commission of offence, by the appellant, under Sections 323/342/328/366/376/376D/377/506/34 IPC.

6. As the appellant pleaded not guilty, to the charges against him, the case was set down for trial.

Evidence

Prosecution witnesses

7. The witnesses cited by the prosecution could be divided into the following groups:

- (i) the prosecutrix PW-1,
- (ii) Police witnesses - PW-2 HC Satish, PW-4 SI Lokesh Kumar Yadav, PW- 6 W/Const. Sunita and PW-7 W/SI Parmila,

- (iii) witnesses regarding sampling - PW-3 Const. Chhatar Mal,
- (iv) hospital witnesses - PW-5 Dr. Shweta, PW-9 Dr. Soma Mitra and PW-10 Dr. Manjeet Kumar, and
- (v) other witnesses - PW-8, the learned MM.

Evidence of the prosecutrix

Statement of prosecutrix under Section 164, Cr.P.C.

8. In her statement, recorded by the learned MM under Section 164, Cr.P.C., the prosecutrix deposed that, on 15th June, 2012, while travelling from Kanpur to Raebareli by train, along with her husband and children, she visited the toilet, and found the appellant inside. On her trying to leave the toilet, the appellant asked her to keep quiet, threatening her that, else, he would kill her husband and children. Thereafter, she deposed, the appellant covered her mouth with a handkerchief, and she became unconscious, whereafter she could not recollect what happened till she regained consciousness and found herself locked in a room. On looking through the window, she saw the board on a school, from which she learnt that she was in Delhi. She deposed that the appellant returned about an hour and half later, and, on her requesting for being allowed to return to her husband and children, severely beat her. As she was having headache, the appellant gave her some tablets. According to her statement, the appellant often used to give her tablets, which put her to sleep for several hours, after which, on awakening, she used to find herself naked with large quantities of semen around her vaginal area, from which she

understood that the appellant had raped her after rendering her unconscious. She stated, further, that she started disposing of the tablets, and that, about two to four months later, she realized that the tablets were rendering her unconscious. She alleged that, during this period, the appellant used to beat her severely, and also that he used to commit rape on her even when she was conscious, threatening to kill her if she would raise any alarm.

9. The prosecutrix further alleged that, on 22nd March, 2013, at about 11:00 PM, the appellant arrived at the room with two other men. The appellant closed the room, raised the volume of the TV to a high level and switched off the lights. He pushed her onto the bed and, when she tried to scream, stifled her mouth with a handkerchief and bound her hands. She alleged that the second man covered her mouth with the handkerchief and the third man started pulling at her clothes. In this manner, she alleged, the three men raped her in turns. Thereafter, the two other men went away and the appellant again raped her. According to her statement, the faces of the two other men were covered with a handkerchief and they had black caps on their heads. One was wearing a blue shirt and cream coloured pant and the other was wearing a black pant and shirt with black and white checks.

10. The prosecutrix further stated that, when she awoke next morning, i.e. on 23rd March, 2013, the appellant was watching TV, and she found a mobile phone under the pillow, which she purloined. On her expressing a desire to visit the toilet, the appellant agreed but said that he would accompany her. She further deposed that, on

reaching the toilet, she told the appellant that she was closing the door of the toilet, and asked him to go and get her toothpaste. During the time the appellant went to get toothpaste, she fled from the toilet. She reached the nearby Bijwasan Railway Station, and dialed the Police, who arrived. She took the Police team to the room, where the appellant was packing his clothes, ready to flee. She deposed that the Police also found used condoms. Alleging, in fine, that the appellant had forcibly had sex with her, she stated that he deserved to be punished, so that he would not repeat the same act with some other girl.

Evidence of the prosecutrix during trial

11. Testifying as PW-1, the prosecutrix stated that, on 15th June, 2012, she, along with her husband and children, were returning from Kanpur to Raebareli by train and that when, at about 3:00 PM she visited the toilet, she found the appellant present inside. When she turned and tried to leave, the appellant caught hold of her hand and threatened that, if she raise any alarm, he would kill her husband and children. He, thereafter, covered her mouth with a handkerchief, and she lost consciousness. According to her deposition, when she regained consciousness, she found herself in a closed room. On peeping through a small whole of the window, she noticed the board of a school on the other side of the road, on reading which he realized that she was in Delhi. She deposed that, about an hour and half later, the appellant entered the room and started beating her and, on her complaining of a headache, gave her a tablet, the consumption of

which were rendered her unconscious. Prior to becoming unconscious, however, according to her deposition, the appellant committed sexual intercourse with her against her consent. This *modus operandi*, according to her testimony, was repeated on further occasions i.e., the appellant used to administer some tablets to the prosecutrix and, when she was in semi-conscious state, used to commit unwelcome sexual intercourse with her, whereafter she lost consciousness. She deposed that, on regaining consciousness, she used to find that she was naked and that there were semen stains all over the body. The appellant was also present in person; at times naked and at others clothed. The prosecutrix further deposed that the appellant did not permit her to leave the room and, though he took her to a nearby doctor at times when she was feeling sick, he used to threaten her not to disclose the commission of sexual intercourse with her either to the doctor or to anybody else. This, according to the testimony of the prosecutrix, continued for two to three months. One evening, the appellant brought, with him, two other persons whose faces were covered with small cotton towels. Raising the volume of the television, in the room, to a very high level, the appellant, according to the testimony of the prosecutrix, pushed her onto the bed and, when she started to cry, covered her face with a cloth. Thereafter, she deposed, the appellant and his two companions disrobed her, whereafter the two other persons forcibly committed sexual intercourse with her one after the other, whereafter they left. After this, according to her deposition, the appellant also committed sexual intercourse with her against her consent and also beat her severely, threatening her, all the while that, if she narrated the incident to anyone, he would eliminate her.

12. According to the testimony of the prosecutrix, the next morning, at about 10:00 AM, she expressed a desire to visit the toilet, which was at a distance from the room, whereupon the appellant went with her. She requested the appellant to bring toothpaste, for which the appellant returned to the house, seizing which opportunity she fled. Near the house, she found a railway station, from which she dialed the police. The police arrived and recorded her statement, under Section 161, Cr.P.C. (Ex. PW-1/A). They, thereafter, brought her to the police station, from where she was taken to the DDU Hospital and medically examined. The doctor took, into her possession, the undergarments of the prosecutrix and also obtained various samples from her. She deposed that, from the hospital, she was brought back to the police station and was taken from there to “Alpawas”, where she remained till 25th March, 2013, on which date she was produced before the learned MM, who recorded her statement under section 164 Cr.P.C (Ex. PW-1/B). She also showed the police officials the room where she had been confined and sexually assaulted by the appellant and deposed, further, that the appellant was arrested from the said house in her presence on the same day, i.e. 23rd March, 2013. The prosecutrix further deposed that, from the court, she was taken to Nari Niketan, where she remained for about twelve to thirteen days.

13. The prosecutrix was cross-examined. In cross-examination, she admitted that her husband had not lodged any complaint after she was kidnapped, though she denied the suggestion that this was because that her husband suspected her character. She further stated that the house in which she was initially confined by the appellant had three storeys

with ten to twelve rooms. She further stated that, after about three months, the appellant shifted her to another house, where she was confined in a room on the ground floor. She stated that there were six to seven rooms in the house. She confessed not knowing how many rooms were on the ground floor on which she was kept, though she deposed that this was because she was in a “frightened state”.

14. Apropos the second house in which she was confined, the prosecutrix deposed, in cross-examination, that (i) there were two doors in the room in which she was confined, (ii) the house had two main gates, (iii) the gate at the rear side of the house used to be locked from outside, (iv) the front gate used to be bolted from inside by the appellant and (v) there was a Videocon colour TV which had been brought by the appellant in her presence.

15. The prosecutrix admitted that she accompanied the appellant to an electronic store where he purchased a TV, and that the choice of TV was her selection, though she added that the appellant had threatened her not to disclose her plight to anyone, failing which he would kill her. She further deposed, in her cross-examination, that the appellant had purchased the T.V. by selling her gold and silver jewellery. She further stated that the appellant had taken her, on foot, from the first house to the second house and had brought the goods from the first house later on, though she clarified that she could not state the distance between the two houses.

16. In cross-examination, the prosecutrix further deposed that the appellant was not employed, and was normally in the room with her, leaving the room for just five to ten minutes, during which time he used to lock the room from outside, though, at times, he used to ask her to bolt the door from inside, stating that he would be nearby.

17. She further deposed that, alongwith the police she had reached the house at 11:00 AM and had again visited the room where she had been confined along with her husband after which she was released from Nari Niketan, in order to collect her belongings. She further deposed that the landlord of the second house was Rambir Singh, whose wife used to collect rent from the appellant. She further deposed, in her cross-examination, that she had returned, from Mumbai, about one and half months before the date when she was kidnapped by the appellant and that, during the said period, she had stayed with her husband at her in-laws' house at Raebareli. She deposed that, while she was at Raebareli, she was working with a women's organisation, as an agent, for about a year and a half, and that the appellant was also employed as an agent in the same organisation. The prosecutrix denied the suggestion that the appellant had once purchased a railway ticket for her and her children to travel to Ahmedabad, or that she had gone to Ludhiana with the appellant. She also denied the suggestion that she, and the appellant, had solemnised a court marriage at District Banda, U.P. and that she had destroyed the marriage certificate pertaining thereto. She acknowledged, in cross-examination, that, at the time of her being kidnapped, she was travelling in an overcrowded general

compartment, and that there were many persons standing outside the toilet, when she had sought to visit it. She further deposed that her husband had informed that, when he reached the toilet to look for her, he was told by the persons standing outside the toilet that she had been taken by another person by covering her mouth with a handkerchief.

18. She further deposed that the appellant used to administer two to three tablets, to her, during the day, in order to render her semi-conscious and that, after taking the tablets, she used to remain unconscious for three to four hours. She further deposed that the appellant used to commit sexual intercourse, with her, three to four times in a day and that, during the period of her confinement; the appellant did not permit her to talk to her husband on phone.

19. The prosecutrix also denied having stated, to the police, that she had seen the appellant when she came out of toilet, though, in her statement under Section 161 Cr.P.C., she had so stated. The prosecutrix also denied the suggestion that she had filed a case against her husband in the Raebareli and testified that, in fact, the appellant had filed the said case, in her name, against her husband, by forging her signatures on the petition.

Police witnesses

PW-7 Const. Parmila

20. One may first advert to the statement of the IO Const. Parmila, who testified as PW-7. Her statement was recorded twice, firstly on 21st November, 2013 and, later, on 10th February, 2014.

21. In her statement dated 21st November, 2013, PW-7 Const. Parmila deposed that, on 23rd March, 2013, when she reached House No. 303, Bharthal Village, she found SI Lokesh (PW-4) and Const. Radhey Shyam already present there, along with the prosecutrix and the appellant. She deposed that the prosecutrix complained that she had been raped by the appellant, and that she was injured and in intense pain. She, thereupon, had the prosecutrix examined at the DDU Hospital, where she recorded the statement of the prosecutrix, under Section 161 Cr.P.C. (Ex. PW-1/A), and prepared the *Rukka*, on the basis of which FIR was registered. She deposed that the doctors, at the Hospital, handed over, to Const. Sunita (PW-6), 12 sealed *pullandas* along with one sample seal, which were seized, by the, *vide* Seizure Memo Ex. PW-4/A. Thereafter, she returned, at about 10:30 PM, to House No. 303, where she prepared two *pullandas*, one containing a towel, bed sheet, mattress and *Gudri*, and the second containing used condoms. Both were sealed with the seal 'PK' and seized *vide* Seizure Memo Ex. PW-4/B. She further deposed that she arrested the appellant *vide* Arrest Memo Ex. PW-4/C and recorded his Disclosure Statement, which was exhibited as Ex. PW-4/E. The accused pointed out the spot of incident, which was recorded, *vide* her, *vide* Pointing Out Memo Ex. PW-4/F. Thereafter, deposed PW-7, the prosecutrix was sent to Nari Niketan, and the appellant was sent to the Hospital for medical examination. After his medical examination, Const. Radhey Shyam returned, from the hospital, with three *pullandas* and one sample seal, given by the doctor, which were

seized, by her, *vide* Seizure Memo Ex. PW-4/G. All exhibits, she deposited, were deposited in the *Malkhana*.

22. PW-7 further deposed that, on 21st November, 2013, she recorded the supplementary disclosure statement of the appellant, which was exhibited as Ex. PW-4/H and, on 25th March, 2013, the prosecutrix was produced before the learned MM where her statement, under Section 164, Cr.P.C. was also recorded. As she stated that the exhibits, sent, by her, to the FSL, had not yet been received back, her further statement was deferred. She, however, testified to having filed the chargesheet in the court, on conclusion of investigation, and also identified the appellant in Court.

23. On 10th February, 2014, the MHC (M) produced 2 *pullandas*, sealed with the seal of the FSL, which contain various items, which were identified by PW-7 as having been seized, by her, at the place of occurrence. They were, therefore, accorded separate Exhibit numbers.

24. PW-7 was cross-examined. In cross-examination, she deposed that, when she had reached House No. 303 on 23rd March, 2013, she found the prosecutrix weeping and terrified. She further deposed that the prosecutrix had told her that she had stolen the mobile of the appellant and used it to telephone the Police from the Bijwasan Railway Station. She testified that the distance between the House No. 303 and Bijwasan Railway Station was 600 to 700 meters. PW-7 further confirmed that she had not asked the prosecutrix where she had kept the mobile, or seized it. She further deposed that the two other

persons, who, the prosecutrix alleged, had committed gang rape on her, could not be traced and that the prosecutrix stated that, as their faces were covered, she would not be in a position to recognise them. She noted the fact, in her deposition, that the appellant had, on the other hand, denied the allegation that he was accompanied by any other person. In her cross-examination PW-7 further confirmed that the prosecutrix had been staying with the appellant in the room at House No. 303 for the past six to seven months, though the prosecutrix stated that, prior thereto, she was staying at another house for two to three months. She, however, did not provide the address of the said other premises where she was lodged.

PW-6 Const. Sunita

25. The examination-in-chief of PW-6, Const. Sunita, was substantially identical to that of PW-7 Const. Parmila. She, too, identified the appellant correctly in court.

26. In cross-examination, however, PW-6 Const Sunita, on being queried, admitted that Const. Parmila (PW-7) did not ask any of the other tenants to join in the investigation, and stated, in the same breath, that she did not know whether PW-7 had made any inquiry from the other tenants, though she admitted having been with her throughout the day. She also deposed that she did not recollect whether the other tenants were present in the house when they reached there. Regarding the prosecutrix, PW-6 acknowledged that, when they

took her to the hospital, she was not bleeding, and there was no external injury on her body.

PW-4 SI Lokesh

27. PW-4 SI Lokesh deposed, during trial, that, on 23rd March, 2013, he reached House No. 303, where he met the prosecutrix, who alleged that she had been beaten and raped by three persons the previous night – i.e., the night between 22nd and 23rd March, 2013. The appellant was also present at the time. PW-4 further deposed that, on hearing the said complaint of the prosecutrix, he called the SHO, whereupon Const. Parmila (PW-7) reached the spot, from where they took the prosecutrix, for medical examination, to the DDU Hospital, where the statement of the prosecutrix, under Section 161 Cr.P.C., was recorded by Const Parmila (PW-7). On the basis thereof, PW-7 Const. Parmila prepared the *rukka*, on the basis of which FIR was registered by him at the Police Station. He deposed that, after having the FIR registered, he returned to the Hospital, where he handed over the FIR and copy of the *rukka* to PW-7 Const. Parmila.

28. PW-4 further deposed that, after the medical examination of the prosecutrix was concluded, the doctor at the hospital handed over, to Const. Sunita (PW-6), twelve *pullandas* and a sample seal, which were subsequently seized by PW-7 Const. Parmila *vide* Seizure Memo Ex PW-4/A.

29. From the Hospital, deposed PW-4, they returned to House No. 303, from where they prepared a single *pullanda* of two packets/packages, one containing a bed sheet, mattress, towel and *Gudri*, and the other packet of used condoms, which were seized *vide* Seizure Memo PW-4/B. The appellant was subsequently arrested *vide* Arrest Memo Ex PW-4/C, his disclosure statement (Ex PW-4/E) was recorded by PW-7 and the Pointing Out Memo, recording the pointing out, by the accused, of the spot of occurrence, was recorded as Ex PW-4/F. The appellant was, thereafter, taken to the Hospital, where he was medically examined, and the three sealed *pullandas*, provided by the doctor, were seized *vide* Seizure Memo Ex PW-4/G.

30. PW-4 further testified that the appellant was produced, in Court, on 24th March, 2013, and remanded to one day's Police Custody, during which his supplementary disclosure statement (Ex PW-4/H) was recorded by Const. Parmila (PW-7). On 25th March, 2013, the appellant was produced in Court, and remanded to judicial custody. On the same day, the prosecutrix was produced in Court, and her statement, under Section 164 Cr.P.C., was recorded by the learned MM.

31. PW-4 correctly identified the appellant in court. As the report of the FSL was awaited, his examination-in-chief was concluded, with liberty to learned Counsel for the prosecution as well as the appellant to recall him for further examination if need arose. He was not, however, recalled.

32. In cross-examination, PW-4 acknowledged that House No. 303 had ten to twelve rooms, all of which were tenanted, and that they had a common toilet. He further agreed that the appellant was not having any external injuries when he met her, though she was weeping. He also deposed that none of the tenants, residing in the house, was aware of any rape having been committed.

PW-2 HC Satish

33. HC Satish, deposing as PW-2, testified to having been handed over, at 4:30 PM on 23rd March, 2013, the *rukka*, by SI Lokesh (PW-4), on the basis of which he registered FIR No. 69/13 against the appellant, under Sections 323/342/376D/377/506/34 IPC (Ex PW-2/A). In cross-examination, he deposed that he could not state whether the overwriting, at point 'X' in the *rukka*, was before the *rukka* was sent to him, or thereafter. The said "overwriting", it may be noted, was regarding the figure "22", in the period of commission of the offence, as noted at the foot of the *rukka*, as "15 June 2012 to 22/3/13 upto about 11 PM". A careful look at the said alleged "overwriting" does not, however, indicate that it was, in reality, overwritten. In my opinion, nothing turns on the said alleged "overwriting".

Witnesses regarding sampling – PW-3 Const. Chhatar Mal

34. PW- Const. Chhatar Mal deposed, during trial, that, on 2nd April, 2013, he had received seventeen sealed *pullandas* along with

two sample seals from the MHC(M) and deposited them in the FSL, and obtained acknowledgement thereagainst, which he handed over to the MHC(M). He swore that the *pullandas* remained intact while in his custody. In cross-examination, PW-3 confirmed that fifteen *pullandas* had the seal of the CMO, DDU Hospital, while two had the seal 'PK'.

Hospital Witnesses

35. Dr. Shweta, Medical Officer at the DDU Hospital, testifying as PW-5, deposed, during trial, that, on 23rd March, 2013, the prosecutrix had been brought to the Hospital by Const. Sunita (PW-6), with alleged history of physical and sexual assault, and that the prosecutrix had been examined by Dr. Anurag under her medical supervision. She proved the MLC prepared by Dr. Anurag, which was accordingly exhibited as Ex PW-5/A, stating that she identified the signature of Dr. Anurag. She further testified that the prosecutrix had, thereafter, been referred to the Obg/Gynae Department of the Hospital for further examination. In cross-examination, PW-5 denied the suggestion that the prosecutrix was not having any external injury and that the injuries mentioned in the MLC were merely as per the statement of the prosecutrix.

36. In juxtaposition with the evidence of PW-5 Dr. Shweta, PW-9, Dr Soma Mitra, proved, during trial, the entries made by Dr. Tabassum, Senior Resident (Gynae) in the Hospital, in the MLC of the

prosecutrix (Ex PW-9/A). She testified that she recognized the handwriting of Dr. Tabassum, who had since left the Hospital.

37. Dr. Manjeet Kumar, Senior Resident (Casualty), DDU Hospital, who had conducted the MLC of the appellant, testified, during trial, as PW-10. He deposed that, on 24th March, 2013, the appellant had been brought to the hospital by Const. Radhey Shyam and that he had conducted his medical examination, in connection with FIR No. 69/13. He confirmed that he did not find anything to suggest that the appellant was not capable of performing the sexual act, but stated that the appellant could not give a semen sample. He proved the MLC of the appellant, as prepared by him, which was exhibited as Ex. PW-10/A. He also deposed that he had handed over samples of the blood and pubic hair of the appellant, as well as the appellant's undergarments, to the I/O in a sealed condition. He was not cross-examined, despite grant of opportunity.

MLC of prosecutrix and appellant

38. In juxtaposition with the oral evidence, during trial, of the above referred hospital witnesses, it would be appropriate, at this stage itself, to refer to the MLCs of the prosecutrix and the appellant.

39. The detailed MLC of the prosecutrix, as written by Dr. Tabassum, read thus:

“UPT – Negative

C/S/B S/R – OBGY

33 yrs lady/

With A/H/o sexual and physical assault by Shiva alias Chandrika 29 yrs/M and two other male friends of Shiva (names of which is not to Sunita) to W. Ct. Sunita No. 2775 ... medical and gynaecological examination

According to (prosecutrix) she was travelling in train on 15/06/12 from Kanpur to Rae Bareilly with her husband and three children. She went to washroom, where Shiva threatened her with killing her husband and children and kidnapped her after using some drug with handkerchief.

(Prosecutrix) does not remember anything after that. When she gained consciousness, she found herself in a room in which later she came to know was in Delhi.

She contacted her husband and her family 3 months after being kidnapped; but the family refused to accept her and so she continued living with Shiva.

She used to talk to her husband and also sometimes to her children and parents but none of them were ready to accept her.

Shiva used to give her some medications daily after which she used to become drowsy & not remember anything.

He used to have sexual intercourse with her after giving her the drug and also physically assault her. She gives H/o injury to left eye during assault by Shiva 1 ½ months back for which she had taken medical treatment.

He used to sexually assault her daily and ejaculate in her vagina.

She also gives H/o oral and anal intercourse (penetration) and ejaculation.

He used to also assault her on her breasts and other body parts during the act.

Last night (22/03/13 at around 11 pm), Shiva got two other male companions who sexually and physically assaulted her one by one using condom.

She gives H/o vaginal penetration by both males using condom. Her clothes were removed and she was made nude before the assault.

But no H/o any oral or anal penetration.

After this, Shiva also sexually and physically assaulted her and did vaginal penetration without using condom.

After which he locked her inside a room, when both the males left.

In the morning, (prosecutrix) locked herself in the washroom and when shiva left the house, she ran away from there and reached Bijwasan station and called 100 no. (Police) and sought help.

She gives H/o passing urine and stools after incident.

No H/o taking bath after the incident.

C/o pain in lower abd & back & also in the pineal region.

No H/o vomiting or bleeding.

No H/o any other complaints.

O/G

G.C. Avg; afeb

Pt. conscious oriented to time/place/person

P/R – 80/min

BP – 110/70 mm Hg

CVS/RS/NAD

P/A - Soft, No G/R/T; No organomegaly

Suprapubic (illegible)

C/Ex - No obvious pineal injury or bleeding from any site

P/S: Cx erosion. Foul smelling discharge (+)

P/V: Ex ↑
Ut R/V; MPS P/V F/M/R; B/L Fx free; NT

No obvious rectal injury

No obvious injury on any other body part.

No C/o bleeding from any site.

No C/o seminal stain at any other site.

Samples collected

Blood samples

- 1) Plain vial: 2 cc for BG & other inv
- 2) EDTA vial for DNA
- 3) Na F for alcohol & other intoxicant
- 4) outer clothes – grey colour salwar
- 5) inner clothes:- brown colour panty
- 6) Hair strands
- 7) Nail scrapings
- 8) Nail clippings
- 9) Pubic hair clipping
- 10) 2 vulval swabs
- 11) 2 vaginal swabs
- 12) 2 vaginal smears

13) 2 rectal swabs

Sealed & handed over to W. Ct. Sunita.”

40. The MLC of the appellant (Ex PW-10/A), to the extent it was relevant, merely stated that there was no fresh external injury seen at the time of examination, and that there was nothing to suggest that he could not “perform sexual act”. It was noted, however, that the appellant could not give a semen sample and that, therefore, his blood gauze sample, undergarment and sample of pubic hair were sealed and labeled and handed over to the IO.

Other witnesses – PW 8, the learned MM

41. The learned MM who had recorded the statement of the prosecutrix, under Section 164 of the Cr.P.C., merely testified as to the recording of the statement and the fact that the prosecutrix had been identified by PW 7 SI Parmila. She confirmed that the prosecutrix had herself dictated the statement in narrative form.

Further Evidence

Forensic Evidence

42. The report of the FSL, regarding the samples sent to it, was tendered in evidence, by the learned APP, on 10th February, 2014, and exhibited as Ex PA.

43. As per the FSL report, *inter alia*, human semen was detected in (i) the *salwar* of the prosecutrix, (ii) the underwear of the prosecutrix, (iii) the vulval swab of the prosecutrix, (iv) the vaginal swabs of the prosecutrix, both deep and anterior, (v) the vaginal smear of the prosecutrix, (vi) the bed sheet seized from House No. 303 and (vii) the used condom. The report further certified that the DNA profile of the semen found on the *salwar*, underwear, vulval swab and vaginal swab of the prosecutrix, as well as the semen found on the bed sheet seized from House No. 303, matched with that of the appellant. However, the DNA profile of the semen found on the used condom was found to be dissimilar to the DNA profile generated from the said exhibits. The semen found on the used condom was not, therefore, that of the appellant.

Statement of appellant under Section 313, Cr.P.C.

44. In his statement, under Section 313 of the Cr.P.C., the appellant, while baldly denying most of the allegations put to him, as “incorrect”, admitted, as “correct”, the suggestion that he had taken the prosecutrix, twice or thrice, to a nearby doctor on foot, when she was feeling sick and, on the said occasions, “used to threaten her not to disclose the incidents of sexual intercourse either to the doctor or anybody else”. He also denied having travelled in the train, from Kanpur to Raebareli, in which the prosecutrix was travelling, insisting that he was in Delhi on the said date. He denied knowledge of the rape of the prosecutrix, or of her having sustained injuries in the process. He denied having made any disclosure statement to PW-7 SI Parmila,

or having pointed out the place of incident. He denied the veracity of the Pointing Out Memo Ex. PW-4/F, or the fact that it was prepared at his instance. He alleged that the FSL report (Ex. PA) was a false report, and further alleged that he had been falsely implicated, alleging that, in 2009, the prosecutrix, along with her children, had voluntarily come to his room, as she had been thrown out of the matrimonial home, and had remained there for about one week. He denied having ever had sexual intercourse with the prosecutrix, and alleged that the case against him had been created by the prosecutrix at the instance of the husband, who refused to accept her back unless she lodged a complaint against him. He stated that he did not desire to lead any defence evidence, and that he was innocent.

The impugned judgment of the learned ASJ

45. The learned ASJ, in the impugned judgment, has observed it was not believable that the prosecutrix would have been kidnapped from a crowded train compartment, by the appellant, as she had alleged. In this connection, the learned ASJ has noted the fact that the prosecutrix was around 30 years of age at the time, and, apart from the fact that the grown-up lady could not be taken away from a crowded train compartment in such a fashion, the learned ASJ observes that “it would not be possible for a person to carry a lady in an unconscious state from a railway station between Kanpur and Raebareli upto Delhi without being noticed by any person including police officials”. In this connection, the learned ASJ has also noted the fact that no complaint had been lodged, regarding the prosecutrix being missing,

either by her husband or by any of her family members, till she was recovered by the Police on 23rd March, 2013. In these circumstances, the learned ASJ holds that the prosecutrix “may have gone to the accused on her own and voluntarily”, and that she “was not forced or drugged by the accused”. Consequent on these findings, the learned ASJ has dropped the charges under Sections 328 and 366 of the IPC, as framed against the appellant.

46. The learned ASJ goes on to hold, however, that it was the consistent statement of the prosecutrix that, after administering her some substance, which rendered her unconscious, on a regular basis, the appellant had been committing sexual intercourse with her, without her consent. He observes that, merely because the evidence led by the prosecutrix indicated that she may have gone to the appellant voluntarily and on her own, it did not imply or construe that she had gone to him to enjoy sexual relations, and that the reason for her to leave her husband and children could have been something else, “may be a marital discord etc.”.

47. Proceeding therefrom, the learned ASJ noticed the fact that, as per the DNA report (Ex. PA) of the FSL, human semen, the DNA of which matched that of the appellant, was found on the *salwar*, underwear, vulval swab, vagina swab and vaginal smear of the prosecutrix. This evidence, notes the learned ASJ, established the fact that the appellant had sexual intercourse with the prosecutrix a very short time before she was found by the Police and sent for medical examination. The fact that the DNA of the semen found in the used

condom was dissimilar to the DNA generated from the above exhibits, he holds, also proved that the prosecutrix had been subjected to sexual intercourse, not only by the appellant, but by some other persons as well, who had used the condom which is seized from the room of the appellant. The learned ASJ holds that these conclusions, of his, were also in line with the evidence of the prosecutrix herself.

48. The learned ASJ then proceeds to invoke Section 114A of the Indian Evidence Act, 1897 (hereinafter referred to as “the Evidence Act”), holding that, once it was proved by the prosecution that sexual intercourse between the appellant and the prosecutrix, as well as between some other person in the prosecutrix, had taken place on 22nd March, 2013, and the prosecutrix had been consistently alleging that it was against her consent, the Court was bound to presume lack of consent, the onus lying on the appellant to rebut the presumption and establish that the sexual intercourse between him and the prosecutrix, as also between the prosecutrix in the said other persons, was consensual. No such evidence of consent, it is observed, had been led by the appellant, who, in his statement under Section 313, Cr.P.C., had sought to adhere to the stand that he had not committed sexual intercourse with the prosecutrix at any point of time – a stand which, notes the learned ASJ, stood falsified by the DNA report. The learned ASJ has rejected the submission that the prosecutrix was voluntarily having sexual relations with the appellant on the reasoning that, if this were so, there was no reason for her to suddenly call the Police on 23rd March, 2013.

49. Following on the above reasoning, the learned ASJ finds the charge of the prosecutrix having been forcibly subjected to sexual intercourse by the appellant, as well as other persons (on 22nd March, 2013), stands proved. He also holds the allegation of the appellant having regularly belaboured the prosecutrix to be established. The charge under Section 377 IPC, though, has been held to be unsubstantiated.

50. The learned ASJ has, therefore, convicted the appellant under Sections 344, 376, 376(D), 323 and 506 of the IPC, while acquitting him of the charges under Sections 328, 366 and 377 thereof.

Submissions of learned Counsel before this Court

51. Arguing on behalf of the appellant, Mr. Pramod Kumar Dubey advanced the following submissions:

- (i) The FSL report could not be relied upon, as the author of the report had not been examined.
- (ii) The seizure memo, qua the condom, had not been proved.
- (iii) There was a delay of two weeks in sending the samples to the FSL for analysis.
- (iv) In the facts of the case, consent, on the part of the prosecutrix, was bound to be inferred, especially as the

prosecutrix and the appellant had cohabited for nine months in the same premises.

(v) The deposition, during the trial, of the prosecutrix to the effect that, on opening the door of the toilet, she found the appellant inside, could not be believed, as there was nothing to indicate how the appellant was aware which toilet the prosecutrix would use.

(vi) Neither could her further statement, in the same testimony, that she could not understand, properly, what was written in English on the board of the school opposite the room where she was confined, could not be believed, as she had had passed her 12th class and was working with the LIC.

(vii) While asserting, in her examination-in-chief, during trial, that the appellant did not allow the prosecutrix to go outside the room, she admitted, in her cross-examination, that she had accompanied the appellant for buying a TV, which was selected as per her choice.

(viii) Though, in her examination-in-chief, the prosecutrix alleged that the two persons, who had been brought by the appellant on 22nd March, 2013, had pulled off her clothes, no such clothes were recovered by the Police.

(ix) It could not be believed that the appellant had “found that there was a railway station nearby”, only after having stayed in the same house for nine months.

(x) The allegation, the prosecutrix, that the appellant used to commit sexual intercourse, with her, three to four times a day, could not be believed.

(xi) The recovery memo of the condom (Ex. PW-4/B), not having been signed by either the prosecutrix or the appellant, was not admissible in evidence.

Analysis and Findings

Factum of sexual intercourse, between appellant and prosecutrix, stands proved

52. In the opinion of this Court, the result of the DNA profiling of the semen found at various sites, as reported by the FSL, can leave no manner of doubt regarding the actual physical fact of sexual intercourse, between the appellant and the prosecutrix, having taken place. The “Results of DNA Analysis”, as contained in the report of the FSL (Ex. PA) clearly stated that “male DNA profile generated from source of Ex. ‘20’ (Blood gauze of the accused) was accounted in the mixed DNA profile generated from the source of Ex. ‘1’ (*Salwar* of prosecutrix), whereas Male DNA profile generated from the source of exhibits ‘2’ (Underwear of prosecutrix), ‘10’, ‘12’ (vulval and vaginal swab of prosecutrix) and ‘19a’ (Bed sheet) were

found to be similar to the DNA profile generated from the source of Ex. '20' (blood on gauze of the accused). The alleged data, enclosed with the said Report, bears out these findings. Though the FSL report was tendered in evidence, by learned APP, before the learned ASJ on 10th February, 2014 and exhibited as Ex. PA, the appellant did not choose to controvert or question the findings therein.

53. It cannot, therefore, be disputed that the appellant did, in fact, commit sexual intercourse with the prosecutrix, and this Court entirely endorses the findings of the learned ASJ, to this extent. The submission, of the appellant, that he had never had sex with the prosecutrix is, therefore, rejected.

Kidnapping – Section 366, IPC

54. This Court also entirely endorses the finding, of the learned ASJ, to the effect that the allegation of the appellant having kidnapped the prosecutrix from the train, is not proved, and is inherently unbelievable. Though there is no significant inconsistency, regarding the said allegation, as it figures in the statement of the prosecutrix, under Section 161 of the Cr.P.C., Section 164 of the Cr.P.C., her examination-in-chief during tendering of evidence in trial, the version of the incident as related to the Doctor at the Hospital and as recorded in the MLC of the prosecutrix (Ex. PW-9/A), this Court agrees with the learned ASJ that the allegation of kidnapping cannot, however, sustain. The prosecutrix, in cross-examination during trial, accepted that the compartment, from which she was supposedly kidnapped, was

an overcrowded General compartment of the train, and that, at the said time, many persons were standing outside the toilet, from which she was allegedly kidnapped. She went on to state, in cross-examination, that her husband told her that the said persons (who were standing outside the toilet), on being queried by him, stated that she had been taken by a person by covering her mouth with a handkerchief. It is impossible to believe that such an incident took place in a crowded General compartment of the train, without anyone raising any objection. Significantly, the prosecutrix also admitted, in cross-examination, that her husband did not lodge any complaint with the Police authorities, after she had been allegedly kidnapped, even while denying the suggestion that there was any ill will between her husband and herself. If one were to believe the version of the prosecution, therefore, it would appear that, from a crowded General class train compartment, the appellant, single-handedly, rendered the prosecutrix unconscious, at or in the toilet of the compartment, in the presence of a number of passengers, and boldly carried her, in unconscious state, to his house at Delhi, without anyone raising any objection, much less any alarm. The learned ASJ has, quite rightly, refused to accept that this could have occurred, and this Court endorses the findings of the learned ASJ, on this score as well. The appellant has, therefore, rightly been acquitted of the charge under Section 366 of the IPC, and this Court upholds the said finding.

55. There is, therefore, no explanation, whatsoever, for the period during the time when the prosecutrix left her husband and children to visit the toilet, and when she reached House No. 303, of the appellant.

This court is constrained to observe that the total absence of any attempt, on the part of the investigating officers, and the prosecution, to explain this, is a serious lapse, and presents a yawning gap in the chain of circumstances, which would link all the strands of the story. The learned ASJ has held, consequent to his finding that the prosecutrix had not been kidnapped from the train by the appellant, that the prosecutrix voluntarily visited the house of the appellant, perhaps on account of some marital discord, etc. Needless to say, such a finding would be purely presumptive, and cannot sustain in law. There is no evidence to suggest any marital discord between the prosecutrix and her husband, and, therefore, the period prior to the prosecutrix reaching the house of the appellant, i.e. House No. 303, must necessarily be regarded as remaining unexplained.

56. Were the present case to be purely one of circumstantial evidence, perhaps, such a yawning gap might, by itself, have been fatal to the case of the prosecution, as it is one of the fundamental principles of appreciation of circumstantial evidence, that the circumstances, which are proved, must form an unbroken chain, and that the benefit of any missing links in such a chain must necessarily enure in favour of the accused, and vitiate the case of the prosecution.

57. This case, however, cannot be allowed to blindly follow that path, as the factum of sexual intercourse, between the appellant and the prosecutrix, stands proved by the DNA profiling evidence provided by the FSL, as is already noticed hereinabove.

Rape and Gang Rape – Sections 376 and 376D, IPC

58. “Gang rape” is defined, in Section 376D of the IPC, in the following terms:

“376D. Gang rape. – Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person’s natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.”

59. “Rape” is defined in Section 375, and punishment, for the said offence, is contemplated by Section 376, of the IPC.

60. These provisions underwent what, for the purposes of the present case, may be regarded as a radical change, by the Criminal Law (Amendment) Act, 2013 (hereinafter referred to as “the 2013 Amendment Act”). These amendments also affected Section 114A of the Evidence Act, which was also correspondingly amended. It would be useful to set out the pre-and post-amended provisions, thus, to enable a clear comparison between them:

Provision (Section)	Pre-3 rd February, 2013	Post-3 rd February, 2013
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375, IPC	“Rape – A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: – <i>First.</i> – Against her will. <i>Secondly.</i> – Without her consent. <i>Thirdly.</i> – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. <i>Fourthly</i> – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. <i>Fifthly.</i> – With her	Rape. – A man is said to commit “rape if he – (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

	consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. <i>Sixthly.</i> – With or without her consent, when she is under sixteen years of age. <i>Explanation.</i>– Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. <i>Exception.</i> – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.	under the circumstances falling under any of the following seven descriptions: – <i>First.</i> – Against her will. <i>Secondly.</i> – Without her consent. <i>Thirdly.</i> – With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. <i>Fourthly.</i> – With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. <i>Fifthly.</i> – With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or
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		through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. <i>Sixthly.</i> – With or without her consent, when she is under eighteen years of age. <i>Seventhly.</i> – When she is unable to communicate consent. <i>Explanation 1.</i> – For the purposes of this section, “vagina” shall also include <i>labia majora</i>. <i>Explanation 2.</i> – Consent means an unequivocal voluntary agreement where the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
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		Provided that a woman who does not physically resist to the act of penetration shall not by the recent only of that fact, be regarded as consenting to the sexual activity. <i>Exception 1. – A medical procedure or intervention shall not constitute rape.</i> <i>Exception 2. – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”</i>
376, IPC	Punishment for rape.— (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be	Punishment for rape.— (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to

	liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. (2) Whoever,— (a) being a police officer commits rape— (i) within the limits of the police station to which he is appointed; or (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or (iii) on a woman in his custody or in the custody of a police officer subordinate to	imprisonment for life, and shall also be liable to fine. (2) Whoever,— (a) being a police officer, commits rape— (i) within the limits of the police station to which such police officer is appointed; or (ii) in the premises of any station house; or (iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or (c) being a member of the armed forces deployed in area by the Central or a State Government commits rape in such area; or (d) being on the management or on the staff of a jail,
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	him; or (b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or (c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or (d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or (e) commits rape on a woman knowing her to be pregnant; or (f) commits rape on a woman when she is under twelve years of	remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or (g) commits rape during communal or sectarian violence; or (h) commits rape on a woman knowing her to be pregnant; or (j) commits rape, on a woman incapable of giving consent; or (k) being in a position of control or dominance over a
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	age; or (g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. <i>Explanation 1.</i>—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. <i>Explanation 2.</i>—“Woman’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or	woman, commits rape on such woman; or (l) commits rape on a woman suffering from mental or physical disability; or (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or (n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. <i>Explanation.</i>—For the purposes of this sub-section,— (a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces
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	children or a widows' home or by any other name, which is established and maintained for the reception and care of woman or children. <i>Explanation 3.</i> "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.	constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government, or the State Government; (b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation; (c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861); (d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution
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		called by any other name, which is established and maintained for the reception and care of women or children. (3) Commits rape on a woman when she is under sixteen years of age.
114A, Evidence Act	Presumption as to absence of consent in certain prosecutions for rape. – In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub- section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that he did not consent, the court shall presume that she did not consent.	Presumption as to absence of consent in certain prosecution for rape. – In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub- section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence

		before the court that he did not consent, the court shall presume that she did not consent. <i>Explanation.</i> – In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).”
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61. The amendments carried out by the 2013 Amendment Act do not significantly impact the applicability of Section 375 of the IPC, to the facts of the present case, though they do have their impact on the applicability of Section 376 of the IPC and Section 114A of the Evidence Act.

62. Insofar as Section 375 of the IPC is concerned, save and except for cases which fall under clause (d) *supra*, of the said Section, penetration, clearly, is the *sine qua non* for rape to be held to have taken place. Clause (a) of Section 375 deals with peno-vaginal penetration, whereas clauses (b) and (c) deal with other forms of penetration. There is neither any allegation, nor any evidence, to bring the present case within the ambit either of clause (b) or of clause (c); ergo, this Court needs concern itself only with clause (a) of Section 375.

63. At this stage, before proceeding further, one may directly address the allegation of “gang rape”, as levelled against the appellant, and his two “unknown” compatriots, by the prosecutrix. “Gang rape” necessarily involves rape, of a woman, by one or more persons. The forensic evidence, as it emerged from the FSL report (Ex. PA), clearly established that the semen of the appellant, alone, was found in the vulval and vaginal swabs of the prosecutrix, as also on her *salwar* and on the bed sheet seized from the room where the offence was alleged to have taken place. No semen, of any other person, was found in any of these exhibits.

64. The learned ASJ has chosen to uphold the allegation of “gang rape” solely on the basis of the finding, in the FSL report, that the semen found in one used condom did not match the DNA profile of the appellant. In this context, a serious discrepancy becomes immediately apparent, when one views the evidence holistically. The testimonies, during trial, of PW-4 SI Lokesh and PW-7 SI Pramila, clearly state that a *bag, containing used condoms*, was seized from House No 303. The Seizure Memo (Ex. PW-4/A) also refers to seizure of a bag containing used condoms. According to the testimony of PW-3 Const. Chattar Mal, he had transported the *pullandas*, as received by him, to the FSL. However, the FSL report (Ex. PA) refers to “one used condom along with the cover wrapped in a polythene bag”. The results of the DNA analysis, too, referred to “used condom”. There is no explanation, whatsoever, as to how, when a bag of used condoms was seized from House No. 303, only one used condom was contained in the exhibit provided to the FSL. *This is, in*

the opinion of this Court, an extremely serious discrepancy, especially as the DNA analysis of the semen found on the single used condom received by the FSL constitutes the sole basis for the decision, of the learned ASJ, to convict the appellant under Section 376D of the IPC. Given the fact that there was a delay of two weeks in forwarding of the seized exhibits to the FSL, the inference that the bag of used condom is, seized from the place of incident at House No. 303 was tampered with, before it was forwarded to the FSL, is inescapable. Even on this sole ground, in the opinion of this Court, the appellant would be entitled to be acquitted of the charge under Section 376D of the IPC.

65. That apart, the finding of semen, on the said used condom, which did not match with the DNA profile of the appellant, was, in the opinion of this Court, entirely insufficient to justify a finding of gang rape having taken place, far less a conviction for the said offence. If nothing else, the presence of semen in a condom does not necessarily indicate penetration. The evidence, on the basis of which the learned ASJ has convicted the appellant under Section 376D of the IPC, therefore, in the opinion of this Court, is too tenuous to support the conviction.

66. This Court is, therefore, of the view that the charge, against the appellant, of having been a participant in “gang rape” and, therefore, having exposed himself to conviction under Section 376D of the IPC has, necessarily, therefore, to fail. The appellant would, therefore, be entitled to be acquitted of the said charge.

67. Having said that, as this Court has already observed, hereinabove, the fact of sexual intercourse, between the appellant and the prosecutrix, having taken place, stands established by the forensic evidence on record. Given the scheme and structure of Section 375 of the IPC, therefore, the question of whether the said act/acts of sexual intercourse, constituted “rape”, or not, would fall to be determined on the basis of whether the prosecutrix could be said to have “consented”, to the said act/acts, or not.

68. Section 376 of the IPC, as it stood prior to, as well as after, its amendment, w.e.f. 3rd February, 2013, by the 2013 Amendment Act *supra*, contained two sub-sections. For the sake of brevity and convenience alone, sub-section (1) of Section 376 may be referred to, as dealing with cases of “rape simplicitor”, whereas sub-section (2) of Section 376 deal with more “aggravated” cases of rape, as is apparent from the fact that the minimum punishment prescribed, in cases of rape falling under Section 376(2) is higher than that prescribed in cases falling under Section 376(1).

69. This distinction case of some importance, in the facts of the present case, as the allegation, of the prosecutrix, was that she was being continuously raped, on a daily basis, from 15th June, 2012 till 22nd March, 2013. A reading of the various clauses in Section 376 (2) of the IPC, as it stood before, and after, its amendment w.e.f. 3rd February, 2013, reveals that none of the said clauses, as they existed prior to 3rd February, 2013, would apply to the present case, whereas,

after 3rd February, 2013, assuming the allegation of the prosecutrix to be correct, the offence committed by the appellant could conceivably be brought within the ambit of clause (n) of Section 376 (2), which deals with commission of “rape repeatedly on the same woman”. The case could also, conceivably, attract clause (k) of Section 376 (2), which deals with cases in which the offender is “in a position of control or dominance over” the woman on whom he commits rape.

70. Neither of these clauses, however, figured in Section 376(2) of the IPC, as it stood prior to its amendment w.e.f. 3rd February, 2013. The position that emerges is, therefore, that, for the period 15th June, 2012 till 3rd February, 2013, the act of sexual assault, if any, committed by the appellant on the prosecutrix would fall within the ambit of Section 376(1), whereas, for the period 3rd February, 2013 till 23rd March, 2013, the case would attract Section 376(2) of the IPC.

71. This distinction assumes significance when one refers to Section 114A of the Evidence Act, on which the learned ASJ has chosen to place considerable reliance. Section 114A creates a “presumption of absence of consent”, where the prosecutrix so alleges, thereby shifting the onus, to prove presence of consent, on the accused. The protection of Section 114A of the Evidence Act would not, however, be available to the prosecutrix, in the present case, for the period prior to 3rd February, 2013, as the offence committed by the appellant, even if it were to be deemed to have been so committed, would fall within Section 376(1) of the IPC, prior to the said date, and not under Section 376(2) thereof, and the applicability of Section

376(2) of the IPC is the statutory *sine qua non*, for Section 114A of the Evidence Act to apply.

72. The position that would emerge would, therefore, be that, for the period prior to 3rd February, 2013, the onus would be on the prosecutrix to prove want of consent, whereas, for the period after 3rd February 2013, the onus would be on the appellant to prove the existence thereof.

73. This distinction, however, is more one of form, than of substance, in the facts of the present case as, in the opinion of this Court, viewed any which way, the allegation of the appellant having continuously raped her, over a period of over nine months (from 15th June, 2012 till 22nd March, 2013), purportedly three to four times a day, cannot, on the facts of the present case, be believed. The case, as sought to be built up by the prosecution, on the basis of the allegations of the prosecutrix, bristles with improbabilities and, even, impossibilities. Among the factors, which incline this Court to disbelieve that case, of the prosecution, regarding the prosecutrix having been subjected to continuous rape, by the appellant, over the aforesaid period of nine months, may be enlisted the following:

- (i) There is no explanation for the manner in which the prosecutrix reached House No. 303, where the appellant is alleged to have raped her continuously for over nine months. The allegation of the prosecutrix having dragged her, by placing a handkerchief over her mouth and, thereby, rendering her

unconscious, in the train in which she was travelling between Kanpur and Raebareli, as already been found, by this Court, hereinabove, to be unbelievable. Neither is there any explanation for the conveying of the prosecutrix, from the said train compartment, to House No. 303. The allegation that the prosecutrix was forcibly brought to the said house, in an unconscious state, therefore, does not inspire confidence.

(ii) Though, according to the prosecutrix, she was repeatedly beaten and belaboured, by the appellant, over the aforesaid period of nine months, to the extent that, according to her allegation, the appellant had beaten her severely even after his two unknown colleagues had raped her and left, no evidence of any injury, on any part of her body, was found, even in her MLC. The Police witnesses (PW-7, PW-4 and PW-6), too, deposed, in one voice, did not notice any injury on the body of the prosecutrix, when they reached House No. 303. It is highly improbable that, if the prosecutrix had been subjected to repeated rape, for over nine months, as well as the physical assault during the course of commission of rape, there would be no external injury, whatsoever, on a person.

(iii) It has also emerged, in evidence, as noted hereinabove, that the house, in which the prosecutrix was thus being repeatedly raped on a daily basis, for over nine months, housed as many as ten to twelve other tenants, and that all other rooms were occupied. None of the tenants has been co-opted as a

witness. That apart, PW-4 (SI Lokesh) acknowledged, in cross-examination, that none of the tenants was aware of the rape of the prosecutrix.

(iv) It has also emerged, in evidence, that all the tenants shared a common toilet, which was at some distance from the room where she was confined. In fact, the prosecutrix, in cross-examination, deposed that she was confined in a room on the ground floor of the house, whereas the toilet was located on the third floor thereof. The prosecutrix must, therefore, have necessarily visited the said toilet several times, over the aforesaid period of nine months, and it is inherently unbelievable that she would neither inform any of the other tenants in the building about what was transpiring with the, nor would any of the tenants be become aware of the fact that she was being subjected to rape and physical assault on a continuous and daily basis.

(v) It was admitted, by the prosecutrix herself, that she had visited the shop, with the appellant, for purchasing a new television set, and that the new television set, which was purchased, was as per her choice. These facts, too, militate against the allegation of continuous physical assault and rape, by the appellant, of the prosecutrix.

(vi) Similarly, the prosecutrix also acknowledged the fact that the appellant had taken her to the doctor, on various occasions. No attempt has been made to identify the said doctor, or to co-

opt the doctor as a witness in the proceedings. Even on such occasions, the appellant, as per her version, remained silent about the alleged atrocities which were being committed with her.

(vii) During the course of her cross-examination before the learned ASJ, the prosecutrix deposed that, after she was released from the Nari Niketan, she again visited the room, in House No. 303, in which she had allegedly been subjected to rape by the appellant, with her husband, to collect her belongings, and that the landlord of the said premises demanded rent from her, against which her husband paid in ₹ 3200/- as arrears of rent. This fact remains totally unexplained. The admission, of the prosecutrix, that her husband paid *arrears of rent*, for the said premises, indicates that, contrary to her version, she was not an alien to the room or to House No. 303.

(viii) According to the version of the prosecutrix, the appellant used to administer some kind of sedative, to her, and to take advantage of her while she was in a semi-conscious state. Though this practice continued, according to her, for nine months, the prosecutrix claims that she did not know the nature of the drugs/sedative which was being administered to her. No such drug or sedative was recovered, either from the appellant or from House No. 303.

74. The above facts, when seen holistically, makes the entire narrative, as propounded by the prosecutrix, adopted by the prosecution and accepted (in part) by the learned ASJ, impossible to believe. The chronicle of the tale, as sought to be propounded by the prosecution, is that, in an overcrowded General class compartment of a train running between Kanpur and Raebareli, the appellant managed, somehow, to render the prosecutrix unconscious, in the toilet of the compartment, with the number of persons standing outside and in some mysterious and inconceivable manner, transport her to his house in Delhi, and lock her in a room, taking care that she remained unconscious throughout and regained consciousness only after she was locked in the room. As to how, in a crowded train compartment, the appellant managed to execute such a coup, remains totally unexplained. It is not known where the appellant alighted, from the train, carrying the supposedly unconscious prosecutrix. Equally, it is not known as to how, from the said report, the appellant managed to transport the prosecutrix to the room in House No. 303, keeping her unconscious the whole time. As for the husband of the prosecutrix, he, according to the prosecutrix, was informed, by the persons in the compartment, that the prosecutrix had been rendered unconscious and taken away by the appellant, and he neither chose to make any further enquiry, nor any complaint to the Police authorities in that regard. With near superhuman tenacity, he bore the absence of the prosecutrix till nine months later, when, supposedly through the agency of the Police, she was “returned” to him. In the room in House No. 303, the story becomes even more fantastic. According to the prosecutrix, she was subjected to unwelcome sexual intercourse, by the appellant,

three to four times every day, for over nine months, generally after administering some drug – of which she neither knew the name nor the identity – which rendered her semi-conscious. Whether, over a period of nine months, it would have even been physically possible for the prosecutrix to bear intercourse, by the appellants, three to four times every day, is itself doubtful. Though the house had ten to twelve rooms, with tenants in all the rooms, none of the tenants was aware of the fact that their fellow-lodger had kept, in his room, the prosecutrix imprisoned, and that he was raping her three to four times every day. Admittedly, there was only one common toilet for all the rooms; yet, none of the fellow-lodgers in the building was ever aware of the plight of the prosecutrix, or of the atrocities being perpetrated, on her, by the appellant. The prosecutrix used to go out with the appellant, to the extent that, when the television set in the room had to be changed, it was the prosecutrix who chose the new television set. The appellant also purchased clothes for the prosecutrix, as per his choice. When the prosecutrix fell ill, the appellant used to take her to the doctor. All this time, however, no one ever got to know about the fact that the prosecutrix was being subjected to daily unwelcome sexual assault by the appellant. Neither did the prosecutrix ever get a chance to alert anybody of her condition. Suddenly, one day, more than nine months after this supposed that ordeal had started, the appellant brought, with him, two of his friends, who also raped the prosecutrix. The prosecutrix, however, claims to be ignorant about the identity of the said two persons, stating that their faces and heads were covered. After committing sexual assault on her, the said two persons left, whereafter, according to the prosecutrix, the appellant again

committed rape on her. All through this time, the prosecutrix also alleges that the appellant used to beat her severely. The day after the alleged “gang rape” occurred, the prosecutrix found the appellant’s mobile phone under his pillow, and managed to steal it. Concealing the said mobile phone, the prosecutrix requested the appellant that she desired to visit the toilet. The appellant accompanied her to the toilet. The prosecutrix, then, requested the appellant to return to the room and bring her toothpaste, and leaving the prosecutrix alone, the appellant, allegedly, returned to the room. At this time, the appellant managed to flee and, from the nearby Railway Station, make a call to the Police.

75. Several questions are thrown up, from the above narrative, to none of which there is any answer forthcoming, viz.

(i) How did the appellant manage, in a crowded train compartment, to render the prosecutrix unconscious by covering her mouth with a handkerchief, with no one raising an alarm?

(ii) How did the appellant manage to carry the allegedly unconscious prosecutrix, in the running train, without her family becoming aware, and with all other passengers remaining supposedly unconcerned?

(iii) Where did the appellant alight, carrying the unconscious prosecutrix? Again, how did he manage to do so, without the appellant's husband and children becoming aware of the fact?

(iv) When did the husband of the prosecutrix enquire about her absence?

(v) When he was allegedly informed, by the passengers, that his wife had been carried away by the appellant, why did the husband of the prosecutrix not raise any alarm? Why did he not make any complaint to the Police authorities?

(vi) How did the appellant manage to carry the unconscious prosecutrix to his house in Delhi? What means of transport did he adopt to travel from the station where he alighted from the train, till Delhi, and how did he ensure that the prosecutrix remained unconscious throughout?

(vii) How did the appellant manage to achieve the above feat, without any person, either in the train, or in the station where the appellant must have alighted from the train, carrying the unconscious prosecutrix, or en route between the said station and Delhi, raising any objection or alarm?

(viii) In a house comprising ten to twelve rooms, all of which were tenanted, and all of which share a common toilet situated some distance away from the rooms, how could the appellant

manage to subject the prosecutrix, on a daily basis (three to four times a day, if the prosecutrix is to be believed), to unwelcome sexual assault, without any of the tenants becoming aware thereof?

(ix) Is it believable that, having, for some reason, remained incapable of fleeing from the spot for over nine months (though she must have visited the toilet several times during the said period), the prosecutrix, on 23rd March, 2013, managed to escape by simply asking the appellant to go back to the room and fetch her toothpaste?

(x) What “belongings” had the prosecutrix left behind, in the room, for collecting which she returned to the room, with her husband, after having been released from the Nari Niketan?

(xi) Why did the husband of the prosecutrix pay “arrears of rent”, of ₹ 3200/-, to the landlord of House No. 303, on the said occasion?

76. It is true that, in cases of sexual offence and sexual assault, the testimony, of the allegedly assaulted prosecutrix, carries great weight, and may, in many cases, justifiably constitute the sole basis for conviction. It is equally trite, however, that, at the very highest, such testimony remains in the realm of presumption, howsoever strong such presumption may be. Law, however, does not recognise the irrebutable presumption, and the expression, though often used, must

remain an oxymoron. The law does style certain presumptions as “irrebuttable”; that, however, only means that the law would not allow the rebuttal of such presumptions, and not necessarily that the presumptions themselves are incapable of rebuttal.

77. It is not necessary, however, to enter into this somewhat involved jurisprudential thicket, for the purposes of the present case, as the presumption of truth, which attaches to the testimony of every victim of alleged sexual assault, is not, in law, irrebuttable, though the evidence, which would be required to be adduced in order to rebut such a presumption would be of an extremely high standard. In the present case, there can be no dispute regarding the fact of sexual intercourse, between the appellant and the prosecutrix, having taken place. The question, therefore, is one of consent, and, even if Section 114A of the Evidence Act were to be treated as applicable, the usage of the words “shall presume”, in the said provision, read with Section 4 of the Evidence Act, would allow a rebuttal, albeit with adequate evidence and material, of the presumption of lack of consent, which Section 114A creates.

78. Proving the presence, or absence, of consent, is always a tricky affair, as it requires psychoanalysis of the victim of the alleged sexual assault. It being impossible to conclusively determine the state of mind of any person, the court is always required, where the determination of such state of mind is necessary in law, to holistically consider the circumstances of the case, and arrive at a conclusion in that regard.

79. A comparison of the statements of the prosecutrix, as originally recorded by the I/O under Section 161 of the Cr.P.C., as later recorded by the learned MM under Section 164 of the Cr.P.C., and as tendered in evidence during trial, is revealing. In her statement under Section 164, the prosecutrix deposed, for the first time, that she had started surreptitiously disposing of the tablets which the appellant desired to administer her, as she got to know that the tablets rendered her unconscious. It was, similarly, the first time, in the said statement, that the prosecutrix chose to detail the manner in which she managed to escape, by stating that, when she awoke on 23rd March, 2013, she found that the appellant was watching television, purloined his mobile phone from underneath the pillow, requested him to allow her to visit the toilet, and asked him to return to the room and fetch her toothpaste, seeing which opportunity she fled. As against this, in her statement under Section 161 of the Cr.P.C., the prosecutrix had deposed that she “somehow” managed to escape, at 11:00 AM on 23rd March, 2013. In her evidence, as tendered during trial, the prosecutrix alleged, for the first time, that, before administering the tablets to her, the appellant had sex with her without her consent. Similarly, it was in the said testimony that, for the first time, the prosecutrix stated that she had earlier been confined in another house, from which she was brought to House No. 303 by foot. Even so, she deposed that she could not remember the distance between the said two houses. Again, it was in this deposition (during trial), that the prosecutrix alleged, again for the first time, that the appellant used to have unwelcome sex, with her, three to four times every day.

80. It is also significant that, though, in her statement under Section 161 of the Cr.P.C., the prosecutrix alleged that the appellant had indulged in “unnatural sex” with her, no such allegation finds place, either in the statement under Section 164 of the Cr.P.C., or in her testimony during trial. It is very difficult for this Court to believe that, and the appellant actually indulged in “unnatural sex” with the prosecutrix, she would refrain from making any reference, thereto, in her deposition either under Section 164, or during trial. Significantly, the MLC of the prosecutrix, too, did not disclose any evidence of any such “unnatural” sexual assault having been perpetrated, on the prosecutrix, by the appellant. Apart from the fact that the learned ASJ has, in the circumstances, rightly acquitted the appellant of the charge, against him, under Section 377 of the IPC, this inconsistency is serious, and considerably diminishes the evidentiary value of the various statements made by the prosecutrix from time to time, as well as of the allegations contained therein.

81. Such embellishments and inconsistencies, between the former statement and the latter, though unquestionably of limited value in cases of alleged sexual offence, when seen in the context of the overall circumstances of the present case, serves to thicken the haze of improbability which clouds the case of the prosecutrix and, consequently, of the prosecution.

82. Apropos the testimony of the prosecutrix during trial, and her cross-examination thereon, the following two features are also of significance, in the present case:

(i) According to the testimony of the prosecutrix, in the “second house”, in which she was lodged by the appellant, i.e. House No. 303, she was confined in a room on the ground floor, whereas the bathroom and toilet were on the third floor of the building. This renders it all the more improbable that the prosecutrix, if she was actually suffering unwelcome sexual assault three to four times every day, could ascend two floors to use the toilet, without any of the other inmates of the house becoming aware of her condition.

(ii) It was only during cross-examination that the prosecutrix acknowledged that a case had been filed, in court, in her name, against her husband. It is unfortunate that no further enquiry or investigation was done, by the investigating officers, regarding this aspect. On this matter coming to light, the prosecutrix sought to wish away the said fact, by alleging that the appellant had forged her signature in the petition. Owing to the regrettable lapse, on the part of the investigating officers, to inquire into this aspect, this Court is handicapped from returning any further findings thereon. Suffice it to state, however, that, seen in conjunction with the fact that the husband of the prosecutrix never even chose to complain against her absence, to the Police or to any other competent

authority, after she had allegedly been kidnapped, the complaint, of the prosecutrix against the appellant, of having kidnapped her and periodically subjected her to unwelcome sexual assault, over a period of over nine months (though, in her testimony during trial, the prosecutrix alleged, again incorrectly, that the said period was two to three months), completely fails to inspire confidence.

83. The case of the prosecutrix, as sought to be set up against the appellant is, therefore, replete with inconsistencies, improbabilities and imponderables and cannot, therefore, in the opinion of this Court, suffice to convict the appellant of having committed “rape” on the prosecutrix, or even of having assaulted her in any other manner. The findings of the learned ASJ, to the contrary, in the opinion of this Court, cannot, therefore, sustain, and deserve, consequently, to be set aside.

84. Before parting with this case, this Court notices, from the record, that, under cover of an application/letter dated 15th March, 2014, the appellant had sought to place, on record, a sworn statement (*halaf nama*), signed by the prosecutrix, in which she has stated that, as she was unable to cope with the vagaries of her husband, she had decided to enter into a relationship – in fact, an unofficial marriage – with the appellant, with a prayer for permission to examine the prosecutrix in connection therewith, so as to be able to prove the document. Unfortunately, the learned ASJ did not pass any orders on the said application, and the document remained unexhibited. In view

thereof, this Court is not in a position to state anything further in that regard.

Conclusion

85. As a sequitur of the above discussion, the appeal of the appellant has necessarily to succeed. The appellant is entitled to be acquitted, consequently, of all charges against him. The impugned judgment of the learned ASJ, as well as the order on sentence pronounced as a consequence thereof, are, therefore, quashed and set aside.

86. The appeal is allowed. The appellant shall be released forthwith, unless his incarceration is required in any other case.

JULY 01, 2019/HJ

C. HARI SHANKAR, J