

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-A-24-MA-2018
Date of Decision: 20th.04.2024

SAMSUDEEN

...Applicant

Versus

STATE OF HARYANA AND OTHERS

...Respondents

**CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE HARSH BUNGER**

Present : Mr. Abhinav Sood, Amicus Curiae
for the applicant.

Mr. Rahul Jaswal, Advocate
for respondent Nos.3 and 7.

HARSH BUNGER, J.

The instant application seeking leave to appeal is preferred against the judgment dated 21.02.2017/22.02.2017 passed by the learned Additional Sessions Judge, Palwal, qua respondents No.2 to 8; whereby respondents No.2 and 3, who were charge-sheeted under Sections 368/120-B of the IPC, respondent No.4, who was charge-sheeted under Sections 216/120-B of the IPC, respondents No.5, 7 and 8, who were charge-sheeted under Sections 376-D/120-B of the IPC and respondent No.6, who was charged under Sections 452/363/366-A/328/120-B of the IPC, were acquitted of the charges framed against them.

2. The lower Court record has been received, as stated in order dated 13.02.2024.

3. The prosecution case, as per the complaint (Exhibit P-1) of complainant-Samsudeen (PW-1), is that in the intervening night of 8/9.10.2014, he found his minor daughter (about 16 years of age) missing from the house and simultaneously, accused Yusuf and Noman were also found missing from their houses. Upon suspicion, the complainant moved an application to know the whereabouts of his daughter and said Yusuf and Noman. Thereafter, the complainant recovered his daughter from Chandigarh and she informed that Rasid, Mustkim and Vakeela took her to Village Dhigcholi in the house of one Sohrab and thereafter, they took her to Village Jafrabad and then to Chandigarh. The police, after recording the statement of complainant's daughter, kept her in protection house, Palwal and thereafter, her custody was handed over to her father i.e. the applicant/complainant.

4. Based on the afore-said complaint, FIR No.73 dated 10.10.2014 under Sections 216/328/363/366-A/368/376-D/452/1230-B IPC was registered at Police Station Bahin, Palwal. During investigation, the victim was medico-legally examined at the local hospital and her statement under Section 164 Cr.P.C. was recorded. Thereafter, the accused were arrested and interrogated. After completion of the investigation, the final report under Section 173 of Cr.P.C was submitted. Thereafter, charges were framed against the respondents-accused to which they pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined seventeen witnesses, namely, Samsudeen-Complainant (PW-1), Nasim Ahmad (PW-2), Juber (PW-3), ASI Sarwan Kumar (PW-4), Victim (PW-5), Mukim (PW-6), Partap Singh (PW-7), Arshad (PW-8), Aman Parkash (PW-9),

L/Ct. Vandana (PW-10), Dr. Maan Singh (PW-11), Ct. Vinay Kumar (PW-12), Narender Singh (PW-13), Ct. Mijajuddin (PW-14), SI Nanak Singh (PW-15), HC Surender (PW-16) and Dr. Ruchi Mangla (PW-17). Prosecution also placed on record documentary evidence by way of Ex.P-1 to Ex.P-23.

6. Thereafter, the statements of respondents-accused were recorded under Section 313 of the Cr.P.C; wherein they denied the entire prosecution case and had led their evidence i.e. DW1-Mahmooda, DW2-Mohammad Arshad, DW3-Mohd. Shakeel, DW-4 Inspector Ranjeet Singh, DW-5 Bhim Sain and DW-6 Satish Chandra Varshney. They had also placed on record the following documents in their defence evidence:-

<i>Sr. No.</i>	<i>Exhibit/s</i>	<i>Documents</i>
<i>1</i>	<i>Ex.D1</i>	<i>Statement of Nasim Ahmad u/s 161 Cr.P.C.</i>
<i>2</i>	<i>Ex. D2</i>	<i>Statement of Juber u/s 161 Cr.P.C.</i>
<i>3</i>	<i>Ex. D3 & D4</i>	<i>Photographs</i>
<i>4</i>	<i>Ex. D5</i>	<i>Statement of victim u/s 161 Cr.P.C.</i>
<i>5</i>	<i>Ex. D6</i>	<i>Statement of Mukim u/s 161 Cr.P.C.</i>
<i>6</i>	<i>Ex. D7</i>	<i>Letter dated 31.01.2017 from Railways</i>
<i>7</i>	<i>Ex. D8</i>	<i>Ticket booking</i>
<i>8</i>	<i>Ex. D9/A</i>	<i>Expert Report</i>
<i>9</i>	<i>Ex. D9/B</i>	<i>Enlarge Photographs</i>
<i>10</i>	<i>Mark-D10</i>	<i>Report of DSP, Hathin</i>
<i>11</i>	<i>Mark-DA</i>	<i>Affidavit of victim</i>
<i>12</i>	<i>Mark-DB/DC</i>	<i>Affidavit of victim</i>
<i>13</i>	<i>Mark-DD</i>	<i>Nikhanama</i>
<i>14</i>	<i>Ex.DE</i>	<i>Statement of Arshad u/s 161 Cr.P.C.</i>
<i>15</i>	<i>Mark-DE</i>	<i>Ticket Confirmation</i>
<i>16</i>	<i>Ex.DA</i>	<i>Marked DA</i>
<i>17</i>	<i>Ex.DB/DC</i>	<i>Marked DB/DC</i>
<i>18</i>	<i>Ex.DD</i>	<i>Marked DD</i>

7. The trial Court framed the following points for determination :-

- “a. Whether on the date of the incident the victim was under the age of eighteen years.*
- b. Whether the victim was kidnapped or abducted by the accused.*
- c. Whether accused Fakrudeen and Samsudeen wrongfully and illegally concealed and confined the victim knowing that she was kidnapped or abducted person.*
- d. Whether accused Sher Mohd., harboured and concealed accused Yusuf and others with the intention of preventing their apprehension by the police.*
- e. Whether accused Yusuf, Mohd. Rizwan, Mohd. Noman, Mustkim and Asif committed gang-rape of the victim.”*

8. After conclusion of the trial, one accused named Yusuf son of Deen Mohd. was convicted under Section 376 IPC and sentenced to undergo rigorous imprisonment for seven years whereas accused-respondents No.2 to 8 were acquitted of the charges framed against them by the learned trial Court.

9. In the afore-mentioned circumstances, applicant/complainant-Samsudeen has preferred the instant leave to appeal against the judgment dated 21.02.2017/22.02.2017 passed by the learned Additional Sessions Judge, Palwal, qua acquittal of respondents No.2 to 8.

10. The grounds considered by the learned trial Court for acquitting respondents No.2 to 8, are as under :-

- (i) The victim was aged about 17 years – 2 months on the date of the incident.*
- (ii) The theory of enticement has been demolished by the victim who has stated that in the intervening night of the date of the incident, she was asleep in courtyard of her house and about midnight, she was made to sniff*

which made her unconscious. If the victim was benumbed then she could not have been enticed away by the accused as has been projected by PW1.

(iii) The theory of forcible taking away or abduction appears quite improbable. In cross-examination, PW5 admits that on the date of the incident, her parents, her younger sister and her brother were present and sleeping in the house. In the courtyard, she alongwith her parents was sleeping though on separate cot. The main door of the house was closed / bolted from inside. In her previous statement Ex. D5 given to the police, PW5 did not mention that she was made unconscious by the accused before taking her away and in Ex. D5, the victim simply stated that she was forcibly taken by accused Yusuf, Noman and Anis. This omission in Ex. D5 is material omission / contradiction and fatal for the prosecution in so far as abduction is concerned.

(iv) Prosecution has not placed on record any material from which it could be inferred that the victim was under the influence of any sedative or she was made unconscious.

(v) Two things emerge from the statement of the Victim that either she was not forcibly taken or she herself accompanied the accused and in both the eventualities, it could not be said that the victim was either kidnapped or forcibly abducted. Resultantly, charges under Sections 363/366-A/328 IPC cannot be sustained. Charges under Section 452 can hardly be sustained when it is highly doubtful whether the accused entered into the house of victim.

(vi) The plea of enticement projected by PW1 is entirely based on suspicion and as such, it could not be sustained. Even in his application Ex.P1, he appears unsure whether the victim was 'forcibly taken' or 'enticed away' and only after recovery of the victim, he had

disclosed to the police that the victim was enticed away and that theory of enticement was demolished by the victim who has stated that in the intervening night of the date of the incident, when she was sleeping, she was made to snuff which made her unconscious. On the other hand, theory of forcible abduction propounded by PW5 does not inspire confidence on account of material omission with reference to her previous statement given to the police; wherein she did not mention that she was made unconscious by the accused before taking her away.

(vii) Deposition of PW2-Nasim Ahmad could have been useful for sustaining charge under Section 368 IPC against accused Samsudeen and Fakrudeen; had the prosecution been able to prove that victim was either kidnapped or was abducted as Section 368 IPC presupposes kidnapping or abduction; whereas on 10.10.2014 when accused Samsudeen and Fakrudeen were arrested, the applicant-complainant was not sure whether the victim was kidnapped or abducted.

(viii) If a disclosure statement (Ex. P10) of accused Sher Mohd. is considered to be accepted that he had provided shelter, funds and place to his nephew accused Yusuf; then the Investigating Officer ought to have demarcated the places allegedly disclosed by accused Sher Mohd. and the sources of funds etc. Mere tailored made confessional statement incorporating the essentials of Section 216 IPC is not sufficient. Furthermore, the Investigating Officer did not place on record any call detail record between accused Yusuf and accused Sher Mohd. to bring home charge under Section 216 IPC.

(ix) Except Yusuf, none of the accused was medico-legally examined to ascertain whether they were capable of performing sexual activity or not. Therefore, omission to get accused Rizwan, Asif and Mustkim medically examined is fatal to the prosecution case.

(x) Plea of alibi taken by accused Mohd. Rizwan, Mohd. Noman, Mustkim and Asif, could not be kept aside, especially when the same is duly corroborated by the deposition of DW-1, DW-3 and DW-5 as there is no law prescribing that statement of the victim is always to be taken as a gospel truth.

(xi) The victim has known accused Yusuf since her childhood, but she denies having ever talked to him on phone. PW5 denies that her photograph was clicked in the house of accused Yusuf but she admits that in photograph Ex. D3 and Ex. D4 she is visible alongwith accused Yusuf on the bed.

(xii) PW5 appears unsure whether she was allegedly raped in the night of her alleged kidnapping / abduction or in the subsequent night.

(xiii) Although the victim was brought back from Chandigarh on 16.10.2014 but she was produced before the police on 18.10.2014 by her father as has been specifically recorded in her previous statement Ex. D5. From this omission, two things arise for consideration, first; why PW1 did not inform the police about the whereabouts of the victim when he had come to know that the victim was in Chandigarh and second; why the victim was not produced straight away before the police once she was brought back from Chandigarh. Natural answer is that the complainant party utilized the interregnum of two days from 16.10.2014 to 18.10.2014 for the purpose of tutoring the victim against the accused.

(xiv) PW5 denies that on 12.12.2014 she had performed nikah with Roshan Jamil r/o Kodiya, District Aligarh and out of the said wedlock, one boy was born. She claims that she is still unmarried. This statement of the victim stands contradicted by PW6-Mukim who states that the victim is married to Roshan Jamil and mother of one boy.

It was concluded by Trial Court that the victim is in the habit of telling lie for no viable reason.

11. While assailing the impugned judgment, the learned counsel for the applicant has submitted that the judgment dated 21.02.2017, qua the acquittal of accused-respondents No.2 to 8, passed by the trial Court is erroneous and against the facts and law as the trial Court did not appreciate the evidence on record in correct perspective. Learned counsel for the applicant submitted that the trial Court has erred in law and facts in appreciating that the names and role of each of the accused was specifically described by the prosecutrix under Section 164 Cr.P.C. and also before the trial Court, therefore non-conduct of medico-legal examination of respondents-accused in terms of Section 53-A of the Cr.P.C. was not fatal to the prosecution case, moreso when one of the accused, namely, Yusuf has been held guilty and convicted under Section 376 IPC. It is further submitted that the trial court has erred in not relying upon disclosure statements suffered by respondents-accused. Learned counsel for the applicant further submits that the trial Court has completely misread the material evidence on record and the findings returned by the trial Court on *points (b), (c) and (d)* as framed by it, are perverse and hence, unsustainable. It is contended that the very approach of the trial Court in acquitting the respondents-accused herein, is not tenable in the eyes of law.

12. After hearing the submissions made by the learned counsel for the applicant, the following issues arise for consideration in the present application:-

(i) *Whether the non-compliance of provisions of Section 53-A of the Code of Criminal Procedure as regards respondents – Asif, Razwan and Mustkim is fatal to the prosecution case?*

(ii) *Whether the findings returned by learned trial Court on points (b), (c) and (d) framed by it, are perverse?*

13. As regards issue no. (i), it would be apposite to consider the provisions contained in Section 53-A Cr.P.C. Recently, Hon'ble Supreme Court in the case of "**Chotkau v. State of Uttar Pradesh**", 2022(4) RCR (Criminal) 813; while considering the provisions of Section 53-A Cr.P.C. observed as under:-

"III. Failure to conduct medical examination

69. *Despite the fact that it was a shocking case of rape and murder of a six year old girl, the prosecution did not care to subject the accused (appellant herein) to examination by a medical practitioner. There were two documents which formed part of the records submitted along with the final report, but which were not exhibited. One of them appears to be a Memo signed by PW-5, the Doctor who conducted the post-mortem. This Memo is dated 09.03.2012 addressed to the Senior Pathologist, District Hospital, Bahraich. The Memo reads as follows:*

"Vaginal smear prepared in two slides from the body of Km. Uma D/o Chhedam Lai, R/o Semgadha, PS Ikauna, Dist: Shravasti."

70. *The second is a Report dated 10.03.2012. It reads as follows:-*

"Report- In microscopic examination of supplied specimen, no spermatozoa seem alive or dead. No (unclear) seen.

71. *Despite the fact that the author of the Memo dated 09.03.2012 was examined as PW-5, he never spoke about this. The Report of the Forensic Sciences Laboratory, to whom the salwar was forwarded, was also not obtained by the Investigating Officer.*

72. *Section 53(1) of the Code enables a police officer not below the rank of Sub-Inspector to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the*

facts which may afford such evidence, whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. Section 53(1) reads as follows:

"53. Examination of accused by medical practitioner at the request of police officer .- (1)

When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of subinspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose."

73. By Act 25 of 2005, a new Explanation was substituted under Section 53, in the place of the original Explanation. The Explanation so substituted under Section 53, by Act 25 of 2005 reads as follows:

"Explanation.-In this Section and in Sections 53A and 54,-

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical

qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

74. *Simultaneously with the substitution of a new Explanation under Section 53, Act 25 of 2005 also inserted a new provision in Section 53A. Section 53A reads as follows:*

"53A. Examination of person accused of rape by medical practitioner, -

(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

"(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in Clause (a) of sub-Section (5) of that Section."

75. Even in a case where the victim of rape was alive and testified before the Court and the accused was also examined by a doctor, this Court found in **Krishan Kumar Malik v. State of Haryana (2011) 7 SCC 130** that the failure to obtain the report of the Forensic Sciences Laboratory was fatal. Paragraph 40 of the said decision reads as follows:

"40. The appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the appellant."

76. On the scope of the newly inserted Section 53A, this Court said in **Krishan Kumar Malik (supra)** as follows:

"44. Now, after the incorporation of Section 53A in the Criminal Procedure Code, 1973 w.e.f. 23.6.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of

cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences."

77. It is true that a three member Bench of this Court indicated in **Rajendra Pralhadrao Wasnik v. State of Maharashtra (2019) 12 SCC 460** that Section 53A is not mandatory. It was held in paragraphs 49 and 50 of the said decision as follows:-

"49. While Section 53-A CrPC. is not mandatory, it certainly requires a positive decision to be taken. There must be reasonable grounds for believing that the examination of a person will afford evidence as to the commission of an offence of rape or an attempt to commit rape. If reasonable grounds exist, then a medical examination as postulated by Section 53-A(2) CrPC must be conducted and that includes examination of the accused and description of material taken from the person of the accused for DNA profiling. Looked at from another point of view, if there are reasonable grounds for believing that an examination of the accused will not afford evidence as to the commission of an offence as mentioned above, it is quite unlikely that a charge-sheet would even be filed against the accused for committing an offence of rape or attempt to rape.

50. Similarly, Section 164-A CrPC requires, wherever possible, for the medical examination of a victim of rape. Of course, the consent of the victim is necessary and the person conducting the examination must be competent to medically

examine the victim. Again, one of the requirements of the medical examination is an examination of the victim and description of material taken from the person of the woman for DNA profiling."

78. *After saying that Section 53A is not mandatory, this Court found in paragraph 54 of the said decision that the failure of the prosecution to produce DNA evidence, warranted an adverse inference to be drawn. Paragraph 54 reads as follows:-*

"54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53-A and Section 164-A CrPC. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly of the view that where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution."

79. *It is necessary at this stage to note that by the very same Amendment Act 25 of 2005, by which Section 53A was inserted, Section 164A was also inserted in the Code. While Section 53A enables the medical examination of the person accused of rape, Section 164A enables medical examination of the victim of rape. Both these provisions are somewhat similar and can be said approximately to be a mirror image of each other. But there are three distinguishing features. They are:-*

(i) Section 164A requires the prior consent of the women who is the victim of rape. Alternatively, the consent of a person competent to give such consent on her behalf should have been obtained before subjecting the victim to medical examination. Section 53A does not speak about any such consent;

(ii) Section 164A requires the report of the medical practitioner to contain among other things, the general mental condition of the women. This is absent in Section 53A;

(iii) Under Section 164A(1), the medical examination by a registered medical practitioner is mandatory when, "it is proposed to get the person of the women examined by a medical expert' during the course of investigation. This is borne out by the use of the words, " such examination shall be conducted". In contrast, Section 53A(1) merely makes it lawful for a registered medical practitioner to make an examination of the arrested person if "there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence".

80. In cases where the victim of rape is alive and is in a position to testify in court, it may be possible for the prosecution to take a chance by not medically examining the accused. But in cases where the victim is dead and the offence is sought to be established only by circumstantial evidence, medical evidence assumes great importance. The failure of the prosecution to produce such evidence, despite there being no obstacle from the accused or anyone, will certainly create a gaping hole in the case of the prosecution and give rise to a serious doubt on the case of the prosecution. We do not wish to go into the question whether Section 53A is mandatory or not. Section 53A enables the prosecution to obtain a significant piece of evidence to prove the charge. The failure of the prosecution in this case to subject the appellant to medical examination is certainly fatal to the prosecution case especially when the ocular evidence is found to be not trustworthy.

81. Their failure to obtain the report of the Forensic Sciences Laboratory on the blood/semen stain on the salwar worn by the victim, compounds the failure of the prosecution..."

14. Coming to the case in hand, the learned trial Court in paras 40 and 44 of its judgment has held as under:-

*“40. For the sake of argument, if plea of alibi and finding of innocence recorded by the police is kept aside even then in **Ujjagar Singh v/s State of Punjab, 2008(1) RCR (Criminal) 305**, Hon’ble Supreme court held that conviction of the accused u/s 376 IPC is liable to be set aside when accused was not medico legally examined to ascertain his capacity to perform sexual intercourse. Admittedly, except accused Yusuf none of the accused was medico-legally examined to ascertain whether they were capable of performing sexual activity or not. No doubt, in order to prove gang-rape, sexual intercourse by all the accused is unnecessary but PW5 has specifically maintained that she was raped by accused Yusuf, Asif, Rizwan and Mustkim at night in village Digeholi at the house of accused Sorab. Therefore, omission to get accused Rizwan, Asif and Mustkim medically examined is fatal for the prosecution case. If it is so, the deposition of DW4 cannot be brushed aside who on verification of the investigations by SI Sukhbir Singh found accused Mustkim, Jamshed and Asif innocent besides other persons.*

41 to 43. xxx xxx xxx

44. The allegation of gang-rape is also refuted by PW17 who states in her affidavit Ex.PW17/A that no external sign of injury was seen over perineum, thigh and cervical region. PW17 did not find any other injury over the body of the victim and this is suggestive of consensual sex between the victim and accused Yusuf only. Accused Yusuf could have avoided his criminal liability only if he had been able to prove marriage with the victim and not otherwise. At the cost of repetition, consent by the victim is immaterial as she is held to be below the age of eighteen years. The judgments relied on behalf of the complainant

are not applicable to the facts in hand. I have also noticed an interesting aspect though the same has not been referred to on behalf of either side. In FSL report Ex.PX which was tendered in evidence before filing application u/s 319 Cr.PC but thereafter, it was not tendered by the prosecution, wherein, semen was detected on the underwear, salwar and underwear of accused Yusuf Khan. This report could not have been of any usage against other accused who were summoned u/s 319 Cr.PC because admittedly, they were never subjected to medical examination as per Section 53-A Cr.PC and accused Yusuf has admitted having sexual intercourse with the victim and his only plea is that sexual relations were developed with the consent of the victim after contracting marriage with her. This plea has not been proved by accused Yusuf. Therefore, this point is decided only against accused Yusuf.”

A perusal of above extracted findings would show that the learned trial Court has clearly found that except accused Yusuf, none of the accused was medico-legally examined and therefore, omission to get accused Rizwan, Asif and Mustkim medically examined was fatal to the prosecution case. Further, it has been observed that the allegation of gang rape is also refuted by PW17, who deposed that no external sign of injury was seen over perineum, thigh and cervical region.

15. It is well settled that the cases involving offence under Section 376 IPC, requires corroboration of the victim's version and if corroborated, the statement of the victim can bring home the guilt on the part of the accused.

16. In the instant case, concededly, learned trial Court has held as a matter of fact that except accused-Yusuf, none of the respondent-accused was medico-legally examined nor any external sign of injury was seen over

perineum, thigh and cervical region of the victim. Therefore, there is no conclusive evidence of the commission of rape by respondents-accused namely, Rizwan, Asif and Mustkim.

17. Hon'ble Supreme Court in the case of *Ram Narain Vs. State of Punjab, (1975) 4 SCC 497* and *Amar Singh and Ors. Vs. State of Punjab, AIR 1987 SC 826*, held that inconsistency between the ocular and medical evidence is a fundamental defect in the prosecution case, and unless reasonably explained, it is sufficient to discredit the entire case.

18. Thus, once there is no conclusive proof, more so supported by any clinical finding that the respondent-accused herein had committed rape upon the prosecutrix, it is held that the non-compliance of provisions of Section 53-A of the Code of Criminal Procedure as regards respondents – Asif, Razwan and Mustkim, is fatal to the prosecution case and this issue is decided accordingly.

19. As regards issue no. (ii) as to whether the findings of the learned trial Court on points (b), (c) and (d) are perverse; it is noticed that as per the prosecution case, the victim was around 17 years of age at the time of occurrence. If she had been forcibly taken, she could have made an attempt to save herself and in that process, there might have been some injuries on her person, but nothing of the kind was found in the medical report. Still further, victims family members were stated to have been sleeping in the courtyard and had she made a little resistance, they would have woken up and made an attempt to save the victim. There is no explanation as to why the victim remained silent and did not raise even slightest of the resistance against the alleged crime. Further, prosecution did not place on record any material from which it could be inferred that the victim was under the

influence of any sedative or she was made unconscious. Once there is no conclusive evidence on record to prove kidnapping/abduction of victim, the charge under Section 368 IPC against accused Samsudeen and Fakrudeen could not have been sustained, especially when Section 368 IPC pre-supposes kidnapping or abduction. It is also noticeable that the victim was brought back from Chandigarh on 16.10.2014 but she was produced before the police on 18.10.2014 by her father. The said gap of two days has not been explained; therefore no fault can be found with the observation of the trial court that the complainant party utilized the interregnum of two days from 16.10.2014 to 18.10.2014 for the purpose of tutoring the victim against the accused. Furthermore, it was also concluded by Trial Court that the victim is in the habit of telling lie for no viable reason.

20. Further, so far as charge under Section 216 of the IPC against Sher Mohd. is concerned, the same is primarily based upon the disclosure statement (Exhibit P-10) of Sher Mohd., which in itself cannot be treated so strong a piece of evidence sufficient on its own and without any further corroboration, to bring home the charge beyond reasonable doubt. There are neither any call record details between Sher Mohd. and Yusuf nor is there any evidence as regards the demarcation of places allegedly disclosed by Sher Mohd. and/or source of funds etc. Learned counsel for the applicant has failed to dislodge the findings returned by the learned trial Court on points *(b)*, *(c)* and *(d)* nor any illegality or perversity in those findings has been pointed out. Considering the totality of circumstances, it is held that the findings of learned trial Court on points *(b)*, *(c)* and *(d)* are not perverse and rather the same are based upon appreciation of evidence on record and also

in accordance with law and therefore, the learned trial Court has rightly acquitted the respondents-accused.

21. In criminal appeal against acquittal what the Appellate Court has to examine is whether the finding of the learned Court below is perverse and prima facie illegal. Once the Appellate Court comes to the finding that the grounds on which the judgment is based is not perverse, the scope of appeal against acquittal is limited considering the fact that the legal presumption about the innocence of the accused is further strengthened by the finding of the Court. At this point, it is imperative to consider the decision of the Hon'ble Supreme Court rendered in the case of **Surajpal Singh & Ors. Vs. The State, 1952 SCR 193**, has held as under:-

“...the High Court has full power to review the evidence upon which the order of acquittal was founded. But it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.”

In the case of **Ghurey Lal Vs. State of Uttar Pradesh, (2008)**

10 SCC 450 in para no.75, the Hon'ble Supreme Court re-iterated the said view and observed as follows :

“75. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable.”

22. Thus, an order of acquittal is to be interfered with only for compelling and substantial reasons. In case, the order is clearly un-

reasonable, it is a compelling reason for interference. But where there is no perversity in the finding of the impugned judgment of acquittal, the Appellate Court must not take a different view only because another view is possible. It is because the trial Court has the privilege of seeing the demeanour of witnesses and, therefore, its decision must not be upset in the absence of strong and compelling grounds.

23. In view of the above, we do not find any illegality or perversity in the findings recorded by the trial Court. Accordingly, the present application is dismissed and leave to appeal is declined.

(SUDHIR SINGH)
JUDGE

(HARSH BUNGER)
JUDGE

April 20th, 2024
gurpreet

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No