

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

CRA No.06/2013

Pronounced on: **04.12.2025**

1. **Sanjay Kumar, age 28years**Appellant(s)
s/o Rattan Chand
R/o Karva, Udhampur
(now dead)
2. **Jatinder Singh @ Dimple @**
Rinku, age 25 years S/o
Kalwant Singh R/o Derrian,
Ramanagar.
At present: Both C/o
Superintendent Kot Bhalwal,
Jammu.

Through: Mr. Sachin Gupta, Advocate

Vs

1. **State of J&K through Advocate** Respondent(s)
General, J&K State.

Through: Mr. Sumeet Bhatia, GA

Coram: HON'BLE MR. JUSTICE MOHD. YOUSUF WANI, JUDGE

JUDGMENT

1. Appellant No.1-Sanjay Kumar S/o Rattan Chand R/o Karva, Udhampur was reported dead during the proceedings of the instant appeal by the learned counsel for the respondent/UT as is apparent from the perusal of the interim order dated 02.11.2023. The instant appeal as regards the said deceased-appellant stands dismissed as abated vide the aforesaid order dated 02.11.2023 of this Court.

2. Impugned in the instant conviction appeal is the judgment dated 28.01.2013 of the Court of learned Sessions Judge, Udhampur (hereinafter

referred to as 'Trial Court' for short) passed in file No.48-A/Sessions, charge-sheet No.226/2006 dated 19.11.2006 of Police Station, Udhampur titled '*State Vs. Sanjay Kumar & Anr.*' culminating from the investigation in case FIR No.109/2005 of the aforesaid Police Station, whereby both the appellants including the deceased came to be convicted for the offences under Sections 376(2)(g), 342 r/w 34 RPC and sentenced to undergo a rigorous imprisonment for a period of ten years with payment of fine of Rs.20,000/- for commission of offence under Section 376(2)(g) RPC and also to rigorous imprisonment of one year for the commission of offence under Section 342 RPC with the stipulation that in case of default in payment of fine each appellant/convict shall have to undergo imprisonment of a further period of two months. The sentences were directed to run concurrently. The impugned judgment also directed taking in custody immediately of the appellants for committing them to the District Jail Udhampur to serve the sentence.

3. The impugned judgement has been assailed on the grounds that 11 days unexplained delay in lodging the FIR in the instant case renders the impugned judgment of conviction and sentence dated 28.01.2013 as illegal and perverse. That the name of the appellant No.1 was not mentioned by the alleged prosecutrix in her complaint/FIR which doubts the genuineness of the investigation process along with the trial Court proceedings. That linking of appellants with the alleged crime is bad under law for want of scientific evidence as Dr. Veena Gupta, Gynecologist, who conducted the medical examination of the prosecutrix, has categorically deposed at the trial that no

sexual inter-course appears to have been done with her within a week's time. That the alleged prosecutrix as per her own statement had washed her clothes on the next day of the alleged occurrence and sending of the same to the FSL was useless. That none of the prosecution witnesses have supported the prosecution version of the case at the trial and as such, the prosecution has failed at the trial to connect the appellants with the commission of the alleged offences. That there is no consistency between the direct and the expert evidence led by the prosecution at the trial thereby raising doubt in respect of the prosecution version of the case, the benefit of which goes to the appellants. That the statements of the alleged prosecutrix made during investigation and at the trial are contradictory *inter-se* in respect of material particulars. Improvements have been made in her statement by the alleged prosecutrix at the trial of the case. The statements of the alleged prosecutrix do not infer confidence as the said statements recorded at different stages of the criminal case differ *inter-se*. That the learned trial Court did not consider and appreciate the material contradictions, inconsistencies and discrepancies occurring in the prosecution case.

4. I have heard the learned counsel for the surviving appellant/convict-Jatinder Singh alias Dimple alias Rinku S/o Kulwant Singh R/o Derrian, Ramnagar, Udhampur and also the learned counsel for the respondent/UT.

5. The learned counsel for the appellant while reiterating his stand taken in the memo of appeal contended that the learned trial Court has not considered and appreciated the fatal flaws occurring in the prosecution case especially the

undue and unexplained delay of 12 days that has occasioned in lodging the First Information Report by the alleged prosecutrix. He submitted that as per the prosecution version of the case, the alleged occurrence has taken place on 25.05.2005 and the report has been lodged with the Police Station concerned on 06.06.2025. The learned counsel submitted that it is a settled legal position that an undue and unexplained delay in lodging the FIR raises doubt, as regards, the genuineness of the prosecution case.

He further contended that the alleged prosecutrix did not name the accused No.1 (dead) in her complaint/FIR and his involvement in the case happened due to concoction and frivolity, thus doubting the entire prosecution case. The learned defense counsel also contended that the statements of the alleged prosecutrix made by her at different stages i.e. during investigation and at the trial are full of contradictions in relation to material particulars of the case.

He submitted that as per the cardinal principle of our criminal jurisprudence, an accused is presumed to be innocent until proved guilty at the trial beyond any shadow of doubt. He further submitted that in the given facts and circumstances of the prosecution case, an apparent doubt, appears regarding, the genuineness of the prosecution version and the probability of the same being not true. That investigating officer during investigation of the case has not fully established the alleged fact of the prosecutrix being minor as on the date of occurrence.

The learned counsel further contended that non-examination of the Investigating Officer in the case at the trial has created a vast lacuna and discrepancy in the prosecution case. He submitted that the duty of the investigating officers is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth. As according to the learned counsel, the non-examination of the investigating officer in the case has under-mined the principle of fair trial and due process as the defense has been deprived of the opportunity to cross-examine the said important prosecution witness and to question his findings, and to prove his bias.

The learned counsel for the appellant further contended that prosecution has failed at the trial of the case to prove the guilt of the appellant beyond any shadow of doubt. He submitted that a grave doubt stands raised in respect of the prosecution version of the case. He submitted that the testimony of the alleged prosecutrix being the only direct ocular witness in the case being not of sterling nature was not worth to sustain and justify the conviction. That besides there being a unexplained delay of 12 days in lodging of the FIR, the statement of the alleged prosecutrix itself is highly contradictory as given by her at different stages of the criminal proceedings viz at the time of lodging of the FIR, during investigation and at the trial. That the alleged prosecutrix in her statement at the trial inter-alia deposed that she knew the Accused No.1 (appellant/convict now dead) but she did not name the said accused either in the FIR or in her statement recorded during investigation under Section 161 of the Code on 06.06.2005.

That she also deposed at the trial that when they after occurrence came to the Police Station, Udampur, they went back without lodging the FIR and thereafter came on next time after few days for filing the complaint. The learned counsel submitted that the alleged prosecutrix in her statement at the trial did not depose that she made any resistance on her side when the present surviving appellant followed her after she stepped out at Jagnu and took her to secluded place. He contended that even as per the stand of the prosecution she was of the age of 16 years reading in 8th Class and being of matured mind, who was expected to raise alarm while being walking on a public road.

The learned counsel submitted that the deceased-appellant No.1 was introduced by the prosecutrix in her statement at the trial by deposing that he also raped her. As according to the learned counsel such a contradictory statement does not infer confidence and not being of sterling character can sustain the conviction.

The learned counsel in support of his contentions placed reliance on a authoritative judgment of the Hon'ble Supreme Court of India cited as '*Rai Sandeep @ Deepu-Appellant Vs. State of NCT of Delhi-Respondent*' 2012 AIR (SC) (Cri) 1471 and contended that in the said referred case the Hon'ble Apex Court set aside the conviction of the appellants under Section 376(2)(g) IPC as had been imposed on them by the learned trial Court followed by confirmation of the Hon'ble High Court of Delhi, on the observation that prosecution has miserably failed to establish the guilt of gang rape against the appellants. As

according to the learned counsel it was held in the said relied case by the Hon'ble Apex Court at its para 15 as under:-

“15. In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ‘sterling witness’ whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

The learned counsel for the appellant in support of his contentions also placed reliance on another authoritative judgment of the Hon'ble Apex Court cited as '*Krishan Kumar Malik-Appellant Vs. State of Haryana-Respondent*' in which according to the learned counsel under similar circumstances the appellant-accused were acquitted on the grounds that the prosecutrix did not state name of the accused who committed rape though she knew the name of that accused and that no marks of violence were found on the body of the prosecutrix as per medical examination report.

The learned counsel also placed reliance on the judgment of this Court cited as '*Abdul Gani Akhoun and Ors.-Appellants Vs. State of J&K & Ors.-Respondent*' 2025 Criminal Law General 1988 in which it has been held that a conviction to base on the sole testimony of the prosecutrix requires that her statement must be clear, unambiguous, trustworthy, and of sterling quality. As according to the learned counsel, the accused were acquitted in the case on the main ground that the evidence of prosecutrix is not of sterling quality.

The learned counsel further contended that there is material inconsistency between the evidence of the prosecutrix and the medical opinion. As according to the prosecutrix she was forcefully subjected to sexual assault when as per the medical evidence there were no marks of any violence on her body. The learned counsel submitted that in *Ram Narain Vs. State of Punjab* it was held that where the evidence of witnesses of the prosecution is inconsistent with the medical evidence, same amounts to a fundamental defect in the

prosecution case and unless reasonably explained is sufficient to discredit the entire case.

The learned counsel for the appellant also placed reliance on the judgment cited as *Krishan Kumar Malik-Appellant Vs. State of Haryana-Respondent (2011) 7 SCC 130* in which it has been held that a totally conflicting version of the prosecutrix vis-à-vis what was stated in the complaint and what was deposed before the Court, resulting in material inconsistencies cannot sustain conviction, as such, a witness cannot be termed as a 'sterling witnesses'.

The learned counsel for the appellant also contended that prosecution has failed at the trial to examine the very important witnesses i.e. Investigating Officers and their non examination as such justifies an adverse inference.

The learned counsel while summing up his arguments submitted that in the totality of the circumstances especially including the evidence recorded during investigation and at the trial, an irresistible conclusion arises regarding the frivolity and falsehood of the prosecution version of the case. He further submitted that without prejudice to his aforesaid stand regarding failure of the prosecution to prove its case, the alleged minority of the prosecutrix at the time of occurrence was not also fully proved as the prosecution witness number **9 Smt. Vijay Sharma** deposed in her statement at the trial that the prosecutrix got admission in her school in the 6th Standard and the actual proof regarding her date of birth may be lying with her former school. The learned counsel prayed for the setting aside of the impugned judgment of conviction and appeal dated 28.01.2013.

6. *Per contra*, the learned counsel for the respondent, Mr. Sumeet Bhatia, learned Government Advocate submitted that there is no merit in the present appeal which deserves dismissal as the judgment of conviction and sentence dated 28.01.2013 of the learned trial Court does not at all admit of any inference being legally and factually well reasoned and justified. He contended that the prosecution at the trial of the case has fully succeeded in proving the guilt of the present surviving appellant/convict through clear and unambiguous evidence of the prosecutrix and the other witnesses. He submitted that some minor issues pin pointed by defence during the trial of the case and as well as during the proceedings of this appeal are not of any fatal nature but natural and much more negligible under human conduct.

He submitted that it is well settled through a catena of the judgments of the Hon'ble Apex Court and of various High Courts of the Country including this Court that delay in lodging the FIR is but natural in rape cases in which the complaints are made after a cool though as the act is likely to touch the reputation and honour not only of the prosecutrix but of her whole family. He contended that the delay of 11 days having occasioned in the lodging of the FIR stands duly explained by the prosecution witnesses including the victim at the trial of the case.

He further submitted that the learned trial Court has very rightly opined in the impugned judgment that a FIR needs not to be encyclopedia of the entire prosecution case and does not need to contain each and every detail. He also placed reliance on the authoritative judgment of the Hon'ble Apex Court cited as

State of U.P. vs. Munesh 2012 (7) Supreme 321 in which it has been observed that FIR is not an encyclopedia. It is just an intimation of occurrence of an incident and it need not contain all the facts related to the said incident. He further contended that the prosecutrix was subjected to sexual assault under threat and criminal intimidation and, as such, the resistance on her part being minor was not possible. He submitted that the prosecution case duly substantiated at the trial cannot be brushed aside to cause miscarriage of justice on the mere ground that the medical report does not confirm the marks of violence on the body of the victim. He submitted that the parents and the sister of the prosecutrix through their evidence at the trial have supported and corroborated the material particulars of the case. He further submitted that since the prosecutrix at the time of occurrence was a minor, as such, the attempt of the defence to create a doubt regarding the act being consensual loses its significance.

He submitted that it is well settled that the conviction can be based on the sole testimony of a rape victim and same does not require corroboration especially when the evidence is trustworthy as in the incident case.

The learned counsel further submitted that it was expected of the prosecutrix being a minor at the time of occurrence to get her clothes washed when she went to her uncle's home after the occurrence next morning. He submitted that it is but natural that a victim of rape in the first instance consoles herself and attempts to make courage for not revealing the incident even to her

family members and, as such, a victim cannot be blamed for destroying a portion of the evidence.

The learned counsel submitted that the learned trial Court has appreciated the prosecution evidence absolutely in a legal manner whereupon, the Court observed that guilt of the accused stands established in the backdrop of the evidence. The learned counsel prayed for the dismissal of the appeal.

7. The brief facts of the case relevant for disposal of the instant appeal are that on 06.06.2005, a written report was lodged by the prosecutrix alleging there in that on 25.05.2005, she had been to Udhampur town to see her sister. That at about 6/7 P.M. she boarded a matador for her home near Slathia Chowk Udhampur. That when the vehicle reached Jaganu Morh, it was already dark and so she decided to go to her uncle's home who was residing nearby. That she got down and the accused No.2, who was also travelling in the same Matador also got down and started moving along her side. That he took her to a secluded place and raped her 2/3 times against her wish and also threatened her that if she made a noise he would kill her. That in the morning accused No.2 fled away and she also went to her maternal uncle's home and next morning to her home.

That on receiving the said report a case was registered and investigation started. During investigation the medical examination of prosecutrix was conducted. Statements of the witnesses were recorded and a hunt was launched to arrest the accused but they could not be arrested soon. That during investigation it came to the fore that prosecutrix was a student of 8th standard as on the date of occurrence and was studying in Government Girls Middle School,

Jaganu. That on 25.05.2005, she had come with other students of the school to Udhampur stadium for games. That after the games were over, she went to her sister's house at M.H. Morh Udhampur, staying there for about 15/20 minutes. That there from she left for her home and boarded a vehicle bearing No.JK14-5711 being driven by accused/appellant No.1 (dead) at Slathia Chowk Udhampur. That accused/appellant No.2 was the conductor of the said vehicle at the relevant time. That at about 6:30 P.M. while reaching at Jaganu, she felt some ailment and started vomiting. That she got down from the matador and about a furlong away the vehicle stopped again and the appellant/accused No.2 also got down from the vehicle. That he had a soda water bottle with him which he offered her saying that she would feel better. That as she consumed the liquid from the bottle, she felt giddiness. That she consumed water from a nearby water tank. That half an hour after, the driver of the vehicle i.e. appellant/accused No.1 (dead) also reached there and thereafter both the accused took her to a secluded place. That accused No.1 left for his home and brought meals and two bed sheets. That prosecutrix was also offered food but she declined to take it. That accused had meals and thereafter they forcibly raped the prosecutrix one after another and in the morning they threatened her that if she dared to narrate the story to anyone they would kill her. That thereafter prosecutrix went to her uncle's home at Jaganu Morh where she washed her clothes and stayed there for two days and thereafter went to her home. That she did not disclose before anyone about the incident but she stopped going to the

school and on enquiry from her parents she narrated the story to them on 05.06.2005.

The investigating officer after conclusion of the investigation was satisfied that the accused had raped the minor prosecutrix against her wish in furtherance of common intention so the charge sheet found its way to the Court. The appellants/accused came to be formally charged for the commission of the offences punishable under Sections 376(2)(g)/342/34 RPC, who pleaded not guilty pursuant to which prosecution was directed to produce its evidence in support of the case. The prosecution out of its fifteen listed witnesses examined nine witnesses i.e. PW's 1, 2, 3, 4, 6, 8, 9, 10 and 11 at the trial. The statements of the appellants/accused in terms of provisions of Section 342 of the Code came to be recorded on 04.05.2010. The case after being found as not of '**No Evidence**' after hearing the prosecution and defence and after perusing the prosecution evidence and the statements of the accused under Section 342 of the Code, the appellants/accused were directed to lead evidence in their defence, vide order dated 23.06.2010. Although the appellants/accused sought repeated adjournments for leading the evidence in their defence yet they did not lead the same within a period of two years, whereafter, on 28.08.2012, the learned defence counsel made a statement before the learned trial Court that he does not want to any lead evidence in defence.

The learned trial Court after hearing the final arguments returned the judgment of conviction and sentence dated 28.01.2013 impugned in the instant appeal.

It is needful to mention that the appellants/accused including the deceased after being taken into custody to serve the sentence upon pronouncement of the impugned judgment by the learned trial Court came to be subsequently released on interim bail during the proceedings of this appeal. The appellant/convict No.1 was reported dead during the proceedings of this appeal in whose respect the appeal was dismissed as abated in terms of order dated 02.11.2023. The interim bail of the surviving appellant came to be cancelled during the proceedings of this appeal whereupon he was again taken into custody on 19.12.2023 and is undergoing the sentence.

8. I have perused the record of the instant appeal as well of the trial Court file especially the impugned judgment of conviction and sentence dated 28.01.2013.

9. I have also given my thoughtful consideration to the rival arguments advanced on both the sides.

10. Keeping in view the aforementioned perusal and consideration in the light of the law on the subject of 'Burden Proof and 'Appreciation of Evidence' this Court is of the opinion that there is merit in the instant appeal which justifies the setting aside of the impugned judgment of conviction and sentence. In the opinion of this Court, the prosecution has failed at the trial to prove its case in terms of its version beyond any shadow of doubt. A doubt and a discrepancy appears in the facts and circumstances of the case especially having regard to the evidence produced at the trial in respect of the prosecution version of the case.

It is an accepted principle of criminal jurisprudence that an accused is presumed to be innocent till proved guilty and the burden of proving everything essential to the establishment of his guilt lies on the prosecution. There should be a clear and unequivocal proof of corpus *delicti*.

As hereinbefore mentioned, the prosecution out of its 15 listed witnesses produced and examined 09 witnesses i.e. PWs 1 to 4, 6, 8 to 11 at the trial.

The delay in lodging the FIR, contradictory statements of the alleged prosecutrix given as per FIR, during investigation and at the trial in respect of important and material particulars of the case, inconsistencies between the statements of the prosecutrix and the medical opinion, the non-examination of the investigating officers, failure of the prosecution to prove the date of birth of the prosecutrix also in terms of the record of the school of her initial schooling, non-raising of any alarm by the prosecutrix alongside public way after she allegedly stepped from the matador at around 6:30 P.M. at Jaganu for going to her Uncle's home which reportedly was nearby, non-resistance by the alleged prosecutrix at the occurrence are some of the circumstances with the existence of which, it is felt very unsafe to say that prosecution has established the guilt of the present appellant/accused No.2.

The alleged occurrence is admitted to be of 25.05.2005 and the report has been lodged with the Police Station concerned on 06.06.2005 i.e. after a delay of 11 days. In the light of the statement of the alleged prosecutrix, the delay in reporting the crime to the police does not stand satisfactorily explained. In her statement at the trial, the prosecutrix has *inter-alia* deposed that when she

narrated the incident at her home she along with her mother came to Police Station, Udhampur after 2 to 3 days to lodge the complaint but they came back as she was not in a position to write the report being not in complete senses whereupon a policeman told her to come after three days and so she went to Police Station after three days again. She also deposed that she lodged the report on the direction of the police. It is well settled that unexplained delay in lodging the FIR can be viewed with embellishment and as a creature of afterthought. FIR in a criminal case is a substantive piece of evidence which comes on record first in point of time and can be used by the prosecution to corroborate and by the defence to contradict.

The medical opinion of PW-10 has ruled out any marks of violence on any part of her body except a yellow bruise on the outer aspect of her right thigh. It has also come in the medical evidence that 6 o'clock position, at which the hymen of the prosecutrix was torn, could be possible while playing and also by a sudden fall. It has also come in the evidence of said PW-10 Dr. Veena Gupta that as stated by the prosecutrix she was beaten by her parents. The under garments of the prosecutrix could not be seized and sent to FSL opinion as she had allegedly washed her clothes at her uncle's home on the next day of the occurrence. It was inter-alia deposed by the prosecutrix at the trial that she was forcibly subjected to sexual assault which does not appear to have proved in the light of the medical evidence. So there occurs an inconsistency between her statements and the medical opinion.

As hereinbefore mentioned, the prosecutrix did not mention the name of appellant/accused No.1 (Dead) either in the FIR or in her statement recorded during investigation under Section 161 Cr.P.C. At the trial in her statement she *inter-alia* deposed that the said accused No.1-Sanjay Kumar (deceased) was known to her who also came on the spot after half an hour and who also raped her. The non-mentioning of the name of the said accused No.1 (deceased) in the earlier statements by the prosecutrix raises a reasonable doubt as to the genuineness of the prosecution version of the case.

The prosecution has failed at the trial to produce and examine six of its witnesses i.e. PWs 5, 7, 12, 13, 14 and 15 including the investigating officers. The examination of the investigating officers i.e. PWs 13 & 14 was necessary for unfolding the prosecution version of the case and as such their non-examination at the trial justifies an adverse inference.

Admittedly, it is a well settled that conviction can be based even on the sole testimony of a victim of rape provided her testimony infers confidence and the evidence given by her is of sterling quality. However, in the backdrop of the evidence of the prosecution led in the instant case and as hereinbefore referred to, it is unsafe to base the conviction on the sole testimony of alleged prosecutrix. The evidence of the prosecutrix (PW-1) in the instant case is not such which can be believed to be of sterling quality.

PW-1- Mother of the prosecutrix *inter-alia* deposed at the trial that villagers told her that reporting the matter to the police would bring her more shame. That a policeman came to her on his own and told her that she was being

summoned by the police. That she came to the Police Station along with her husband but prosecutrix was not with them and so the report could not be lodged. That next day they again went to Police Station along with the prosecutrix and lodged the report.

It was not a requirement of the law for lodging an FIR that prosecutrix should always be present in person.

PW-3-Naresh Kumar was declared hostile by the prosecution at the trial as he deposed that he knows nothing about the case.

PW-4- the father of the prosecutrix *inter-alia* deposed that he waited for 2 to 4 days to lodge the FIR because he was thinking as to how to deal with the matter. That then a CID personnel came to his home and told him that he shall lodge the report. That then he went to police Station along with prosecutrix to lodge the report. He also deposed that prosecutrix had stayed in her uncle's house for 3 to 4 days.

There appears to be discrepancy between the statements of the parents of the prosecutrix inter-se.

PW-7-Attar Singh, who has been listed as a witness of occurrence deposed at the trial that after the prosecutrix got down from the vehicle, he knows nothing. The said witness has contradicted his earlier statement attributed to him under Section 161 of the Code.

PW-8- the sister of the prosecutrix deposed at the trial that she knew the accused No.1. That prosecutrix met her at Slathia Chowk next day and told her that some boys had raped her on the way to home. That she told that she was

travelling in the Matador but was forced out of the Matador and taken to a secluded place and raped. This statement of the sister of the prosecutrix contradicts with the statement of the prosecutrix herself who deposed that she had on the next morning went to uncle's home for some days and that she had got down from the matador of her own when she did not feel well.

PW-9-Smt. Vijay Sharma, who as per the prosecution case is reported to have corroborated the date of birth of the prosecutrix stated that the date of birth certificate Ext.P-8 dated 11.06.2005 bearing No.48 has been issued by her and bears her signature. The said important witness in her cross-examination deposed that in the "Admission Register" the cutting on the name of the prosecutrix has been effected by Sh. Kewal Krishan Gupta. That the admission of the prosecutrix in her school has taken place for 6th class. That prior to coming to their school, she was reading in the primary school. That the original record regarding the date of birth of the prosecutrix is in the primary school.

PW-10- Dr. Veena Gupta, Gynecologist inter-alia deposed in her statement that there was no mark of violence on any part of the body of the prosecutrix. That her hymen was torn at 6 o'clock position. That no spermatozoa was seen in the vaginal swab. That although prosecutrix is opined to have been subjected to sexual intercourse but the duration could not be ascertained. That 6 o'clock position tear in the hymen could be possible by playing or by a fall. That in this case sexual intercourse was not possible within a week but could be within a month or more.

It is needful to mention that PW-13-Magar Singh then Head Constable No.200/U who was an ASI on 04.06.2009 was dropped without being examined at the trial as per the statement of the then PP. The said PW-13 is listed as the initial investigating officer whose testimony was necessary for unfolding the prosecution version of the case. The deliberate non-examination of the said important witness justifies an adverse inference, as regards, the prosecution version of the case.

PW-11 Dr. Vijay Kumar deposed in his examination at the trial that he has examined the accused in respect of their potency test on 26.08.2006 i.e. after more than two months of the date of occurrence. That the accused were found fit to perform sexual requirement.

11. This Court is of the opinion that where prosecution fails to prove the foundational facts of its case and the alleged occurrence becomes doubtful, the minority of the alleged victim cannot be pleaded as a support. Admittedly, the consent of minor victim is immaterial in respect of the prosecution for the offence of rape but the establishment of the occurrence through clear and uncontradictory evidence is the prior legal requirement for pleading such legal issue to nullify the consent even if given.

12. This Court in its opinion feels fortified with the authoritative judgment of the Hon'ble Supreme Court of India cited as *Ram Narain Vs. State of Punjab* 1975 AIR Supreme Court 1727 in which it has been held that inconsistency between medical evidence and prosecution version is unsafe to base the conviction.

13. This Court is also fortified in its opinion with the law laid down by the Hon'ble Apex Court in *Rai Sandeep @Deepu Vs. State of NCT of Delhi* 2012 SCC online SC 590, also relied upon by the learned counsel for the appellant, in which under similar circumstances the accused alleged to have committed gang rape were acquitted upon allowing the appeal, on the basis of the following observations:-

- i) Case based solely on the evidence of prosecutrix – No evidence to show that she was sterling witness – A sterling witness is one whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished.
- ii) There is total variation in her version from what was stated in the complaint and what was deposed before the Court at the time of trial.
- iii) She stated that after rape accused wiped their private parts with socks- As per FSL Report socks did not contain any semblance of semen on it.
- iv) According to prosecutrix rape was committed forcibly, but there was no injury on the breast or the thighs of the prosecutrix or private parts.

14. This Court in its opinion also feels supplemented by the decision of the Hon'ble Apex Court cited as *State of Himachal Pradesh Vs. Asha Ram*, 2006(1) RCR (Criminal) 139, the relevant extract from which decision at its para 5 is reproduced for ready reference:-

“5. It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is

more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.”

15. This Court also feels fortified in its opinion with the another authoritative judgment of the Hon’ble Supreme Court of India cited as *Krishan Kumar Malik Vs. State of Haryana* (2011) 7 SCC 130 in which under similar circumstances the conviction of the accused was set aside by allowing the appeal.

It is profitable to reproduce the paras 23, 24 and 31 of the judgment for ready reference:-

23. These are some of the salient features of the lop sided story of the prosecutrix, more so, when it has not been corroborated by any other evidence. On the account of various serious contradictions in the statement of prosecutrix and her actions, it could be safely concluded that she was certainly not telling a gospel truth.

24. Needless to say the solitary evidence of the prosecutrix to bring home the charge of abduction and commission of rape by the Appellant does not inspire confidence and is not of sterling quality. In our opinion, it is neither prudent nor safe to hold the Appellant guilty of commission of the said offence. We hold so, on account of many other circumstances, which are against the prosecution.

31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (Criminal Procedure Code), FIR and deposition in Court.”

16. A coordinate Bench of this Court in *‘Abdul Gani Akhoon and Ors. Vs. State of J&K and Ors.’* also relied upon by the learned counsel for the appellant under similar facts and circumstances of the case has laid down that conviction on the sole testimony of the prosecutrix requires that her statement must be clear, unambiguous, trustworthy, and of sterling quality- Material contradictions, lack of corroboration, and absence of reliable evidence make her testimony insufficient for conviction.

17. In the backdrop of the aforementioned discussion, the learned trial Court appears to have not properly considered and appreciated the evidence led by the prosecution at the trial in support of its case.

The instant appeal is, accordingly, **allowed** and the common judgment of conviction and appeal dated 28.01.2013 passed by the Court of learned Sessions

Judge, Udhampur on file No.48-A/Sessions, charge-sheet No.224/2006 dated 19.11.2006 culminating from FIR No.109/2005 of the Police Station, Udhampur is *set aside*. The surviving appellant-Jatinder Singh alias Dimple alias Rinku S/o Kalwant Singh R/o Berrian Ramnagar Udhampur is *acquitted* in the case and is directed to be released from the jail concerned in this case. The bail bonds of the appellant shall stand discharged.

18. *Disposed of.*

(Mohd. Yousuf Wani)
Judge

Jammu
04.12.2025
Shammi

Whether the order is speaking: Yes
Whether the order is reportable: Yes

