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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: July 22, 2019
Decided on : August 22, 2019

\+ CRL.A. 407/2019 and Crl. M (Bail) 591/2019

SAURABH ..... Appellant

Through: Mr. Ajay Verma and Mr. Nikhil Anand, Advocates

versus

STATE OF NCT OF DELHI ..... Respondent

Through: Mr. Kewal Singh Ahuja, APP

\+ CRL.A. 409/2019 and Crl. M (Bail) 593/2019

SANDEEP ..... Appellant

Through: Mr. Ajay Verma and Mr. Katyayini, Advocates

versus

STATE OF NCT OF DELHI ..... Respondent

Through: Mr. Kewal Singh Ahuja, APP

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

J U D G M E N T

1. The two appellants before this court have been described as residents of *jhuggies* (hutments) located in the compound of office of

Delhi Jal Board in the locality called Kishangarh in Vasant Kunj area of New Delhi. They were concededly arrested on 20.03.2017 during the course of investigation into first information report (FIR) No.124/2017, dated 19.03.2017 of Police Station Vasant Kunj (North). They were brought to trial in the court of Additional Sessions Judge (ASJ) in Sessions case No.175/2017 on the basis of report (charge sheet) dated 03.05.2017 under section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) submitted by the Station House Officer of the Police Station through Assistant Commissioner of Police of the sub-division.

2. The trial was held on the charge for offences punishable under section 366 read with section 34 of Indian Penal Code, 1860 (IPC), sections 376(2)(l), 376-D IPC and 323/506 read with section 34 IPC. The ASJ presiding over the trial, by her judgment dated 14.02.2019, found the appellants guilty on charge for offences under sections 323/366 read with section 34 IPC and also under sections 376(2)(l) and 376-D IPC, they having been acquitted on the charge under section 506 IPC.

3. By order dated 22.02.2019, the trial court awarded rigorous imprisonment for twenty years with fine of Rs.10,000/- under section 376-D IPC, rigorous imprisonment for ten years with fine of Rs.10,000/- under section 376(2)(l) IPC, rigorous imprisonment for seven years with fine of Rs.5,000/- under section 366 IPC and rigorous imprisonment for six months with fine of Rs.1,000/- for offence under section 323 IPC to each of these convicts. The trial

court further specified the default sentences in the event of non-payment of fine adding that the entire amount of fine would be payable as compensation to the prosecutrix (the victim), also recommending appropriate compensation to be awarded by the concerned Legal Services Authority under Delhi Victim Compensation Scheme, 2015.

4. Feeling aggrieved by the above-mentioned judgment of conviction, and order on sentence, these appeals have been preferred, the prime contention being that the appellants are innocent, they having been implicated under some confusion, it being a case of mistaken identity.

5. It is apposite to take note at the outset of certain facts which emerge from the record as established by evidence which is beyond reproach, and which are now indisputable, there being no endeavour made by the appellants to question the correctness thereof.

6. The prosecutrix who appeared at the trial as witness for prosecution (PW-1) is a girl who was aged about 22 years' old on the relevant date (17.03.2017). Unfortunately, her mental growth has been stulted, her intelligence quotient (IQ) being very low, she also finding it difficult to engage in conversation with others or to express herself fully, this having been mentioned in so many words by her mother, who appeared at the trial as a witness for prosecution (PW-2), in her statement (Ex.PW-2/A) to the investigating officer SI Preeti (PW-13), which statement became, upon endorsement (Ex.PW-13/A) of PW-13 (investigating officer), to be the basis of the FIR (Ex.PX2).

The prosecutrix was sent for evaluation of her intellectual and mental capacity to Psychiatry Department of All India Institute of Medical Sciences (AIIMS) on 24.03.2017 and, thereafter, on several dates. In AIIMS, she was examined by the specialists, they including Mrs. Tanuja (PW-6) and Dr. Koushik Sinha Deb (PW-7). The said two witnesses have proved their reports (Ex.PW-6/A, Ex.PW-7/A and Ex.PW-7/B), the conjoint effect whereof is that the prosecutrix, in their opinion and assessment, was (then) a person of "*moderate intellectual disability*", her IQ being in the range of 45-50 which would indicate her mental age as that of a child in the age group of 6-9 years.

7. Sub-Inspector Nisha (PW-14) is the first police official before whom information was given about the acts of commission constituting kidnapping and rape of the prosecutrix by two persons. PW-14 was posted at the relevant time in Police Station Mehrauli on 19.03.2017. Her evidence is to the effect that the prosecutrix (PW-1), along with her mother (PW-2), had met her in the Police Station Mehrauli at about 4:00 p.m. on 19.03.2017. It is the mother of the prosecutrix who told her about kidnapping and rape, the prosecutrix being *"unable to speak clearly"*. She (PW-14) visited the place where the rape had allegedly been committed (*i.e.*, Delhi Jal Board office, Kishangarh, New Delhi) and this brought out that the case pertained to the jurisdiction of (adjoining) Police Station Vasant Kunj, (North). PW-14, thus, had made a call to the duty officer of Police Station Vasant Kunj (North) and passed on the information, this becoming

subject matter of daily diary (DD) entry No.34-B being recorded in the said Police Station at 4:35 p.m. on 19.03.2017 (vide Mark 'A').

8. The matter arising out of DD No.34-B was entrusted by Police Station Vasant Kunj (North) to Sub-Inspector Manish Kumar (PW-15) who, accompanied by Constable Mintoo (PW-9), reached the place near Delhi Jal Board, Kishangarh, New Delhi. He was met by PW-14, the prosecutrix (PW-1) and her mother (PW-2). He made inquiries of the prosecutrix but she was unable to *"speak clearly"* and, borrowing the expression used by him (PW-15), she (PW-1) seemed to be *"mentally retarded"* inasmuch as she was unable to answer the queries put to her, even though questions were repeated three-four times, her answers being *"hesitant"*. He gathered the information from her mother and then called the duty officer in the Police Station to request for a lady officer to be sent.

9. It is pursuant to the request of PW-15 that SI Preeti (PW-13), the investigating officer (IO), assisted by Constable Kavita, reached the place. PW-13 (the IO) would corroborate the statement of PW-15 in above regard and also state that during her inquiry she found that the prosecutrix was *"unable to speak clearly",* her observations being that *"her mental conditions was not of a normal person"*.

10. For completion of narration, it may be mentioned that, as proved by PW-13, the FIR was registered on the basis of statement (Ex.PW-2/A) of the mother (PW-2) of the prosecutrix.

11. The evidence adduced before the trial court would also include reference to the application (Ex.PW-13/E) made by the IO before the Metropolitan Magistrate (MM) with the request for the statement of the prosecutrix to be recorded under section 164 Cr.P.C. It is seen from record that the said statement was recorded by Ms. Jasjeet Kaur, MM, New Delhi on 20.03.2017 with assistance of Ms. Parmita Singh, a Counselor working with Prayas Organization, a non-governmental organization (NGO) engaged in the work of crisis intervention, her educational qualification relating to social work. Pertinent to note that the statement of the prosecutrix under section 164 Cr.P.C. as recorded by the Metropolitan Magistrate, on the request of the IO, was not formally adduced as evidence in the trial, neither proved by the prosecution nor used by the defence to contradict the prosecutrix during the course of her court testimony.

12. It may also be mentioned here that when her turn to testify as witness for prosecution came, and the prosecutrix appeared before the special court on 13.09.2017, taking note of the admitted position of the prosecution that she (prosecutrix) *"suffers from moderate intellectual disability"*, accepting the request of counsel representing Delhi Commission for Women, the examination for recording evidence with the assistance of Ms. Huzaifa A. Ahmad, Psychologist was permitted. The special court also examined the said psychologist as court witness No.1 (CW-1). As per the statement of CW-1, who has been working as Psychologist with another NGO – Medecins Sans Frontieres (Doctors Without Borders), she had earlier interacted with the

prosecutrix and had found her to be suffering from *"moderate intellectual disability",* her speech being slurred, she capable of uttering only a few words having difficulty in speaking complete sentences. The trial court record would show that the statement of the prosecutrix (PW-1) was recorded with the assistance of CW-1, she having given interpretation of certain words or sign language that was used by the witness (the prosecutrix).

13. From the above material on record, there being no other theory proponded by either side, there can be no doubt as to the fact that the prosecutrix, though having attained the biological age of about 22 years' (as on 17.03.2017) was a person of very low IQ, her mental age having been assessed to be that of a child aged 6-9 years.

14. It was mentioned in the FIR itself by the mother of the prosecutrix that she (prosecutrix) had been married about two years prior to the date of incident. The said marriage had not worked out, the prosecutrix having been left by her in-laws at her parental home. It has come on record, however, that the prosecutrix had spent sometime in the society of her husband.

15. The evidence on record shows that the prosecutrix is second amongst four daughters of PW-2, native of a village in District Almorah, Uttarakhand. PW-2 lives in Delhi, apparently in an unauthorized colony and earns her livelihood by working as a maid (cook) in nearby households. The family has meagre means of support. There is no clarity as to the nature of job in which the father of the prosecutrix had earlier been engaged, PW-2 testifying that he

was unemployed during the period to which the case relates and would mostly remain at home to take care of the prosecutrix. One of the other daughters would also go out for work to earn.

16. After the FIR had been registered, the prosecutrix was sent for medical examination to Department of Emergency Medicine in AIIMS on 19.03.2017, on the basis of request (Ex.PW-13/B) made by the investigating officer. The medico-legal certificate (MLC) was proved at the trial by Mr. Pramod Joshi (PW-3), an official deputed by Medical Superintendent, the author of such record (Dr. Meenakshi) having left the services of the hospital, the witness being acquainted with her writing and signatures. Through PW-3, the MLC of the prosecturix prepared by Dr. Meenakshi, was proved as Ex.PW-3/A, along with consent form (Ex.PW-3/B) and emergency form (Ex.PW-3/C). It may be mentioned here that PW-3 also proved the MLCs (Ex.PW-3/D and Ex.PW-3/E respectively) in respect of the two appellants, as had been prepared by another medical officer (Dr. Paras Satadeve) on 20.05.2017, the said doctor also having left the services of the hospital.

17. As per the MLC (Ex.PW-3/A) of the prosecutrix, the medical officer had found no external or internal injuries suffered by her, she having also noted old hymenal tear with no fresh bleeding. As was argued on behalf of the appellants, and fairly conceded by the Public Prosecutor for respondent State, the above condition may possibly relate to the period of cohabitation spent by the prosecutrix with her husband.

18. As mentioned earlier, MLCs in respect of the two appellants were also proved by Pramod Joshi (PW-3), an official of AIIMS. The MLC (Ex.PW-3/D) in respect of appellant Saurabh (A-1), and MLC (Ex.PW-3/E) in respect of other appellant Sandeep (A-2), show that at the time of their medical examination in the Department of Emergency Medicine of AIIMS during afternoon of 20.03.2017, no external injury was found on their person. The said MLCs also show that both the appellants had given their age as 19 years, there being no dispute raised in this regard. It also must be added that at the time of their medical examination, each of the appellants was also subjected to *"potency test"*, the reports (Ex.PX1 – admitted under section 294 Cr.P.C.) and (Ex.PX-5 – also admitted under section 294 Cr.P.C.) having come on record with opinion that there was nothing to suggest that each of them was unable to perform sexual intercourse under ordinary circumstances. The appellants do not take a position contrary to the said opinion.

19. The evidence, particularly the MLC (Ex.PW-3/A), shows that at the time of medical examination of the prosecutrix, biological samples were also collected and made over to the investigating agency (vide Ex.PW-13/C). The chain of custody of the said biological samples has been proved through Contsable Mukesh (PW-11) and Constable Sandeep (PW-10), the former having handed over the said samples to the latter who took it and deposited the same with the concerned laboratory. It is admitted case of the prosecution that nothing incriminating could be found on the basis of such exhibits, the report

(Ex.PW-12/A) proved by Dr. V. Sankaranarayanan (PW-12), Senior Scientific Officer (Biology), Regional Forensic Science Laboratory (RFSL) confirming that the DNA analysis could not be performed since no biological fluid (*i.e.* semen or blood) was detected in the vaginal swab (Ex.1) or vaginal smear (Ex.2).

20. In above context, however, it must also be noted here that the rape had allegedly been committed against the prosecutrix sometime after 9:30 p.m. on 17.03.2017. The matter had been formally taken note of by the police vide FIR (Ex.PX2– admitted under section 294 Cr.P.C.) registered at 6:30 p.m. on 19.03.2017. As per the MLC (ExPW-3/A) the prosecutrix had been examined in AIIMS at 6:56 p.m. on 19.03.2017. There is evidence also showing that the prosecutrix having returned home in the early hours of 18.03.2017 had taken bath, thereby washing herself.

21. It will be proper at this stage to take note of the chronology of events, as per the prosecution case, respecting evidence on which score dispute is raised.

22. According to the first version of the prosecutrix, narrated through the mouthpiece of her mother (PW-2), it forming the contents of the statement (Ex.PW-2/A) based on which FIR was registered, the prosecutrix had left home sometime after 3:30 p.m. and before 10:00 p.m. on 17.03.2017. There is no clarity as to whether any member of the family, including the husband of PW-2, was present and actually saw the prosecutrix (PW-1) leaving the house in the afternoon of 17.03.2017. PW-2 had left for her work at 3:30 p.m. and had returned

at 10:00 p.m. to find the prosecutrix not present at home. It is her version that the family had made attempt to locate the missing girl but with no success. The family, thus, returned home late in night. The prosecutrix returned home at 03:45 hours of 18.03.2017. The mother (PW-2) talked to her for a short while but she (PW-1) appeared to be tired and was allowed to go to sleep. The mother (PW-2) went for her duty on the next morning and, upon return in evening, had another talk with the prosecutrix (PW-1). It is at that stage that the prosecutrix (PW-1) told her that she was feeling pain in her vaginal area. When the mother questioned *"in evening of 18.03.2017*", the prosecutrix told her that when she had gone out on 17.03.2017, she had lost her way and had reached Kishangarh. At about 9:30 p.m., near a *peepal* tree, she had come across two young persons, one dark complexioned and the other fair complexioned who had forcibly taken her to *Macchli Wala Park* where they had committed rape upon her, extending threats to kill her, The prosecutrix also told the mother that the two said persons had brought her back near her home and thereafter fled away.

23. Narrating the above sequence in her report to the police (Ex.PW-2/A), the mother (PW-2) also stated that she had taken the prosecutrix (PW-1) out to trace the perpetrators of the sexual assault in the area of *Jal Board office* and *Macchli Wala Park* in Kishangarh but with no clue. She had then brought the prosecutrix to the Police Station Mehrauli in the morning of 19.03.2017.

24. As mentioned earlier, the questioning of the prosecutrix (PW-1) by the police (for recording statement under section 161 Cr.P.C.) and

by the Metropolitan Magistrate (for recording her statement under section 164 Cr.P.C.) was with the assistance of counsellors. It may be mentioned here that in her statement under section 164 Cr.P.C. the prosecutrix is shown to have told the Metropolitan Magistrate that the persons who had committed sexual assault on her had made her remove all her clothes, each of them having raped her by lowering their respective trousers, she having described the acts so as to indicate sexual penetration.

25. The prosecution case, as set out in the charge sheet, has been that on 20.03.2017, SI Preeti (PW-13), the investigating officer accompanied by Constable Pushpender (PW-5) had taken the prosecutrix and her mother to *Macchli Wala Park*, Kishangarh to make another attempt to trace out the perpetrators of the crime. It is during the said visit that the prosecutrix first confided in her mother pointing out towards first appellant Saurabh (A-1), who was present at the scene, identifying him as one of the two rapists. The IO questioned A-1 and then formally arrested him, preparing the arrest memo (Ex.PW-2/B) after effecting personal search (vide Ex.PW-5/A), the said police proceedings showing the arrest to have been made at about 9:00 a.m. on 20.03.2017 from *Macchli Wala Park*, Kishangarh. It is further the case of the prosecution that during interrogation of A-1 complicity on the part of other appellant Sandeep (A-2) came to be revealed, reference in this regard being made to his disclosure statement (Ex.PW-13/D). It is the case for the prosecution that in the follow up on the disclosure of A-1, the second appellant Sandeep (A-

2) was traced out in the compound of the office of *Delhi Jal Board* in Kishangarh where the prosecutrix (PW-1) identified him confirming that he was the second perpetrator of the crime. It is on that basis that A-2 was arrested by the IO vide formal arrest memo (Ex.PW-2/C), after personal search (vide Ex.PW-5/B), the said police proceedings showing the arrest of A-2 to have been effected at 9:45 p.m. on 20.03.2017 from the compound of the office of *Delhi Jal Board* in Kishangarh.

26. The prosecutrix (PW-1), her mother (PW-2), Constable Pushpender (PW-5) and SI Preeti (PW-13) have deposed on oath affirming the above mentioned sequence of events from the time of revelation (of facts constituting the offences) by the prosecutrix to her mother in the evening of 18.03.2017 till the time of arrest of the appellants in the morning of 20.03.2017.

27. It may be mentioned here that the prosecution evidence also proved, through testimonies of SI Ajay (PW-4) and Constable Jai Singh (PW-8), members of the crime team, the fact of inspection of the scene of the alleged incident (*Macchli Wala Park*) but their report does not bring out any incriminating evidence particularly to show the complicity on the part of the appellants.

28. Since the version of mother of the prosecutrix (PW-2), and of the investigating officer (PW-13), is essentially based on what had been told to them by the prosecutrix (PW-1), it is apposite that her version is noted at this stage.

29. The learned trial Judge, taking note of the difficulties of the prosecutrix in expressing herself fully, took care by recording her deposition, with the help of a psychologist (CW-1) eliciting the information and reducing it into writing in question and answer form. In the said court testimony, PW-1 stated that she was taken by two young persons, her hands being held, to *Macchli Wala Park* where she was fully disrobed, she being slapped and hit with leg, threatened with a brick piece, bitten on face and her hand being twisted. She identified the second appellant Sandeep (A-2) addressing him in Hindi as *"Da-Da"* (*डाडा*). She also identified the other appellant Saurabh (A-1) and stated that while A-2 had laid over her, A-1 had also lowered his trousers. She pointed out towards vaginal area and spoke about penetration and indecent act indulged in by both of them, it causing excruciating pain to her, but while pointing out body parts of the appellants which were used for such penetration, she used a colloquial expression which is generally used in the Northern parts of the country as referable to anal region. She stated that the appellants had given Rs.20/- to her but she did not accept the same. She also said that she was left near a shop whereafter both the appellants had gone away. She then spoke about she having returned home, having been rebuked by the parents and prohibited against going out again, she having taken food, washed utensils and clothes and cleaned the house. When asked about the time of she being taken, she referred to the time for it to be as one of lunch (भात) during day, and when asked about the return, she referred to the time of morning (नाश्ते के टाइम). She also

spoke about having gone to the police and being examined by a doctor and identifying the appellants at a place far away from her house, at a stage when her mother was with her.

30. During cross-examination, upon being so questioned, the prosecutrix (PW-1) described the members of the family who were living with her during the relevant period and that she would rarely go out of the house on her own. She clarified that she was taken by the appellants on foot to *Macchli Wala Park* at a time when no one was present there. She stated that she had not been allowed (by the family) to go to the said park earlier. She stated that no one had seen her being taken to *Macchli Wala Park*, it having turned dark by that time. She was questioned about the period (of one month) when she had stayed with her husband after marriage when she stated that he would beat her up. She confirmed that she had not seen the appellants prior to this incident. The defence counsel asked her if the appellants had brought her back up to her house and she answered in negative stating that they left her near a shop which was not very far from her house.

31. The cross-examination of the prosecutrix (PW-1) concluded with her answers to the suggestions given by the defence counsel having been recorded as under:-

> *"...It is wrong to suggest that the accused did not take me to part (sic park) and did not take off my clothes. It is wrong to suggest that the accused persons did not commit any wrong act with me or that they did not offer me money or that they did not give threats to me. It is wrong to suggest that I have falsely implicated the accused*

> *persons at the instance of my mother or that I had never told my mother that the accused persons had committed any offence with me. It is wrong to suggest that I have identified the accused persons at the instance of my mother and the IO. It is wrong to suggest that since it was very dark I could not have seen the accused persons and that some other persons have committed wrong act with me and I have named the accused persons at the instance of my mother. It is wrong to suggest that today I have given false deposition. (All the suggestions have been put to the victim in Hindi and she has shook her head in denial to each of the suggestion)".*

32. When the mother (PW-2) of the prosecutrix entered the witness box, her examination-in-chief having been recorded on the lines indicated above, it was brought out through her cross-examination that her younger daughter had informed her on telephone at about 9:30 p.m. that the prosecutrix was not present at home. She had returned home upon such information being conveyed and then had gone out with her daughters and a son-in-law in search. She mentioned the time of return of the prosecutrix as 3:30 a.m. of 18.03.2017. She admitted that she had not taken the prosecutrix to a doctor till the matter had been reported to the police on 19.03.2017. She spoke about the visit to *Macchli Wala Park* on 20.03.2017 in the company of the IO as an event that had occurred at about 11:30 a.m. – 12 o'clock noon time on 20.03.2017. At that stage, during cross-examination she spoke about presence of appellant Sandeep (A-2) with certain other boys in the park, disputing suggestion that he was instead on duty in *Jal Board* office at that point of time.

33. Certain suggestions were given to PW-2 during cross-examination, they representing the defence, the responses of the witness having been recorded in her testimony thus:-

> *"...It is wrong to suggest that both the accused persons had rescued the prosecutrix and brought her home. It is wrong to suggest that both the accused persons had told us all these facts when they had come to drop the prosecutrix at our house on the night of 17.03.2017 or that this had happened in the presence of my husband and the son in law. It is wrong to suggest that on this day, both the accused persons had told us that they worked with Jal Board office and that if we ever need their help for filing complaint against the auto driver, they can be contacted at the Jal Board office. It is wrong to suggest that when the police failed to apprehend the real culprits, they apprehended the accused persons and falsely implicated them in this case. It is wrong to suggest that I am deposing falsely at the instance of the IO and have manipulated facts at her instance."*

34. The evidence of PW-5 and PW-13 is relevant on the subject of police proceedings leading to arrest of the appellants on 20.03.2017. Both the said witnesses deposed along the lines of the prosecution case, confirming the facts including with reference to the memos of arrests and personal search which have been referred to earlier. Both clarified, even reiterating during cross-examination, that the second appellant Sandeep (A-2) was apprehended from a *jhuggi* near *Delhi Jal Board* office, denying the suggestions given by the defence that

the arrests were made at a time when both the appellants were working in the office of *Jal Board.*

35. When the case reached the stage of statements under section 313 Cr.P.C., each of the appellants was confronted with the incriminating evidence that had come on record at the instance of the prosecution. They denied the said evidence to be incorrect claiming they were being falsely implicated stating that the prosecutrix (PW-1) had deposed falsely. It is essential, however, to take note of the explanation offered by them at the said stage.

36. In the course of his statement under section 313 Cr.P.C. appellant Saurabh (A-1), *inter alia*, stated thus:-

> *"... I have no knowledge what the prosecutrix told to her mother but neither me nor my co-accused Sandeep did any act whatsoever with the prosecutrix. The correct facts are that I worked as a helper in Car Market, Kishangarh and reside in a jhuggi near Jal Board office, Kishangarh and my co-accused Sandeep works as a helper in the Jal Board office. On the night of 17.03.2017 at about 10:30 pm I had gone to the chauraha near the Jal Board office to buy a cigarette. I saw that the prosecutrix was standing against an auto in which there were two men sitting and the man sitting on the rear seat was holding the hand of the prosecutrix. One rickshaw puller told me that the said men are troubling the prosecutrix and I should help her. I then picked up a brick and went near the auto and showed as if I will hit the brick on the front glass of the auto and when the two men saw this, they started the auto and went away leaving*

> *the prosecutrix, I also thereafter came back to my jhuggi and next morning went for my work. When I returned from work, my co-accused Sandeep told me that 3-4 persons had come to our jhuggi and one of them had told him that he is the jija of the prosecutrix and one of the woman was her mother and then they took my friend Sandeep to the house of the jija of the prosecutrix and that they told him that he alongwith another boy had raped the prosecutrix and the other boy i.e. myself who lives with him had left for work and after that he told all these facts to them, they let him come back. Since we were being defamed in the locality, we decided to go ourselves to the house of the jija of the prosecutrix as we have not done anything of this kind. We accordingly the next day i.e. 19.03.2017 at about 7:00 am went to the house of the jija of the prosecutrix and from there the jija of the prosecutrix took us to the house of the prosecutrix. At the said house, the mother of the prosecutrix kept on saying that she will file a complaint against me and Sandeep as we had raped her daughter. We told her that we had not done anything of this kind and that we will ourselves take them to the police station if they are not satisfied. We both then took the prosecutrix, her mother and other family members to PS Mehrauli. At the PS, nobody heard our side of the story and falsely arrested us."*

37. The second appellant Sandeep (A-2), in his statement under section 313 Cr.P.C., offered a different explanation in the following manner:-

> *"...I have no knowledge what the prosecutrix told to her mother but neither me nor my co-accused Saurabh did any act whatsoever with the*

prosecutrix. The correct facts are that I used to work as a helper in Jal Board office, Kishangarh and used to reside in a jhuggi near Jal Board office, Kishangarh alongwith Saurabh, one Jai Prakash and one Shakir. After the work in the Jal Board office got over in February 2017, myself, Jai Prakash and Shakir shifted to Nangloi as some government construction work was going on there. I do not know where accused Saurabh started residing after we left the said jhuggi. He was working in Car Market, Kishangarh even at that time and must be residing somewhere in Kishangarh. In the evening of 17.03.2017, I had accompanied Jai Prakash to Mehrauli as he had some work there and I thought I will also met my sister in law who resides in Achar Wali Gali, Mehrauli. Jai Prakash had to attend some digging work in Mehrauli and the said work got over very late at night and I therefore thought that I will spend the night in Jal Board office and go back to Nangloi after meeting my sister in law. Therefore, on 17.03.2017 in the late evening, I went to the Jal Board office jhuggi, where we used to earlier reside and at about 9-9:30 pm and Saurabh also came to the said jhuggi and thereafter we remained in the said jhuggi the entire night. On 18.03.2017 after I met my Bhabhi and came back to the jhuggi, two women came to the Jal Board jhuggi- one of the them was the mother of the prosecutrix and the other was the sister of the prosecutrix and both of them told me to accompany them to the house of the jija of the prosecutrix and at the said house they started asking me as to which boy resides with me in the said jhuggi and that they were also alleging that me and the said boy had raped the prosecutrix. They also told me that I should bring

> *the said boy the next day. I went back to my jhuggi and thereafter when Saurabh came, I told him everything and the next morning both of us decided to go ourselves to the house of the jija of the prosecutrix as we had not done anything of this kind. We accordingly the next day i.e. 19.03.2017 at about 7:00 am went to the house of the jija of the prosecutrix and from there the jija of the prosecutrix took us to the house of the prosecutrix. At the said house, the mother of the prosecutrix kept on saying that she will file a complaint against me and Sandeep as we had raped her daughter. We told her that we had not done anything of this kind and that we will ourselves take them to the police station if they are not satisfied. We both then took the prosecutrix, her mother and other family members to PS Mehrauli. At the PS, nobody heard our side of the story and falsely arrested us."*

38. The appellants examined one witness Sanjay Singh (DW-1) in their defence. As per the testimony of DW-1, he is an acquaintance of appellant Sandeep (A-2), he (DW-1) having brought him (A-2) from his native village to Delhi in 2015, on the request of the parents of the latter, so that he could get a job. He testified that A-2 was working in a cold drink shop near *Jal Board* office and would live with his employer in the said shop itself. He stated that on 17.03.2017 at about 5:00 - 6:00 p.m. A-2 had come to his residence in Mehrauli (house No.281-B, ward no.2, Mehrauli, New Delhi) and had left after the dinner at about 10:00 – 10:30 p.m. It may be mentioned that the prosecutrix and her family also live in a colony of ward no.2, Mehrauli, New Delhi. Clearly, the version of this witness (DW-1)

contradicts the version of A-2 in his statement about his presence in his own *jhuggi* from 9-9.30 p.m. onwards.

39. The trial judge found the evidence of the prosecutrix (PW-1), and that of her mother (PW-2), credible to accept the allegations forming the sequence of events. She also found the evidence of the investigating officer and the accompanying constable corroborative of the evidence of the former two about the chain of events leading to apprehension and arrest of the appellant Saurabh (A-1) from *Macchli Wala Park* followed by the apprehension and arrest of the other appellant Sandeep (A-2) from a *jhuggi* in the vicinity of Delhi Jal Board in Kishangarh area. In the opinion of the trial judge, the identification of both the appellants by the prosecutrix as the perpetrators of the crime confirmed their complicity. She rejected the arguments of the defence that in absence of corroboration from MLC (particularly about the injuries on the private parts or other parts of the body) and the FSL report (showing absence of biological fluids) was inconsequential. The trial court was not impressed by the argument about investigation being deficient due to failure on the part of the investigating agency to locate the shop near which the prosecutrix had been left by the offenders. It found no merit in the argument that it was not believable that gang rape could have been committed in a public park which was ordinarily frequented by the people at large. It also rejected the argument of delay.

40. The learned counsel representing the appellants has argued, placing reliance on decision of the Supreme Court reported as *Dhan*

Raj @ Dhand Vs. State of Haryana, (2014) 6 SCC 745 that in absence of each circumstance being proved beyond all reasonable doubts by independent evidence, a criminal charge based on circumstantial evidence should not be held to have been brought home. The argument must be rejected straightaway for the simple reason the case at hand is not based on circumstantial evidence. The prosecution seeks to prove the accusations brought against the appellants on the basis of testimony of prosecutrix (PW-1), the victim, result of the charge, of course, being contingent upon credibility of her word.

41. Placing reliance on *Modi's Textbook of Medical Jurisprudence and Toxicology (26th Edition* published by *Lexis Nexis)*, it was submitted on behalf of the appellants that the FSL report rules out the possibility of rape having been committed. It was argued that spermatozoa can be identified for as long as 72 hours after sexual encounter, reference also being made, for support, to views to such effect having been expressed in certain research papers including "*Biological and DNA evidence in 1000 sexual assault cases*" (co-authored by *France Gingras* and ors.), as published in *Forensic Science International*: *Genetics Supplement Series 2 (2009) 138-140* and *Extending the Time to Collect DNA in Sexual Assault Cases* (authored by *Terry Taylor)*, as published in *NIJ Journal / Issue no.267*. The submission of the counsel was that assuming that the prosecutrix had been subjected to forcible sexual intercourse during the late night hours of 17 and 18.03.2017, notwithstanding the fact that she had washed herself (by bathing) on the next day, good quality

DNA result could still be gathered so as to connect the crime with the perpetrators on account of continued presence of spermatozoa for more than 72 hours, her medical examination having been conducted and biological samples taken around 7.00 p.m. on 19.03.2017. The argument was that since FSL scrutiny of the vaginal swab and smear was negative, the possibility of presence of spermatozoa in the private parts of the prosecutrix having been ruled out, the word of the prosecutrix as to penetrative sexual intercourse ought not be believed. This argument cannot be accepted because seminal discharge is not necessary for the offence of rape to be proved nor has it been spoken of by the prosecutrix, she not having been questioned in this regard even by the defence. The reliance on *Krishan Kumar Malik vs. State of Haryana, (2011) 7 SCC 130* is misplaced.

42. There is no doubt that since the prosecutrix suffers from moderate intellectual disability, her mental age being that of a child aged 6 to 9 years, the evidence given by her requires to be subjected to very close and acute scrutiny. Further, given the fact that there was some delay in reporting the crime, the family not taking the prosecutrix to the police till the morning of 19.03.2017, the argument of possibility of tutoring needs to be considered. But then, the plea of the defence counsel that the case deserves to be thrown out only on such account is unacceptable.

43. It does appear that the prosecutrix had spoken of she having been threatened with a brick-piece and slapped on the cheek, her complaint to this effect having been noted in the MLC. Further, in her

statement under Section 164 Cr. PC, she had also spoken about she having been hit with the brick-piece by one of the assailants, the other having given her a slap. During her court testimony, she attributed slap blows being given by both assailants, the brick having been used only for extending threat, she having been bitten on the face, her hand having been twisted. It also does appear that in the MLC, the examining medical officer did not find any sign of external injury having been suffered. Her mother (PW-2) has also not spoken of having seen any physical injury, she having only noticed that when the prosecutrix (PW-1) returned in the wee hours of 18.03.2017, she was in a dishevelled state. The absence of physical injuries by itself, however, cannot mean that the allegations of rape are false. The presence of injury is not a *sine qua non* for credibility of the word of the prosecutrix about sexual assault to be accepted. The cases of *Pratap Mishra & Ors. vs. State of Orissa, (1977) 3 SCC 41; Lalliram and Anr. vs. State of Madhya Pradesh, (2008) 10 SCC 69; Raju vs. State of MP, (2008) 15 SCC 133, Rai Sandeep @ Deepu vs. State (2012) 8 SCC 21* relied upon by the defence are distinguishable on facts.

44. The prosecutrix cannot be blamed for delay in reporting the case to the police. She did not have the capacity to do so on her own. She was a vulnerable person who had strayed out of the house sometime before 9.30 p.m. on 17.03.2017. She could return home around 3.30 a.m. on the next morning i.e. 18.03.2017. The state in which she returned is indicative of she having suffered some traumatic

or exhausting experience. The family at that stage could possibly have had no clue as to what may have happened to her during the period of her absence from home. The omission on the part of the family, particularly the mother (PW-2), to question the prosecutrix (PW-1) at that point of time or during the course of the next day, sounds at first blush to be a lapse. But, it has to be borne in mind that the family apparently has been facing economic distress, it being dependent primarily on the earnings of the mother (PW-2) from her work as a maid-servant in several households, she consequently being obliged to rush to such work, finding time eventually only in the late evening hours of 18.03.2017 to make detailed enquiries from the daughter in question. Being persons from marginalized and vulnerable section of society, the delay in approaching the police on the next morning (i.e. 19.03.2019) cannot be fatal to the prosecution case, in general, or, to the word of the prosecutrix, in particular. This Court draws strength from the decision of Supreme Court in *Tulshidas Kanolkar vs. State of Goa; (2003) 8 SCC 590* which had a similar backdrop.

45. It is the argument of the appellants that the place of occurrence (*Macchli Wala Park*) is a public place where, the evidence concedes, large number of people at large are generally present. It has been submitted that it is inconceivable that a young girl of such age could be dragged to the said park, covering long distance (of over one and half kilometre) from her house and raped in open. It was also argued that a girl, being ravished by two persons, would ordinarily resist and it being an open public place, the hue and cry raised by her would

attract attention and preclude the possibility of any such incident happening. The arguments to this effect ignore the uncontroverted evidence of the prosecutrix that at the time she was taken to the park in question, it had already turned dark and no one else was present there. She has spoken consistently in her statements to the police, to the Magistrate and, at the trial, to the court, that she had been threatened, even slapped and given leg blows, her arm being twisted to force her into submission. Given the fact that it was dark and the park was desolate, threats having been extended, it was apparently not possible or opportune for her to raise alarm. Slaps or leg blows or twisting of arm do not result in tell-tale signs of injuries as can be visible or noted in the medical examination on the third day. It has not been the case of the prosecutrix that she was dragged upto the park. She was taken to the park, her hands being held and, therefore, it would be only logical to conclude that she was led to the park under compulsion.

46. It is the argument of the counsel for the appellants that there are contradictions in the testimonies of witnesses concerning the sequence of events leading to their arrest on 20.03.2017. It is also the argument that the appellant Saurabh (A-1) has been identified only on the basis of dark complexion. It has been submitted that such identification is unsafe to be acted upon.

47. Indeed, the mother (PW-2) of the prosecutrix has spoken about the time of arrest of the appellant Saurabh (A-1) differently from the time reflected in the police proceedings or in the testimony of the IO

(PW-13) and the accompanying constable (PW-5). The statement of PW-2 to such effect, however, stands in isolation. No suggestions to that effect were given by the defence during the cross-examination of PW-5 or PW-13. As noted earlier, in their statements under Section 313 Cr. PC, the appellants have also not indicated the time of their arrest. On the contrary, each of them has spoken about a visit to the house of the prosecutrix in the early morning hours (7.00 a.m.) of 19.03.2017, this being followed by a voluntary visit to the police station, time or date of such visit to the police station having been kept vague. In this view of the matter, the contradiction appearing in the testimony of PW-2 as to the time of arrest of the appellant Saurabh (A-1) does not go to the root of the matter.

48. It is the consistent evidence of the prosecutrix (PW-1), her mother (PW-2), investigating police officer (PW-13) and the police official (PW-5) accompanying her that the appellant Saurabh (A-1) was apprehended from the *Macchli Wala Park* upon he being identified by the prosecutrix (P-1) in the morning of 20.03.2017. It does appear that in the police proceedings, and the evidence, there is a reference to his dark complexion. But then, it is not correct to say that he was identified *because of* the dark complexion. The prosecutrix in her court testimony may have referred to the appellant Sandeep (A-2) by his dark complexion. But again, it does not lead to the assumption that she was identifying him *on account of* his comparative darker complexion. When appellant Saurabh (A-1) was arrested, the other appellant Sandeep (A-2) was yet to be identified or traced. The

reference to dark complexion of the appellant Saurabh (A-1) at that stage would consequentially be not on account of comparison of his complexion with that of the other perpetrator. The reference to dark complexion was, therefore, just a manner of pointing out, not of crucial importance, not the least clinching.

49. The core question is as to whether the prosecutrix was in a position to identify both the appellants and as to whether her evidence holding them complicit in sexual assault against her deserves to be accepted on its own strength. Having examined the material available on the record of the trial court, this court would answer in the affirmative on both counts endorsing the view taken by the trial court in such regard. The reasons may be elaborated hereinafter.

50. It is well settled principle of criminal jurisprudence that onus to prove the requisite facts to bring home a criminal charge rests squarely at the door of the prosecution. The well established norms of the criminal procedure taking care of the principles of natural justice, provide level playing field offering to the accused an opportunity to meet not only the charge for which he has been arraigned but also to explain the incriminating circumstances that are shown to exist against him for proving his complicity. This opportunity is availed by the accused not only by exercising a very valuable right of cross-examining the witness(es) for prosecution – in order to discredit their word – but also by offering (at the stage of his own statement under Section 313 Cr. PC) his explanation for the incriminating facts which are proved by the prosecution, as indeed by adducing evidence in

defence so as to prove facts to the contrary. The stage of statement of the accused under Section 313 Cr. PC is one of great significance and import. The statutory provision in this regard reads thus :

> "*313. Power to examine the accused.*
> *(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-*
> *(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;*
> *(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:*
> *Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).*
> *(2) No oath shall be administered to the accused when he is examined under sub- section (1).*
> *(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.*
> *(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."*
>
> *(emphasis supplied)*

51. Even a bare reading of the statutory prescription makes it clear that the opportunity thereby given is to enable the accused "*to explain any circumstances appearing in the evidence against him*". He does

not appear at such stage as a witness in his defence, as he may do, though only of his own volition, under Section 315 Cr. PC later. The statement under Section 313 Cr. PC is not recorded on oath. It is thus, not evidence in the strict sense of the term. Refusal to answer the questions put to him, or giving false answers to them, does not give rise to he being liable for punishment as are consequences which a witness refusing to make a statement or lying on oath might attract. The answers given by him, however, "*may be taken into consideration"*. It is, however, also a well recognized principle of law that refusal to answer (to offer explanation or incriminating circumstance) or giving a false answer at the stage of statement under Section 313 Cr.PC, may lead to adverse inference being drawn. In this context, it would be of advantage to refer to some judgments of the Supreme Court on the subject.

52. In *Ashok Kumar vs. State of Haryana, (2010) 12 SCC 350*, the dual purpose of the stage of statement of accused under Section 313 Cr. PC was explained thus :-

> "*...It is a settled principle of law that dual purpose is sought to be achieved when the courts comply with the mandatory requirement of recording the statement of an accused under this provision. Firstly, every material piece of evidence which the prosecution proposes to use against the accused should be put to him in clear terms and secondly, the accused should have a fair chance to give his explanation in relation to that evidence as well as his own versions with regard to alleged involvement in the crime. This dual purpose has to be achieved in the interest of the proper administration of criminal justice and in accordance*

> *with the provisions of CrPC. Furthermore, the statement under Section 313 CrPC can be used by the Court insofar as it corroborates the case of the prosecution. Of course, conviction per se cannot be based upon the statement under Section 313 CrPC."*
>
> (emphasis supplied)

53. In *State of U.P. vs. Lakhmi, (1998) 4 SCC 336*, the judgment of acquittal rendered by the High Court in a case of culpable homicide not amounting to murder was upturned by the Supreme Court, the observations to the following effect with regard to the effect of certain answers of the accused in the statement under Section 313 Cr. PC being of import :

> "*8. As a legal proposition we cannot agree with the High Court that statement of an accused recorded under Section 313 of the Code does not deserve any value or utility if it contains inculpatory admissions. The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the court to be apprised of what the indicted person has to say about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes be flat denial or outright repudiation of those circumstances. In certain cases the accused would offer some explanations to incriminative circumstances. In very rare instances the accused may even admit or own incriminating circumstances adduced against him, perhaps for the purpose of adopting legally recognised defences. In all such cases the court gets the advantage of knowing his version about those aspects and it helps the court to effectively*

appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstance appearing in evidence against him there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as a defence strategy.

9. Sub-section (4) of Section 313 of the Code contains necessary support to the legal position that answers given by the accused during such examination are intended to be considered by the court. The words "may be taken into consideration in such enquiry or trial" in sub-section (4) would amount to a legislative guideline for the court to give due weight to such answers, though it does not mean that such answers could be made the sole basis of any finding.

10. Time and again, this Court has pointed out that such answers of the accused can well be taken into consideration in deciding whether the prosecution evidence can be relied on, and whether the accused is liable to be convicted of the offences charged against him; vide Sampat Singh v. State of Rajasthan [(1969) 1 SCC 367]; Jethamal Pithaji v. Asstt. Collector of Customs [(1974) 3 SCC 393 : 1973 SCC (Cri) 958] ; Rattan Singh v. State of H.P. [(1997) 4 SCC 161 : 1997 SCC (Cri) 525]

11. We make it clear that answers of the accused, when they contain admission of circumstances against him are not by themselves, delinked from the evidence, be used for arriving at a finding that the accused had committed the offence."

(emphasis supplied)

54. The background facts in the *Mohan Singh Vs. Prem Singh and Anr., (2002) 10 SCC 236* were similar to the preceding case, the Supreme Court ruling thus :

> *"27. The statement made in defence by the accused under Section 313 CrPC can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 CrPC of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to be false on the basis of the evidence led by the prosecution. See Nishi Kant Jha v. State of Bihar [(1969) 1 SCC 347 : AIR 1969 SC 422] : (SCC pp. 357-58, para 23)*
>
> > *"23. In this case the exculpatory part of the statement in Exhibit 6 is not only inherently improbable but is contradicted by the other evidence. According to this statement, the injury which the appellant received was caused by the appellant's attempt to catch hold of the hand of Lal Mohan Sharma to prevent the attack on the victim. This was contradicted by the statement of the accused himself under Section 342 CrPC to the effect that he had received the injury in a scuffle with a herdsman. The injury found on his body when he was examined by the doctor on 13-10-1961 negatives both these versions. Neither of these versions accounts for the profuse bleeding which led to his washing his clothes and having a bath in River Patro, the amount of bleeding and the washing of the bloodstains being so*

> *considerable as to attract the attention of Ram Kishore Pandey, PW 17 and asking him about the cause thereof. The bleeding was not a simple one as his clothes all got stained with blood as also his books, his exercise book and his belt and shoes. More than that the knife which was discovered on his person was found to have been stained with blood according to the report of the Chemical Examiner. According to the post-mortem report this knife could have been the cause of the injuries on the victim. In circumstances like these there being enough evidence to reject the exculpatory part of the statement of the appellant in Exhibit 6 the High Court had acted rightly in accepting the inculpatory part and piercing the same with the other evidence to come to the conclusion that the appellant was the person responsible for the crime."*
>
> *(emphasis supplied)*

55. Noticeably, the decision in *Nishi Kant Jha vs State of Bihar, (1969) 1 SCC 347*, referred to in the above quoted ruling, was rendered by a Constitution Bench of the Supreme Court.

56. In *Ashok Kumar* (supra), the Supreme Court held as under :

> "*31. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused*

makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

32. The statement of the accused can be used to test the veracity of the exculpatory part of the admission, if any, made by the accused. It can be taken into consideration in any, enquiry or trial but still it is not strictly an evidence in the case. The provisions of Section 313(4) CrPC explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in as evidence for or against the accused in any other enquiry or trial for any other offence for which, such answers may tend to show he has committed. In other words, the use of a statement under Section 313 CrPC as an evidence is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

(emphasis supplied)

57. The decision reported as *Manu Sao vs. State of Bihar, (2010) 12 SCC 310*, is similarly placed. The crucial observations of the Supreme Court *vis-a-vis* the use of the statement of accused to test the veracity of exculpatory nature of his admission read thus :

> *"13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the*

courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in conjunction with evidence adduced by the prosecution."

(emphasis supplied)

58. In *Munna Kumar Upadhyay vs. State of Andhra Pradesh, (2012) 6 SCC 174*, the conviction of the appellant on the charge, *inter alia*, for offence under Section 302 IPC, as affirmed by the High Court, was upheld, endorsing the raising of adverse inference from the vague or false denial of a crucial circumstance by the accused. The court observed thus :

"*72. Besides all this circumstantial evidence, another very significant aspect of the case is that none of the accused, particularly Accused 2, offered any explanation during the recording of their statements*

> *under Section 313 CrPC. It is not even disputed before us that the material incriminating evidence was put to Accused 2 while his statement under Section 313 CrPC was recorded. Except for a vague denial, he stated nothing more. In fact, even in response to a question relating to the injuries that he had suffered, he opted to make a denial, which fact had duly been established by the statements of the investigating officers, doctors and even the witnesses who had seen him immediately after the crime.*
>
> *73. It is a settled law that the statement under Section 313 CrPC is to serve a dual purpose, firstly, to afford to the accused an opportunity to explain his conduct and secondly to use denials of established facts as incriminating evidence against him."*
>
> (emphasis supplied)

59. The ruling in *Raj Kumar Singh vs. State of Rajasthan, (2013) 5 SCC 722*, follows the above principles, holding thus :

> "*41. In view of the above, the law on the issue can be summarised to the effect that statement under Section 313 CrPC is recorded to meet the requirement of the principles of natural justice as it requires that an accused may be given an opportunity to furnish explanation of the incriminating material which had come against him in the trial. However, his statement cannot be made a basis for his conviction. His answers to the questions put to him under Section 313 CrPC cannot be used to fill up the gaps left by the prosecution witnesses in their depositions. Thus, the statement of the accused is not a substantive piece of evidence and therefore, it can be used only for appreciating the evidence led by the prosecution, though it cannot be a substitute for the evidence of the prosecution. In case the prosecution evidence is not found sufficient to sustain conviction of the accused,*

> *the inculpatory part of his statement cannot be made the sole basis of his conviction. The statement under Section 313 CrPC is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 CrPC. An adverse inference can be taken against the accused only and only if the incriminating material stood fully established and the accused is not able to furnish any explanation for the same. However, the accused has a right to remain silent as he cannot be forced to become a witness against himself."*
>
> (emphasis supplied)

60. The stage of recording the statement of an accused under Section 313 Cr.P.C. stems from the principles of natural justice and engages him in a statutorily mandated dialogue, the court affording to the former opportunity to explain the incriminating circumstances established against him by the prosecution evidence. If no such incriminating circumstances have been proved, he need not explain. His statement is not substantive evidence which can be singularly used to hold him guilty. His explanation, if plausible, may be accepted to reject the charge. He may refuse to offer any explanation maintaining silence. But his refusal to explain, or offering vague denial, or tender of false defence are situations wherein the criminal court may draw adverse inference against him. The adverse inference, of course, cannot by itself be the sole basis of finding of guilty being returned, the burden of proof in which regard remains throughout on the

shoulder of prosecution. The exculpatory part of the statement of accused may be rejected if proved to be false by prosecution evidence. The inculpatory part of his statement may be used to draw assurance as to the credibility of evidence of prosecution in respect of incriminating facts or circumstances.

61. As noted above, during cross-examination of the prosecutrix (PW-1), both the appellants have taken the plea of total denial. They not only took the defence that they had nothing to do with the incident and had been falsely implicated at the instance of her mother (PW-2) but also, and more crucially, suggested that she had identified them not of her own, not on account of they having committed wrong acts with her, but at the instance of her mother and the investigating officer. In contrast, when the mother (PW-2) of the prosecutrix entered the witness box and was under cross-examination, the appellants came up with a version affirming the word of the latter (prosecutrix) that they had been with her on the night of 17.03.2017. They took the plea that they had "rescued" the prosecutrix having come with her to drop her back at her home and had even offered to render help in filing complaint against an auto driver. The defence suggestions to such effect, as given to PW-2 (and refuted by her), are conspicuously missing from the cross-examination of PW-1. Be that as it may, what stands out from the suggestions given to PW-2 is the admission of both the appellants atleast to the extent that they together had accompanied her till or upto her house that night on 17.03.2017.

62. In their statements under Section 313 Cr. PC, as extracted above, the version of defence materially changed. Only the first appellant Saurabh (A-1) would continue with the claim of the prosecutrix having been "rescued" from harassment, the sole auto driver (who was earlier projected to be the cause of harassment) being now shown as one of two persons sitting in the auto rickshaw, the second appellant Sandeep (A-2) opting out of the claim of such role, the first appellant Saurabh (A-1) also not naming him to be present. The appellant Saurabh (A-1), in his statement, sought to claim that he had come across the prosecutrix standing near an auto rickshaw, her hand being held by a person sitting in the rear seat at about 10.30 p.m. on 17.03.2017 in the vicinity of *chauraha* (roundabout) near Jal Board office. He claimed that he had intervened because he was told by a rickshaw puller that the said persons were troubling the prosecutrix and that upon he threatening to hit the front glass of the auto rickshaw, the said persons had fled away with their vehicle leaving the prosecutrix behind. He was contradicted materially by the second appellant Sandeep (A-2) in his version by not only not claiming to be part of the rescue effort or being in the company of the former (A-1) but also stating that the appellant Saurabh (A-1) had joined him in the said *jhuggi* in the vicinity of Jal Board office at about 9.00 / 9.30 p.m. on 17.03.2017 where-after both had remained inside the said *jhuggi* for the entire night. If the version of the appellant Sandeep (A-2) is correct, the rescue effort claimed by the other appellant (A-1) is apparently an imaginary story. What is also noteworthy from the statements of both the appellants that neither of them spoke of having

accompanied the prosecutrix back to her house, as was clearly suggested to PW-2, during her cross-examination.

63. The second appellant Sandeep (A-2) has taken the plea of *alibi*, his claim being that he was first in the company of his relative Jai Prakash till return to the *jhuggi* in Jal Board office late in the evening of 17.03.2017, after visiting his sister-in-law in Mehrauli, and thereafter being in the company of the other appellant Saurabh (A-1) throughout the night from 9.00 to 9.30 p.m. onwards. He has not mustered any evidence in support, the testimony of DW-1 not being in *sync* with such claim.

64. From the above, it is clear that when called upon to explain the incriminating circumstances both the appellants have come up not merely with vague denials but also false and inherently contradictory narratives. This must result in adverse inference being drawn. Their suggestion to PW-2 about both of them having accompanied the prosecutrix back upto her house is of crucial import and significance. It carries within an admission that the prosecutrix had come across them during the crucial period after she had strayed out of the house upto the area in the vicinity of Jal Board office which is located far away in Kishangarh where the appellants lived. This reinforces the word of the prosecutrix (PW-1) that she had remained with them on the said night, this giving to her the capability to identify them on her own strength, rather than at the instance of anyone else. This is sufficient to reject the defence argument that it is a case of mistaken identity.

65. It is well settled that conviction can be based on the sole testimony of the prosecutrix if it is implicitly reliable [*State of Punjab vs. Ram Dev Singh, (2004) 1 SCC 421; State of H.P. vs. Asha Ram, (2005) 13 SCC 766; Raju vs. State of M.P, (2008) 15 SCC 133;* and *Rajinder vs. State of H.P., (2009) 16 SCC 69,* to mention a few judgments].

66. In *Narender Kumar vs. State (NCT of Delhi),* (*2012) 7 SCC 171*, the Supreme Court observed thus:-

> **"***20. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case".*
>
> **"***21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (sic circumstantial), which may lend assurance to her testimony.(Vide Vimal Suresh Kamble vs. Chaluverapinake Apal S.P. [(2003) 3 SCC 175 : 2003 SCC (Cri) 596 : AIR 2003 SC 818]*

> *and Vishnu v. State of Maharashtra [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217 : AIR 2006 SC 508])*
>
> (emphasis supplied)

67. In *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*, (1983) 3 SCC 217, while observing that there is no reason for the evidence of the prosecutrix who complains of rape or sexual molestation "*to be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion*" and that "*refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury*", the Supreme Court ruled thus:-

> *"11. ....On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eyewitness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence."*

68. Reiterating the above principles, the Supreme Court in the judgment in case reported as *Mukesh & Anr. vs. State (NCT of Delhi) & Ors., (2017) 6 SCC 1*, observed thus:-

> *383. At the same time while dealing with cases of rape, the Court must act with utmost sensitivity and appreciate the evidence of the prosecutrix in view of settled legal principles. Courts while trying an accused*

on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and it should not be swayed by minor contradictions and discrepancies in appreciation of evidence of the witnesses which are not of a substantial character. It is now well settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstantial evidence such as the report of chemical examination, scientific examination, etc. if the same is found natural and trustworthy.

384. Persisting notion that the testimony of the victim has to be corroborated by other evidence must be removed. To equate a rape victim to an accomplice is to add insult to womanhood. Ours is a conservative society and not a permissive society. Ordinarily a woman, more so, a young woman will not stake her reputation by levelling a false charge, concerning her chastity. In State of Karnataka v. Krishnappa [State of Karnataka v. Krishnappa, (2000) 4 SCC 75 : 2000 SCC (Cri) 755] , it was held as under: (SCC pp. 82-83, paras 15-16)

> *"15. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity — it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely.*
> *...*
> *16. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime*

> *against women than long clauses of penal provisions, containing complex exceptions and provisos."*
>
> (emphasis supplied)

69. It is noted that the trial Judge by the impugned judgment under appeal, taking note of the vulnerable state of the prosecutrix, as indeed her demeanor at the time of deposition at the trial, has observed that her competence to appear as a witness cannot be questioned, notwithstanding the fact that she suffers from moderate intellectual disability, for the reason she was able to comprehend the questions which were put to her and was able to give rational answers thereto, the possibility of she having been tutored being ruled out, her testimony being of such sterling quality in the veracity of which the court could put implicit faith, there being no such major discrepancies as might impair her credibility, her version instead being consistent throughout. Having gone through the trial court record, this court endorses the said conclusions.

70. The prosecutrix may be suffering from low intelligence quotient, her mental age may have lagged behind her physical growth. But, it cannot be ignored that she was about 22 years' old on the relevant date, nature having bestowed on her the inbuilt sense to distinguish ill-intentioned physical contact from good-intentioned one, her short period of cohabitation with the husband having possibly exposed her to physical intimacy. She has been clear and consistent in her word that she was disrobed by the appellants, each of them having lowered their trousers and atleast one of them having laid naked over

her, the acts committed having caused her pain in her vaginal part. The colloquial expression used by the prosecutrix in her testimony may be erroneous but there is no doubt that she had been subjected to penetrative sexual assault. There is no reason why it be assumed that the prosecutrix may have imagined such sequence of events. In absence of any evidence showing the possibility of false implication for ulterior motive, there being no theory of previous enmity, the argument that the prosecutrix has falsely implicated the appellants at the instance of her mother does not appeal to reason. There is a ring of truth around the testimony of prosecutrix when she deposed about the acts in above nature having been committed by the appellants against her body. This court finds absolutely no reasons why her testimony be dis-believed.

71. For the foregoing reasons, this court finds no merit in the appeals. The learned trial judge has appreciated the evidence analysing it threadbare and reaching correct conclusions emerging from the record. The penetrative sexual assault even by one of the appellants, clearly without the consent and against the will of the prosecutrix, with the aid of the other appellant, he also participating in the crime, both acting in furtherance of common intention, established the charge for the offence of gang rape punishable under Section 376 D IPC. The fact that the prosecutrix was taken by the appellants from the public street upto *Macchli Wala Park* quite a distance away from her house, apparently with the intention of subjecting her to sexual assault has rightly been held to prove the charge for offence under

Section 366 read with Section 34 IPC. The fact that the prosecutrix was slapped and hit with legs, her arm being twisted further proves the offence under Section 323 read with Section 34 IPC. No doubt, the acts proved to have been committed by the appellants also constitute the offence of rape punishable under Section 376(2)(l) IPC on account of the fact that the prosecutrix suffered from mental disability at the time of commission of the said offence.

72. In the result, the impugned judgment of the trial court holding the appellants guilty and convicting them for offences under section 376 D, section 376(2)(l), sections 366 and 323 read with section 34 IPC is upheld.

73. The trial court has adopted the punishment prescribed as minimum for offences under Sections 376D and 376(2)(l) IPC. The punishments awarded for the said and other offences, being just, proper and commensurate, are confirmed. This court also endorses the view taken by the trial judge on the subject of compensation to the prosecutrix.

74. The appeals and the applications filed therewith are dismissed. The appellants shall be informed of the result of the appeals by a copy of this judgment being served on them through Superintendent of the jail.

R.K.GAUBA, J.

AUGUST 22, 2019
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