

HIGH COURT OF JAMMU & KASHMIR
AT JAMMU

CRA No. 06/2006

Date of order: 30.11.2018

Mohd Afzal Naik

Vs.

State of J&K

Coram:

Hon'ble Mr. Justice Sanjay Kumar Gupta, Judge

Appearing counsel:

For appellat (s) : M/s S. M. Wajahat & S. C. Subash, Advocates

For respondent(s) : Mr. Ajaz Lone, GA.

- | | | | |
|-----|---|---|--------|
| i/ | Whether to be reported in
Press/Media | : | Yes/No |
| ii/ | Whether to be reported in
Digest/Journal | : | Yes/No |
-

1. Appellant, Mohd. Afzal Naik, who has been convicted and sentenced for rigorous imprisonment of seven years and fine of Rs.10,000/- under section 376 RPC, in default, to further suffer simple imprisonment for one year; and rigorous imprisonment of five years and fine of Rs. 5000/- u/s 366 RPC, in default, to further undergo simple imprisonment of six months, vide judgment of conviction/order of sentence dated 07.02.2006/08.02.2006 respectively by the learned Additional Sessions Judge, Ramban, has filed the present appeal with prayer for setting aside the same..
2. Brief facts of the case are that a criminal challan under Sections 366/376 RPC in FIR no. 65/2002 was filed by the Police Station, Banihal against the present appellant in the Court of Judicial Magistrate 1st Class, Banihal, who committed the same to the Court of learned Additional Sessions Judge, Ramban on 17.07.2002.

3. The allegations against the appellant are that the prosecutrix when had gone to answer the call of nature at Har Beer, Kaskoot, the appellant abducted her and took her to Moga in Punjab and Batote where she was seduced to illicit intercourse against her will and wish. A written report dated 16.05.2002 was lodged by the father of the prosecutrix with the Police Station, Banihal and accordingly FIR No.65/2002 under Section 376 RPC was registered and investigation was started. During the investigation, the prosecutrix was recovered from a room of the appellant's house situated at Batote. She was medically examined and the medical report was procured. The statements of the prosecution witnesses were recorded u/s 161 Cr.P.C. and on completion of the investigation, the police authorities filed the present challan against the accused for the alleged commission of offences under Sections 366/376 RPC. The accused was charge sheeted and the prosecution was directed to produce the evidence. During the course of trial, the prosecution has produced PW-1 Mohd Ayub Khan, PW-2 Mst. Misra Begum, PW-3 Wazir Mohd Khan, PW-4 Mst. "A" (prosecutrix), PW-5 Mohd Ayub SPO, PW-6 Om Singh SPO, PW-7 Dr. Rehana, PW-8 Mohd Iqbal Bhat and PW-9 Gulam Mohd, H.C.
4. The learned Additional Sessions Judge, Ramban on consideration of the matter found that the prosecution had succeeded in establishing the case against the appellant and accordingly convicted the appellant and sentenced him to seven years rigorous imprisonment and fine of Rs.10,000/- under Section 376 RPC and

five years rigorous imprisonment and fine of Rs.5000/- under Section 366 RPC.

5. The appellant feeling aggrieved of the conviction and sentence imposed on him, has challenged the same on various grounds *inter alia* that the trial court has not properly appreciated the evidence; the court has not considered various contradictions which emerge in the prosecution witnesses; the judgment and the order impugned are contrary to the facts of the case and law on the point; that the prosecution case was unbelievable but the trial court has by wrong appreciation of facts, convicted and sentenced the appellant on the basis of insufficient evidence.
6. I have considered the matter and have gone through the trial court record, particularly the statements of the witnesses recorded and relied upon by the learned trial court in arriving at the conclusion of guilt of the appellant.
7. Before commenting upon the merits of the case, the brief resume of the prosecution witnesses is as under;

PW-1 Mohd Ayub Khan: On examination in chief by the APP, the witness stated that he knows the accused present in the court. Prosecutrix “Mst. A” is his daughter. On 11.05.2002 at 2 pm the Army took him to Maira Mangat, who was left by the Army on the next day at 2 pm and when he was taken by the Army, his daughter “Mst. A” was present in the home and his wife had gone to her parental house. When he reached back he did not find his daughter in the house. He started searching for her and after 2/3 days of the

occurrence he lodged the written report with the police. The witness proved the written report marked as EXPW-1. On his report the police registered the FIR No.65 of 2002, the witness proved the contents of the FIR as well as also identified his signatures on the same which is marked as EXPW-1/1. About 1 ½ month thereafter the police recovered his daughter and the accused. The police handed over his daughter to him on the superdnama. The witness proved the superdnama memo which is marked as EXPW-1/2. The police seized the ladies suit which his daughter was wearing and prepared the seizure memo. The witness proved the seizure memo which has already been marked as EXPW-3/1.

On cross examination, the witness stated that it is correct that on 12th his wife informed him about the occurrence. He lodged the report on 13th to the police but the police personnel advised him to produce the written report to the police after 1 or 2 days. The police did not search for the persons who were with the accused about which his daughter told him. The vehicle was also not seized. His daughter was neither abducted nor recovered in his presence.

PW-2 Mst.Misra Begum: On examination in chief by the APP, the witness stated that the accused present in the court is known to her. “Mst. A” is her daughter. About 5/6 months ago she had gone to her parental home and when she returned back she came to know that the accused present in the court had abducted her daughter. She informed her husband about the occurrence when he returned from the Army Camp. After about two months the

prosecutrix was recovered from Batote. The prosecutrix told her that she was abducted by the accused from the house.

On cross examination by the counsel for the accused, the witness stated that the prosecutrix is matriculate.

PW-3 Wazir Mohd Khan: On examination in chief by the APP, the witness stated that he knows the accused present in the court. He also knows the prosecutrix. The accused abducted the prosecutrix 9 months ago from her house. The prosecutrix was recovered by the police and was handed over to her parents. The Police seized the Salwar of the prosecutrix and prepared the seizure memo. The witness proved the seizure memo EXPW-3/1.

On cross examination by the counsel for the accused, the witness stated that the police recorded his statement.

PW-4 "Mst. A": On examination in chief by the APP, the witness stated that she knows the accused who hails from her village. About 8 months ago in the evening, while her parents were not present in the house and when she came out, the accused forcibly dragged her out of the house towards the road where the vehicle was parked in which two other persons were also sitting. The accused took her to Moga. She does not know the other two persons who were also in the vehicle. For four days she was kept in a house in Moga City. The accused and the other two persons also came there. During that period the accused present in the court against her will committed sexual inter course with her. Thereafter the accused brought her to Batote and kept her for a month and 10

days in a house. The accused did not allow her to come out. During the day the accused used to go out and bring food for her. At Batote also the accused against her wish repeatedly committed sexual inter course with her. The police recovered her from Batote and took her to Banihal. The police got her medically examined and handed over to her parents. The police recorded her statement.

On cross examination by the counsel for the accused, the witness stated that two other persons who were with the accused were not associated with the investigation by the police and the vehicle was also not seized by the police. She has not reported that the accused had threatened her. She does not know at what distance from the road in the house the accused have kept her. She was recovered by the Banihal police. The accused was with the police. The police recorded her statement in the police station.

PW-5 Mohd Ayub,SPO: On examination in chief by the APP, the witness stated that he knows the accused present in the court. On 30.06.2002 he was posted in the P/S, Banihal. The police recovered the prosecutrix from Batote and prepared the recovery memo which is already marked as EXPW-6/1. The witness also proved the seizure memo. The accused was also arrested and the arrest memo was prepared. The witness proved the arrest memo marked as EXPW-6/2.

On cross examination by the counsel for the accused, the witness stated that the recovery was affected after information was received by the police. The prosecutrix was recovered from a room.

PW-6 Om Singh, SPO: On examination in chief by the APP, the witness stated that one girl was recovered and the recovery memo was prepared. The witness proved the recovery memo EXPW-6/1. The witness also proved the arrest memo of the accused marked as EXPW-6/2.

On cross examination by the counsel for the accused the witness stated that he did not went to the room from where the prosecutrix was recovered.

PW-7 Lady Dr. Rehana: On examination in chief by the APP, the witness stated that on 16.05.2002 she was posted at Emergency Hospital, Banihal. On the request of the police she examined “Mst A”, who was brought by the police. The witness proved the medical certificate which is marked as EXPW-M/8. According to her opinion “Mst A” had been subjected to inter course. At the time of examination “Mst A” was above 18 years of age. No marks of violence where found on the private parts of “Mst A” at the time of examination “Mst A” was carrying the pregnancy for the last two months.

On cross examination by the counsel for the accused, the witness stated that the pregnancy test was not conducted in the hospital as at that time the facility was not available in the hospital. The test was conducted under her supervision. She examined “Mst A” on 1st of July, 2002, whereas the alleged occurrence is of 16.05.2002.

PW-8 Dr. Mohd Iqbal Bhat: On examination in chief by the APP, the witness stated that on 1st of July, 2002 he was posted as

Assistant Surgeon in Emergency Hospital, Banihal and on the said day he examined accused Mohd Afzal brought by the authorities of police station, Banihal. On examination it was found that accused present in the court was sexually a potent man. The witness proved the certificate placed on the file and is marked as EXPW-9/1.

On cross examination by the counsel for the accused the witness stated that the process of ejaculation of semen was not one under his supervision.

PW-9 Gulam Mohd, H.C: On examination in chief by the APP, the witness stated that in the month of May 2002 he was posted in the police station, Banihal. He conducted the investigation of case FIR No.65/2002. During the investigation he went on the spot and prepared the site plan. The witness proved the site plan EXPW-12/1. He recorded the statements of the prosecution witnesses u/s 161 CrPC. The search of abductees was conducted who was recovered after a long time. The abductees were recovered and the recovery memo was prepared which is marked as EXPW-6/1. He also prepared the site plan of the place of recovery which is marked as EXPW-12/2. On the next day of recovery "Mst A" was medically examined, the salwar of the abductees and the under wear of the accused were seized and the seizure memo was prepared which is marked as EXPW-3/1. From his investigation the accused was found to have committed the offences u/ss 366/376 RPC.

On cross examination by the counsel for the accused, the witness stated that from his investigation “Mst A” was brought on foot from house to the Bazar and not on a vehicle. The occurrence took place on 11.05.2002 and the report with regard to the same was lodged on 16.05.2002. The police station is situated at a distance of about 2 km from the place of occurrence. Abductee is about 19/20 years old. The abductee was recovered on 30.06.2002 from a house situated at Batote. The abductee was recovered after one month and 19 days after the occurrence. At the time of recovery PW Mohd Ayub SPO and PW Om Singh SPO were with him. On the very same day of the recovery the abductee was taken to the hospital at Banihal and since it was closed due to Sunday, as such she could not be examined on the said day. She was thereafter taken on the next day to the hospital for examination.

The statement of the accused as required u/s 342 CrPC was recorded. He has refuted the allegations leveled against him in the prosecution evidence and has claimed that he is innocent. In order to prove his innocence the accused has examined only Asadullah Naik as witness in his defence. The resume of the defence witness is as under:

DW-Asadullah Naik: On examination in chief by the counsel for the accused, the witness stated that he knows the accused Mohd Afzal who hails from his village and is a gentle person. He is an agriculturist. He knows the complainant Mohd Ayub. In his village the police never came and he has also not heard that the accused

has abducted any one. He had heard that the daughter of the complainant had gone somewhere for 2/4 days.

On cross examination by the APP, the witness stated that after 2/4 days "Mst A" came back to her house. The accused was not arrested on the same day when the prosecutrix was recovered.

This is the total evidence in file. Court below has based his conviction on the grounds that statement of victim when appreciated with the statements of PWs 1, 2 and 3 and medical evidence, it inspires confidence of court. Court below has further held that victim has stated sequence of events as to how she was abducted from her residence and taken to Moga Punjab and then back to Batote, from where she was recovered. She has also stated that she was repeatedly raped at Punjab and Batote. Court below has also based his conviction on relying the presumption as given in section 114 (b) of Evidence Act.

8. I have given my thoughtful consideration to whole aspects of the matter and law on the subject.
9. In criminal trial, the burden always lies on prosecution to establish the case against the accused and the accused person is presumed to be innocent of the offence charged till the contrary is established. The presumption of innocence always applies to accused. The prosecution has to discharge its onus of proving the case against the accused beyond all reasonable doubts, which is cardinal principle of criminal jurisprudence. In determining the guilt of person charged with crime, onus of proving everything essential to the established

of the charge against the accused persons lies on the prosecution. The evidence must be such as to exclude moral certainty, every reasonable doubt of the guilt of the accused. In the matter of doubt, it is safer to acquit the accused, because it is better that several guilty person should escape than that one innocent person suffer. If there be any gap or lacunae in the prosecution evidence, it is the accused and not the prosecution, would be entitled to get the benefit of doubt. It is the duty of the prosecution to ensure all diligence and carefulness required to see that all are brought on record and that prosecution does not fail to such neglect. The weakness in defence established by the accused persons is no help to prosecution, because the prosecution has to prove its case beyond all shadow of doubt. Mere creation of suspicion is not enough. There is inevitably long distance to travel between 'may be true' and 'must be true'. The distance to travel must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted. More the heinous offence, strict proofs are required.

10. The fact in issue can be established by direct evidence or by indirect evidence.
11. In case of rape, the evidence of Prosecutrix carries value, other evidence are only of corroborating in nature. Now law is well established that court can base his conviction in rape case, only on sole testimony of Prosecutrix, if her testimony inspires confidence of court.

12. Rape has been defined under section 375 RPC, which has been amended in 2014; it says that if any person has sexual intercourse with a woman under seven circumstances, then it can be termed as rape. These are 1) against the WILL of Prosecutrix; 2) Without her consent; 3) with her consent when consent has been obtained by putting her or any other person in whom she is interested, in fear of death; 4) With her consent, when the man knows that he is not her husband and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; 5) With her consent when at the time of giving consent she was by reason of unsoundness of mind or intoxication was unable to understand the nature of consent; 6) with or without her consent when she is under 18 years; and 7) When she is unable to communicate consent.

In term of clause 6 of section 375 RPC, consent if given by a girl below 18 years carries no value and person is liable to be convicted.

13. Further, in case of rape, the statement of Prosecutrix is very important since in such cases normally direct evidence is not available. Court has to draw its conclusion from attending circumstances and probability of facts stated by victim. Conduct of Prosecutrix is very important in order to appreciate her evidence on right perspective. There should not be animus against the accused by victim or her relative; there should not be artificiality and unnaturalness in version of victim.

14. In AIR 2012 (SC) 2281 in case titled “Narinder Kumar Vs. State (NCET of Delhi), it has been held as under:

“23. the court while trying an accused on charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defense to explain as to how and why in rape case the victim and other witness have falsely implicated the accused.

24. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defense. However, great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on record, he cannot be convicted for an offence. There is an initial presumption of innocence of accused and the prosecution has brought home the guilt against he accused by reliable evidence. The accused is entitled to benefit of every reasonable doubt. Prosecution has to prove its case beyond reasonable doubt and take support from weakness of case of defense. There must be proper legal evidence and material on record to record the conviction of accused. Conviction can be based on sole testimony of Prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept version of Prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and story projected by Prosecutrix is found to be improbable the prosecution case is liable to be rejected.”

15. From bare perusal of statements of prosecution witnesses PWs Mohd. Ayub Khan, the father of victim; Mst. Misra Begum, the mother of victim; Wazir Mohd Khan, Mohd Ayub SPO and PW-Om Singh SPO, it is evident that they have not seen the accused enticing away the victim on day of occurrence. Only the prosecutrix in the case has narrated about the occurrence.

16. Learned counsel for the appellant has vehemently argued that the trial court has not properly appreciated the defence of the accused and has believed the solitary statement of the prosecutrix and convicted the accused, while as this statement does not inspire confidence of the Court as the prosecutrix has given completely a false statement about the occurrence. According to the learned counsel, the court has not taken into consideration the circumstances that the prosecutrix had remained with appellant for quite long time, she went along with appellant from Ramban to Moga in Punjab and remained there for three days and thereafter she came back with appellant and remained at Batote for more than one month. During this period, she never narrated her abduction to any person as she having a sufficient chance to narrate her abduction to the person. The girl has gone with the appellant out of her own.
17. As per prosecution case, victim was abducted by accused-appellant on 11.05.2002; written FIR was lodged on 16.05.2002; the age of victim has been given as 19/20 years; she was thus major; she was recovered on 30.06.2002 after 1-1/2 months from the date of abduction from the possession of accused-appellant from Batote i.e. the house of accused.
18. PW Victim has stated that about 8 months ago in the evening, while her parents were not present in the house and when she came out, the accused forcibly dragged her out of the house towards the road where the vehicle was parked in which two other persons were also sitting. The accused took her to Moga. She does not know the other two persons who were also in the vehicle. For four days she was

kept in a house in Moga City. The accused and the other two persons also came there. During that period the accused present in the court against her will committed sexual inter course with her. Thereafter the accused brought her to Batote and kept her for a month and 10 days in a house. The accused did not allow her to come out. During the day the accused used to go out and bring food for her. At Batote also the accused against her wish repeatedly committed sexual inter course with her.

In cross examination she has stated that she has not reported that the accused had threatened her. She does not know at what distance from the road in the house the accused have kept her.

19. So far as Section 366 RPC is concerned, the essential ingredients are: (i) kidnapping or abducting any woman; (ii) such kidnapping or abducting must be (a) with intent that she may be compelled or knowing it to be likely that she will be compelled to marry any person against her will; or (b) in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. The second part of the section requires two things. (1) By criminal intimidation or abuse of authority or by compulsion inducing any woman to go from any place; and (2) such going must be with intent that she may be, or with knowledge that it is likely that she will be, forced or seduced to illicit intercourse, with some person. If the girl was eighteen or over, she could only be abducted and not kidnapped, but if she was under eighteen she could be kidnapped as well as abducted if the taking was by force or the taking or enticing was by deceitful means. The

intention of the accused is the basis and the grave men of offence under Section 366. The volition, the intention and the conduct of the woman do not determine the offence; they can only bear upon the intent with which the accused kidnapped or abducted any woman and the intent of the accused is the vital question for determination in each case. Kidnapping and abduction are two distinct offences. The ingredients of the two offences are entirely different. Kidnapping except kidnapping from India is an offence against guardianship. It consists of enticing or removing a girl from the keeping of the lawful guardian without her consent. Abduction is an offence as defined in Section 362 when a person is by force compelled or by deceitful means induced to go from any place. In abduction the person abducted may be a minor or a major. Kidnapping is punishable per se in terms of Section 363. Abduction on the other hand is not punishable per se, and is punishable only when accompanied by a particular purpose as contemplated in sections 364 to 366. But as kidnapping also may be for the same purposes, Sections 364 to 366 deal with both kidnapping and abduction for the purposes stated therein and prescribe the punishments.

20. It may be well to recall at this stage, the age old maxims which run like a golden thread through our criminal jurisprudence. They are that the accused is presumed to be innocent unless proved guilty, the quality of proof must be beyond any reasonable doubt, the Court must be morally certain of the guilt of the accused before recording conviction of the accused and in case any doubt remains lurking in

the mind of the Court in this behalf, the benefit thereof must go to the accused. The basic idea behind these principles is that the liberty of an individual is a most valuable and fundamental right which inheres in him and it should never be jeopardized unless the court, after bringing its judicial experience and acumen to bear upon the facts placed before it, comes to an inescapable conclusion that the guilt against the accused before him has been proved beyond all reasonable doubt.

21. Now looking at the facts of the case in hand in the light of the above foregoing principles, I feel that the conviction of the accused is not sustainable. In fact, this Court is constrained to observe that the trial court has not cared to use his judicial acumen and experience while appreciating the evidence on record. It is clear that in order to hold a person guilty of an offence under Section 366 of the Ranbir Penal Code, it must be proved that the accused played an active part in taking away a female , for seducing her to illicit intercourse. Apex Court in *Sadashiv Ramrao Hadbe v. State of Maharashtra* (2006) 10 SCC 92, wherein it has been observed that it is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix if it is capable of inspiring confidence in the mind of the Court and if the version given by the prosecutrix is supported by medical evidence and the whole surrounding circumstances makes the case set up by the prosecutrix highly probable and believable. Therein it is also observed that the Court shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen. The Apex Court

in Narayan v. State of Rajasthan reported in (2007) 6 SCC 465, held that though evidence of prosecutrix can alone sustain conviction of the accused but if the evidence is found so artificial that it cannot be accepted, conviction and sentence imposed upon the accused for offences punishable under [Sections 363, 366](#) and [376](#) IPC is liable to be set aside.

22. On appreciation of evidence led by prosecution, I am of the considered opinion that court below has completely misdirected itself by relying on the statement of victim with regard to commission of rape and abduction. Victim has stated that the accused forcibly dragged her out of the house towards the road where the vehicle was parked in which two other persons were also sitting. The accused took her to Moga. She does not know the other two persons who were also in the vehicle. This story of victim appears to be false as I/O has not involved other two persons in commission of crime; accused single handed cannot drag victim from her house and put him in vehicle standing on road. I/O Gulam Mohd. has belied this version of victim who has stated that from his investigation victim was brought on foot from house to the Bazar and not on a vehicle.
23. Removing of girl from residential house to Bazar or to road side and made her to sit in vehicle, is possible only if she would have gone with her own consent; further it is not probable to take victim to Jammu then to Moga, Punjab and then back to Botote, and to keep victim for one and half months forcibly. **PW-7 Lady Dr. Rehana,** has stated that no marks of violence on body of victim were found;

she was habitual of intercourse; Victim at the time of examination was carrying the pregnancy for the last two months. This shows that victim has enjoyed the company of accused with her consent. Victim was major at the time of occurrence, as such consent given is very material and goes to root of case; this circumstance belies story of victim with regard to abduction and forcibly sexual intercourse with her by accused. Court has based his conviction on conjectures and surmises.

24. In **Ram Das v State of Maharashtra** reported in **2007 (2) SCC 170**, apex court has held that conviction on the sole testimony of prosecutrix would be sustainable only where the court is convinced about truthfulness of prosecutrix and there exists no circumstances which cast a shadow of doubt about her veracity.
25. In present case, story of forcible sexual intercourse has been belied by doctor, who finds no injury on private parts of victim and found victim pregnant at the time of examination. There should be sterling quality of statement of victim for basing conviction on her sole testimony.
26. Court below has relied on section 114-B of the Evidence Act, which provides, that if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not, in fact, give such consent. This presumption is always a rebuttable presumption. The fact of rebuttable presumption can be gathered from facts of each case and other attending circumstances of the case. Consent may be express or implied. This consent can also be inferred from

facts of the case. The facts of the instant case do not warrant that the provisions of Section 114-B of the Evidence Act be pressed into service. Because as already held victim has gone from Ramban to Moga Punjab, lived there for quite some time, then came back to Batote, lived with accused for one and half month and became pregnant. So impliedly it can be inferred that she was consenting party. She was having sufficient opportunity to disclose about her abduction while going from Ranban to Moga Punjab and then back to Batote; she has also stated that accused used to go out of house to bring food at Batote, even then she did not run away. In cross examination, she has deposed that she has not reported that the accused had threatened her.

27. In AIR 1998 SC 2694 in case titled **Kuldep K. Mahato v. State of Bihar**, it is held as under:-

“Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of prosecutrix being truthful held that the appellant has forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of neighbours from the said village. The medical evidence of Dr. Maya shankar Thakur - P.W.2 also indicates that there were no injuries on the person of the prosecutrix including her private part. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result her movements were restricted. This circumstance also goes to negative

the case of forcible intercourse with the prosecutrix by the appellant.”

28. In AIR 2012 SC 2281 in case titled **Narender Kumar v. State (NCT of Delhi)** it has been held as under:-

“17. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: Suresh N. Bhusare & Ors. v. State of Maharashtra, (1999) 1 SCC 220)

18. In **Jai Krishna Mandal & Anr. v. State of Jharkhand**, (2010) 14 SCC 534, this Court while dealing with the issue held: "The only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

19. In **Rajoo & Ors. v. State of Madhya Pradesh**, AIR 2009 SC 858, this Court held that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. The court however, further observed:

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

20. In **Tameezuddin @ Tammu v. State (NCT of Delhi)**, (2009) 15 SCC 566, this Court held as under: "It is true that in a case of rape the evidence of the prosecutrix must be given predominant

consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

29. Supreme Court in case titled **Rajak Mohammad vs The State of Himachal Pradesh on 23 August, 2018** in CRIMINAL APPEAL NO(S).1395/2015, it is held as under:-

"3. Apart from the above, from the evidence of Bimla Devi (P.W.7) it appears that the prosecutrix has remained with the accused appellant for about two days in Kullu in the house of P.W.7 and that there were about 60-70 houses in the village. The materials on record also indicate that the prosecutrix remained in the company of the accused appellant for about 12 days until she was recovered and that she had freely moved around with the accused appellant in the course of which movement she had come across many people at different points of time. Yet, she did not complain of any criminal act on the part of the accused appellant.

4.
5.
6.-----

7. While it is correct that the age determined on the basis of a radiological examination may not an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.

8. We will, therefore, have to hold that in the present case the prosecution has not succeeded in proving that the prosecutrix was a minor on the date of the alleged occurrence. If that is so, based on the evidence on record, already referred to, we will further have to hold that the possibility of the prosecutrix being a consenting party cannot be altogether ruled out.

9. We will, therefore, have to conclude that the accused appellant deserves to be acquitted on the benefit of doubt. We,

consequently, set aside the order of the High Court and the conviction recorded as well as the sentence imposed and acquit the accused appellant of the offences alleged. We further direct that the accused appellant be released from custody forthwith unless his custody is required in connection with any other case.”

30. In view of facts and circumstances of the case especially the evidence of victim, as discussed above, are not found to be cogent, reliable and trustworthy, not to speak of sterling quality inspiring the confidence of the court and to base the conviction and sentence on such evidence. The prosecution has, thus, failed to prove charge against appellant beyond reasonable doubts.
31. Hence, appeal is **allowed**; judgement of conviction and order of sentence passed by court below passed are set aside. Accused/ appellant is acquitted; he is discharged from bail bonds.

(Sanjay Kumar Gupta)
Judge

Jammu:
30.11.2018
Vijay