

IN THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Crl. A. No. 07 of 2020

Shri Shajal Rai alias Adrian,
Aged about 22 years,
Son of Late Bharat Singh Rai,
Resident of Zoom Busty,
West Sikkim.
At present: Rongyek Jail.

... Appellant

Versus

State of Sikkim.

... Respondent

BEFORE

HON'BLE MR. JUSTICE JITENDRA KUMAR MAHESHWARI, CJ.
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.

For appellant : Mr. N. Rai, Legal Aid Counsel.
Ms. Sudha Sewa, Advocate.

For respondent : Mr. Yadev Sharma, Addl. Public Prosecutor.

Date of hearing : 03.03.2021

Date of judgment : 24.03.2021

JUDGMENT

PER J.K. MAHESHWARI, CJ

Assailing the validity of the Judgment and Order dated 17.02.2020 and the Sentence awarded on 18.02.2020 in Sessions Trial (F.T.) Case No. 04 of 2019 by the Judge, Fast Track Court, East & North Sikkim at Gangtok and challenging the findings recorded against the accused/ appellant of his conviction and sentence of 10 years rigorous imprisonment and the amount of fine of Rs.50,000/- (Rupees Fifty Thousand), in default three months simple imprisonment for an offence

under Section 376 (1) of the Indian Penal Code, 1860 (for short, IPC), this appeal has been preferred by the accused.

2. The case of prosecution, in brief, is that the accused Shajal Rai @ Adrian, aged 22 years, is a resident of Zoom Busty, West Sikkim, at present resident of 6th Mile, Tadong, East Sikkim. He is a driver by profession and was in occupation to drive a tourist vehicle bearing registration number SK01 Z-0702 belonging to Damber Bahadur Chettri of Deorali, East Sikkim. On 17.04.2019 at around 20.30 hrs., the victim's sister while checking the mobile phone of the victim, received a call from the accused, who asked the victim's sister to come and meet him at Putali Garden, East Sikkim. The victim snatched her phone from her sister and switched on the speaker of phone and responded to accused "why should I come". The accused asked the victim whether "she loved him or not". The victim did not respond to that. The victim's sister asked the accused to give Rs.500/- with a promise to return it the next day after going to Gangtok. The accused agreed to give the money as demanded but asked the victim or her sister to come alone, whosoever may be. The story further revealed that the victim got acquainted with the accused over a month back after being introduced by her sister, as her friend's boyfriend. The victim also saw the accused visiting the church situated next to her house. During one occasion the accused met the victim's sister and asked her mobile phone. The victim's sister did not have her own mobile phone, however, gave the number of her sister, which was saved by accused. The accused used to call the victim's sister on the victim's phone. On the date of the incident, after talking with the accused, the victim proceeded towards the main road, i.e. Putali Garden, 32 Mile, East Sikkim and met the accused. The accused forcibly caught the victim and placed her inside his vehicle bearing no. SK01 Z-0702 and

locked it from inside by the central locking system. Despite strenuous effort from the victim she could not open the door of the vehicle. The accused had also snatched the phone of the victim and kept it. After driving for a while the accused stopped the vehicle at Radong, New Road, East Sikkim and started the music player on a maximum volume. The accused pushed back the seat where the victim was sitting, forcibly removed the clothes, put a knife on the neck of the victim and threatened to cut her neck if she screamed or resisted. At that time victim continued to curse and scold him but she was overpowered by the accused who then committed rape on her. Thereafter, the accused threatened the victim with dire consequences if she complained of the incident. After a while, the accused dozed off giving an opportunity to the victim to escape from the vehicle by somehow pressing the button of the driver's seat and taking her mobile phone. When the victim had just walked a few yards, the accused again came, took the victim inside the vehicle and dropped her at Putali Garden, 32 Mile, East Sikkim. By the time the victim reached her house it was already 21.30 to 22.00 hrs. Thereafter, the victim called her boyfriend, PW-4 over his phone on 17.04.2019 around 23.00 hrs. and narrated the incident. On the next day morning, i.e. 18.04.2019, the accused again called the victim and assured to take care of her. He also told her that now they would be treated as a couple. On reaching the house of the victim, the boyfriend suggested to call the accused person to the same place wherefrom she was kidnapped and was raped. On the next day when the accused reached the same place the victim's boyfriend, one Rahul, the victim and victim's sister caught the accused. The father lodged the FIR on 18.04.2019, the next day, in Ranipool Police Station at 22.30 hrs. The SHO, Ranipool Police Station recorded the statement under Section 161

of the Code of Criminal Procedure, 1973 (for short, CrPC) and also sent her for medical examination. After medical examination, seizures of some articles were made by the Doctor who handed over the same to the police team for RFSL examination. The vehicle was also seized by the police. On finding that the place of incident did not fall within the jurisdiction of Ranipool Police Station, the case was transmitted to the Police Station, Singtam on 19.04.2019. The Sub-Inspector prepared the spot map and sent the seized clothes, slides and vehicle for RFSL examination and received the report Exhibit-17. After completion of investigation Challan was filed for alleged commission of offence under Section 376/365 of the IPC.

3. Finding that the case was triable by the Court of Session it was committed to the competent Court then assigned for trial to the Fast Track Court, East & North Sikkim at Gangtok. The Sessions Court framed charges under Section 376(1), 365 and 506 of the IPC. The accused has abjured the guilt and submitted a defence of his false implication demanding trial. The prosecution has examined 14 witnesses while the accused has not examined any witness in support of his defence.

4. Learned Trial Court found that the charges under Sections 365 as well 506 of the IPC have not been proved from the evidence brought by prosecution. However, relying upon the testimony of the prosecutrix the learned Trial Court held that charge under Section 376(1) of the IPC is proved. Accordingly, the learned Trial Court convicted the accused/ appellant for the said charge and directed the accused to undergo the sentence as described hereinabove.

5. Learned counsel appearing on behalf of the appellant would urge with vehemence that it is a case of false implication of the appellant. The

prosecutrix is major. As per the contents of the FIR nothing is alleged regarding sexual assault. The story so prepared by the prosecution is concocted. The FIR registered by Ranipool Police Station on 18.04.2019 had been sent to the concerned Magistrate on 20.04.2019 without any explanation for the delay and non-compliance of Section 157 of the CrPC. The allegations as alleged in the prosecution story does not inspire trust, looking at the testimonies of the victim and witnesses or even by his statement recorded before police. The testimony of the prosecutrix is not of sterling character which can be relied upon to convict the appellant. The allegation of commission of rape is not corroborated by medical evidence or from the scientific evidence, to bring the charge at home.

6. The prosecution has left so many lacunas in the case. DNA test was not conducted; the vehicle though seized and sent for RFSL examination the report did not substantiate the allegation of rape. Although the prosecution alleges that rape was committed after the accused centrally locked the doors but no technical report of the vehicle was obtained. The spot map does not specify the place of incident and no explanation has been offered by I.O. The FIR is delayed by one day although the incident was reported on the same day to the boyfriend, the friend and the victim's sister was present all throughout with her. The father of the prosecutrix was unaware of the incidence though he resided with the victim in the same house. He was called only when the police instructed to call the guardian. He did not know the contents of the FIR, but said he came to know from his son-in-law. He admitted that he did not know the accused who committed rape on his daughter. As per the case of the prosecution, the accused has put a knife on the neck of the prosecutrix, threatened her and overpowered her to commit rape. However, the alleged knife was not recovered by the prosecution. Although the alleged

story started from the telephonic conversation and exchange of messages between the accused, the prosecutrix, the boyfriend and Rahul Sharma, PW-5 the CDRs have not been collected and produced by the police. In view of the forgoing, it is argued that either it may be a case of consent or otherwise of false implication and for these reasons prompt information had not been given to the police station. In view of the forgoing facts, relying upon the judgments of **Sudhansu Sekhar Sahoo vs. State of Orissa** reported in **(2002) 10 SCC 743**, **Yerumalla Latchaiah vs. State of Andhra Pradesh** reported in **(2006) 9 SCC 713**, **Ramesh Baburao Devaskar and others vs. State of Maharashtra** reported in **(2007) 13 SCC 501**, **Dinesh Jaiswal vs. State of M.P.** reported in **AIR 2010 SC 1540**, **State of Rajasthan vs. Babu Meena** reported in **2013 Crl LJ 1634** and **Mohd. Ali alias Guddu vs. State of Uttar Pradesh** reported in **(2015) 7 SCC 272**, it is submitted that the conviction under Section 376(1) of the IPC as directed by the Trial Court is unsustainable and the consequential sentence as directed may also be set aside.

7. On the other hand, learned Additional Public Prosecutor made strenuous attempt to support the findings as recorded by the learned Trial Court, *inter alia*, arguing that the conviction in a case of an offence of commission of rape can be proved by the sole testimony of the prosecutrix. Therefore, finding of guilt as recorded and the sentence as directed by the Trial Court do not warrant interference. The arguments advanced that allegation of rape is belied by medical evidence is of no substance looking at the testimony of the prosecutrix, which is reliable and inspire confidence. Thus the appeal may be dismissed and the conviction and sentence of the appellant may be upheld. In support of his contention reliance is placed on the judgments of **B.C. Deva alias**

Dyava vs. State of Karnataka reported in **(2007) 12 SCC 122** and ***Sudhansu Sekhar Sahoo vs. State of Orissa*** reported in **(2002) 10 SCC 743**.

8. After having heard learned counsel appearing on behalf of both the parties, we have perused the findings recorded by the Trial Court. It reveals that the learned Trial Court relied upon the sole testimony of the prosecutrix, accepting the allegation that the accused brought her to the isolated place in his vehicle removed her clothes and committed rape. The accused has been identified by the prosecutrix in the Court as he was known to her through her sister's friend. The learned Trial Court further, referring the judgments of the Supreme Court held that the sole testimony of the prosecutrix could be relied upon. It was further held that the testimony of PW-2 (father of the prosecutrix), PW-4 (husband of the prosecutrix), PW-5 (friend of the prosecutrix), PW-6 (sister of the prosecutrix), PW-8 (prosecutrix sister's friend) and various documents were also reliable. Some parts of the testimonies and the cross-examinations have been reproduced in the judgment. It was held that the prosecutrix was staying with the father and younger sister and had acquaintance with the accused. However, the victim believed the accused when he asked for some help and reached Putali Garden to meet him. It was held that the delay in lodging FIR may be due to mental trauma, feeling of guilt, shame because of outraging her modesty in a situation in which she was going to be married soon with PW-4. It was further held that the defence was unable to give any cogent reason why the victim had named the accused as perpetrator of commission of the offence. The learned Trial Court had acquitted the accused from the charge under Sections 365/506 of the IPC, but convicted him for the charge under Section 376(1) of the IPC.

9. In the matter of proving the guilt of an accused in Court it is not out of place to state that the basic principle of criminal law is that the prosecution has to prove his own case and they cannot take advantage of the lacunas of the defence. Except in a case of admission of guilt in Court by an accused his defence may be seen after the discharge of burden by prosecution when onus shifts. The Court has to record a finding that the charge so framed has been proved by prosecution beyond reasonable doubt. Thereafter onus shifts upon the accused and the Court could see the defence put up by the accused while convicting or acquitting the accused. At the appellate stage, the High Court may examine the justiciability of the findings recorded by the Trial Court taking note of the above principles of law and can reverse those findings if it was perverse or illegal on appraisal or reappraisal of evidence. The defence so put by the accused may be looked into only when the prosecution proves the case beyond reasonable doubt. On the said basic parameters, the legality and propriety of the impugned judgment is required to be examined.

10. Prior to appreciating the facts and evidence brought on record, the judgments relied by learned counsel representing the parties may be discussed. As per appellant counsel in the case of ***Dinesh Jaiswal vs. State of Madhya Pradesh*** (supra), the Apex Court observed that the sole statement of the prosecutrix was not reliable. Her testimony had no corroboration and considering the improbabilities in her story, conviction was set aside by allowing the appeal. In the case of ***State of Rajasthan vs. Babu Meena*** (supra), the Apex Court has held that if the statement of the prosecutrix is not at all reliable or wholly unreliable and no other evidence has been led to support the allegation of rape, it would not be

safe to convict the appellant on her sole testimony. The Apex Court observed that the testimony of the prosecutrix may be of three categories, first wholly reliable, second wholly unreliable and third neither wholly reliable nor wholly unreliable. While explaining the same it was observed that if the testimony is wholly reliable, the sole testimony can be relied upon otherwise its corroboration from other prosecution witnesses must be sought. In the case of **Mohd. Ali alias Guddu vs. State of Uttar Pradesh** (supra), it was held that there can be no iota of doubt that a conviction can be based on sole testimony of prosecutrix even without corroboration if it is of unimpeachable character and beyond reproach. It was observed that the testimony of prosecutrix is placed on a higher pedestal than an injured witness. But if the testimony is not reliable and doubted then there is requirement for search of corroboration.

11. Learned Additional Public Prosecutor in opposition has cited the judgment of **B.C. Deva alias Dyava vs. State of Karnataka** (supra), in which the Apex Court has upheld the conviction based upon the sole testimony of the prosecutrix and her subsequent conduct and held that the said testimony was enough to base the conviction of the accused for an offence under Section 376 of the IPC. In the case of **Sudhansu Sekhar Sahoo vs. State of Orissa** (supra), the Apex Court observed that the sole testimony of the prosecutrix if safe, reliable and worthy of acceptance is sufficient to convict the accused.

12. In view of the aforesaid judgments relied upon by the learned counsel for the appellant as well as respondent it is crystallized that sole testimony of the prosecutrix if wholly reliable, safe and worthy to accept the conviction can be relied upon for an offence under Section 376 of the

IPC, but, if the testimony throws doubt on prosecution case due to the unnatural conduct of family and then evidence being impeachable, it cannot be relied upon without corroboration by other evidence, more so when it creates doubt about the improbability of the story of the prosecution.

13. The Apex Court in the case of **Yerumulla Latchaiah vs. State of Andhra Pradesh** (supra) while dealing with a case of a prosecutrix aged 8 years had not found any sign of rape on the body of the victim. In the said case medical evidence was found to be relevant and it was held that if statement of the prosecutrix is belied by the medical evidence conviction is not safe. In the case of **Ramesh Baburao Devaskar and others vs. State of Maharashtra** (supra), the importance of the delay in lodging FIR and the delay in sending the copy to the Magistrate was examined and it was held that the requirement of Section 157 of the CrPC has not been complied. In view of the said two judgments it is clear that the requirement of non-compliance of Section 157 CrPC with a delayed FIR is material and may affect the conviction of the accused in a given case. Simultaneously if the allegation of rape based upon the testimony of the prosecutrix is found not reliable without support from medical evidence then it can be a ground to set aside the conviction. In the light of the law laid down by Hon'ble the Apex Court and relied by the parties the facts of the present case is required to be seen.

14. In the present case, the incident took place in between 20.30 to 21.30 hrs on 17.04.2019. The FIR has been lodged by PW-2, father of the prosecutrix at Ranipool Police Station on 18.04.2019 at 22.30 hrs, *inter alia*, stating that when she was at home, the accused called his daughter on mobile phone to Putali Garden, 32 Mile and forcibly

abducted her in an Innova vehicle bearing no. SK 01 Z-0702. The accused after centrally locking the vehicle drove towards Radong, new road and started playing loud music. The accused touched her body and committed bad act which came to his knowledge and so he was submitting the report to punish the accused and give protection to his daughter as per law. As per the statement of PW-2 in Court it is clear that his son-in-law came to his house and asked him to go Ranipool Police Station. When he asked him, he informed that the prosecutrix (daughter) had been raped by the accused at Radong road. Although he has admitted his signature on the FIR, Exhibit P-1, in cross-examination he stated that the prosecutrix (daughter) did not narrate anything about the incident to him. The FIR submitted by him i.e. Exhibit P-1 was not scribed by him. He do not know the contents of the FIR. It is further admitted by him that his son-in-law, PW-4, did not tell him the name of the accused person while narrating about the incident. He admitted that his son-in-law, PW-4, used to stay at his house as he was engaged with his daughter during the relevant time and the prosecutrix is married to PW-4. Thus, it is clear that the FIR was not scribed by the father and he does not know the name of the accused and the contents of the FIR. The prosecutrix although staying with him did not narrate anything about the incident to him. PW-4 in his Court deposition said that the police personnel instructed him to call the guardian, therefore, he and Rahul, PW-5, informed the father, PW-2, for lodging the FIR. In the deposition of PW-5-Rahul Sharma, it is only stated that the guardian of the victim lodged the FIR in Ranipool Police Station, which was forwarded to Singtam Police Station. Therefore, the lodger of the FIR was not aware who was the accused, what incident took place and also he has not proved the narration of the FIR in the manner as stated therein.

15. With regard to the story of the commission of rape, it is said by the prosecution that on 17.04.2019 around 20.30 hrs. the sister of the victim, PW-6 while checking the mobile of victim, received a call from the accused who asked the victim's sister to come and meet him at Putali Garden. It is their case that the victim snatched her phone and responded to the accused by asking "why should I come". It is also their case that she had switched on the speaker of the mobile on which accused asked whether "she loved him or not", but the prosecutrix did not respond. At the same time the sister of the prosecutrix, PW-6, teased the accused and asked for R.500/- with a promise to return the same. To that the accused agreed but asked either of them to come personally and receive the amount. The acquaintance of the prosecutrix and accused were a month prior to the incident. At that time the victim's sister had introduced the accused to the prosecutrix as her friend's boyfriend. At that time, the mobile phone number of the prosecutrix was given to the accused because the victim's sister did not keep a mobile phone. In such circumstances, the accused called on the mobile of the prosecutrix on the date of incident and the victim and victim's sister both talked with him.

16. In that regard the statement of PW-6, sister of the prosecutrix, under Section 164 of the CrPC is also relevant to know how prosecution set out the case. It indicates the accused had met her earlier. She was shown the accused by her sister as the boyfriend of her friend. She further states that she was in talking term with the accused, as the victim's sister did not have a mobile phone. Therefore, the mobile number of the victim had been given to the accused. PW-8, the friend of victim's sister deposed regarding the meeting. She said that the accused used to be her boyfriend. She did not say anything about giving mobile

number of the victim to the accused for her use. The prosecutrix in this regard has stated that the accused met in the Nimtar Church. As per the statement recorded in the Court PW-6 said that PW-8 saved the mobile number of the accused in the mobile of the victim and asked to contact the victim in case of any emergency, though it is nobody's case (either of PW-1, PW-6 and PW-8) before police. Therefore, the story of asking of the mobile number through victim's sister's friend as the accused being boyfriend of the victim's sister's friend is differently set out. As per their statements under Section 161 CrPC and in Court it can be gathered that the sister of victim was in touch with accused and later the victim had also come in contact and both were in talking terms with the accused. It appears that the story that the accused was boyfriend of victim's sister's friend is a cooked up story. Therefore, how the mobile number of the accused had come to the victim as stated by the prosecution has not been proved beyond reasonable doubt.

17. The story of checking the mobile phone of victim by victim's sister and her conversation with accused or with victim as set out by the police has also not been proved in the Court. The sister of the victim, PW-6, states that she received a call from the accused asking her to meet him at Butterfly Garden for some work which was declined by her. As the accused was calling her again and again the victim picked up the mobile, received the call and went out of the house while talking to accused. The prosecutrix, PW-1 stated that she received a call from the accused to come to Butterfly Garden as her needed help. Accordingly she reached the place and saw the accused in an intoxicating state. As such the story of prosecution about the call by the accused on mobile phone to the victim; the mobile being checked by the victim's sister, PW-6, and the accused asking her whether "she loved him or not" and of "asking of

Rs.500/- by victim's sister"; teasing him and the victim going to get the said amount are not proved with the testimonies of PW-1 (victim) and PW-6 (victim's sister). Therefore, the prosecution case has not been proved convincingly by the statement of the prosecution witnesses.

18. Now the statement of the victim that after reaching Putali Garden, the accused told her to sit in the vehicle and she sat on the front seat on her own, thereafter all the four doors were centrally locked by the accused who then overpowered her and raped her, may be examined. The prosecutrix, PW-1 in her testimony tried to make out a case that the accused who was in an intoxicating state at that time asking her to sit on the front seat of the vehicle but she refused and asked him the reason for calling. On the insistence of accused she, however herself sat on the front seat after boarding the vehicle. The accused locked the door and started playing loud music, drove the vehicle towards Ranipool by the newly constructed road and on reaching there, parked the vehicle at an isolated place and asked the victim for a kiss. On refusal by the victim and on her threatening to inform his girlfriend (PW-8), the accused pushed back the seat, took the mobile phone of the victim, and committed rape after removing her clothes. Thereafter, the accused slept on the driver's seat and the prosecutrix traumatized, managed to wear her clothes, came out from the vehicle after opening the door and taking her mobile tried to flee. After some time again the accused reached there told her that he would drop her at the same place from where she was picked. The accused threatened her that in case she narrated the story to anyone it would be fatal to her. Thus the statement recorded in the Court in fact, is an improvement of prosecution story. She had not stated about the accused putting a knife on her neck while committing rape.

19. The statement of PW-6, sister of the prosecutrix who was with her states different story in this regard. As stated by her, she was called by the accused but the victim had received the call of the accused and while talking to him she visited Putali Garden. PW-6 tried to call from her father's mobile repeatedly but she did not pick up the calls. Finally at about 09.15 pm the accused answer the call from the victim's mobile phone. What was the accused person's reply has not been stated in her testimony. Thereafter PW-6 herself reached the Butterfly Garden to see and meet the victim. She saw one white colour Innova car coming with the victim sitting inside. After opening the door she came out but was not in normal self and appeared tensed. PW-6 has not asked anything from her sister. The aforesaid narration is neither the case of prosecution nor as per the statement of the prosecutrix/victim. The prosecution story as reflected in the chargesheet about what happened to the victim, the circumstances before and after the incident is substantially different to what the prosecution witnesses stated in the Court. The sister of the prosecutrix, PW-6, who was with prosecutrix since the time the accused called her has narrated a different story as described above. Therefore, looking at the prosecution case, the sole testimony of the prosecutrix is not of sterling character even in the manner the allegation of rape is alleged. In addition to the aforesaid, the place of incident in the Court statement was said to be towards Ranipool road not Radong new road. As per Sketch Map Exhibit P-25, the place of incident has not been specified. The perusal of the sketch map makes it clear that from Putali Garden one side road goes towards Ranipool and the other towards Singtam but the place of incident i.e. new Radong road is not specified in it. Thus place of incident is also not clear in the sketch map.

20. As per the above discussion the sole testimony of the prosecutrix is not safe to rely upon and its corroboration from the medical evidence may have relevance to prove the allegation of rape. As per the materials available, the medical examination of the prosecutrix, Exhibit P-15, was conducted by Dr. Madhu Shweta Sharma, PW-13. As per her testimony it is clear that the victim was examined within 48 hours from the time of incident. At the time of examination no injury was seen by her on the private parts of victim. She further opined that in case rape is committed within 48 hours, some injuries should be found on the victim's private parts. During her internal examination, old tear of hymen was found which may be of about a month old. There was no sign of struggle on the body of the victim. She deposed that she cannot say whether the patient may have been involved in any sexual intercourse within 48 hours prior to the time of examination. PW-13 made the seizure of two vaginal swabs, one oral swab, one salivary sample, two nail clippings, pubic hair sample, hair sample and three vials of blood sample. All were sent for RFSL examination. However, no incriminating material was found during the examination. Therefore, allegation of commission of rape has not found support from medical evidence.

21. Mr. Prem Kumar Sharma, PW-11, who was the junior scientific officer, came from RFSL Saramsa. He has proved the report, Exhibit-16, and as per the said report there is no corroboration regarding commission of rape. It is also relevant that the vehicle was also sent for examination because the prosecution set out a case that the sperm were ejaculated outside after rape, however, it may be in the vehicle, but even in the report of vehicle nothing incriminating was found. As per his statement the vaginal swab slide of the victim from the posterior region is marked in the lab as BIO 471 (B). The vaginal swab slide from the

anterior region is marked in the lab as BIO 471 (C). Buccal swab slide of the victim is marked in the lab as BIO 471 (D). Urine sample of the victim is marked in the lab as BIO 471 (E). Oral swab of the victim is marked in the lab as BIO 471 (F). In the test, neither blood nor semen was detected in those exhibits in the report. Nail clippings of right hand of the victim was marked in the lab as BIO 471 (G), nail clippings of left hand of the victim was marked in the lab as BIO 471 (H) and pubic hair of the victim marked in the lab as BIO 471 (I) on which no foreign material was detected as per the report. On the undergarments of the victim marked as BIO 471 (Q) no blood or semen were detected. The Innova vehicle which was marked as BIO 471 (R), neither blood nor semen or any other foreign material i.e. hair was detected on it. As per the report, BIO 471 (A) and (K), which is a blood sample of accused, blood group was found matching. Human blood was detected in Exhibit BIO 471 (P), which is the underwear of the accused of the same group which alone cannot be incriminating evidence in the case. Considering the aforesaid, it is apparent that neither the blood group of the accused nor the semen was found in the serological test nor as stated by the prosecution no ejaculated semen was found in the vehicle.

22. In addition to the aforesaid, there are several lacunas in the prosecution case. As per prosecution, accused called the victim, PW-1, as well as her sister, PW-6, by making a call on her mobile. Call details of the mobiles have not been collected by calling for the CDRs of the mobile of the accused and victim. After commission of rape, victim has sent the message to her friend i.e. Rahul, PW-5. CDR and message details of Rahul have not been produced. PW-4, husband of the victim is said to have called the victim on the same date at night as per prosecution case, however, the CDR thereto has also not been produced. The conduct of

prosecutrix is unnatural. On coming back after the incident, she met with sister when the father was also at home. But she has not said anything about the incident to both of them. It is alleged that at the time of commission of the rape, threat was given putting knife on the neck of the prosecutrix inside the vehicle but the knife has not been seized or produced by the prosecution. The prosecution story is that when prosecutrix entered the vehicle, by a central locking system all the doors were locked. No technical report of the vehicle was produced to prove that the vehicle had a central locking system. DNA test has also not been conducted in the case more particularly when RFSL test did not disclose the commission of offence as per prosecution story. Furthermore, even the FIR was not sent within 24 hours in compliance with the provisions of Section 157 of the CrPC. On the person of the accused, injuries were found, as revealed from his medical report, Exhibit-15, to which no explanation is on record. All these facts also create doubts on prosecution case and the manner in which investigation has been conducted. All these lacunas are collectively fatal to the case of the prosecution in proving the guilt of the accused bringing the charge home under Section 376(1) of the IPC. Learned Trial Court has not considered all these aspects although acquitting the accused under Sections 365 and 506 of the IPC.

23. In view of the discussion made hereinabove, this Court is of the opinion that the testimony of the prosecutrix is not of sterling character, therefore it is not safe to rely upon the testimony of the victim to prove the charge against the accused under Section 376(1) of the IPC. In addition, the case of the prosecution as set out has not been proved by the statements of the prosecution witnesses in Court. The prosecution witnesses disclosed a different story than of prosecution case in the

Court. As discussed, sole testimony of the prosecutrix is not of a sterling character and is belied by medical and scientific evidence. As per the material brought on record either it appears to be a case of consent or of false implication. In view of the said discussion it is observed that learned Trial Court has failed to appreciate the evidence in right perspective and held the charge under Section 376(1) of the IPC proved without any cogent evidence, contrary to the basic principles. Therefore, it is held that the findings and judgment of the Trial Court to prove the allegation of commission of rape is perverse and illegal and hence liable to be set aside. Accordingly, the judgment of the Trial Court is hereby set aside.

24. In view of the forgoing, the finding and the judgment holding the accused guilty to the charge under Section 376(1) of the IPC and the sentence as awarded by the learned Trial Court are hereby set aside. Accordingly, this appeal succeeds and is hereby allowed. The accused is acquitted from the charge under Section 376(1) of the IPC giving benefit of doubt. Consequent to it if the accused is in custody, he be forthwith released from the jail, if not required in any other case.

25. The Registry of this Court shall send the copy of the order and record to the Trial Court forthwith.

(Justice B.R. Pradhan)
Judge

(Justice J.K. Maheshwari)
Chief Justice

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