IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 579 of 2016
Reserved on 5.10.2018
Decided on 01. 11.2018

Vikram Khimta ***……...Appellant***

Versus

State of H.P. ***…….....Respondent***

Coram
Hon'ble Mr. Justice Sandeep Sharma, Judge.
Whether approved for reporting[1]? Yes.

For the appellant: Mr. Anoop Chitkara, Advocate.

For the respondent: Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocate Generals.

Sandeep Sharma, J.

Instant criminal appeal filed under Section 374 (II) Cr.PC, is directed against the judgment dated 30.9.2016, passed by the learned Additional Sessions Judge-I Shimla, in Sessions trial No. 8-R/7 of 2013, whereby learned court below while holding the appellant-accused guilty of having committed offence punishable under Section 376 of IPC, convicted and sentenced him to undergo imprisonment as under:-

> "***Under Section 376 of IPC***
> *To undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 50,000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one year.*

2. Facts of the case as emerge from the record are that allegedly on 13.6.2013, appellant/accused kidnapped/abducted the prosecutrix from bus stand at Rohru, falling in jurisdiction of police station Rohru, District Shimla,

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Whether reporters of the Local papers are allowed to see the judgment?

with an intention to compel her to marry him. As per initial complaint, Ext.PW2/A, which ultimately culminated into FIR No. 36/ 2013 dated 16.6.2013 (Ext. PW22/A), at Police Station Rohru, prosecutrix as well as accused were studying together at Government College Sawara, District Shimla, H.P. Allegedly, on 13.6.2013, accused called the prosecutrix and prosecutrix went to Rohru to meet accused, where he instigated/pressurized her to solemnize marriage with her and for this purpose, he took her to Shimla. Subsequently, accused took the prosecutrix to the room of his friend namely Atul (PW25). She alleged that they had started from Rohru on 13.6.2013, during evening time and reached cemetery, Shimla on 14.6.2013, at about 5:00 AM. Though prosecutrix made an attempt to make accused understand, but he under the pretext of solemnization of marriage not only abducted her, but sexually assaulted her against her wishes. During this period, accused allegedly developed physical relations with the complainant-prosecutrix. In the aforesaid background, complainant-prosecutrix by way of complaint Ext.PW2/A prayed that legal action be taken against the accused and she also intended to get herself medically examined**.** It may be noticed that aforesaid complaint was filed at police post Sanjauli. PW23 LHC Sarita forwarded the same alongwith rukka to HAG Rajinder (PW9) for registration of case. Endorsement with regard to registration of zero FIR is Ext.PW24/A.

3. Careful perusal of FIR Ext.PW7/A reveals that accused had threatened the complainant-prosecutrix that in case she did not come, he will consume the poison and accordingly, prosecutrix left the home by asking her parents that she is going to take admission in the college, but she did not go

to the house in the evening and told her parents that she will stay with her cousin at Rohru. Prosecutrix came to the bus stand Rohru, whereafter accused took her to Shimla in a private vehicle belonging to person namely Atul PW25. Prosecutrix reached Shimla alongwith accused as well as person namely Atul (PW25) on 14.6.2013 at about 5:00 am. Allegedly, accused took the prosecutrix to the room of Atul and had sexual intercourse with her against her wishes. Thereafter, accused took her to the house of his god sister Minakshi (PW8) and again committed sexual intercourse with her against her wishes. Allegedly, prosecutrix had been insisting upon solemnization of marriage, but the accused after having committed sexual assault upon her fled away and parents of the accused gave beatings to the prosecutrix and threatened her to eliminate her in case she discloses the alleged incident to anybody.

4. After registration of FIR, police got the prosecutrix medically examined and procured MLC Ext.PW16/B. Similarly, accused was also medically examined and his MLC Ext. PW21/B was obtained. As per opinion rendered by the medical officer, there were no signs of prosecutrix's having undergone recent sexual intercourse, whereas medical officer, who examined the accused opined that there is nothing suggestive of the fact that accused is not capable of performing the sexual intercourse. After completion of investigation, police presented challan in the court of learned JMIC Rohru, who vide order dated 15.10.2013, committed the case to the court of learned Sessions Judge, Shimla. Ultimately, matter came to be assigned to the Court of learned Additional Sessions Judge, Shimla, for disposal, who on being satisfied that prima-facie case exists against the

accused, charged the present petitioner-accused for having committed offences punishable under Sections 366 and 376 of IPC, whereas co-accused Sikandar Khimta and Sunita Khimta were charged for having committed offences punishable under Sections 323 & 506 read with Section 34 of the IPC, to which they pleaded not guilty and claimed trial.

5. Prosecution with a view to prove its case examined as many as 28 witnesses, whereas accused did not lead any evidence in support of their defence.

6. Learned Additional Sessions Judge on the basis of material adduced on record by the prosecution held the petitioner-accused guilty of having committed offence punishable under Section 376 of IPC and accordingly, vide judgment dated 30.9.2016, convicted and sentenced him as per description given herein above, however fact remains that learned court below acquitted the petitioner-accused of the offences punishable under Sections 366 of IPC. Learned court below also acquitted the other co-accused Sikandar Khimta and Sunita Khimta for the offence punishable under Sections 323, 506 and 366 of IPC. It may be noticed that no appeal, whatsoever, came to be filed against the acquittal of the co-accused Sikandar Khimta and Sunita Khimta, who happened to be the parents of the present accused, under Sections 323, 506 and 366 of IPC and as such, same has attained finality. In the aforesaid background, appellant-accused has approached this Court in the instant proceedings, praying therein for his acquittal after setting aside judgment of conviction recorded by the court below.

7. Mr. Anoop Chitkara, learned counsel representing the accused while referring to the judgment of conviction recorded by the court below vehemently argued that learned counsel below while holding accused guilty under Section 376 IPC, miserably failed to appreciate the evidence in its right perspective, as a result of which, erroneous findings to the detriment of the accused have come to the fore. With a view to substantiate his aforesaid argument, Mr. Chitkara while making this Court to peruse the statements having been made by the various prosecution witnesses, contended that prosecutrix had lodged false FIR with a view to compel the appellant to marry her. He further argued that though allegations in the FIR are concocted but even if allegations contained in the FIR are read in its entirety, they are of consensual coitus on misconception of fact of promise of marriage. While referring to the statement having been made by the prosecutrix PW2, Mr. Chitkara, made a serious attempt to persuade this Court to agree with his contention that both the appellant-accused and prosecutrix were closely known to each other and prosecutrix was also active partner in the consensual sexual intercourse, which took place with the will and consent of the prosecutrix. While referring to the age of the prosecutrix i.e. 21 years, Mr. Chitkara contended that she was fully informed about the consequences and implications, be it social or getting pregnant of having joined the company of the accused and thereafter, having sexual intercourse with him. Learned counsel while making this Court to peruse the statement of prosecutrix in its entirety, pointed out certain discrepancies to demonstrate that there are material contradictions in the statement of prosecutrix. While making this

Court to read statements of prosecutrix made in Court juxtaposing her initial statement given to the police, Mr. Chitkara argued that there has been consistent effort on behalf of the prosecutrix to improve her case, especially to impress upon the court that her relationship with the accused was far older than she as earlier stated 2-3 weeks. While referring to the initial complaint having been filed by the prosecutrix as well as statement given to police and magistrate under Section 164 Cr.PC, Mr. Chitkara contended that her statement given before the court is in total contradiction to earlier statements as referred above and probably, same was done because prosecutrix realized that 2 to 3 weeks is too short a time for settlement of marriage. Mr. Chitkara also argued that prosecutrix is absolutely incredible witness because she substantially improved her initial story while deposing before the court below during trial and her untruthfulness is proved by various contradictions. While referring to the medical examination Ext.PW16/B of prosecutrix by PW16 Dr. Minakshi Sharma, Mr. Chitkara contended that there is no medical evidence suggestive of the fact that prosecutrix had undergone intercourse as alleged by her, rather he further argued that PW16 while giving her final opinion has categorically opined that she is of the view that there is no finding suggestive of the fact that prosecutrix has undergone recent sexual intercourse. While referring to the report of FSL with regard to the evidence collected from the spot, Mr. Chitkara contended that save and except DNA on towel, nothing matched with the DNA collected from the accused. While referring to the report submitted by the FSL qua Ext.P5 i.e. double bed sheet which came to be recovered vide seizure memo Ext.PW2/C upon which, rape

was allegedly committed on the night of 14.6.2013 in the building of Ramesh Chuahan, Mr. Chitkara argued that two DNA profiles pertaining to male individuals were obtained from Ext.P5 i.e. double bed sheet and both these profiles did not match with the DNA obtained from the accused. Lastly, Mr. Chitkara argued that though as per report of FSL, DNA profile obtained from the towel used for cleaning the private parts matched with DNA obtained from the 10 FTA (accused), but that could not be a ground to conclude that accused committed sexual intercourse with the prosecutrix.

8. Mr. S.C. Sharma, learned Additional Advocate General, while refuting the aforesaid submissions having been made by the learned counsel representing the accused strenuously argued that bare perusal of the impugned judgment of conviction recorded by the court below, clearly suggest that court below not only appreciated the evidence in its right perspective, rather dealt with each and every aspect of the matter meticulously and as such, there is no scope left for this Court to interfere with the findings returned by the court below. With a view to refute the contention put forth on behalf of the accused that there are material contradictions in the statement of prosecution witnesses, Mr. Sharma, while making this Court to peruse statement of prosecution witnesses, contended that story put forth by PW2 (complainant-prosecutrix) stands fully corroborated by other prosecution witnesses. He further contended that version putforth by the prosecutrix is consistant, cogent and natural and at no point of time, defence was able to shatter her testimony. Mr. Sharma further contended that though medical evidence collected on record by the prosecution also corroborates the

version put forth by the prosecution, but even if for the sake of arguments, it is presumed that nothing emerged against the accused in the medical evidence that may not be a ground to hold accused not guilty of having committed offence punishable under Section 376 IPC. He further argued that there is ample evidence on record that accused on the pretext of marriage not only abducted the prosecutrix, rather repeatedly, sexually assaulted her against her wishes. While referring to Section 375 IPC, wherein rape has been defined, Mr. Sharma, made a serious attempt to persuade this Court to agree with his contention that mere fondling of body parts of the prosecutrix by the accused against her wishes amounts to rape and as such, learned court below rightly held the accused guilty of having committed offence under Section 376 IPC.

9. I have heard the learned counsel for the parties as well as gone through the records of the case.

10. In her examination-in-Chief, prosecutrix (PW2) deposed that she was called by the accused on 12.6.2013, and thereafter, she met the accused at Rohru market on 13.6.2013, at 11:30 am, whereafter at 5:00 pm accused called her and persisted her to perform marriage. Prosecutrix deposed that accused threatened her that in case she does not solemnize marriage with him, he will end up his life. As per prosecutrix, accused brought her to Shimla in a vehicle of person namely Atul (PW25). They reached Shimla on 14.6.2013, at about 5:00 am. At this stage, it may be noticed that if the line of defence taken by the accused is considered/analyzed, there appears to be no dispute with regard to the factum of prosecutrix having accompanied

accused from Rohru to Shimla. As per prosecutrix, she was taken to the room of Atul, which was situated in Cemetery at Shimla. Allegedly, Atul (PW25) left the room in the morning, whereafter accused committed sexual intercourse with the prosecutrix against her wishes. As per prosecutrix, she asked the accused to perform marriage first but her request was ignored by the accused, who thereafter committed forcible intercourse by laying mattress on the floor of the room. Prosecutrix deposed before the court below that accused committed intercourse first time by using condom and thereafter, second time without condom. As per prosecutrix, accused used brown colored towel to clean his private part. She further deposed that after 3-4 hours, accused took her in a private taxi to the house of his god sister Minakshi PW8 at Indernagar, Dhalli Shimla. Accused told his god-sister that he and his girl friend (prosecutrix) are going to perform marriage and as such, she allowed them to stay in her house. She deposed that in the house of Minakshi, accused again committed rape with her 3-4 times on the mattress, which was lying on the ground in the room. She also stated that accused used one white colour muffler to clean the private parts. On 15.6.2013, prosecutrix again requested the accused to perform marriage, but he on one pretext or the other refused and thereafter, at about 2:00 pm, parents of the accused i.e. accused Sikander Khimta and Sunita Khimta, came to the house of Minakshi, to whom prosecutrix disclosed that accused brought her to Shimla to perform marriage. Mother of the accused Sunita Khimta slapped the prosecutrix and allowed accused to run away from there, whereafter accused Sikandar Khimta asked prosecutrix to go home and not to disclose

anything to anyone otherwise, they will kill her and her family members. She also stated that at that time Minakshi (PW8) was not at home.

11. This Court with a view to ascertain the correctness of argument advanced by Mr. Chitkara that there are material contradictions in the statements of the prosecutrix, perused statement of prosecutrix made in Court juxtaposing same with her initial statement recorded under Section 154 Cr.PC. i.e. complaint Ext.PW2.A (mark-B statement made under Section 164 Cr.PC). At this stage, it may be noticed that since statement (mark-B) was not bearing the signatures of the prosecutrix, it was not exhibited, rather marked as mark-B. In her initial statement Ext.PW2/A prosecutrix alleged that she was on talking terms with the accused for the last 3 weeks. Similarly, in the statement recorded under Sectionb164 Cr.PC, she stated that she met the accused, who is her senior in college for last 2-3 weeks, however, before court prosecutrix deposed that accused was personally known to her as they were students of Govt. College Sawara Hatkoti. It appears that prosecutrix purposely did not state the period with regard to her relationship while deposing before the court below with a view to impress upon the court that her relationship was far older than she earlier stated it was 2-3 weeks. Similarly, Ext.PW2/A reveals that complainant alleged that on 13.6.2013, she went to Rohru to meet accused, whereas in her statement recorded under Section 164 Cr.PC (mark-b), she stated that on 13.6.2013, accused called her to home. While deposing before the court, PW2 complainant stated that on 12.6.2013, accused called her through mobile phone at about 9 pm and on the next morning, i.e. 13.6.2013, at about 6:30 am, he again called her to

meet him at Rohru, whereafter on the pretext of getting admission in college, she came to Rohru to meet the accused. PW2 also stated in her statement before the court that accused met her at Rohru bazar.

12. If the aforesaid three statements having been made by the prosecutrix are read juxtaposing each other, definitely there appears to be attempt on the part of the prosecutrix to improve her version given in her initial statement to the police and to the magistrate under Section 164 Cr.PC. Similarly, this Court finds that there is contradiction with regard to the date on which allegedly, accused had called the prosecutrix to Rohru. In complaint Ext.PW2/A, prosecutrix alleged that on 13.6.2013, accused called her from her home, whereas in her statement recorded under Section 164 Cr.PC, she stated that on 13.6.2013, accused called her to his home, but interestingly, in her statement given before the Court, she stated that on 12.6.2013, accused called her through mobile phone at about 9 pm, whereafter on the next morning by 6:30 am, accused again called her to meet him at Rohru, whereafter on the pretext of getting admission in college, she came to Rohru to meet the accused Vikram Khimta.

13. If aforesaid versions given by the prosecutrix are read in conjunction, it clearly suggests that there is no mention, if any, of phone call given by the accused on 12.6.2013 in the complaint Ext.PW2/A and thereafter in statement recorded under Section 164 Cr.PC before the magistrate. Similarly, this Court finds that prosecutrix in her statement recorded under Section 154 Cr.PC (mark-B) claimed that accused had told her that in case she does not come, he will consume the poison, whereas this aspect is totally

missing in her initial complaint Ext.PW2/A. Subsequently, while deposing before the Court, she stated that accused met her at Rohru Bazar on 13.6.2013, at about11:30 pm and thereafter, they visited Rohru Bazar and took lunch. She further stated that after having lunch, they remained together for some time and thereafter , by saying bye to accused, she went to room of her cousin Kalpana Walia, accused again called her to come to the bus stand Rohru, otherwise he will commit suicide by consuming poison. At this stage, it would be appropriate to take note of statement of PW1 Ram Lal, who stated that on 13.6.2013, prosecutrix came to Sarswati Nagar for getting admission in BA in the college situate In Sarswati Nagar. He stated that prosecutrix told him before leaving the home that she will go to the house of Kalpana, who is in her relations for stay and will not come back in the night. At the time of registration of FIR, there is no mention, if any, by the prosecutrix that accused had threatened her of consuming poison on her not visiting him but subsequently, she narrated aforesaid story. In FIR, prosecutrix did not state that she had gone to meet accused due to fear that in case, she would not go, accused would consume poison. Rather her statement made before the court clearly suggests that she of her own, after having received call from the accused had come to Rohru bazaar, whereafter they after having taken lunch remained together for some time. She category stated that accused called her at the house of Kalpana to come to bus stand Rohru, otherwise he will commit suicide by consuming poison. On this aspect, if statement made under Section 164 Cr.PC (mark-B), given by the prosecutrix is examined, she

stated that she went due to fear that in case, she does not go, accused would consume the poison.

14. Careful perusal of FIR lodged at the behest of the prosecutrix suggests that prosecutrix alleged that accused had allured her to elope but interestingly, while deposing before the court she improved her version by deposing that he had not allured to perform marriage but had also threatened her that if she would not accompany him, he would consume poison. This Court may take note of the fact that prosecutrix at the time of alleged commission of offence was 23 years of age and it is highly improbable that she had come under the pressure of the accused solely because of threat of suicide extended by the accused. Leaving it apart, PW2 complainant in her cross-examination admitted that she left Rohru with the accused as she was interested to perform marriage with him. Having carefully perused the statement of prosecutrix made before the trial court as well as her initial version given in complaint, which subsequently culminated in FIR Ext.PW22/A and statement made under Section 164 Cr.PC, this Court is persuaded to agree with the learned counsel for the petitioner that prosecutrix had prior acquaintance with the accused and she of her own volition, joined the company of the accused. As has been taken note herein above, it has come in the cross-examination of prosecutrix that she herself was interested to perform marriage with the accused. Otherwise also, statement of prosecutrix itself revels that she of her own volition joined the company of the accused for leaving towards Shimla. She deposed before the court that accused persisted to perform marriage, but she refused to marry.

She stated that accused called vehicle of Atul (PW25) and thereafter, they left Rohru in the said vehicle of the Atul (PW25) being driven by Atul (PW25). This version put forth by the prosecutrix does not appear to be correct, especially, in view of the statement of PW25 Atul, who deposed that on 13.6.2013, at about 5 pm, he received telephonic call from the prosecutrix and then, he met her at Rohru. He specifically stated that one boy (accused) was accompanying the prosecutrix. He also stated that he was in his Bolero vehicle bearing No. HP 10-A 2024. He stated that accused and complainant asked him to drop them to Shimla and then he took them to Shimla and dropped them at his quarter at Cemetery road. Most importantly, it has come in the statement of PW25 that he dropped prosecutrix and accused on the request of the prosecutrix. This witness categorically denied suggestion put to him in his cross-examination that he knows the accused as he has studied with him in DAV School. He also stated that prosecutrix was my god sister. He also stated that for the first time, he saw the accused on the said date i.e. 13.6.2013. Having carefully perused the statement of prosecutrix juxtaposing the statement of Atul PW25, who remained alongwith the prosecutrix and accused during their journey from Rohru to Shimla, this Court has no hesitation to conclude that statement of prosecutrix does not inspire confidence, rather story put forth by her appears to be untrustworthy.

15. At this stage, this Court may also take into consideration statement of PW8 Minakshi, who deposed that she knows the family of Kalpana Walia, who is in relation of the prosecutrix. She stated that she used to visit the shop of Kalpana Walia at upper Bazar Rohru, wherein she came in

contact of the prosecutrix. This witness deposed that on 14.6.2013, at about 4.45pm, she received a call from the prosecutrix, who sought her help by stating that she has performed marriage with the person namely Vicky Khimta. She deposed that prosecutrix told her that she has no place to stay and she does not have money and as such, she requested her to meet her at Dhalli near tunnel. She further stated that jeep came from Dhalli side at about 7 am which was being driven by Atul (PW25), wherein prosecutrix alongwith another person Vicky were sitting inside the jeep. She further stated that she joined their company and thereafter they all went to the room of Atul (PW25) near cemetery at Shimla. If aforesaid version put forth by this witness is examined in light of statement given by the prosecutrix, this completely demolishes the case of the prosecution because, in nutshell case of the prosecution as projected before the court is that accused allured the prosecutrix and thereafter, took her to Shimla on the pretext of marriage and in this process, he was helped by PW8 Minakshi, who was alleged to be god sister of the accused and PW25 Atul Rokta (friend of the accused), but as has been noticed herein above, both the aforesaid prosecution witnesses i.e. PW25 and PW8, have categorically deposed before the court below that they had prior acquaintance with the prosecutrix, not with the accused and they had joined the company of prosecutrix as well as accused at Rohru and subsequently, at Shimla at the insistence/askance of the prosecutrix and not at the asking of the accused.

16. There is another material contradiction, which compels this Court to conclude that story put forth by the prosecutrix is unreliable, as per

PW2 prosecutrix, accused took her to the room of Atul (PW25), which was situate at Cemetery Shimla, whereas PW8 Minakshi deposed before the Court below that she met prosecutrix and accused at Dhalli near Tunnel, whereafter she joined their company and they all went to the room of Atul (PW25) near Cemetery at Shimla. To the contrary Atul (PW25) stated that when they reached at Cemetery Shimla, prosecutrix talked with her friend Minakshi on mobile. PW25 further stated that Minakshi accompanied her to his room and remained there up to leaving of his room by the prosecutrix, accused and Minakshi (PW8). As per version put forth by Atul (PW25), he remained in his room till the time prosecutrix, accused and Minakshi left for the house of Minakshi (PW8) at Indernagar, whereas as per Prosecutrix, Atul (PW25) after leaving them in his room went away and accused sexually assaulted her on two occasions against her wishes. Factum with regard to the presence of PW2 and PW25 Atul in the room of PW25 Atul, wherein prosecutrix was allegedly taken by the accused at the first instance stands duly corroborated with the versions put forth by PW8 and PW25. PW8 and PW25 both in their depositions made before the Court below categorically stated that they all went to the room of Atul (PW25) near Cemetery at Shimla with the prosecutrix, which version of them totally belies the version put forth by the prosecutrix that she was alone with the accused in the room with Atul on the date of alleged incident. PW25 Atul categorically deposed that he remained in his room till the time prosecutrix, accused and Minakshi left the room, meaning thereby story putforth by the prosecutrix that accused sexually assaulted her in the room of PW25 Atul is highly unbelievable, rather appears to be

concocted one. Interestingly, if the statement of PW8 Minakshi is read in its entirety, it reveals that PW8 Minakshi, Prosecutrix and the accused took bath in the room of PW25 Atul and thereafter, they found nothing to eat in the room of Atul (PW25) and as such, PW8 Minakshi took the prosecutrix and accused to her room at Indernagar. She further stated that Atul (PW25) left the room and she alongwith prosecutrix and Vicky came to her room. Since PW8 Minakshi remained throughout with the prosecutrix and accused at the room of Atul (PW25), story put forth by the prosecutrix with regard to the forcible sexual intercourse committed by the accused in the room of Atul (PW25), appears to be highly improbable and could not be believed. There is no mention, if any, about use of condom by the accused while making sexual intercourse with the prosecutrix in her initial statement i.e. complaint PW2/A and her statement made under Section 164 Cr.PC (Mark B), whereas in her deposition made before the Court, she claimed that accused for the first time committed sexual intercourse by using condom and thereafter, second time without condom. Similarly, there is no mention, if any, of use of brown coloured towel by the accused for cleaning his private part in his statement made under Sections 154 and 164 CrPC, whereas in her statement made before the Court, she claimed that accused used brown coloured towel to clean his private part. Though, prosecutrix deposed that accused committed sexual intercourse with her without her consent forcibly and she had requested the accused to first perform marriage, but accused ignoring her request forcibly committed sexual intercourse by laying mattress on the floor of the room, but she admitted in her cross-examination that there are so many

residential accommodations around the building of Naveen Manta(PW4) at Cemetery. She also admitted that there are other persons residing in the same building but it is not understood that if she was being sexually assaulted against her wishes, what prevented her from raising hue and cry. PW4 Naveen Manta (landlord of room of Atul PW25) in his statement deposed that he has four tenants on the same floor. He also stated that on the alleged date of incident, other tenants were also residing in his building and his building is surrounded by other residential buildings. He also deposed that nobody told him about the incident, whether occurred or not.

17. Prosecutrix in her initial version recorded in her complaint (Ext.PW2/A) alleged that accused confined her in a room of his friend namely Atul, whereas in her statement recorded under Section 164 Cr.PC (Mark B), she alleged that accused kept her in the room of Atul for 3-5 hours, whereafter he took her to the house of his cousin/god sister Minakshi (PW8) at Indernagar, Dhalli. If the aforesaid version put forth by her is tested with her statement given in the court, it creates suspicion on the correctness and genuineness of the story put forth by the prosecutrix. PW2 in her statement before the Court stated that after 3-4 hours, accused took her in private taxi to the house of god sister Minakshi at Indernagar Dhalli. She further deposed that accused had told his god sister that he and his girl friend are going to perform marriage and as such, she allowed them to stay in her house, whereas PW8 Minakshi stated that they all took bath in the room of Atul and thereafter when they found nothing eatable in the room of the Atul (PW25), she took prosecutrix and Vicky (accused) to her room but Atu l(PW25) left his

room. She further stated that they took meal in her room and in the evening, one person namely Rohit came to her room and took dinner and thereafter Vicky (accused) and Rohit went to sleep in another room, whereas she and prosecutrix slept in a separate room. If the aforesaid version put forth by PW8 Minakshi is considered vis-à-vis statement of PW2 complainant prosecutrix, it creates serious suspicion with regard to the allegation of prosecutrix that accused had committed sexual intercourse with her on two occasions in the room of Minakshi (PW8). As per initial story put forth by the prosecutrix, she had undergone intercourse twice in the house of Minakshi (PW8), whereas in the court, prosecutrix improved her statement by saying that accused committed sexual intercourse 3-4 times, but statement of PW8 is totally contrary to the probability of accused and prosecutrix sleeping together. PW2 in her statement claimed that in the house of Minaskshi in the night, accused again committed sexual intercourse with her 3-4 times on the mattress, which was lying on the ground in the room having black and white bed sheet with red flowers, but her aforesaid statement is totally contrary to version putforth by her before PW16 Dr. Monika at the time of her examination. PW16 deposed that prosecutrix's alleged history disclosed that she had undergone intercourse twice but if the version putforth by the prosecutrix, wherein she alleged that on two occasions, she was sexually assaulted at the room of Atul and thereafter 3-4 times at the house of Minakshi (PW8) is examined in light of statement of PW16 Dr. Monika, it completely belies the version of prosecutrix.

18. Having carefully perused statements of PWs i.e. complainant and PW8 Minakshi, and PW25 Atul, who are the material witnesses with regard to the commission of offence , if any, committed by the accused under Section 376 IPC, vis-à-vis statement of complainant-prosecutrix PW2, this Court is compelled to agree with the contention of Mr. Chitkara, that story put forth by the prosecution with regard to her having subjected to sexual intercourse initially at the room of the Atul (PW25) and subsequently, in the room of Minakshi (PW8) is highly doubtful and could not be accepted merely being the statement of prosecutrix. If the version put forth by the prosecutrix with regard to her having made request to Vicky to perform marriage and arrival of parents of the accused in the house of PW8 Minakshi, is examined/analyzed in the light of statements made by PW8, it again creates serious doubt with regard to the correctness of version putforth by the prosecutrix (PW2). Prosecutrix in her statement deposed that on 15.6.2013, she again requested the accused to marry her, but he on the one pretext or the other, refused and thereafter, at 2 pm, parents of accused i.e. Sikander Khimta and Sunita Khimta, came in the house of Minakshi PW8, and she told them that accused brought her to Shimla to perform marriage, whereas PW1 Ram Lal (father of the complainant), in his statement stated that prosecutrix disclosed to her that accused called her parents at Shimla, who after reaching Shimla threatened the prosecutrix not to disclose the incident to anyone, otherwise they will kill her and her family. PW8 in her statement stated that in the next morning, parents of Vicky (accused) came to her room and prosecutrix started weeping and told that they want to perform

marriage. This witness also stated that prosecutrix stated she will commit suicide, in case her marriage was not solemnized with the accused. Interestingly, this witness in her cross-examination admitted that when parents of the accused came to her room, she along with prosecutrix and accused was present there, whereas PW2 stated in her statement that parents of the accused slapped her and allowed the accused to run away. Most importantly, this has come in the statement of this witness that at that time, PW8 was not at home. She deposed that Sikander Khimta and Sunita Khimta also left the house, whereafter Minakshi came there. This version of her is in total contradiction to the statement of PW8 Minakshi, who while acknowledging the presence of parents of the accused, categorically stated that she was present in the room along with prosecutrix and accused, during visit of the parents of the accused.

19. Having examined aforesaid aspect of the matter, this Court finds force in the argument of learned counsel representing the accused that prosecutrix wanted to marry accused, but since parents of the accused were not ready for the same, she lodged false complaint against the accused with a view to pressurize him to marry her. Otherwise also, PW2 in his statement categorically admitted that she lodged FIR only with an intention to perform marriage with the accused and get justice. He also stated that today, she is not interested to perform marriage with the accused Vikram. Though prosecution with a view to prove its case examined as many as 28 witnesses but having perused the record this Court finds that only statements of PWs1, 2, 8, 12 and 25 are material witnesses to determine the correctness of story put

forth by the prosecution with regard to the alleged commission of offence under Section 376 IPC by the accused, because other witnesses are formal witnesses in nature and their statements may not be very important to determine the guilt, if any, of the accused under Section 376 IPC.

20. Conjoint reading of statements made by PW1, PW2, PW8 and PW25 clearly reveals that there are material contradictions in the statements having been made by the aforesaid material prosecution witnesses. If the statement of PW2 (prosecutrix) is examined/analyzed juxtaposing statements of PW8 and PW25, who admittedly remained, in and around, throughout with the prosecutrix and accused, at the time of the alleged commission of offence, this Court is not willing to accept the contention of learned Additional Advocate General that discrepancies, if any, are minor in nature and can be ignored. Rather, this Court having noticed material contradictions as have been taken note herein above is of the view that contradictions as have been noticed herein above, completely belie the story of the prosecution and compels this Court to draw inference that story put forth by the prosecution with regard to forcible sexual intercourse committed by the accused is concocted and far from the truth.

21. In the case at hand, entire story put forth by the prosecution appears to be untrustworthy and full of contradictions. Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of

witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on touchstone of consistency. In this regard, reliance is also placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 645, wherein it has been held as under:-

> ***"45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)***
>
> > ***"14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."***
>
> ***46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."***

22. Medical evidence adduced on record by the prosecution otherwise nowhere indicates towards sexual intercourse, if any, committed by the accused and as such, contradictions as have been taken note herein above, certainly suggest that story put forth by the prosecution is not at all trustworthy and at no point of time, prosecutrix was subjected to sexual intercourse as alleged by her.

23. Now this Court would advert to the medical evidence led on record by the prosecution. At this stage, it would be appropriate to take note of medical examination i.e. MLC Ext.PW16/B of prosecutrix by PW16 Dr. Monika Sharma. PW16 in her opinion (Ext.PW16/B) categorically opined that on physical and chemical examination, no findings were suggestive that she had undergone intercourse as alleged by the prosecutrix. There were no fresh tears on the hymen area.

24. After having perused categorical analysis, Dr. Monika (PW16), also opined that *keeping in view the aforesaid chemical analysis report and findings of examination of the victim …., I am of the opinion that there are no finding to suggest that she (….) has undergone recent sexual intercourse*. It has also come in the statement of PW16 that *I have not found any struggle marks on the body of the prosecutrix. There were no external and internal injuries on the body of the prosecutrix. No spermatozoa were detected in the virginal swab and smear of the prosecutrix.*

25. It is also apparent from the medical evidence, especially, chemical analysis report given by the FSL that except DNA on towel, nothing else matched with the DNA collected from accused (Ex.PX & PZ).

> 1. ***Single bed sheet, green colour, with pink stripes:***
> *Ex. PW-1/A seizure memo of articles from the residence of Atul Kumar, on 17th June, 2013.*
> *Single bed sheet, green colour, with pink stripes:*
> *PW2 Pooja Steta, page 7, 9th line, "the mattress was covered with bed sheet green in colour and rose colour lines."*
> *Ex.PX. FSL Report:*
> *Result*
> *(2) Human Semen was detected on:*
> *Exhibit-6b (one gree and light pink) (bed sheet).*
> ***Ext PZ-FSL-DNA:***
> ***Report:***
> ***Exhibit-6b: one green, pink and grey coloured bed sheet. The exhibit was stated to be single bed sheet.***

6. Exhibit-6b (Single bed sheet) yielded a DNA profile pertaining to a female and this profile does not match with the DNA profile obtained from Exhibit-3 (FTA, Pooja Stata)

Conclusion:

iii) Exhibit-6b (Single bed sheet) yielded a DNA profile pertaining to a female and this profile does not match with the DNA profile obtained from Exhibit-3 (FTA, Pooja Stata)

2. Used Condom:

Ex. PW-1/A, seizure memo of articles from the residence of Atul Kumar, on 17 June, 2013

Condom:

Used condom-subsequently sealed by police in a match box

Ex.PX, FSL Report:

Result

(3) Human semen was detected on:

Exhibit-7 (condom)

Blood was not detected on these exhibits.

Ext PZ-FSL-DNA:

Report:

Conclusion:

iv) Exhibit-7 (Condom) yielded highly degraded DNA from which a partial and mixed DNA profile was obtained, from which nothing specific could be inferred.

3. White colour muffler:

Ex. PW-2/B, seizure memo of Muffler of accused and clothes from prosecutrix:

PW-2 Pooja Steta, page 7, 25th line, "The accused Vikram has also used one white colour muffler to clean his private part."

Ex.PX, FSL Report:

Result

(4) Blood and semen was not detected on:

Exhibit -4 e (muffler, pooja)

4. Clothes of prosecutrix:

Cloths of prosecutrix: Slex (Green), Red coloured shirt, White coloured shirt, one brown coloured underwear, (All clothes were washed).

Ex.PX, FSL Report:

Result

(5) Blood and semen was not detected on:

Exhibit-4a (underwear, Pooja),

Exhibit-4b (slacks, pooja),

Exhibit-4c (vest, Pooja),

Exhibit-4d (upper, Pooja),

Exhibit-4e (muffler, Pooja)

5. Black and white bed sheet, with red flowers:

Ex.PW-2/C, seizure memo of bed sheet, upon which rape was committed on the night of 14 June, 2013, in the building of Ramesh Chauhan, on 18 June, 2013

Black and white bed sheet, with red flowers,

PW-8 Minakshi, page 28, 34th line, "It is incorrect that bed sheet Ex.P-17 was taken into possession by the police from my room. Self stated that said bed sheet not belongs to me."

Ex.PX, FSL Report:

Result

(6) Human semen was detected on:

Exhibit-5 (one red, black and gray) (bed sheet),

Ext PZ –FSL-DNA:

Report:

Exhibit-5 one off white, black and red coloured double bed sheet
4. From Exhibit-5 (Double bed sheet) two male DNA profiles (pertaining to two individuals) were obtained. Neither of these profiles matches with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta).
Conclusion:
i) Two DNA profiles (pertaining to male individuals) were obtained from Exhibit-5 (Double bed sheet) and both of these profiles matches with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta)

6. ***One towel, colour brown (bhura), make ANNALDIS. Recovery of this towel is not proved:***
Ex.PW01/A, seizure memo of articles from the residence of Atul Kumar, on 17 June, 2013
Towel:
One towel, colour brown (Bhura), make ANNALDIS:
PW-2 Pooja Steta, page 7, 14th line, "Accused Vikram has used brown coloured towel to clean his private part."
Ex. PX, FSL Report:
Result
(7) Human semen was detected on :
Exhibit -6a (towel),
Ext.PZ-FSL-DNA:
Exhibit-6a: one brown coloured towel. The exhibit was stated to be towel used by the accused for cleaning after intercourse.
Report:
Exhibit-6a: one brown coloured towel. The exhibit was stated to be towel used by the accused for cleaning after intercourse.
5. The DNA profile obtained from Exhibit-6a (Towel, used for cleaning after intercourse) matches completely with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta).
Conclusion:
i) The DNA profile obtained from Exhibit -6a (Towel, used for cleaning after intercourse) matches completely with the DNA profile obtained from Exhibit-10 (FTA, Vikram Khimta).

26. If the aforesaid report/chemical analysis report is perused, it reveals that Ext.6/B (single bed sheet) yielded a DNA profile pertaining to female and this profile did not match with the DNA profile obtained from Ext. 3 FTA i.e. prosecutrix.

27. Allegedly, police had recovered one used condom Ext.PW1/A vide seizure memo of articles from the residence of Atul Kumar (PW25) on 17.6.2013, which was allegedly used by accused while committing sexual intercourse with the victim, however it has been categorically opined by the FSL that though Ext.7 (condom) yielded highly degraded DNA from which, a

partial and mixed DNA profile was obtained, from which nothing specific could be inferred.

28. If the aforesaid report is perused in its entirety, from Ext.P5 i.e. (double bed sheet), two male DNA profiles (pertaining to two individuals) were obtained, but neither the profiles matched with the DNA profiles obtained from Ext.10 FTA, of accused. FSL has categorically concluded that two DNA profiles pertaining to two male individuate were obtained from Ext.5 (double bed sheet) and both of them, did not match with DNA profile obtained from Ext.10 FTA Vikram (accused).

29. One brown coloured towel recovered from the residence of Atul Kumar (PW25) vide Ext.PW1/A (seizure memo of articles from the residence of Atul i.e. on 17.6.2013), was also sent for chemical analysis. DNA profile obtained from Ext.6A i.e. towel allegedly used for cleaning after intercourse matched completely with DNA profile obtained from Ext.10 (FTA, Vikram Khimta), but this Court is of the view that same could not be a ground for court below to arrive at a conclusion that accused forcibly committed sexual intercourse with the prosecutrix, especially when there is categorical finding by the medical officer based upon chemical analysis report that there is no evidence that prosecutrix had undergone intercourse as alleged by her. Since story put forth by the prosecutrix with regard to her being subjected to sexual intercourse in the room of PW25 Atul and thereafter in the room of PW8 Minakshi, does not appear to be trustworthy, as has been discussed herein above, mere matching of DNA profiles of the accused with DNA profile obtained from Ext.6A i.e. towel, is not sufficient to conclude the guilt, if any, of

the accused, especially when factum if any of complainant having been subjected to sexual intercourse is highly doubtful.

30. Otherwise also, this Court finds from the record that recovery of towel allegedly used by the accused for cleaning his private parts after having sexual intercourse with the prosecutrix is highly doubtful. As per story of prosecution, Ext.6a (brown color towel) was recovered from the room of Atul on 17.6.2013. As per site plan Ext.PW26/A, residence of Atul Kumar was at third storey of the building of Naveen Manta. PW 1 Ram Lal in his statement deposed that when we reached the room, it was locked and the key was with the police. He further stated that said key was found in the purse of the accused but interestingly, as per own story of the prosecution, accused was not with the police. He also stated that he had not seen the key personally with the police and the lock was opened by the police. Prosecutrix/PW2 deposed that when we visited the building of Naveen Manta at Cemetery, room was already locked but I do not know who locked the same. Interestingly, she stated that the key was with her as the key was found by her in the room, which was situate in Indernagar, when she and Vikram left the room at Cemetery, she had not locked the said room. PW4 Naveen Manta, landlord of Atul (PW25), stated that room was not opened by the police in his presence and as such, he cannot say from where police obtained key of the room. He also stated that police had already entered into the room when he reached the spot. This witnesses (PW4) stated that police obtained his signatures at police station Dhalli and he cannot tell about the time when he visited the police station and the seal impression "T" was given to him by the

police at the police station Dhalli. This witness though categorically stated that no proceedings took place at the spot/residence i.e. his building, PW26 Sub-Inspector, Madan Lal deposed that when we visited cemetery on 17.6.2013, in the quarter of Atul Rukta PW25, room was locked. He stated that key of the room was taken from owner of the building Naveen. He also admitted that neither he narrated this fact regarding taking of the key from Naveen Manta in the police challan nor he mentioned in the Ext.PW1/A. He also stated that Atul Rokta (PW25) met him on 23.6.2013 and prior to this, he did not consult him. He also stated that key of the room of Atul was found near the door, which was kept there. He stated that he made statement to the effect that key of the room was obtained from the owner of the building Naveen Manta is incorrect. He admitted that Atul was not present and also was not contacted and as such, no permission was obtained to open the room, however, he self stated that we tried to contact, but he could not contact him.

31. If the aforesaid versions putforth by PWs1, 2, 4 and 26, who are witnesses to recovery Ext.PW1/A, are perused in conjunction, it creates suspicion with regard to the recovery of brown colored towel from the residence of Atul on 17.6.2013. All the aforesaid witnesses have in unison stated that when they visited the house of the Atul (PW25), room was locked. All the witnesses have given contradictory version with regard to their having procured key of the room. As per PW1 Ram Lal, key was found in the purse of the accused, who was admittedly not present on the spot at the time of the recovery of towel Ext.P1/A. To the contrary, PW2 complainant claimed that

key was with her, which she found in the room situate at Indernagar, where she stayed with the accused. PW26 SI Madan Lal claimed that key of the room was taken from the owner of the building, who categorically denied that key was obtained by police from him, rather he deposed that room was not opened by the police in his presence.

32. Having carefully perused aforesaid version put forth by the witnesses of recovery, this Court finds considerable force in the argument of Mr. Chitkara, that recovery, if any, of towel is not proved in accordance with law, and as such, finding, if any, given by the FSL qua the same could not be taken into consideration by the court below while ascertaining the guilt of the accused.

33. After having perused statements/depositions having been made by the material prosecution witnesses i.e PW1, PW2, PW8 and PW25, this Court has no hesitation to conclude that prosecution has been not able to prove beyond reasonable doubt that on the date of alleged incident, prosecutrix, PW2 was subjected to sexual intercourse against her wishes repeatedly, initially at the room of Atul PW25 and subsequently, in the room of PW8 Minakshi. Statement of prosecutrix PW2, is full of contradictions and does not inspire confidence, rather version putforth by her is not at all probable but even if the same is examined/scrutinized in the light of the statements having been made by other material prosecution witnesses i.e. PW8 and PW25, it compels this Court to draw inference that story putforth by the prosecutrix is not worth credence and court below wrongly placed heavy reliance upon

the sole testimony of the prosecutrix, while holding accused guilty of having committed offence punishable under Section 376 IPC.

34. There cannot be any quarrel with the proposition of law laid down by the Hon'ble Apex Court in catena of pronouncements that in case of rape, evidence of prosecutrix must be given predominant consideration, and finding of guilt in case of rape can be based upon the uncorroborated evidence of the prosecutrix, but apart from above, Hon'ble Apex court has also held that if the story put forth by the prosecutrix is improbable and belies logic, placing sole reliance upon her statement would be violence to the very principles which govern the appreciation of evidence in a criminal matter. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in case titled ***Tameezduddin alias Tammu v. State of NCT of Delhi, (2009) 15 SCC 566***, wherein it has been held as under:-

> "9.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. We are of the opinion that story is indeed improbable.
>
> 10.We note from the evidence that PW.1 had narrated the sordid story to PW.2 on his return from the market and he had very gracefully told the appellant that everything was forgiven and forgotten but had nevertheless lured him to the police station. If such statement had indeed been made by the PW2 there would have been no occasion to even go to the police station. Assuming, however, that the appellant was naive and unaware that he was being lead deceitfully to the police station, once having reached there he could not have failed to realize his predicament as the trappings of a police station are familiar and distinctive. Even otherwise, the evidence shows that the appellant had been running a kirana shop in this area, and would, thus, have been aware of the location of the Police Station. In this view of the matter, some supporting evidence was essential for the prosecution's case.
>
> 11. As already mentioned above the medical evidence does not support the commission of rape. Moreover, the two or three

> persons who were present in the factory premises when the rape had been committed were not examined in Court as witnesses though their statements had been recorded during the course of the investigation.
>
> 12.In this background, merely because the vaginal swabs and the salwar had semen stains thereon would, at best, be evidence of the commission of sexual intercourse but not of rape. Significantly also, the semen found was not co-related to the appellant as his blood samples had not been taken. In this background the evidence of the defence witness, Mohd. Zaki becomes very relevant. This witness testified that there was no occasion for PW.2 to have come to the factory as no payment was due to him on any account. The courts below were to our mind remiss in holding that as no written accounts had been maintained by Mohd. Zaki and no receipt relating to any earlier payment to PW.2 had been produced by him, his testimony was not acceptable, the more so, as the factory was a small one and Mohd. Zaki was a petty factory owner.
>
> 13.We also see from the orders passed by this Court from time to time and particularly the Order of 25th October, 2004 that the counsel for the appellant had pointed out that though the appellant had been sentenced to imprisonment for a term of seven years, he had already exceeded that period but was still in custody and he was accordingly bailed out after verifying this fact on 16th November 2004. In normal circumstances we would not have passed a detailed order in this background but as an allegation of rape, is one of the most stigmatic of crimes, it calls for intervention at any stage."

35. Reliance is placed on judgment rendered by the Hon'ble Apex Court in case titled ***Rajoo v. State of MP, AIR 2009 SC 858***, wherein it has been held as under:-

> 9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. 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, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but 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. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

10. Undoubtedly, the charge under section 366 of the IPC has not been made out as per the findings of the courts below. We, however, find that the evidence of rape is distinct from the other charge and the matter should be examined in that background. We are, accordingly, of the opinion that merely because the accused have been acquitted for the offence punishable under Section 366 of the IPC is ipso-facto no reason to disbelieve the entire prosecution story on this solitary ground.

11. The veracity of the story projected by the prosecution qua allegations of rape must, thus, be examined. It has come in the evidence of PW8 that the prosecutrix had been married while a child but her gauna had not been performed as her husband, had, in the meanwhile, taken a second wife. The Doctor PW1 Dr. Smt. Christian has, however, opined that the prosecutrix was so habituated to sexual intercourse that it was not possible to ascertain as to when she had last been subjected to it. It has also come in the evidence of PW8 that the police had often questioned the prosecutrix as to why she was indulging in prostitution. The prosecutrix herself also admitted that she had once been arrested in the Ajanta Hotel case but had been bailed out by Shri Bansal, Advocate. It is indeed surprising that though, as per her allegations, all 13 accused had assaulted her one after the other, but the doctor did not find even a scratch on her person. The trial court and the High Court have not accepted the plea raised by the accused as to the adverse character of the prosecutrix as the evidence on this score was not conclusive. We are of the opinion, however, that in the light of the facts mentioned above, it is probable that the prosecutrix was indeed involved in some kind of improper activity.

12. The other evidence in the matter would have to be examined in this background. Primary emphasis has been placed by Mr. Ranjit Kumar on the identification of the accused. It has been submitted that the identification itself was faulty whereas the State Counsel has argued to the contrary and submitted that as the accused were known to the prosecutrix she had been in a position to identify them. The question of identification is, to our mind, the determining factor in this case. In the FIR the prosecutrix has named four of the accused as having committed rape on her, they being Nandoo, Bindu, Pintoo and Raju. PW8, who was unsure, as to the identity of the accused, however, stated that she knew Nandoo, Pyaru, Pawan, Pintoo and Raju but conceded that she had not known any of the accused at the time of the incident but after the police had enquired about the names of the boys in her presence, she had come to know who they were. It is also significant that the Court had recorded a note that even after she had named the five accused she had been able to identify only Pawan and she had not been able to identify any of the other accused. She also stated that some of the boys had been arrested on the day of the incident and that she had been called to visit the police station several times to identify them and that the police had often threatened her and her daughter that if they did not come to the police station they would file a case against them. In the last paragraph of her examination-in-chief PW8 clearly stated that she was not in a position to identify the boys at the time of incident or even in Court. It is significant that the prosecutrix, her mother and all the accused were residents of Ruabandha and as per the prosecutrix's evidence she was aware of the identity of only a few of them whom she had named in the FIR. It is also significant that in her examination-in-chief the prosecutrix stated that at the time when she had been taken away on the Luna she did not know the names of the accused who were taking her away and that she was not personally acquainted with any of the boys at the time of incident and did not know their names and was not in a position to recognize them. In paragraph 46 of the evidence, this is what she had to say:

"Police personnel had taken me to Police Station at about 2.30 O'clock in the night. Immediately after lodging the report there, they came at the place of occurrence taking me there and had got identified the accused persons having taken them out of their houses. Then the police personnel had taken the accused persons also at the Police Station. In that night nine boys had been brought having arrested. Remaining five boys had been brought by the police on the second day. I had identified those also in the Police Station.
After arrest of nine-ten boys, they had taken near the house where incident had taken place and they had asked to identify the remaining boys. Then I had identified 4-5 boys from that crowd. I had gone to the Police Station having sit in Daga with all those boys. Witness now states that 2-3 boys had been arrested from the houses, remaining 6-7 boys had been arrested from Dance site, remaining 4-5 boys had been brought having arrested on the second day.
I had not gone to the houses of the boys for identification. Police personals had called them in the hotel and I used to identify them there."

We are of the opinion that in the light of the categorical statements of the two main prosecution witnesses, the identification of the accused is extremely doubtful.

13. The test identification parade conducted by PW5 Sakharam Mahilong, Naib Tehsildar is equally farcical. This witness stated that 36 persons in all, including 9 of the accused, had been associated with the parade held by him on 30th December 1986 but he also admitted that the 9 accused had been covered with black and brown coloured blankets. To our mind the only inference that can be drawn from this admission is that similar and distinctive blankets had been provided so as to facilitate the identification of the accused. Moreover, in the light of the fact that the witness had been shown to the prosecutrix not once but several times while they were in police custody, the identification parade held by PW5 is even otherwise meaningless.

14. The learned State counsel has, however, placed special emphasis on the fact that the underwear handed over by the accused to the investigating officer were found by the chemical examiner to be stained with semen which corroborated the prosecution story. In the light of the fact that we have found the identification of the accused to be doubtful, the recovery of the underwear becomes meaningless. But we have nevertheless chosen to examine this submission as well. In this connection, we have gone through the evidence of Durga Prasad Shukla PW10, the investigating officer. We notice that the underwear of some of the accused had been produced by them on 29th December 1986 whereas the remaining accused had likewise produced their underwear on the 2nd of January 1987. We find it some what difficult to believe that the accused had themselves provided the evidence of having committed rape soon after the incident, and even more surprising, that some of them had done so three days after the incident. The recovery of the stained underwear is a factor which, by itself, cannot support a case of rape against the accused.

15. On an examination of the entire evidence, we are of the opinion that it would be difficult to conclusively show the involvement of each of the accused beyond reasonable doubt. To our mind the truth and falsehood are so inextricably intertwined, that it is impossible to discern where one ends and the other begins.

16. As already noted above Raju, son of M. Billya did not file an appeal in this court. In the light of the fact that we have found the prosecution story to be doubtful, Raju too must be given the benefit of doubt in the light of the judgments in Raja Ram & Ors. Vs. State of M.P. (1994) 2 SCC 568, Arokia Thomas vs. State of T.N. (2006) 10 SCC 542 and Suresh Chaudhary etc. vs. State of Bihar (2003) 4 SCC 128. We, accordingly allow the appeals and acquit the present appellants, as also Raju son of M. Billya.

36. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Radhu v State of Madhya Pradesh, (2007) 12 SCC 57***, wherein it has been held as under:-

> "6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."
>
> 7. Sumanbai (PW-3) stated in her evidence that when she entered the hut of Gyarsibai responding to her invitation, Radhu who was inside the hut, shut the door and forcibly committed rape by inserting his penis twice; that when she started crying, Radhu gagged her with cloth and kept her confined in the room during the night and released her only the next day morning; and that thereafter she went and informed her mother as to what happened. This version is in consonance with her report of the incident recorded in the FIR (Ex.P5) which was read over and accepted by her in her evidence. Lalithabai (PW-4) stated that when her daughter returned on Tuesday morning and told her that Radhu had raped her by force the whole night. Significantly, the prosecutrix, in her cross-examination, has given a completely different version. She stated that when Radhu committed the 'bad' act by inserting his penis twice, she fainted and remained unconscious throughout the night; that she came back to her senses only the next day morning; that she did not know what happened during the night; that when she regained consciousness and walked out of the place, Radhu was present but Gyarsibai was elsewhere. She also asserted that she told the police that she had become unconscious when the 'bad' act was committed. If she lost consciousness when the alleged act was committed, and if she regained consciousness only the next morning and left the house of Gyarsibai without any obstruction,

the prosecution case that the prosecutrix was gagged by Radhu, that the prosecutrix was confined in his house during the entire night by use of force by Radhu, that she was freed by Radhu only the next morning, becomes false.

8. In her examination-in-chief, Sumanbai categorically stated that Gyarsibai called her to her house when she was going to the shop of Sony for buying sugar and tea. In her oral report of the incident registered as FIR (Ex.P5), she had stated that she went to Gyarsibai's house, while on the way to the shop. But in the cross-examination, she stated that Gyarsibai called her when she was coming back from the shop after purchasing tea and sugar. She also stated that she could not tell the value of the goods purchased by her at that time. Thus, the prosecution case that the incident occurred when she was going to the shop to purchase tea and sugar is not proved.

9. Sumanbai stated that the incident took place on Monday night, that she returned on Tuesday morning and her father returned on Wednesday, that she and her father went to the house of Gulabbai and Ram Lal at Barud and she narrated the incident to Ramlal, that Ramlal also accompanied them to the Barud Police Station. Sumanbai's mother Lalita Bai (PW4) also stated that on Wednesday her husband took their daughter Sumanbai to Barud Police Station, and that after returning from the Police Station, her husband told her that they had also taken her brother Ram Lal, who resided at Barud, to the Police Station. Mangilal (PW-7) father of Sumanbai, did not mention about Ram Lal or his wife Gulabbai in his examination in chief. However, in his cross-examination, he stated that he went to the house of his relative Ramlal at Barud and Ramlal accompanied them to the police station. But, Ram Lal was not examined. Ram Lal's wife Gulab Bai, examined as PW-5, was declared hostile and she denied that Mangilal and Sumanbai visited their house and informed them about the incident. She also stated that neither she nor her husband accompanied Sumanbai to the Police Station. Therefore the prosecution case that Sumanbai and her father informed Ramlal about the incident on 30.1.1991 appears to be doubtful.

10. Sumanbai's mother Lalithabai states that when Sumanbai did not return on Monday night, she and her son-in-law Ramesh searched for her up to 3 a.m. on Tuesday morning. In her cross-examination, she stated that she searched for Sumanbai in the village, and that she also asked Gyarsibai about Sumanbai. In the cross-examination, she stated that she did not remember whose houses she went to enquire about her daughter, and that she did not remember whether she had gone to anyone's house at all. Lalithabai further stated that she told her son-in-law Ramesh about the incident and asked him to go to Chacharia to inform her husband about the incident and to bring him back. Mangilal also said his son-in-law came and informed him about the incident. Sumanbai stated that her brother-in-law was sent to bring back her father; that her brother-in-law's name is Ramesh but the SHO wrongly wrote his name as Dinesh in the FIR. Significantly, Dinesh or Ramesh, brother-in- law of Sumanbai was not examined to corroborate that there was a search for

Sumanbai on the night of 28.1.1991 or that he was appraised about the incident by his mother-in-law on 29.1.1991 and that he went and informed his father-in-law about the incident.

11. Thus the two persons (other than the parents) who were allegedly informed about the incident namely Ramesh (on 29.1.1991) and Ramlal (on 30.1.1991) were not examined and consequently there is no corroboration.

12. Dr. Vandana (PW-8) stated that on examination of Sumanbai, she found that her menstrual cycle had not started and pubic hair had not developed, and that her hymen was ruptured but the rupture was old. She stated that there were no injuries on her private parts and she could not give any opinion as to whether any rape had been committed. These were also recorded in the examination Report (Ex. P8). She, however, referred to an abrasion on the left elbow and a small abrasion on the arm and a contusion on the right leg, of Sumanbai. She further stated that she prepared two vaginal swabs for examination and handed it over along with the petticoat of Sumanbai to the police constable, for being sent for examination. But no evidence is placed about the results of the examination of the vaginal swabs and petticoat. Thus, the medical evidence does not corroborate the case of sexual intercourse or rape.

13. We are thus left with the sole testimony of the prosecutrix and the medical evidence that Sumanbai had an abrasion on the left elbow, an abrasion on her arm and a contusion on her leg. But these marks of injuries, by themselves, are not sufficient to establish rape, wrongful confinement or hurt, if the evidence of the prosecutrix is found to be not trustworthy and there is no corroboration.

14. Lalithabai says that when Sumanbai did not return, she enquired with Gyarsibai. Sumanbai also says that she used to often visit the house of Gyarsibai. She says that Radhu's parents are kaka and baba of her mother and Radhu was her maternal uncle. The families were closely related and their relationship was cordial. In the circumstances, the case of the prosecution that Gyarsibai would have invited Sumanbai to her house to abet her son Radhu to rape Sumanbai and that Gyarsibai was present in the small house during the entire night when the rape was committed, appears to be highly improbable in the light of the evidence and circumstances.

15. The FIR states that one Dinesh was sent by Lalithabai to fetch her husband. Lalitabai and Mangilal have stated that they did not know anyone by the name Dinesh. Sumanbai stated in her evidence that on 29.1.1991, as her father was away, her brother-in-law went to bring back her father, that the name of her brother-in-law is Ramesh, but the SHO wrongly wrote his name as 'Dinesh'. But none else mentioned about such a mistake. Neither Ramesh nor Dinesh was examined.

16. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other

> circumstances make it highly improbable that such an incident ever took place. The learned counsel for the respondent submitted that defence had failed to prove that Mangilal, father of prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix, of the suggestion made on behalf of the defence, that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money, they had made the false charge of rape, to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication, does not have much relevance, as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the Trial Court and High Court erred in returning a finding of guilt.
>
> 17. We, therefore, allow the appeal, set aside the judgments of the courts below and acquit the accused of all charges."

37. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Vimal Suresh Kamble v. Chaluverapinake Apal SP (2003) 3 SCC 175***, wherein it has been held as under:-

> "18. However, the evidence of the prosecutrix does not inspire confidence. The occurrence took place at about 12.30 p.m. on a Sunday. The High Court has observed that on a Sunday, if the prosecutrix had raised an alarm it would have been heard by many persons who would have immediately come to her rescue, particularly in such a society where the respondent No.1 resided. On a Sunday most of the residents are at home at about 12.30 p.m. and, therefore, it was surprising that no one heard the cries of the appellant when she was raped by respondent No.1. There after also the conduct of the prosecutrix is rather surprising. She was loitering in the locality till about 2.30 p.m. i.e. for about 2 hours after the incident. She again went to the flat of respondent No.1 on the second floor after having come down immediately after the occurrence. The reason given by her is that she wanted to return the keys to respondent No.1. At one stage she stated she had decided to handover the keys to one of the neighbours, but actually she did not handover the keys to anyone. When she went up to the flat of respondent No.1 she met PW.2 and his wife. But she did not tell them about the incident. She then came back home and went to sleep. In the evening when her husband came she did not report the incident to him. At night, as usual, she cooked food for the family and went to sleep. Next morning she came to the society and attended to her routine work. Admittedly she worked in four flats on that day but she did not report the matter to anyone. Later in the afternoon she went to the house of her brother. It is there for the first time that she reported the matter to her sister-in- law Smt. Tarabai, who has not

> been examined. Only thereafter they went to the police station and lodged the report at about 3.00 p.m.
>
> 19.Respondent No.1 in his examination under Section 313 Cr. P.C. stated that the case had been fabricated only to extort money. He was a resident of the State of Karnataka and that is why PW.4 Manohar Sawant, a Shivsena leader, supported the prosecutrix. A false case had been lodged against him. On 25th April, 1992 the prosecutrix had asked him for some money but he refused to pay her saying that her salary had already been paid by his wife. On 26th April, 1992 she again came to him and again demanded money which he refused. She threatened him saying that if he did not give her money, he will have to face the consequences. In sum and substance, the defence of respondent No.1 appears to be that no such occurrence took place at all and a false case had been filed to extort money from respondent No.1 who was a government employee.
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> 20.In cross-examination PW.1 (prosecutrix) asserted that she was determined to lodge a complaint. She also knew that taking bath would cause disappearance of the evidence of rape and yet she took a bath as she was feeling dirty. Thereafter she went to sleep.
>
> 21.On an overall appreciation of the evidence of the prosecutrix and her conduct we have come to the conclusion that PW.1 is not a reliable witness. We, therefore, concur with the view of the High Court that a conviction cannot be safely based upon the evidence of the prosecutrix alone. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a truthful statement. We, therefore, find no reason to disagree with the finding of the High Court in an appeal against acquittal. The view taken by the High Court is a possible, reasonable view of the evidence on record and, therefore, warrants no interference. This appeal is dismissed."

38. It is quite apparent from the aforesaid exposition of law that ordinarily, the evidence of prosecutrix should not be suspected and should be believed and if the evidence is reliable, no corroboration is necessary, but the Hon'ble Apex Court in the aforesaid judgments, has very carefully observed that statement made by the prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court because rape cases cause the greatest distress and

humiliation to the victim but at the same time, false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The Hon'ble Apex Court in ***Rajoo v. State of MP*** (supra), has categorically held that the accused must also be protected against the possibility of false implication and it must be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for presuming that the statement of such a witness is always correct or without any embellishment or exaggeration. In the case at hand, as has been discussed in detail, statement of prosecutrix is full of contradictions and story put forth by her is highly improbable. Evidence available on record clearly suggests that it was prosecutrix, who of her own volition, joined the company of the accused and thereafter, came to Shimla from Rohru. PW8 and PW25 have categorically deposed before the court below that they joined the company of the prosecutrix and accused on the askance of the prosecutrix as they were of her prior acquaintance. Statements having been made by PW8 and PW25 clearly suggest that they remained throughout with the accused and prosecutrix on the dates of alleged incident, coupled with the fact that nothing has emerged in the medical evidence suggestive of the fact that prosecutrix was subjected to sexual intercourse in recent times. Leaving everything aside, it has specifically come in the statement of prosecutrix that she wanted to marry accused. She categorically stated in her cross-examination that she lodged FIR against the accused to pressurize him to solemnize marriage with her. If evidence, be it

ocular and documentary, is read in its entirety, it nowhere indicates that prosecutrix was subjected to sexual intercourse by the accused and as such, her sole testimony being highly improbable, deserves to be rejected outrightly, especially, when same has been not corroborated by any of the material prosecution witnesses.

39. The Hon'ble Supreme Court in case titled ***Rai Sandeep @ Deepu v. State (NCT) of Delhi, 2012 (8) SCC 21***, has held that sterling witness should be of a very high quality and caliber, whose version should, therefore, be unassailable. The Hon'ble Apex Court has held that such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end. Relevant paras of the judgment is reproduced herein below:-

> *22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific*

evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

23.On the anvil of the above principles, when we test the version of PW- 4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the Court at the time of trial. There are material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence took place. The so-called eye witnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants.

24. With the above slippery evidence on record against the appellants when we apply the law on the subject, in the decision reported in State of Punjab v. Gurmit Singh & Ors. (supra), this Court was considering the case of sexual assault on an young girl below 16 years of age who hailed from a village and was a student of 10th standard in the Government High School and that when she was returning back to her house she was kidnapped by three persons. The victim was stated to have been taken to a tubewell shed of one of the accused where she was made to drink alcohol and thereafter gang raped under the threat of murder. The prosecutrix in that case maintained the allegation of kidnapping as well as gang rape. However, when she was not able to refer to the make of the car and its colour in which she was kidnapped and that she did not raise any alarm, as well as, the delay in the lodging of the FIR, this Court held that those were all circumstances which could not be adversely attributed to a minor girl belonging to the poor section of the society and on that score, her version about the offence alleged against the accused could not be doubted so long as her version of the offence of alleged kidnapping and gang rape was consistent in her evidence. We, therefore, do not find any scope to apply whatever is stated in the said decision which was peculiar to the facts of that case, to be applied to the case on hand.

25. In the decision reported in Ashok Kumar v. State of Haryana (supra), this court while dealing with the offence under Section 376 (2) (g) IPC read with explanation held as under in Para 8:

"8.Charge against the appellant is under Section 376(2)(g) IPC. In order to establish an offence under Section 376(2)(g) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence."

26. Applying the above principle to the case on hand, we find that except the ipse-dixit of the prosecutrix that too in her chief examination, with various additions and total somersault in the cross examination with no support at all at the instance of her niece and nephew who according to her were present in the house at the time of occurrence, as well as, the FSL report which disclosed the absence of semen in the socks which was stated to have been used by the accused as well as the prosecutrix to wipe of semen, apart from various other discrepancies in the matter of recoveries, namely, that while according to the prosecutrix the watch snatched away by the accused was 'Titan' while what was recovered was 'Omex' watch, and the chain which was alleged to have been recovered at the instance of the accused admittedly was not the one stolen, all the above factors do not convincingly rope in the accused to the alleged offence of 'gang rape' on the date and time alleged in the chargesheet.

27. In the decision reported as State of Himachal Pradesh v. Asha Ram - AIR 2006 SC 381, this Court highlighted the importance to be given to the testimony of the prosecutrix as under in para 5:

5. .....It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for

judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case." (emphasis added)

28. That was a case where the father alleged to have committed the offence of rape on one of his daughters who was staying with him while his wife was living separately due to estranged relationship. While dealing with the said case, where the prosecutrix, namely, the daughter, apart from the complaint lodged by her, maintained her allegation against her father in the Court as well. This Court held that the version of the prosecutrix in the facts and circumstances of that case merited acceptance without any corroboration, inasmuch as, the evidence of rape victim is more reliable even that of an injured witness. It was also laid down that minor contradictions and discrepancies are insignificant and immaterial in the case of the prosecutrix can be ignored.

29. As compared to the case on hand, we find that apart from the prosecutrix not supporting her own version, the other oral as well as forensic evidence also do not support the case of the prosecution. There were material contradictions leave alone lack of corroboration in the evidence of the prosecutrix. It cannot be said that since the prosecutrix was examined after two years there could be variation. Even while giving allowance for the time gap in the recording of her deposition, she would not have come forward with a version totally conflicting with what she stated in her complaint, especially when she was the victim of the alleged brutal onslaught on her by two men that too against her wish. In such circumstances, it will be highly dangerous to rely on such version of the prosecutrix in order to support the case of the prosecution.

30. In the decision reported as Lalliram & Anr. v. State of Madhya Pradesh (supra) in regard to an offence of gang rape falling under Section 376 (2) (g) this Court laid down the principles as under in paras 11 and 12:

"11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra v. State of Orissa where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar v. State of Haryana.)
12. As rightly contended by learned counsel for the appellants, a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar case it was observed that a prosecutrix complaining of having been a victim of the offence of

rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial." (emphasis added)

31. When we apply the above principles to the case on hand, we find the prevaricating statements of the prosecutrix herself in the implication of the accused to the alleged offence of gang rape. There is evidence on record that there was no injury on the breast or the thighs of the prosecutrix and only a minor abrasion on the right side neck below jaw was noted while according to the prosecutrix's original version, the appellants had forcible sexual intercourse one after the other against her. If that was so, it is hard to believe that there was no other injury on the private parts of the prosecutrix as highlighted in the said decision. When on the face value the evidence is found to be defective, the attendant circumstances and other evidence have to be necessarily examined to see whether the allegation of gang rape was true. Unfortunately, the version of the so called eye witnesses to at least the initial part of the crime has not supported the story of the prosecution. The attendant circumstances also do not co-relate to the offence alleged against the appellants. Therefore, in the absence of proper corroboration of the prosecution version to the alleged offence, it will be unsafe to sustain the case of the prosecution.

32. In the decision reported as Krishan Kumar Malik v. State of Haryana (supra) in respect of the offence of gang rape under Section 376 (2) (g), IPC, it has been held as under in paras 31 and 32:

"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.
32. Indeed there are several significant variations in material facts in her Section 164statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant." (emphasis added)

33. Applying the said principles to the facts of the case on hand, we find that the solitary version of the chief examination of PW-4,

> the prosecutrix cannot be taken as gospel truth for its face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellants.
>
> 34. The prosecution has miserably failed to establish the guilt of gang rape falling under Section 376(2) (g), IPC against the appellants. The conviction and sentence imposed on the appellants by the trial Court and confirmed by the impugned order of the High Court cannot, therefore, be sustained. The appeals are allowed. The judgment and order of conviction and sentence passed by the trial Court and confirmed by the High Court are hereby set aside. The appellants are acquitted of all the charges and they be set at liberty forthwith, if not required in any other case.

40. Reliance is also placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Narender Kumar v. State (NCT of Delhi), 2012 (7) SCC 171***, wherein it has been held as under:-

> 28. The 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 not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.
>
> 29.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 defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. 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 the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).
>
> 30. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its

totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

31.The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.

32. The instant case is required to be decided in the light of the aforesaid settled legal propositions. We have appreciated the evidence on record and reached the conclusions mentioned hereinabove. Even by any stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime, In such a fact-situation, the appellant becomes entitled to the benefit of doubt.

33.In view of above, the appeals succeed and are allowed. The judgment and order dated 25.3.2009 passed by the High Court of Delhi in Criminal Appeal No. 53 of 2000 and that of the trial court dated 7.12.1999 are hereby set aside. The appellant is on bail, his bail bond stands discharged."

41. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Abbas Ahmad Choudhary v. State of Assam (2010) 12 SCC 115,*** wherein it has been held as under:-

9. We are however, of the opinion that the involvement of Abbas Ahmad Choudhary seems to be uncertain. It must first be borne in mind that in her statement recorded on 17th September, 1997, the prosecutrix had not attributed any rape to Abbas Ahmad Choudhary. Likewise, she had stated that he was not one of those who kidnapped her and taken to Jalalpur Tea Estate and on the other hand she categorically stated that while she along with Mizazul Haq and Ranju Das were returning to the village that he had joined them somewhere along the way but had still not committed rape on her. It is true that in her statement in court she has attributed rape to Abbas Ahmad Choudhary as well, but in the light of the aforesaid contradictions some doubt is created with regard to his involvement.

10.Some corraboration of rape could have been found if Abbas Ahmad Choudhary too had been apprehended and taken to the police station by P.W. 5 -Ranjit Dutta the Constable. The Constable, however, made a statement which was corraborated by the Investigating Officer that only two of the appellants Ranju Das and Md. Mizalul Haq along with the prosecutrix had been brought to the police station as Abbas Ahmad Choudhary had

> run away while en route to the police station. Resultantly, an inference can be rightly drawn that Abbas Ahmad Choudhary was perhaps not in the car when the complainant and two of the appellants had been apprehended by Constable Ranjit Dutta.
> 11.We are, therefore, of the opinion that the involvement of Abbas Ahmad Choudhary is doubtful. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.

42. Reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Dinesh Jaiswal v. State of MP, (2010) 3 SCC 232***, wherein it has been held as under:-

> "10.Mr. C.D. Singh has however placed reliance on Moti Lal's case (supra) to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one.
>
> 11.As already mentioned above, in our opinion, the story given by the prosecutrix does not inspire confidence. We thus allow this appeal, set aside the impugned judgments and direct that the appellant be acquitted."

43. Now, if this Court proceeds to test the version of prosecutrix (PW2) on the anvil of principles laid down in the aforesaid judgment, it has no hesitation to conclude that testimony of prosecutrix is not worth credence as there is total variation in her version; what was stated in the complaint and what was deposed before the court at the time of trial. Similarly, there are material contradictions in her version with regard to her having met accused for the first time at Rohru and her meeting PW25 Atul and PW8 Minakshi at Rohru and Shimla, respectively. Similarly, prosecution failed to prove the

recovery of Towel Ext.6/A. Medical/FSL report nowhere co-relates the version of the prosecutrix that she was subjected to sexual intercourse by the accused and as such, prosecutrix failed to instill the required confidence to bring home the guilt, if any, of the appellant-accused.

44. Though having carefully perused and examined the evidence, available on record, this Court is of the definite view that prosecution has failed to prove that prosecutrix was subjected to sexual intercourse as alleged by her on the alleged date of incident but yet there is another aspect of the matter, if it is examined from another angle. It is not the case of the prosecutrix that she agreed to have sexual intercourse with the accused believing that he is likely to marry her and definitely, there was no mis-conception of fact, rather specific allegation of prosecutrix is that she told accused to wait for sex until marriage, but he did not agree and forced him upon her and committed rape. Careful perusal of initial statement having been made by the prosecutrix under Section 154 Cr.PC/complaint Ext.PW2/A suggests that she alleged that accused forcibly established sexual relations with her at Cemetery at Shimla. She again in her statement recorded under Section 164 Cr.PC claimed that accused forcibly established physical relations with her despite her saying no to it and she requested him to wait till the marriage. In her statement before the court below, she stated that PW25 Atul left the room in the morning and thereafter, accused Vikram committed sexual intercourse with her without her consent forcibly. She further stated that she asked the accused to perform marriage first, but her request was

ignored by the accused, who thereafter committed forcible intercourse by laying mattress on the floor of the room.

45. Though as has been categorically concluded by this Court (supra) that having perused evidence, this Court is convinced and satisfied that there is no evidence worth the name that prosecutrix was subjected to sexual intercourse on the date of alleged incident initially at the residence of PW25 and subsequently, at the room of PW8 Minakshi, but even if statement of PW2 Prosecutrix is presumed to be correct, it compels this Court to draw an inference that there is no mis-conception of fact as far as prosecutrix is concerned, rather statement of prosecutrix suggests that she of her own agreed to have intercourse with the accused, because she herself, stated that she requested accused to wait till marriage, but he forcibly committed intercourse. It has also come in her statement that she asked the accused to perform marriage first. Aforesaid statement having been made by prosecutrix does indicate that she was fully aware of the moral quality and inherent risk involved and she having considered the pros and cons of the act, subjected herself to wishes of the accused. It is not in dispute that at the time of alleged incident, prosecutrix was major and was capable of understanding the consequences of her having joined the company of the accused, especially when the accused had allegedly brought her to Shimla on the pretext of marriage. It also emerges from the statement of prosecutrix and PW8 Minakshi that she wanted to marry accused, but parents of the accused were not in favour of the same, that is why, they decided to elope, meaning thereby, the prospect of marriage proposal not materializing was

very much in the mind of prosecutrix, but despite that she joined the company of the accused, who allegedly despite her opposition, sexually assaulted her, but as has been taken note herein above, statement of prosecutrix clearly reveals/indicates that her participation in the sexual act was voluntary and deliberate. In this regard, reliance is placed on judgment rendered by the Hon'ble Supreme Court in case titled ***Deelip Singh @ Dilip Kumar v. State of Bihar, 2005 (1) SCC 88***, wherein it has been held as under:-

> *2.The victim girl lodged a complaint to the police on 29.11.1988 i.e., long after the alleged act of rape. By the date of the report, she was pregnant by six months. Broadly, the version of the victim girl was that she and the accused were neighbours and fell in love with each other and one day, the accused forcibly raped her and later consoled her saying that he would marry her, that she succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her and therefore continued to have sex on several occasions. After she became pregnant, she revealed the matter to her parents. Even thereafter the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl but the accused avoided to marry her and his father took him out of the village to thwart the bid to marry. The efforts made by the father to establish the marital tie failed and therefore she was constrained to file the complaint after waiting for sometime.*
>
> *27.On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, we have the decision of Division Bench of Calcutta High Court in Jayanti Rani Panda vs. State of West Bengal [1984 Crl.L.J. 1535]. The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in Uday (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:*
>
> *"Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is….. why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then*

the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged."

The discussion that follows the above passage is important and is extracted hereunder:

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her." (emphasis supplied)

The learned Judges referred to the decision of Chancery Court in Edgomgtpm vs. Fotz,airoce (1885) 29 Ch.D 459 and observed thus:

"This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: "There must be a misstatement of an existing fact." Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Sec. 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact."

After referring to the case law on the subject, it was observed in Uday, supra at paragraph 21:

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding

> *circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."*

46. Hon'ble Apex Court in judgment in ***Deelip Singh @ Dilip Kumar's*** case (supra) while referring to various judgments, arrived at a conclusion that consent given by the prosecutrix to have sexual intercourse with a person, with whom, she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under mis-conception of fact. No doubt, Hon'ble Apex Court in aforesaid Judgment has stated that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under a misconception of fact, rather court must in each case consider the evidence before it and the surrounding circumstances, before arriving at a conclusion because each case has its own peculiar facts which may have a bearing on the question whether consent was voluntary or was given under a misconception of fact. In the case at hand, at the cost of repetition, though this Court has no iota of doubt after having closely/minutely analyzed evidence that prosecution miserably failed to prove that prosecutrix was subjected to sexual intercourse by the accused, but bare perusal of statement of prosecutrix, if considered solely, it itself suggests that she was deeply in love with the accused and wanted to marry him. There is ample evidence available on record that prosecutrix voluntarily joined the company of the accused with a view to

marry him and she remained in the company of the accused for at least 2 days of her own volition and without there being any external pressure.

47. Leaving everything aside, prosecution invariably is under obligation to prove that prosecutrix is a reliable witness and her testimony is sufficient to hold accused guilty of the alleged crime and the burden to prove such, invariably lies on the prosecution, but in the case at hand, evidence brought on record by the prosecution, as has been discussed in detail, is wholly insufficient and does not inspire confidence at all, rather story put forth by the prosecution appears to be highly improbable and full of contradictions and as such, deserves outright rejection.

48. In the case at hand, though there is no iota of evidence to connect the accused with the commission of offence alleged to have been committed by him, but as has been discussed herein above, evidence of prosecutrix should not be suspected unless her evidence is not reliable, but in the instant case, sole testimony of prosecutrix, as has been examined herein above carefully, does not inspire confidence, rather appears to be highly improbable and compels this Court, to arrive at a conclusion that she of her own volition, with a view to perform marriage, had joined the company of the accused. Hence, having carefully perused the material available on record, this Court finds that two views are possible and as such, one being beneficial to the accused needs to be taken note of while determining the guilt of the accused. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **P. Satyanarayana Murthy v. District Inspector of Police State of Andhra Pradesh and Anr. (2015) 10 SCC 152,** wherein it has been held

that if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused. Relevant para whereof is being reproduced herein below:-

> *"26.In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in Sujit Biswas vs. State of Assam (2013)12 SCC 406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused."*

49. In the case titled "**Jose alias Pappachan v. Sub-inspector of Police, Koyilandy and Anr. (2016) 10 SCC 519,** the Hon'ble Apex Court, has held as under:-

> *"56.It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted."*

50. Reliance is also placed on judgment rendered by the Hon'ble Supreme Court in case titled ***T. Subramanian vs. State of Tamil Nadu, (2006)1 SCC 401,*** wherein it has been held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt, relevant para of the judgment is reproduced herein below:

> *10. The evidence throws out a clear alternative that the accused was falsely implicated at the instance of PWs.1, 2 and 6. If two views were possible from the very same evidence, it cannot be said that the prosecution had proved beyond reasonable doubt that the appellant had received the sum of Rs. 200/- as illegal gratification. We are, therefore, of the considered view that the trial court was right in holding that the charge against the appellant was not proved and the High Court was not justified in interfering with the same.*
>
> *11. We, therefore, allow this appeal, set aside the order of the High Court and restore the order of the trial court, acquitting the appellant of the charge.*

51. In this regard, reliance is also placed on judgment rendered by the Hon'ble Apex Court in case titled ***Bhagwan Singh and Ors v. State of MP (2002) 4 SCC 85***, wherein it has been held as under:-

> "*We do not agree with the submissions of the learned counsel for the appellants that under Section 378of the Code of Criminal Procedure the High Court could not disturb the finding of facts of the trial court even if it found that the view taken by the trial court was not proper. On the basis of the pronouncements of this Court, the settled position of law regarding the powers of the High Court in an appeal against an order of acquittal is that the Court has full powers to review the evidence upon which an order of acquittal is based and generally it will not interfere with the order of acquittal because by passing an order of acquittal the presumption of innocence in favour of the accused is reinforced. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence. In the instant case the trial court acquitted the respondents by not relying upon the testimony of three eye- witnesses, namely, Kiran (PW7), Mukesh (PW12) and Jagdish (PW22) on considerations which apparently appeared to be extraneous. Such findings of acquittal apparently are based upon erroneous views or the result of ignoring legal and admissible evidence with the result that the findings arrived at by the trial court are held to be erroneous. The High Court has ascribed valid reasons for believing the statements of those*

> *witnesses by pointing out the illegalities committed by the trial court in discarding their testimonies. The High Court has also rightly held that the trial court completely ignored the basic principles of law in criminal jurisprudence which entitles the accused to claim the benefit of right of self-defence. Without there being any legal and admissible evidence but swayed by finding some injuries on the person of the accused, the trial court wrongly held that the respondents were justified in causing the death of three persons in exercise of their right of self-defence. No fault, therefore, can be found in the judgment of the High Court on this ground."*

52. Consequently, in view of the detailed discussion made herein above as well as law relied upon, this Court has no hesitation to conclude that learned court below has not appreciated the evidence in its right perspective and as such, findings returned by it deserve to be set-aside. Accordingly, present appeal is allowed and judgment passed by the Court below is quashed and set-aside and appellant-accused is acquitted of the offence punishable under Section 376 IPC. Bail bonds furnished by the appellants are discharged. Fine amount, if any deposited by the appellant, be refunded to him. Release warrants be prepared forthwith.

Present appeal stands disposed of, so also pending applications, if any.

1st November, 2018 **(Sandeep Sharma),**
Judge

manjit