

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

Reserved on : 25.04.2023

Pronounced on : 16.06.2023

CRA No.16/2006

Raman Masih

.....Appellant(s)/Petitioner(s)

Through: Mr. Gagan Basotra, Sr. Advocate with  
Mr. Mohinder Kumar, Advocate

**Vs**

State of J&K

..... Respondent(s)

Through: Mr. P. D. Singh, Dy. AG

**Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE**

**JUDGMENT**

**01.** This appeal arises out of the judgment dated 14.10.2006 delivered by the court of learned 2<sup>nd</sup> Additional Sessions Jammu (hereinafter referred to as 'the trial court'), by virtue of which the learned trial court has convicted the appellant for the commission of offences under section 376, 456 RPC and has sentenced him to undergo simple imprisonment for seven years along with fine of Rs. 1000/ for the commission of offence under section 376 RPC and imprisonment of two years along with fine of Rs. 1,000/ for the commission of offence under section 456 RPC. In default of the payment of the fine, appellant has been directed to undergo further sentence for a period of two months.

**02.** The judgment has been impugned by the appellant on the grounds that the learned trial court has not appreciated the evidence in its right perspective and has wrongly convicted the appellant when the medical evidence did not support the prosecution version. It is also stated that once the appellant was

acquitted of the charge for the commission of offence under section 4/25 Arms Act, the appellant could not have been convicted for the commission of offences under section 376, 456 RPC as the factum of possession of the Kirch by the appellant was not proved, which was a vital fact in the sequence of events as projected by the prosecution.

**Submissions of the Appellant:**

**03.** Mr. Gagan Basotra, learned Senior Counsel for the appellant argued that the prosecution has miserably failed to prove the age of the prosecutrix as 14 years and further the medical evidence has clearly negated the testimony of the prosecutrix, as the prosecutrix had stated that she suffered bleeding from private parts whereas the Doctor has clearly stated that there was no injury on any part of the body of the prosecutrix. He further argued that even the FSL report has demolished the prosecution story that trousers of the prosecutrix were having stains of blood and semen. Mr. Basotra further argued that the incriminating evidence against the appellant was not put to him in accordance with law and it has caused miscarriage of justice to the appellant.

**Submissions of the Respondent:**

**04.** Per contra, Mr. Pawan Dev Singh, learned counsel for the respondent argued that the prosecutrix as well as her family members have clearly deposed in an unambiguous manner that the appellant entered in the room of the prosecutrix where her brother and sister were also sleeping and he sexually assaulted the prosecutrix. He further argued that in view of the statement of the prosecutrix, the evidence of the Doctor would have no bearing upon the merits of the case.

**05.** Heard learned counsel for the parties and perused the record including trial court record.

**Prosecution Case:**

**06.** The case projected by the prosecution in the charge-sheet is that the prosecutrix lodged an oral report with Police Station Ramgarh on 22.07.2012 at 01.15 A.M stating therein that she along with her brother and sister, was sleeping in the room and her parents were sleeping in the verandah of the house. The light was on in the room. At around 12:15 a.m, someone forced entry into the room and gagged her mouth with his hand. She woke up and was scared. She found that the light was off in the room. When she tried to get rid of him, he threatened her not to make any noise otherwise, he would kill her as he was armed with a kirch. She recognized him from his voice as the appellant, who was residing adjacent to their quarter. He slapped her thrice, opened the string of her trousers and sexually assaulted her. She raised hue and cry and her brother as well as sister woke up. His brother switched on the light. After hearing the noise, her parents also came there. Accused had bolted the door from inside and after opening the door and by threatening her parents with the Kirch, who were standing at the door, succeeded in fleeing away from the spot. Her parents found her without trousers. She disclosed the incident to her parents. On receipt of this information, FIR No. 33/2002 was registered by the Police Station Ramgarh for commission of offences under section 456, 376 RPC and for 4/25 of Arms Act. The statement of the prosecutrix and other witnesses were recorded by the Investigating Officer. The trousers of the prosecutrix having stains of blood and semen were sent to the FSL for chemical analysis. The prosecutrix was examined by the medical officer. After the

completion of the investigation, the charge-sheet was laid against the appellant for commission of offences under section 376/456 RPC and 4/25 Arms Act before the JMIC Samba, which was committed to the learned Sessions Court Jammu and was later assigned to the learned trial court. The learned trial court vide its order dated 24/04/2003 charged the appellant for commission of offences under section 456/376 RPC and 4/25 of Arms Act. Out of the 16 witnesses cited by the prosecution, 14 witnesses were examined by the prosecution. The appellant did not examine any witness in his support.

**07.** The allegations against the appellant are that on 22.07.2002 at 12.15 a.m, he entered into the room, where the prosecutrix along with her brother and sister was sleeping whereas the parents of the prosecutrix were sleeping in the verandah of the house. The appellant had allegedly sexually assaulted the prosecutrix by threatening her that she would be killed if she raised any hue and cry, as the appellant was armed with the kirch. The prosecutrix has been stated to be 14 years of age. It is also alleged by the prosecution that her trouser was stained with blood and semen.

**Prosecution Evidence:**

**08.** In order to prove the commission of offence of lurking house trespass and rape by the appellant, the prosecution has mainly relied upon the statements of prosecutrix, father, mother, brother and sister of the prosecutrix. The prosecutrix stated that the appellant was related to her. About one year and few months ago, in the night, she was sleeping in a room along with her brother and sister. Her parents were sleeping in the verandah of the house. The appellant at around 11:45 in the night entered into her room as the door was

open. He entered the room and closed the door. He laid upon herself and opened her trouser. It was dark in the room. Thereafter the appellant sexually assaulted her. She cried because of pain and her brother woke up. The appellant thereafter ran away. In the meanwhile, her parents also woke up and came there. Her parents also saw the appellant running away. She suffered bleeding from her private parts. The appellant also threatened her that if she disclosed to anyone, then she would be killed. The appellant was also having knife with him. Thereafter her parents went to the police station. She went after sometime. The police also came on spot after an hour. She handed over her trouser and shirt to the police. The same were seized vide seizure memo (ExpwNK). She was also medically examined by the doctor. She proved the FIR (ExpwNK1). During cross-examination, she stated that she did not know the name of the appellant. Being a relative he used to come to their house. She was 16 years of age at the time of recording of her statement.

**09.** PW Rita (Mother of the prosecutrix) stated that the appellant was related to her and she was sleeping along with her husband in the verandah of the house. Children were sleeping inside the room. The prosecutrix was 14 years of age at the time of incident. The appellant entered the room and sexually assaulted her daughter. She found her daughter trembling without trousers. She was scared. The appellant ran away. She was bleeding from her private parts. She went to the police station. Her husband and prosecutrix went to the police station and FIR was registered. She signed the FIR (Expw-NK1). Police arrived on spot at around 12. The trousers were handed over to the police and she signed the seizure memo (EXPW- NK-1). Her husband also put his thumb impression on the same. The prosecutrix was examined by Doctor

and was taken to Jammu for x-ray. During cross examination, she stated earlier her daughter was studying in the school and she had read up to 2<sup>nd</sup>/3<sup>rd</sup> class. She came to know that the accused was in the room and accused stated that he had not done anything. The accused was having khokhri. The residents had gathered on spot. Three houses belonged to appellant and one house belonged to them. The mother, sister-in-law and the wife of the accused also came there. The statement of sister-in-law of the accused was recorded. The trousers of the prosecutrix was blood stained. The clothes were taken by the police in the night only.

10. PW Gopal Masih (Father of the prosecutrix) stated that the appellant was related to him and the prosecutrix was his daughter. Two years ago he was sleeping in the courtyard along with his wife. Children were sleeping inside the room. The prosecutrix was also sleeping in the room. The accused entered the room and bolted the door from inside. The prosecutrix was undressed. The children raised noise. The prosecutrix also made a noise. He woke up and found the accused running away from the spot. The prosecutrix told her that the accused had undressed and raped her. The prosecutrix was bleeding from her private parts. He went to the police station. Prosecutrix also went to the police station at around 12 in the night. Police immediately came to their house. The accused had absconded from his house. Police took the trousers of the prosecutrix. He put his thumb impression on the seizure memo (Expw-NK). He also put his thumb impression on the FIR (Expw NK1). The accused had stated in the police station that he had thrown the kirch in the store. He put his thumb impression on the disclosure statement (Expw-GM). kirch was also seized vide seizure memo (Expw-GM1). The prosecutrix was also examined by the doctor.

During cross-examination he stated that he saw the accused in his verandah and he was about to attack his wife. After hearing the noise, the mother, the sister-in-law and the wife of the accused also came on spot. The residents who were residing in front of the quarter also gathered on spot.

**11.** PW Vikram (Brother of the prosecutrix) stated that his sister was raped and she was 14 years of age. She was studying in 7<sup>th</sup> Class. She was sexually assaulted by the appellant almost one year ago. His sister was sleeping on the bed and his younger sister was also sleeping along with her. His parents were sleeping outside. At around 12 in the night, the accused came and slept on bed along with prosecutrix. He heard the cries of his sister and woke up. His sister was completely nude and her clothes were taken off by the accused. Raman (accused) asked him to sleep. He went to open the door as the door was bolted from inside but the accused himself opened the door as he (witness) could not open the bolt. His sister was trembling and was bleeding. He did not see but the salwar was blood stained. After opening the door, his mother came there and younger sister also woke up. His mother woke up his father who also came on spot and in the meantime, the accused ran away. Thereafter, he along with his parents and prosecutrix went to the police station at 12.30. The Police came to their house and seized blood-stained trousers of the prosecutrix and took away with them. During cross-examination, he stated that the accused had switched off the light but he had not seen him switching off the light. When he woke up, the accused was standing alongside the bed. His sister was sitting on the bed at that time and was crying. She was nude. The accused had assaulted her sister when he woke up. When he woke up, the accused had laid himself upon his sister. The prosecutrix was trying to get rid of the accused. He had made similar

statement to the Police that his sister was raped and he had not used the word wrong act. He cannot say as to how the Police mentioned the same in his statement. The Police had recorded the statements of only the family members and not of others. His father had not seen the occurrence. He had gone to the Police Station along with his parents.

**12.** PW-Deepa stated that the accused resided near their residence. Prosecutrix was her sister. The accused had committed wrong act with her sister. It was night. She alongwith her sister and brother were sleeping in the same room. Her parents were sleeping outside. The door of the room was open, where they were sleeping. Her sister was crying and after hearing cries, she also woke up. When she heard the cries, the light was off and her brother switched on the light. Sister was not wearing trousers and the accused was also without pant. The accused had laid himself upon her sister. The accused opened the door and ran away. They made noise and after hearing noise, her parents woke up and came inside and when they were about to enter inside, the accused ran away. Her sister was crying. Thereafter, her parents and the prosecutrix went to the Police Station. The Police came to their house. She had told the Police that the accused was armed with one kirch. During cross-examination, she stated that all the brothers and sisters sleep together after closing the door but on that day, the door was open. When she woke up, the accused had laid himself upon her sister and he was not wearing any clothes.

**13.** PW Dr. Reva Sharma, Gynecologist stated that on 22.07.2002, she was posted as Gynecologist at SDM, Samba. Prosecutrix was brought to her by SHO Ramgarh. She examined the victim and as per her opinion, on examination, there was no evidence of sexual intercourse. She proved the



report (ExpW/RS). She further stated that on the basis of examination of the victim, there was no presence of spermatozoa on the smears. During cross examination, she stated that she cannot say whether the victim could resist or not.

**14.** PW Dr. Amarjit Singh stated that he examined one Raman Masih son of Sadiq Masih, who was brought before him at 6:15 PM by the police on 29.07.2002. He was having pain and was advised for treatment. During cross-examination he stated that he examined Raman Masih son of Sadiq Masih but not Raman Masih son of Gopal Masih.

**15.** PW Tarsam Masih stated that the accused was arrested by the Police. Nothing was seized in his presence. The accused was related to him. He denied the contents of the disclosure statement.

**16.** PW-Gulzar and Joginder Masih were declared hostile and during cross-examination, no incriminating material could be extracted from them by the APP during their cross-examination.

**17.** PW-Rasal Singh resealed the packet and issued the certificate (ExpW RS).

**18.** PW-Arjun Singh and PW-Kaka Ram proved the supurdnama (ExpW AS).

**19.** PW Sanjeev Singh, Investigating Officer stated that he conducted the investigation and after the completion of the investigation, he filed the charge sheet against the accused for commission of offences under sections 376 and 456 RPC and 4/25 Arms Act. During cross-examination, he stated that he went

on spot. There was double bed in the room. He had not seized the bed sheet. The prosecutrix was a student but he did not collect any marks list or date of birth from the school. He had obtained one report from the doctor. The accused was arrested on 28.07.2005.

**Appreciation of Evidence:**

20. Before this court examines the prosecution evidence, this Court deems it proper to observe that the incriminating evidence brought on record by the prosecution has not been put to the appellant in accordance with law. As per the mandate of section 342 of the Criminal Procedure Code (Section 313 of the Central Code), the incriminating evidence brought on record is required to be put to the accused, so as to seek his explanation and in fact this provision is an embodiment of the principle of natural justice that no one should be condemned unheard. The learned trial court in the instant case has put the incriminating material to the appellant in following manner:

21. Question: Whether you have heard the statements of the prosecution witnesses?

Answer: Yes.

Question: Whether you have committed an offence?

Answer: No

Question: The prosecution witnesses, namely, prosecutrix, Gopal Masih, Reeta, Vikram Masih, Deepa Masih, Tarsem Masih, Gulzar Masih and other witnesses have deposed against you?

Answer: All the witnesses are related to Gopal Masih and witness No. 1 is his daughter. He was having enmity with Gopal Masih and because of enmity, statements have been made against him.

Question: Whether you want to say anything in respect of the allegations?

Answer: The allegations are false. Because of enmity, these allegations have been leveled against him.

Question: Whether you want to lead any evidence in their support?

Answer: Yes.

**22.** From the perusal of the statement of the appellant recorded under section 342 Cr.P.C., it is evident that no incriminating evidence with specific reference has been put to the appellant and in one question only the appellant has been asked to explain why these witnesses have deposed against him and he was not confronted with the incriminating statements made by those witnesses. Further from the perusal of the record, this Court finds that PW Joginder Masih, PW Gulzar Masih and PW Tarsem Masih have not deposed against the appellant but despite that the appellant was asked to reply as to why these witnesses have made statements against the appellant. In **‘Maheshwar Tigga v. State of Jharkhand’**<sup>1</sup> the Hon’ble Apex Court considered the importance of examination of the accused under Section 313 Cr.P.C. and observed as under:

“7. A bare perusal of the examination of the accused under Section 313 CrPC reveals it to be extremely casual and perfunctory in nature. Three capsuled questions only were asked to the appellant as follows which he denied:

“*Question 1.* There is a witness against you that when the informant V. Anshumala Tigga was going to school you were hiding near Tomra canal and after finding the informant in

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<sup>1</sup> (2020) 10 SCC 108’

isolation you forced her to strip naked on knifepoint and raped her.

*Question 2.* After the rape when the informant ran to her home crying to inform her parents about the incident and when the parents of the informant came to you to inquire about the incident, you told them that “if I have committed rape then I will keep her as my wife”.

*Question 3.* On your instruction, the informant's parents performed the “Lota Paani” ceremony of the informant, in which the informant as well as your parents were present, also in the said ceremony your parents had gifted the informant a saree and a blouse and the informant's parents had also gifted you some clothes.”

**8. It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.**

9. This Court, time and again, has emphasised the importance of putting all relevant questions to an accused under Section 313 CrPC. In *Naval Kishore Singh v. State of Bihar* [(2004) 7 SCC 502] , it was held to be an essential part of a fair trial observing as follows :

“5. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. **We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence.**”

(Emphasis Added)

**23.** In its latest pronouncement in case, titled, **Raj Kumar v. State (NCT of Delhi)**<sup>2</sup>, the Hon'ble Apex Court has held as under:

**17.** The law consistently laid down by this Court can be summarized as under:

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.

**24.** So far as instant case is concerned it appears that the learned Trial Court without even perusing the statements made by the prosecution witnesses put the same to the appellant without referring the incriminating evidence to the appellant and it has no doubt caused prejudice to the appellant. Without referring the incriminating evidence to the appellant and seeking any explanation from the appellant, the appellant could not have been convicted by the learned trial court by placing reliance on that evidence. Another issue that

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<sup>2</sup> 2023 SCC OnLine SC 609

crops up before this court is as to whether the matter is required to be remanded for compliance of the provisions contained under section 342 Cr.P.C after 21 years of the occurrence, as the learned trial court has in fact not complied with the provisions contained under section 342 Cr.P.C as the learned Trial Court has merely completed the formality of recording the statement of the accused. In this regard, the judgment in Raj Kumar's case (supra) is very relevant, where the Hon'ble Apex court observed that **'Even assuming that the defect or irregularity was curable, the question is whether today, the appellant-accused can be called upon to explain the said circumstance. More than 27 years have passed since the date of the incident. Considering the passage of time, we are of the view that it will be unjust now at this stage to remit the case to the Trial Court for recording further statement of the appellant under Section 313 of CrPC.** As such this court finds that it would be unjust at this stage to remand the matter for examination of the appellant after 21 years of the occurrence.

25. While examining the evidence brought on record by the prosecution this court finds that the prosecutrix and all her family members have deposed against the appellant. The statement made by PW-Dipa (Sister of the prosecutrix) is very material, as in her cross examination, she has stated that the brother and sisters used to sleep together after closing the door, but on the day of occurrence, the door was not closed. It is not forthcoming from the evidence as to how the appellant came to know that the children including the prosecutrix were sleeping in the room and the door was open on that day. PW Vikram has made a statement which is unbelievable as he stated that the accused entered their room and slept along with his sister. He heard the cries of

his sister and then woke up and the accused asked him to sleep. It is improbable to believe that the appellant would know that the prosecutrix was sleeping in the room with doors open on that day only and also that the appellant would go to the house of the appellant where the parents of the prosecutrix were also there and would sexually abuse the prosecutrix on a bed where her brother and sister were sleeping with her. The prosecution story appears to be not only doubtful but also improbable. In **Tameezuddin v. State (NCT of Delhi)**,<sup>3</sup> the Hon'ble Apex Court has 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 the story is indeed improbable.”**

**(Emphasis Added)**

**26.** Though the prosecutrix has alleged that the prosecutrix was 14 years of age at the time of alleged occurrence but there is no documentary evidence in the form of date of birth certificate or school certificate, demonstrating the date of birth of the prosecutrix. The Investigating Officer PW Sanjeev Singh has stated that the prosecutrix was a student but he did not collect any record from her school in respect of her date of birth but he admitted that he got the prosecutrix examined from a doctor. Though the prosecution has not proved the certificate issued by the Radiologist, GMC, Jammu but as per report of the Radiologist, the bone age of the prosecutrix was between 14 to 18 years. There can be error of 2 or 3 years on either side. In view of this, the benefit must go to the accused and the prosecutrix cannot be considered as **minor**.

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<sup>3</sup> (2009) 15 SCC 566

Reliance is placed upon the decision of the Hon'ble Apex court in *Rajak Mohammad v. State of H.P.*,<sup>4</sup> where in it was held as under:

“8. On the other hand, we have on record the evidence of Dr Neelam Gupta (PW 8), a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

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

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

(Emphasis Added)

27. As this court has already observed that the prosecution story appears to be doubtful and improbable as such now this court would examine whether the other attending circumstances lends any credence to the prosecution story. It is true that much importance is not to be given to the medical opinion when the prosecutrix has deposed about the commission of offence of rape by the accused, but equally true is that when it is the positive case of the prosecution that the prosecutrix suffered bleeding from her private parts, then the medical evidence would be of some significance. PW Dr. Reva Sharma stated that there was no mark of violence on the body of the victim and also that there was no evidence of sexual intercourse. It assumes significance as the prosecutrix was examined by the Gynaecologist on 22.07.2002 at 11 a.m whereas the time of occurrence has been mentioned as 12.15 AM on 22.07.2002, meaning thereby that the prosecutrix was examined within 10-11 hours of the alleged commission of offence of rape. Had there been any injury, the doctor would

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<sup>4</sup> (2018) 9 SCC 248



obviously have mentioned the same in the report. In this regard, it would be apt to take note of the judgment of the Hon'ble Apex Court in **YerumallaLatchaiah v. State of A.P.**<sup>5</sup>, wherein it was held as under:

**“3. In the present case, age of the victim was only eight years at the time of alleged occurrence. Immediately after the occurrence, she was examined by Dr. K. Sucheritha (PW 7) who has stated in her evidence that no injury was found on any part of the body of the victim, much less on private part. Hymen was found intact and the doctor has specifically stated that there was no sign of rape at all. In the medical report, it has been stated that vaginal smears collected and examined under the microscope but no sperm detected. The evidence of the prosecutrix is belied by the medical evidence. In our view, in the facts and circumstances of the present case, the High Court was not justified in upholding the conviction.”**

**(Emphasis Added)**

**28.** In **Dilip v. State of M.P.**<sup>6</sup>, the Hon'ble Apex Court acquitted the accused who was convicted by the trial court and whose appeal was dismissed by the High Court by observing as under:

**“14. The age of the prosecutrix was around 16 years, maybe a little more. The fact remains that she was not just a child who would have surrendered herself to a forced sexual assault without offering any resistance whatsoever. Without going into testing the truthfulness of the explanation offered by the prosecutrix that because of being overawed by the two accused persons, she was not able to resist, the fact remains that the “probabilities factor” operates against the prosecutrix. The gang rape is alleged to have been committed at about 2 p.m., in her own house, situated in a populated village by the side of the main road where people were moving on account of Holi festival. The prosecutrix did raise a hue and cry to the extent she could and yet none was attracted to the place of the incident. The prosecutrix is said to have sustained injuries, also bled from her private parts staining her body as also the clothes which she was wearing. This part of the story, is not only not corroborated by the medical evidence, is rather belied thereby. The presence of bloodstains is not confirmed by the Forensic Science Laboratory or by the doctors who examined the prosecutrix. Her own maternal aunt to whom the story of sexual assault has been narrated by the prosecutrix gives a version which does not tally with the version of the prosecutrix as given in the court. The learned counsel for the State relied on Section 114-A of the Evidence Act, 1872 which provides that in a trial on a charge under Section 376(2)(g) IPC on the prosecutrix stating that she was not a consenting party, the court shall presume absence of consent of the woman alleged to have been raped. Suffice it to**

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<sup>5</sup> (2006) 9 SCC 713

<sup>6</sup> 2001 AIR(SC) 3049

observe that we should not be misunderstood as recording a finding that the prosecutrix was a willing party to the sexual intercourse by the accused persons. The Court is finding it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault as alleged was committed on her in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of the Forensic Science Laboratory. The defence has given suggestion in cross-examination for false implication of the accused persons which, however, have not gone beyond being suggestions merely. It is not necessary for us to dwell upon further to find out the probability of truth contained in the suggestions because we are not satisfied generally of the correctness of the story as told by the prosecutrix. We find it difficult to hold the prosecutrix in the case as one on whose testimony an implicit reliance can be placed.

**(Emphasis Added)**

29. In **Bibhishan v. State of Maharashtra**<sup>7</sup>, the Hon'ble Apex Court has held as under:

“6. We have gone through the judgment of both the courts below and also perused the necessary record. As per the evidence of the doctor, there was no injury on the body of the prosecutrix Anita. **There was no sign of semen on the private part of the body.** Neither her clothes were torn nor there was any presence of hair of the accused on the private part of the prosecutrix. The doctor after examining the prosecutrix deposed that the girl was habituated to sexual intercourse. In view of this evidence, we are of the opinion that the High Court as well as the trial court has not correctly appreciated the evidence and has wrongly convicted the appellant-accused. The accused who has been charged under Section 376 read with Section 511 IPC is entitled to benefit of doubt.”

**(Emphasis Added)**

30. In **Dola v. State of Odisha**<sup>8</sup>, the Hon'ble Apex Court has held as under:

“6. It is well-settled law that if the version of the prosecutrix is believed, basic truth in her evidence is ascertainable and if it is found to be credible and consistent, the same would form the basis of conviction. Corroboration is not a sine qua non for a conviction in a rape case. **The evidence of a victim of sexual assault stands on a par with the evidence of an injured witness and is entitled to great weight, absence of corroboration notwithstanding. If the evidence of the victim does not suffer from any basic infirmity and the “probabilities factor” does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.**

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<sup>7</sup> (2007) 12 SCC 390

<sup>8</sup> (2018) 18 SCC 695

When a grown up and married woman gives evidence on oath in court that she was raped, it is not the proper judicial approach to disbelieve her outright.”

**(Emphasis Added)**

**31.** Another fact, which creates doubt about the prosecution story, is that in the FSL report, it has been observed by the Scientific Officer that the printed Salwar was apparently not stained with any semen/ blood like stains and after the chemical and microscopical examination, it did not reveal the presence of semen/human spermatozoa/blood. Though the prosecution has not proved this report but once it has been placed on record by the Investigating Officer himself, then the same can be referred to by the accused to establish his innocence. Besides, the recovery of weapon from the accused has not been proved and the appellant was acquitted by the learned trial court of the charge for commission of offence under section 4/25 Arms Act.


**32.** This court has examined the judgment passed by the learned trial court and finds that the learned trial court has not appreciated the evidence in its right perspective. The learned trial court has wrongly determined the age of the prosecutrix to be below 16 years of age and further has erroneously rejected the report of the Forensic Science Expert. The learned trial court has further held that the appellant has made a vague allegation in his statement recorded under section 342 Cr.PC that witnesses have deposed against him because of enmity but at the same time, the learned trial court miserably failed in its statutory duty to put incriminating evidence to the appellant in accordance with law, which has caused serious prejudice to the appellant. The evidence led by the prosecution is not trustworthy and the story projected by the prosecution is improbable as such it would not be safe to convict the appellant. The learned trial court instead of granting the benefit of doubt to the appellant-accused has

granted the same to the prosecution which is against the settled principle of criminal law. In such circumstances the appellant was in fact entitled to the benefit of doubt.

**33.** In view of above, the judgment of the conviction and the sentence dated 14.10.2006 passed by the court of learned 2<sup>nd</sup> Additional Sessions Judge, Jammu in challan titled “State vs. Raman Masih” arising out of FIR NO. 33/2006 of P/S Ramgarh is not sustainable in the eyes of law and is accordingly set aside. The appellant is acquitted of the charge for commission of offences under sections 376, 456 RPC. The challan shall stand dismissed. The appellant is on bail. His personal and surety bonds stand discharged.

**34.** The record of the trial court be sent back forthwith alongwith a copy of this judgment.

**Jammu**  
16.06.2023  
Karam Chand/Secy.

  
**(RAJNESH OSWAL)**  
**JUDGE**

Whether the order is speaking: Yes/No.  
Whether the order is reportable: Yes/No.