

IN THE COURT OF MS. RENU BHATNAGAR,
ADDITIONAL SESSIONS JUDGE - SPECIAL FAST TRACK
COURT : SOUTH EAST DISTRICT : SAKET COURTS:
NEW DELHI.

SC No. : 2467/16
FIR No. : 662/15
PS : Jaitpur
U/s : 376D IPC, 506/34 IPC

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| State | Versus | Narender Singh Bhadana Sh. Balmukud Bhadana R/o- H.No. 1196, Gali No. 1, Lakhpat Colony, Part-II, Meethapur, New Delhi |
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Date of Institution : 13.01.2016.
Judgment reserved for orders on : 19.04.2018.
Date of pronouncement : 05.05.2018.

J U D G M E N T

Brief facts of the case:-

1. The case of the prosecution is that on 02.09.2015 an information was received on the wireless set that at H.No. C-204, Gali No. 3, Ekta Vihar, Jaitpur rape has been committed with a girl. Information was got recorded in DD No. 40A, PS Jaitpur and investigation was marked to SI Suraj Singh, who along with Ct. Rakesh and Ct. Sarita reached at the spot where they met prosecutrix and JCL Sonu & Sameer and Ct. Dinesh Kumar and PCR Staff. SI Suraj Singh reached AIIMS Hospital along with prosecutrix and both JCLs, who were beaten up by public.

W/Ct. Sarita, prosecutrix and her father were left in AIIMS Hospital by SI Suraj Singh, who called W/SI Sarika Sharma at AIIMS Hospital. Both JCLs along with Ct. Rakesh and Ct. Dinesh were also taken to AIIMS Trauma Center. NGO counselor was called at AIIMS Hospital and prosecutrix/victim was got counseled. Victim was medically examined and her statement was recorded wherein she deposed that she resides with her parents and do household works. She is illiterate and Sameer @ Hunny is her distant relative. Sameer @ Hunny and his mother had stayed in their house for three months and one month prior they vacated their house. During his stay, Sameer @ Hunny started talking to her. On 02.09.2015 at around 01 PM in the afternoon he along with her friend Sonu stopped their motorcycle near her house and Sameer @ Hunny stated to her that he will give her something to eat and asked her to come with them for excursion. She refused the same but Sameer @ Hunny again asked her to come with him and by alluring her made her sit on the motorcycle. She was sitting in the middle of the motorcycle. Sunny was driving the motorcycle and Sonu was sitting behind her. They reached Lakhpat colony at the house of Narender. Narender and one other boy were present in the house, who were not known to her. Sonu went from there. Narender paid money to Hunny for bringing meals and they all four ate meals there. Thereafter, Narender and the other boy went outside the room. Hunny told her to lie on the bed and removed her clothes forcibly and committed wrong act with her (rape with her) without her consent and went outside the

room. Thereafter one person looking like Sunny came there and he also committed wrong act with her. She then started wearing clothes. At the same time one person who they were calling Narender came there and also committed rape with her without her consent. She deposed that she was threatened by them and she got scared. Hunny started the motorcycle, victim sat in the middle of the bike and Sonu sat behind her. They left her near Nala of her house. She stated the entire fact to her father. Her father apprehended Hunny and Sonu and called on 100 number. Public persons had given beatings to them. Prosecutrix was medically examined. Site plan prepared at the instance of prosecutrix. Both the JCLs were apprehended and FSL team was called on the spot on whose directions exhibits were taken into possession by the police. Pullanda was prepared with the seal of 'SS' and deposited in Malkhana. Statement of witnesses recorded. JCLs were produced before the J.J. Board and on the directions both were sent to Prayas, Delhi Gate. Statement of prosecutrix under Section 164 Cr.P.C were got recorded by the police. On the identification of prosecutrix on 11.09.2015 accused Narender was arrested and necessary documents of his arrest were prepared and his disclosure statement was recorded. Potency test and medical examination of accused Narender conducted and exhibits were deposited in Malkhana. Age proof of both the JCLs was collected from their school and potency test and medical of JCL Sameer @ Honey was got conducted and exhibits were taken into possession by the police. Exhibits were

sent to FSL, Rohini for examination. PIR report of both JCLs Sonu and Sameer sent to JJ Board. After completion of investigation, chargesheet was filed in the court under Section 376D/506 IPC against the accused Narender Singh.

Charge:-

2. After complying with the requirements contemplated u/s 207 Cr.P.C., the case was committed to this Court. Vide order dated 10.02.2016, prima facie case was made out against the accused for the offence u/s-376D, 506/34 IPC. The charge was framed to which accused pleaded not guilty and claimed trial.

Prosecution Evidence:-

3. To substantiate its allegations against the accused, prosecution examined the following witnesses:-

Material Witnesses:-

4. PW1 prosecutrix deposed that Samir is her distant relative. She does not remember the exact date and year. On one day, she was present in my house and taking rest. Samir @ Hani (JCL) son of her cousin sister Ruby came there. He told her that he will take her to the house of her Nani. She refused but they made her sit on a motorcycle forcibly. She raised alarm but no one was present in the gali. One more boy whose name she does not remember was also sitting on the motorcycle. They both took her to the house of accused Narender. She does not know the place where the house of accused was situated. Accused Narender, Samir @ Hani (JCL) and the third person

committed sexual intercourse with her without her consent. They tied the cloth on her mouth at the time of the incident. Thereafter, Samir @ Hani dropped her at naala near her house. Her parents and maternal uncle were present in the house when she reached there. She told them the entire incident. Her maternal uncle searched accused Samir @ Hani and the third person, caught them and brought to the house and gave beatings to them. Her father called the police. Police came at her house. Police took her to the hospital for her medical examination. Police also took Samir @ Hani and another boy to the hospital. Her mother gave brief history of the incident to the examining doctor. She was medically examined in the hospital vide MLC Ex.PW1/A. Police recorded her statement Ex.PW1/B. Police did not take her to the place of incident. She also did not tell the police about the place of incident. She was brought to the Court by the police where the Magistrate recorded my statement. She has correctly identified her statement u/s-164 Cr.P.C Ex.PW1/C. During her examination, on the request of Ld. Addl. PP, permission was granted to him to put leading questions to the witness as the prosecutrix was not disclosing the complete facts, whereupon she deposed that it is correct that the name of the boy who was sitting on the motorcycle besides her and Samir @ Hani was Sonu (since JCL). She further stated that it is correct that it was 02.09.2015 at about 1 PM, when JCL Samir and Sonu took her on a motorcycle to the house of accused Narender. She stated that it is correct that the house of the accused Narender i.e. place of incident was situated in Lakhpat Colony,

Mithapur Extension, New Delhi. She deposed that it is correct that she had told the police that Samir @ Hani and Sonu took her to the house of accused Narender at Lakhpat colony. She stated that it is correct that at the time of committing of rape with her, accused Narender threatened her to kill with knife and that police took her to the house of the accused Narender where she identified his house and also that police prepared the site plan of the house of accused Narender at her instance which is Ex.PW1/D. She deposed that it is correct that accused Narender was arrested from his house at her instance on 11.09.2015 vide arrest memo Ex.PW1/E and personal search memo Ex.PW1/F. Police also recovered the motorcycle from the house of the accused Narender on which she was taken to his house by Samir and Sonu. The recovery memo of motorcycle is Ex.PW1/G. No one except accused Narender, Samir and Sonu came at the house of accused Narender during the incident.

5. PW8 W/SI Sarika Sharma had deposed that on 02.09.2015, she received a call from SI Suraj Singh that there was a call of rape, they have come with the victim at AIIMS. He also asked her to come at AIIMS. She went to the emergency of AIIMS. There, the prosecutrix alongwith her father and Lady Ct. Sarita met her. The prosecutrix was got counseled through counselor Ms Sushma, a NGO official. The prosecutrix was medically examined in the hospital by the doctor vide MLC Ex.PW1/A. She recorded the statement of the prosecutrix which is Ex.PW1/B. She prepared the rukka Ex.PW8/A on the aforesaid

statement of the prosecutrix and handed over the same to Ct. Rakesh for registration of the FIR. Ct Rakesh went to the police station and got the case registered vide FIR Ex. PW 2/A. Ct Rakesh again came back to the spot and handed over her the copy of FIR and original rukka. Thereafter, she alongwith the prosecutrix, her father and Lady Ct. Sarita and other staff reached at the spot i.e H. No. 1196, Lakhpat Colony which was the house of accused Narender Singh Bhadana, present in the court today. The prosecutrix identified the spot where accused Narender, Honey @ Samir raped her. She inspected the spot and prepared the site plan at her instance which is Ex. PW 1/D. There she also recorded the statement of father of the prosecutrix, Lady Ct. Sarita and supplementary statement of the prosecutrix. Officials from FSL also visited the spot. One bed sheet, kurta, dupatta and one condom etc were lifted from the room. They were kept in a white parcel and was sealed with her seal of SS. The seal after use was handed over to Ct. Narender. The parcel was taken into possession vide memo Ex. PW 4/A. The parcel was deposited in the malkhana. Thereafter she went on medical leave due to illness and she handed over the file of this case to MHC(R). Thereafter, further investigation was carried out by SI Suraj. On her joining, the file was again marked to her for further investigation. During investigation, she also got conducted the Ossification test of the prosecutrix at Safdarjung Hospital, collected its report mark PW 8/A, as per which, the bone age of the prosecutrix is mentioned between 18 to 19 years. After

completion of the investigation, she filed the charge-sheet in the court against accused. She had identified the case property containing one bedsheet, one chunni, one cloth piece, baby T-shirt with some sealing materials, shown to the her in the court. She correctly identified these articles to be the same which were recovered from the spot. Bedsheet is Ex.P1, chunni is Ex.P2, cloth piece is Ex.P3 and baby T-shirt is Ex.P4. The FSL result of biological examination and DNA examination of the exhibits was collected and filed the same in the Court. The same is Ex.PW8/B.

6. PW9 Retd. SI Suraj Singh had deposed that on 02.09.2015, he was posted at P.S Jaitpur as SI. He was on emergency duty from 8 a.m to 8 p.m. He received DD NO. 40A Ex. PW 3/A regarding rape. He alongwith Ct. Rakesh and WCt Sarita went to the spot at Ekta Vihar. There, beat staff and PCR were already present. Many persons had gathered. Prosecutrix, her father and two JCLs were also there. On enquiry he found that the public persons had beaten the JCLs. He came to know from the father of the prosecutrix that rape was committed upon the prosecutrix by the JCLs and Narender Bhadana. He prepared the medical documents of the prosecutrix and the JCLs and took them to AIIMS for their medical examination. Ct Sarita got the prosecutrix medically examined vide MLC Ex. PW 1/A. NGO Sushma was informed. WSI Sarika was also informed. He took both the JCLs to trauma center. He had prepared the request papers for the medical examination of the prosecutrix vide Ex. PW 9/A and Ex. PW 9/B and

given to Ct. Sarita before her medical examination. He got both the JCLs medically examined. They then returned to AIIMS. They met W/SI Sarika in the hospital. W/SI Sarika recorded the statement of the prosecutrix. She made endorsement on the statement and gave it to Ct. Rakesh, who went to the police station and got the case registered. He brought both the JCLs at the police station. He informed their family members and took the JCLs to the spot. Prosecutrix was also brought by SI Sarika on the spot. She prepared the site plan of the place of incident at the instance of the prosecutrix. FSL team also arrived there. They inspected the spot. W/SI Sarika seized the clothes from the spot vide memo Ex. PW 4/A after making the pulanda sealing with the seal of SS. On 11.09.2015, he arrested the accused Narender Bhadana from his house on the identification of the prosecutrix vide arrest memo Ex. PW 1/E. He conducted his personal search vide memo Ex. PW 1/F. He seized the motorcycle from the spot vide memo Ex. PW 1/G. He got the JCLs medically examined qua their potency. He also collected their age proofs. He interrogated the accused and recorded his disclosure Ex. PW 9/C. He sent the accused Narender for medical examination through Ct Narender Singh and collected his exhibits from him in sealed condition alongwith the sample seal vide memo Ex. PW 4/B. He deposited the exhibits in the malkhana. Further investigation was conducted by W/SI Sarika.

Formal Witnesses:-

7. PW2 ASI Ram Gopal had deposed that on 03.09.2015, he was

working as Duty Officer in P.S Jaitpur and his duty hours were from 8 AM to 4PM. On that day, at about 2.00 p.m, he received a rukka from SI Sarika Sharma upon which he recorded the FIR, the computer generated copy of which is Ex. 2/A. He made endorsement Ex. PW 2/B on the rukka. He also issued certificate u/s 65B of the Evidence Act Ex.PW2/C. After registration of the FIR, he had handed over the original rukka and copy of FIR to SI Sarika Sharma for further investigation.

8. PW3 ASI Shoib Alam deposed that on 02.09.2015 he recorded the DD entry No. 40A at 16.32 hours on a call from the PCR about a rape committed in House No. C -204, Gali No. 3, Ekta Vihar, Jaitpur. He gave the DD to SI Suraj Singh, who left the police station for the spot with Ct. Rakesh and W/Ct. Sarita. He has brought the roznamcha. The DD is Ex.PW3/A.

9. PW4 HC Narender had deposed that on 03.09.2015, he was posted as Constable at PS Jaitpur. On that day, he along with the IO and both the JCL namely Samir and Sonu reached the spot i.e. Gali no. 1, Lakhpat Colony Part-II, New Delhi. FSL team also reached the spot. FSL team inspected the spot where IO recovered one bedsheet, one chunni, one kurti, one cloth, one condom, the total six items. All the items were sealed with the seal SS and seized vide seizure memo Ex.PW4/A. On 12.09.2015, on the directions of the IO he took the accused Narender Singh Bhadana, present in the Court today, to AIIMS for getting his potency test. The examining doctor handed over to him

the MLC and the exhibits of the accused with sample seal. He had handed over the same to the IO. IO seized the exhibits and sample seal vide seizure memo Ex.PW4/B. IO recorded her statement. He deposed that he can identify the case property if shown to me. The case property is lying in FSL.

10. PW5 Ct. Rakesh Kumar had deposed that on 02.09.2015, he was posted as Constable at PS Jaitpur. On that day, he was on emergency duty from 8 a.m. to 8 p.m. In the evening, DD no. 40A was received by SI Suraj Singh. He along with SI Suraj Singh and W/Ct. Sarita reached the house of the caller i.e. B Block, Gali no. 5, Ekta Vihar, Jaitpur. Prosecutrix with her father met them there. JCLs Samir and Sonu were also present there. Ct. Dinesh also reached there. They were already given beatings by the public persons. They took the prosecutrix and both the JCLs to AIIMS. The father of the prosecutrix accompanied them to the hospital. IO W/SI Sarika was called in AIIMS. W/SI Sarika prepared a rukka and handed it over to him which he took to police station for getting the FIR registered. After registration of FIR, he went to the spot i.e. Gali no. 1, Lakhpat Colony Part-II, New Delhi. He handed over the rukka and copy of FIR to the IO. IO recorded her statement.

11. PW7 Father of prosecutrix had deposed that prosecutrix is her daughter. On 02.09.2015, he had gone to my work. When he came back for lunch at her house, he asked about the prosecutrix, as at that time, she was not present in the house. His younger son told him that Honey

@ Samir came in the gali. He got suspicion. He left his food and went for search of the prosecutrix. When he went towards drain situated at Ekta Vihar, Jaitpur, he saw two persons who were on motorcycle and the prosecutrix was also with them. They dropped her there. Both of them went away on their bike. He went towards the prosecutrix and asked what happened with her. She told him that wrong has been committed with her by Samir, Narender and one Sonu. He sent the prosecutrix to home and chased both the above said persons for about 1 k.m. and apprehended both of them. He came to know their names as Sonu and Samir. He brought both of them to his house. He informed the police on 100 number. PCR van as well as Police officials from police station came there. They were 10 to 15 in numbers including SI Suraj Singh. His daughter was inquired in presence of lady police official. His daughter was taken to AIIMS for her medical examination. Both the aforesaid accused persons were also handed over to the police. They came back to police station from the hospital. Thereafter, he and his daughter alongwith police reached at the house of Narender where his daughter pointed out the place of incident. Police officials also carried out investigation in this regard. At the time of incident, the prosecutrix was about 17 – 18 years age and she is illiterate. Later on accused was apprehended by the police. He was arrested vide memo already Ex.PW1/E. Personal search memo Ex.PW1/F. Accused was arrested at the instance of the prosecutrix.

12. PW10 Ms. Neha Gupta Singh, Ld. MM had recorded the

statement of prosecutrix under Section 164 Cr.P.C Ex.PW1/C and has duly proved on record Ex.PW10/A.

Medical Witness:-

13. PW6 Dr. Rashmi Pillania had deposed that on 02.09.2015 prosecutrix was brought to AIIMS Hospital by Ct Sarita for her medical examination. She had conducted her medical examination vide MLC Ex.PW1/A. Alleged history mentioned at point B to B in Ex.PW1/A was given by prosecutrix herself. On examination, hymen of prosecutrix was found not intact. She had not collected the samples of the prosecutrix as she was menstruating at the time of assault and at the time of examination.

Statement of accused and Defence taken by accused:-

14. Statement of accused was recorded under Section 313 Cr.P.C wherein he deposed that he and his mother Smt. Rajesh both were not present in the house. On 02.09.2015 when she and his mother reached to his house, he found co-accused Sameer @ Hani and one other boy sitting in his room. The prosecutrix was also present there. He does not know from where co-accused Sameer @ Hani and one third boy got the keys of his room. His mother had rang him up on that day when he was on duty and his mother enquired from him as to how Sameer @ Hani and the said third person got the keys of their room. He stated that he had not given the keys to anybody and that he shall be coming within five minutes. When he reached there his mother had scolded co-accused Sameer @ Hani, the said boy who was with Sameer and the

prosecutrix and they all left. Police came after some time to his room and stated to him that there is a complaint against him and thereafter he was taken to police station and involved in this case falsely. He stated that he had not raped the prosecutrix. He stated that it is a false case against him since his mother had scolded and beaten him and those boys and had thrown the prosecutrix out of the house stating that how she had come to her house. She had threatened his mother to teach a lesson and thereafter falsely implicated him in this case. When he was in custody in this case, prosecutrix and her family had broke open the lock of his room and removed all his belongings, as per the information given to him by his mother when she had come to meet him in Tihar Jail and to this effect she had made a complaint to the police. Accused stated that he was arrested and his personal search was conducted by the police but his disclosure statement was not recorded in his presence. He stated that he does not know anything about the seizure of motorcycle and the same does not belong to him. Accused in his defence had not produced any witness in his defence. Hence, the Defence Evidence was closed.

Arguments of Ld. Addl. PP for State:-

15. It is argued by the Ld. Addl. PP for the State that case of prosecution stands proved from the statement of prosecutrix who has named accused Narender Singh Bhadana in all her statements. However, fourth accused could not be found despite efforts of the police. So far as FSL is concerned, exhibits are not collected seeing the

condition of prosecutrix who was menstruating at that time. Prosecutrix has stated in her statement under Section 164 Cr.P.C that she was given biscuit by the accused which shows that victim is innocent and might not have resisted the act of the accused persons. It is stated that complaint or statement under Section 164 Cr.P.C was not put to the prosecutrix nor contradicted nor the defence of the accused was put to her. It is stated that in all the statement she has given the name of accused Narender. There are minor discrepancies on the point of taking her which are natural variations. Hence, it is prayed that the accused be convicted.

Arguments of the Ld. Counsel for accused:-

16. It is argued by the counsel for accused that as per prosecution story accused Sameer, Narender and one other boy, who was arrested in this case has committed rape with the prosecutrix however there are discrepancy in the statement of the prosecutrix with regard to the identity of the accused in the court. She has not stated that there was one other boy also who had committed rape with her. There are also discrepancy with regard to giving of threats by accused or raising of alarm by the prosecutrix when she was taken by Honey and Sonu on the motorcycle. No knife or pistol was recovered from the accused Honey and Sonu. Accused Narender is stated to be an old person by the prosecutrix but he is just 35 years of age. As per the statement of the prosecutrix, her mouth was tied by a cloth but no cloth was recovered. No sketch of unknown boy was made by the police nor the

name of other person appeared in the disclosure of the co-accused. There are also contradictions in the statement of 164 Cr.P.C wherein the prosecutrix stated that she was given two packets of biscuits and money but in the complaint she stated that they all four had taken food. No mention of giving money is made in the complaint to the police. Victim not stated that condom was used by the accused Narender. There is no female DNA detected on condom. FSL result is not conclusive to prove the offence of rape against the accused. In the cross examination she stated that her father had written complaint. There are also contradictions as to who showed the place of incident to the police i.e. whether the prosecutrix or her father. In the cross examination she has mentioned that accused Narender did not threatened her. No semen of the accused was found on the clothes or body party of the victim. In the court she stated that accused Narender raped her three times but said fact is not mentioned in her complaint to the police or to the Magistrate. No injuries are there on the person of the prosecutrix. Hence, it is stated that seeing the contradictions, accused be acquitted.

Conclusion:-

17. I have heard the submissions of the Ld. Addl. PP for the State and Ld. Counsel for accused and perused the record.

18. Before appreciating the facts of this case, it is necessary to know the ingredients of the offence of rape by resorting to the provisions of section 375 IPC. Section 375 IPC provides as under:-

“375. Rape. - A man is said to commit “rape” if he -
(a) penetrates, his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body or a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions :-

First. - against her will.

Secondly. - Without her consent

Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under eighteen years of age.

Seventhly. - When she is unable to communicate consent.

Explanation 1. For the purpose of this section, “vagina” shall also include labina majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specified sexual act;

Provided that a woman who does not physically resist to the act of the penetration shall not be the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

19. Rape is the act of physically forcing a woman to have sexual intercourse; an act of sexual intercourse i.e. forced upon a woman against her will. The offence of rape in its simplest term is ‘the ravishment of a woman, without her consent, by force, fear or fraud’, or as ‘the carnal knowledge of a woman by force against her will? ‘Rape’ or ‘Raptus’ is when a man hath carnal knowledge of a woman by force and against her will (Co. Lett. 130-b); or as expressed more fully, ‘rape’ is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will. Section 375 IPC defines rape. This Section requires the following essentials”-

1) Sexual intercourse by a man with woman.

2) The Sexual intercourse must be under circumstances falling

under any of the six clauses in Section 375 IPC.

20. Section 90 of the IPC defines consent. It reads: a consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

21. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance the good and evil on each side. Consent is rape covers states of mind ranging widely from actual desire to reluctant acquiescence. Consent within penal law, defining rape, requires exercise of intelligent based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. Legal consent, which will be held sufficient in a prosecution for rape, assumes a capacity to the person consenting to the understand and appreciate the nature of the act committed, its moral character, and the probable or natural consequences which may attend it.

22. In the case of ***Rao Harnarain Singh Sheoji Singh Vs. The State, AIR 1958 P H 123***, the High Court while holding the accused liable for the offence of rape has distinguished between the word ‘ consent’ and ‘submissions’ as shown below:-

“(1) A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed

to be “ consent” as understood in law.

(2) Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

(3) Submission of her body under the influence of a fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and mere act of submission does not involve consent.

(4) Consent of the girl in order to relieve an act, of a criminal character, like rape must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one’s will or pleasure.

(5) A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wants. Consent implies the exercise of a free and untrammelled right to forbid or without what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.”

23. **Section 506 IPC defines:-** *Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

If threat be to cause death or grievous hurt, etc.- And if the threat be to cause death of grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

24. The most material witness to prove the offence is prosecutrix. The prosecution story as propounded on the complaint Ex.PW1/B given to the police is that she was taken by accused Honey and Sonu on a motorcycle from her house on the pretext of offering good things to eat to her. They had taken her to the house of Narender where one another boy was also there. Honey brought food and they all consumed food in the house of Narender whereafter Narender and said boy went out of the room and Honey forcibly committed rape with her. Thereafter, one more boy came and committed wrong act with her and then accused Narender came and committed rape with her and thereafter giving threats, Honey and Sonu left her to her house where her father was present to whom she narrated the incident and her father apprehended both the accused persons. Public persons were collected at the spot and had beaten them and thereafter this case was registered against the accused JCL Sameer, JCL Son and accused Narender Singh Bhadana. Fourth accused could not be apprehended by the police.

25. In the statement before the Court the prosecutrix had deposed

that she was taken by Sameer and one more boy on a motorcycle to the house of accused where Narender, Sonu @ Honey (JCL) and the third person committed rape with her without her consent. In the statement in the Court the prosecutrix did not mention about the presence of fourth accused in the house of Narender who had also committed rape upon her. When Ld. Addl. PP had led the witness, she had admitted that the other boy with JCL Sameer was JCL Sonu who took her on the motorcycle to the house of Narender otherwise she had not named JCL Sonu in her statement in chief. However, during cross examination she had deposed that first of all accused Honey had committed rape upon her and thereafter accused Sonu had committed rape upon her and then accused Narender had committed rape upon her. Hence in the court she has named JCL Sonu also to be involved in gang rape with her, though, that is not the case of prosecution in police complaint.

26. Prosecutrix has also deposed in her cross examination that accused Narender had committed rape upon her three times on the same day, which is not her case before police. She has also stated that accused Honey shown her a pistol and Sonu was carrying a knife with him. This fact is also nowhere mentioned by her in her earlier statement given to the police or to the Magistrate.

27. Moreover, accused, JCL Sameer and JCL Sonu were apprehended by father of prosecutrix after chasing them and they were beaten up by public but no pistol or knife was recovered from their possession.

28. In the cross examination, the prosecutrix has stated that she did not eat food in the house of Narender which is contradictory to her complaint made to the police. As per statement in the court, prosecutrix raised alarm but no one was present in the gali. However, in her further examination she has deposed that public persons were present at her house when she was taken on motorcycle by the JCLs. She also stated in her later cross examination that she did not raise any alarm on the way to the house of the accused. In her cross examination she has stated that she did not eat food at the house of accused Narender which is contradictory to the prosecution case. She has also deposed that no one except accused Narender, Sameer and Sonu came at the house of the accused Narender during the incident. This statement is contrary to her complaint wherein she has named one other boy at the house of Narender, who has committed rape with her and who could not be apprehended by the police during the investigation of the case.

29. So far as taking of the prosecutrix by the accused Sameer and Sonu is concerned, prosecutrix has deposed in the cross examination that she did not tell the police that accused told her that they would offer her good food to eat but in the complaint she has mentioned so and her complaint clearly shows that she had gone with the accused Sonu and Sameer with her own willingness without raising any alarm but in her statement in the court she tried to put up story of raising alarm when she was taken by the accused and also of giving threat on

the point of pistol and knife by accused Honey and Sonu.

30. As per the prosecution case the accused Honey and Sonu were apprehended by the father of the prosecutrix on the date of incident itself and they were beaten up by the public however, no knife or pistol was recovered from their possession.

31. There are also contradictions on the point as to who had pointed out the place of occurrence to the police. The prosecutrix has admitted in the cross examination that she did not point out the house of the accused Narender to the police and the same was shown by her father to the police. However, the site plan Ex.PW1/D of the place of occurrence bears thumb impression of the prosecutrix.

Medical Evidence:-

32. The prosecutrix was medically examined at AIIMS Hospital on 02.09.2015 itself. Perusal of the MLC of the prosecutrix shows that there were no injuries on the internal or external body parts of the prosecutrix. Prosecutrix is a grown up girl and if she was gang raped by the accused persons there should have been some injuries on the person of the prosecutrix. Absence of injuries on the person of the prosecutrix are suggestive of the fact that no rape was committed upon the prosecutrix or the same was consensual.

33. In the case of *1) Raghunath Vs State 1991 (JCC) 426, 2) Kuldeep K. Mehto Vs State of Bihar 1998 (3) Crimes 151 Supreme Court, 3) Shivaji Suryabhau Gire Vs State of Maharashtra Crimes 1991 (1) 513* the Delhi High Court, Apex Court as well as Bombay

High Court respectively have categorically held that lack of injuries on the person including the private part of the prosecutrix show that she was a consenting party to the sexual intercourse.

34. In the case of *Shivaji Suryabhau Gire Vs State of Maharashtra (Supra)* the court has held that:-

“The medical evidence does not support the testimony of Shantabai of any resistance. In other words, it is undisputed that no marks of violence were noticed on other parts of her body except some abrasions on her breasts. The prosecutrix is a grown up lady. Had there been resistance on her part, obviously she would have received various injuries on her back, legs or face especially when she was forcibly layed down in the sugarcane field. Surprisingly enough, her version as regards resistance on her part has not been supported by other attending circumstances. As seen above, except testimony of Kadubai, there is no evidence to lend support to the infirmed testimony of the prosecutrix. It is, therefore, unsafe to rely upon uncorroborated testimony of the prosecutrix who is a grown up lady. In this context, it is important to account to a total silence on the part of the prosecutrix in answering a pointed question, if she was unhappy about sex with her husband when he is older by 15 years than her. Silence on her part to answer that question suggests 'consent' on her part to the act of sexual intercourse”.

35. Further no exhibits of the prosecutrix were collected by the doctor at the time of her examination as she was menstruating at that time and in view of this the prosecution does not have the advantage of

corroboration from the FSL result. Exhibits which were seized from the house of accused Narender do not belong to the prosecutrix and the exhibits are of the accused persons only and as such the FSL result is of no help to the prosecution case.

36. Though it is settled law that conviction can be based on the sole testimony of the prosecutrix but the same should inspire confidence.

37. In ***Sada Shiv Ram Rao Hadbe Vs. State of Maharashtra and Anr., 2006 (10) SCC 92***, Apex Court has observed :

“It is true that in rape case, the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or “the whole surrounding circumstances” are highly improbable and belie the case, the case set up by the prosecutrix, the court shall not act on the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

38. The court, while evaluating the facts of a case, is supposed to form an opinion about the credibility of the witnesses examined in a case. The judge has to form his own estimate of the evidence produced before him and to articulate an opinion on the credibility of the witnesses. For the purpose of assessing the credibility, the court has to consider the evidence of a witness to find out as to how he has fared in the cross examination and what impression is created by his evidence taken in the context of other facts of the case. Law recognizes

following ways in which evidence of a witness can be termed unreliable:-

- a) the witness's statement is inherently improbable or contrary to the course of nature,
- b) his deposition contains mutually contradictory or inconsistent passage,
- c) he is found to be bitter enemy of the opposite party,
- d) he is found not to be a man of veracity,
- e) he is found to have been bribed or accepted any other corrupt inducement to give evidence and,
- f) his demeanor, while under examination, is found abnormal and unsatisfactory.

39. It is for the court to consider in each case whether as a result of cross examination, the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases, the court can rely upon a part of the testimony of a witness if the said deposition is found to be credit worthy. The law even recognizes to rely upon the part of the testimony of a hostile witness if the same inspires confidence. A part of the testimony of a witness can be incredible but the other part can be credible on a careful scrutiny and that portion of the evidence which is consistent with the case of the prosecution or the defence can be relied upon if the testimony is found to be credible.

40. In the case of **Rai Sandeep @ Deepu Vs. State of NCT of Delhi, 2012 (131) DRJ, 3 SC**, it was held:-

“In our considered opinion, the sterling witness should be of 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 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 correlation 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.”

41. In the light of above judgments and discussion, it is held that testimony of the prosecutrix is not of sterling quality so as to base the conviction of the accused on her sole testimony. The prosecution has failed to prove its case beyond reasonable doubt against the accused. Giving the benefit of doubt, accused Narender Singh Bhadana is acquitted of the offence punishable under Section 376D, 506/34 IPC for which he has been charged.

42. In view of the Section 437A of Cr.P.C., accused is directed to furnish bail bond in a sum of Rs. 30,000/- with one surety of like amount for the period of six months with the condition that he shall appear before the Hon'ble High Court as and when notice be issued in respect of any appeal filed by the state against the judgment within a period of 6 months. Case property be confiscated to the state after expiry of period of revision/appeal, if any. File be consigned to Record Room.

**Announced in the open
court today i.e. 05.05.2018.**

**(Renu Bhatnagar)
ASJ-Spl. FTC / SED/Saket Courts
New Delhi**