Before S.S. Nijjar and S.S. Grewal, JJ

STATE OF HARYANA,—*Appellant*

versus

ANIL KUMAR,—*Respondent*

Crl. A.No. 610/DBA of 1995

11th July, 2003

Indian Penal Code, 1860-Ss.363,366 and 376— Indian Evidence Act, 1872—S. 114(e)—Abduction and rape of a minor illiterate girl from a very impoverished background— Date of birth of girl in brith certificate inconsistent with the date of birth recorded in school leaving certificate— Trial Court discarding proof of age— Acquittal— S.114 (e) of 1872 Act provides that if an official act is proved to have been done, it would be presumed to have been regularly done—In the absence of clear proof of age presumption under section 114 (e) could only be nullified by clear and cogent evidence to the contrary— Accused failing to prove date of birth by producing cogent evidence—Such a discrepancy in date of birth has no consequence— Some medical evidence showing that the girl had indulged in sexual intercourse earlier— Not sufficient to hold that girl must have consented with the rapist- Accepting such a broad proposition would mean that no mature woman accustomed to sexual intercourse can be raped— Trial Court also ignoring the harrowing experience and hostile atmosphere which a victim of sexual assault or rape has to face whilst giving evidence in Court— Judgment of the trial Court suffers from total non-application of mind and is not sustainable— Case of prosecution proved beyond all reasonable doubt— State's appeal allowed while setting aside acquittal of the accused.

Held, that the rule embodied in the illustration (e) of section 114 of the Indian Evidence Act flows from the *maxim omnia praesumuntur rite et solemniter esse* acts, i.e. all acts are presumed to have been rightly and regularly done. In other words, in the absence of clear proof to the contrary, the trial Court ought to have relied on the birth certificate to determine the age of the victim. The illustration contained in Section 114 (e) of the Indian Evidence Act, simply means that if an official act is proved to have been done, it would be presumed to have been regularly done.

(Para 28)

Further held, that the learned trial Court has committed a fatal error of law in discarding the clear proof of age of the victim given in the birth certificate on the ground that it was inconsistent with the date of birth recorded in the School Leaving Certificate and the age given by the victim to Dr. Renu Aggarwal. These discrepancies were of no consequence. The presumption under section 114 (e) of the Indian Evidence Act could only be nullified by clear and cogent evidence to the contrary.

(Para 29)

Further held, that the learned trial Court erred in law in ignoring all factors in coming to the conclusion that the evidence of the victim does not inspire confidence. The learned trial Court has wrongly emphasised only the negative aspects of the evidence. No reliance could have been placed on the fact that there was no fresh bleeding and that the vagina admitted two fingers to come to the conclusion that the victim had consented to sexual intercourse. All the factors mentioned by the learned trial Court may well lead to a conclusion that the victim had sexual intercourse prior to her medical examination by Dr. Renu Aggarwal. The learned trial Court was wholly unjustified in holding that the victim must have consented because she had indulged in sexual intercourse earlier. Such a myth needs to be exploded permanently from the psyche of those judges who are entrusted with the very delicate task of conducting trials in cases relating to sexual offence/assault/rape. Accepting such a broad proposition would mean that no mature woman accustomed to sexual intercourse can be raped.

(Para 32)

Further held, that the observations of the trial Court that the statement of the victim is not sufficient to prove the ingredients of rape are contrary to the law laid down by the Supreme Court. The learned trial Court totally ignored the glaring fact that the sexual assault or rape is not usually committed in the presence of witnesses. The reasons given by the learned trial Court cannot be accepted on the basis of any known principles of appreciation of evidence.

(Para 33)

Further held, that the judgment of the learned trial Court suffers from total non-application of mind. The evidence of the prosecution has been discarded without any cogent reasons. The conclusions arrived at by the learned trial Court are perverse. None of the findings given by the learned trial Court are sustainable. The prosecution has proved its case beyond all reasonable doubt. The appeal of the State is accepted.

(Para 37)

Ms. Palika Monga, Assistant Advocate General, Haryana, *for the Appellant*

Rakesh Nagpal, Advocate, *for the Respondent*

JUDGMENT

S.S. NIJJAR, J.

(1) The State of Haryana has filed this appeal against the judgment dated 13th March, 1995, passed by Mr. Dewan Chand, Additional Sessions Judge II, Jind, in Sessions Case No. 1 of 7th October, 1994/ 25th November, 1993. Sessions Trial No. 22 of 29th November, 1994, whereby the accused (respondent-herein) has been acquitted of the charge under Sections 363, 366 and 376 of the Indian Penal Code.

(2) The prosecution case, is partially set out in the first information report No. 141 dated 8th April, 1993, registered at Police Station, City Jind, District Jind, on the statement of Balku Ram son of Surta Ram Balmiki, resident of House No. 3703, Urban State Jind. He stated that his daugther Lakhwinder Kaur, aged about 14 years has been doing domestic work in the house of one Naresh Kumar resident of House No. 1619, Urban Estate, Jind, for the last three years. In the morning of 7th April, 1993 at about 7.30 A.M. his daughter was called by Naresh Kumar to his house for doing domestic work. Earlier his daugther used to go for domestic work at noon time. She did not come back to the house on that day. His niece Sunita daughter of Sobha Ram had seen his daughter sitting in the car of Naresh Kumar when his niece was grazing the goats near sales tax office. She had seen his daugther sitting in the car at about 9.30 A.M. He stated that he has a suspicion that the family of Naresh Kumar

might have left his daughter somewhere after inducing her. Naresh Kumar is stated to be a Government Employee in a Bank. At the relevant time, he was on duty in Oriental Bank of Commerce, Gohana. He had, thereafter, shifted his house from Urban Estate, Jind to Gohana. He further stated that Naresh Kumar had asked his daughter many times to go with them to Gohana as girl like her was not available there. He further stated that "We also suspect that my daughter had got changed her old suit after getting it mended at his house. It could be possible that she might have gone with him. Uptill now, I have searched my daughter at my own level in brotherhood but could not trace her. Action be taken".

(3) This statement was made on 8th April, 1993 at about 6.05 P.M.,—*vide* DDR No.14. The aforesaid statement of Balku Ram was sent to the Police Station for registration of the FIR by Sub Inspector, Malkiyat Singh, Incharge Police Post Civil Lines, Jind, on 8th April, 1994 at 5.30, to the Police Station, City Jind, for necessary action. On the receipt of the same, formal FIR mentioned above, has been recorded by Birsal Singh, Sub Inspector.

(4) On 13th April, 1993, Malkiyat Singh, Sub Inspector, received a secret information that the girl was seen roaming around in Sohna town in the company of one Anil Kumar. On receipt of this information, he joined the father and reached to Sohna. They found Anil Kumar and Lakhwinder Kaur standing at the bus-stand, Sohna. Statement of Lakhwinder Kaur was recorded under Section 161 of the Code of Criminal Procedure. The Police also visited the places pointed out by Lakhwinder Kaur, where the alleged rape had taken place. Site plan was prepared. Lakhwinder Kaur was medicolegally examined. Her clothes were made into a parcel. Another parcel containing two swabs were duly sealed by the doctor and the same were taken into possession ,--*vide* Memo Ex. PK. Anil Kumar was also medicolegally examined. During investigation, Lakhwinder Kaur narrated the story. She stated that Anil Kumar accused met her on the way. He asked her to enjoy Haryanvi songs in Kundan Cinema. She accompanied him. She has served tea at bus stand, Jind. On drinking the tea, she became giddy. The accused took her near the culvert of Safidon Road. She become semi-unconscious. He took her to the ditches and committed "bad acts" with her. Again, she was brought to the bus stand, Jind. Again, she was served with tea. Then he brought her to Gurgaon in

a semi-unconscious condition. She was taken to Sohna via Bhadurgarh. She also remained unconscious in the bus. Anil Kumar took her to his Auntie's house (Bua). He kept her in a separate room and used to commit "bad acts" with her. One day when they were waiting for a bus at bus stand, Sohana, they were apprehended by the Police accompanied by her father. They were got medicolegally examined. On completion of the investigation, a report under Section 173 Code of Criminal Procedure was prepared and presented to the Court for trial of Anil Kumar.

(5) Copy of the documents as required under Code of Criminal Procedure were duly supplied free of costs to the accused. The case was committed to the Court of Sessions by the learned Chief Judicial Magistrate, Jind, by order dated 11th November, 1993, for trial.

(6) The accused was charge-sheeted under sections 363, 376 of the Indian Penal code by Mr. M.C. Aggarwal, the then Sessions Judge, Jind,—*vide* order dated 25th November, 1993. He pleaded not guilty and claimed trial.

(7) In order to substantiate its case, prosecution has examined eight witnesses. PW-1, Dr. Dhan Kumar, Medical Officer, C.H.C., Safidon, stated on oath that on 14th April, 1993, he had medicolegally examined Anil Kumar. He found Anil Kumar fit to perform sexual intercourse. This witness was not cross-examined by the accused. PW2, Hakam Singh, Statistical Assistant, office of the Chief Medical Officer, Kurukshetra, stated that he had brought the birth register of 1978 of District Kurukshetra. He produced certificate Ex.PB issued by the Chief Medical Officer, Kurukshetra. He identified the signatures on the certificate as he was familiar with the handwriting of Dr. T.R. Girdhar, who had signed the certificate. He stated that the certificate is a true representation of the record brought by him. He further stated that the date of birth of Lakho Devi daughter of Balku resident of village Gangheri is given as 30th September, 1978 in Ex.PB. In cross-examination, he stated that the original entry appearing at page 99, is not in his hand. He had also stated that he had neither seen Lakho Devi, nor did he know her. PW-3, Dr. Renu Aggarwal Medical Officer, General Hospital, Jind, stated that on 13th April, 1993 at about 9.20 P.M. She medicolegally examined Lakhwinder Kaur @ Guddi daughter of Balku Ram, aged 16 years, female Balmiki,

resident of Gangheri care of 3703, Urban Estate, Jind, Police Station, City Jind. She stated that the girl was brought by Malkiyat Singh, Sub Inspector and Balwinder Kaur, Constable No. 606. She has stated that the patient was conscious and cooperative. Her B.P. was 110/70 mm. Her pulse were 80 per minute regular. There was no injury any where on the body. Her height was 5' 5" . 28 teeth were present in her mouth. She further stated that on local examination, she found that the breasts of the girl were partially developed bilaterally equal and there was no external injury. Hymen was ruptured. There were tear on posterior aspect of the hymen and other small tears were also present. There was no fresh bleeding. On prevaginan examination, vagina admitted two finger's but with difficulty and patient had pain during the examination. Two vaginal swabs were taken and sealed. Public hair were also cut and sealed. The public hair were not matted. One Salwar one Kurta and one underwear were taken duly signed and sealed. All three things were handed over to the Police. The patient was referred to Radiology department for confirmation of age. The Salwar, Kurta an underwear were taken into possession,—*vide* Memo Ex.P1 to P-3, which had been handed over to the police. In cross-examination, this witness stated that she had seen the Chemical Examiner's report Ex.DA. According to the report, none of the exhibits were found stained with semen. The doctor further stated that the age and parentage was given by the patient herself. She was not identified by any body at the time of her examination. However, the doctor had noted the marks of identification in the M.L.R. She had also obtained signatures of the girl examined which were duly attested by the doctor. The doctor stated that "I cannot say whether the age of the patient could be more than 16 years as I had referred the matter to the Radiology department. She had been indulging in sexual intercourse prior to her examination by me, as is suggested from her condition noted by me in the M.L.R. She further stated that, according to the report of the Radiologist Mark-A, the age of the girl is recorded between 16 years six months and 17 years".

(8) PW-4, Veer Bhan, M.H.C., tendered his affidavit Ex.PE. In his affidavit dated 29th November, 1994, Veer Bhan has stated that on 13th April, 1994, three parcels in relation to the present case were deposited in the Malkhana to the Police Station. On 21st April, 1994, all the three parcels which were duly sealed, were taken out of the Malkhana and handed over to Nand Lal, Constable No. 508

for depositing the same with the F.S.L., Madhuban. He states that so long as the parcels remained in the Malkhana, the same were neither tampered with by him, nor he allowed any body else to tamper with the same. Mrs. Savitri Devi, Head Mistress, Government Middle School, defence colony, Jind, appeared as PW-5. She has produced original School Leaving Certificate of Lakhwinder Kaur. In this School Leaving Certificate, the date of birth of Lakhwinder Kaur is recorded as 2nd January, 1981. Ex.PP is the photostat copy of the original certificate. She stated in the cross-examination that the certificate is based on the entries made in the admission and withdrawal register of the School. The name of Lakhwinder Kaur was struck off from the School register due to her absence. Her name was struck off on 28th February, 1991 as noted in the remarks column of the register. She further stated that the date of birth as mentioned in the register is based upon the admission form which is submitted by the guardian of the student. Lakhwinder Kaur herself stepped into the witness box as PW-6. She gives the evidence on 17th January, 1995. She stated that about one and half years ago, she used to work as Sweeper in the Urban Estate and Housing Board Colony in the Private residential houses in Jind. She used to work in Kothi No. 1619, Urban Estate, Jind owned by Naresh Kumar, who is a Bank Manager. On the day of the incident, she was coming from the kothi of Naresh Kumar after doing her work. Anil Kumar accused met her on the way. He told her to enjoy Haryanvi songs in Kundan Cinema. She accompanied him. He used to treat her as his sister. He served her tea at bus-stand, Jind. She felt giddiness. The ɔ, the accused took her near the culvert on the Safidon road. Her condition was precarious. She was not conscious. The accused took her in the ditches, threatened her and misbehaved with her. She further stated that the accused removed her clothes and committed bad acts with her. Thereafter, he brought her to the bus-stand, Jind and served her with tea. Thereafter, the accused brought her to Gurgaon by bus in a semi-unconscious condition. From Gurgaon too, she was taken to Sohna via Bahadurgarh. The accused took her to the house of his Auntie (Bua). At night, the accused used to keep her in a separate room from Bua and used to remove her clothes and commit bad acts with her. She further stated that she could not tell about the incident to anybody due to fear. One day, when they were waiting for the bus for Gurgaon at bus stand-Sohna, her father and police came there. She further stated that the accused had committed "bad acts" with her without her permission.

I was brought back to Jind. She was medicolegally examined. In cross-examination, the girl has stated that she has attended the school for two years. She admitted that her name had been struck off as she had discontinued the studies. She also admitted that she had worked for Naresh Kumar for about one year and six months. She also accepted as correct that Naresh Kumar has suggested to her that she should go with him to Gohana as good girl like her will not be available there. She further stated that Preeti who is the wife of Naresh Kumar also treated her in a good way. She further stated that it takes one hour to reach the house of Naresh Kumar from her house. She stated that accused had met her only on the day when she was taken away. He had never met her prior to that. He had met her near a ground in Urban Estate. She had gone first to the house of Naresh Kumar and worked for about one hour. She then had to go to work in another house but she did not go there. On the date of the incident, she had prepared a suit at the house of Naresh Kumar which she had to wear for going to a marriage. The suit had been given to her by Vijay Auntie in whose house she used to work. Naresh Kumar had given her a lift in his car and had brought back to his house and left her there. She had pointed out the shop to the police where she had been given tea. She had no idea that how many people were sitting at the spot when she was given tea. She narrates the story as stated above in the examination-in-chief. She adds that there was rush of people in front of the bus stand. The bank of the Rajbaha is also frequented by the people. The ditches were on the right side of the Rajbaha while going to Safidon road. Ditches were about 2/3 feet deep. If one goes on the bank of Rajbaha, then the person sitting in the ditches is not visible. She had also shown the ditches to the police. She denied that she had been tutored outside the Court by the Thanedar as she had remembered the whole incident. She then stated that she had worked at the kothi of accused Anil Kumar for 3/4 months and thereafter she was removed from the work. She was removed from the job as she had gone late once or twice. She denied if the father of the accused worked in the HUDA also. She stated that she had worked at the house of the accused for 3/4 months ago but had never met the accused before the date of the incident. She had seen the accused once or twice in the beginning. She had no connection with the accused during that time. She also stated that it takes about half an hour from the house of Auntie (Bua) of the accused to the place where she was apprehended by the police.

(9) PW-7, Balku Ram son of Surta Ram, father of the girl stated that he is residing in Urban Estate, Jind. He is serving in the department of HUDA. His daughter Lakhwinder Kaur is aged about 16 years. She used to do domestic work in house No. 1619, Urban Estate, Jind, owned by Naresh Kumar. Earlier, his daughter used to go for domestic work at noon. On 7th April, 1993, she went to do her domestic job at about 7.00 A.M. On receipt of the call from Naresh Kumar. She did not come back after doing the domestic work. He stated that he searched her daughter during the whole day, but could not find her. On the next day he made a statement to the Police which is Ex. PG. On 14th April, 1993, he along with Malkiyat Singh, Sub Inspector, reached bus stand Sohna and found the accused with his daughter there. In cross-examination, this witness has stated that his niece Sunita daugther of Sobha Ram told him that on 7th April, 1993, she had seen Lakhwinder Kaur with Naresh Kumar in his car near sales tax office. He further stated that he approached Naresh Kumar and his wife in connection with search of his daughter but was told that she had left the house after doing the domestic work. They did not tell anything about her. He has further stated that it is wrong to suggest that his daughter was not taken away by the accused and the accused has been falsely involved on account of his strained relations with the father of the accused, who is also employed in the HUDA. He further stated that house of the Bua of the accused was at a distance of about 2 kilometers from the place where his daughter and the accused were apprehended. He further stated that he had never seen the accused earlier. He stated that his daughter had studied up to class-IV.

(10) PW-8, Malkiyat Singh, Sub Inspector, A.E.C., Dhamtan, stated that on 8th April, 1993, he was posted as incharge Civil Lines, Jind. On that day he recorded the statement of Balku Ram which is Ex.PG, on the basis of which formal first information Report Ex. PG/1 was recorded by Birsal Singh, Sub Inspector. He further stated that on 13th April, 1993, he received secret information that Lakhwinder Kaur and accused Anil Kumar were seen roaming around in Sohna Town. Thereafter, he alongwith the complainant Balku Ram and one Constable reached Sohna Town. Lakhwinder Kaur and Anil Kumar accused were found standing at bus-stand, Sohna. They were apprehended by him. He recognised the accused in Court. He further stated that he recorded the statement of Lakhwinder Kaur under

Section 161 of the Code of Criminal Procedure. The accused was arrested and interrogated. He also stated that he also visited the places where Lakhwinder Kaur was allegedly raped by the accused firstly and prepared the site plan at the pointing out of the girl, which is Ex.PH which is of his hand and bears his signatures. Lakhwinder Kaur was got medicolegally examined in Civil Hospital Jind. The sealed parcel containing Salwar, Kurta and underwear belonging to the girl and another parcel containing swabs of Lakhwinder Kaur duly sealed in by the doctor, were produced before him by the Lady Constable Balwinder Kaur. The next day, the accused was got medicolegally examined from Civil Hospital, Jind. He further stated that on his transfer on 20th April, 1993, the challan of the case was prepared by Waryam Singh, Inspector/S.H.O., Police Station , Jind. He identified the signatures of Waryam Singh. In cross-examination, he stated that the report Ex.PG was lodged by Balku Ram with him on 8th April, 1993 at 5.30 P.M. at Safidon by-pass Urban Estate, Jind. The statement Ex.PG was correctly recorded by him as stated by the complainant and that nothing was added or omitted by him. He admitted that the statement of Naresh Kumar under Section 161 Cr.P.C. was not recorded during investigation. He also admitted that Sunita daughter of Sobha Ram was not examined under Section 161 Cr.P.C. by him and that she was not joined in the investigation. He also stated that he correctly recorded the statement of the girl, which is Ex.DA. He denied that the accused is innocent and has been falsely implicated insteadNaresh Kumar, who was initially named by the complainant as culprit.

(11) After closing of the evidence by the prosecution, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. All the incriminating evidence appearing against him in the prosecution witnesses, was put to him. He stated that his father and Balku Ram, the father of the girl were employed in HUDA office at Jind and their relations were strained. He stated that in order to save Naresh Kumar at whose residence the girl used to work, he has been falsely involved. He further stated that he was not arrested from Sohna. His father brought him from there and produced him before the police. He also claimed that the witnesses are deposing against him falsely.

(12) In defence evidence, the accused has examined Ravinder Kumar, No. 230, M.C., P.P., Civil Lines, Jind, as DW-1. He has produced in Court the summoned record. He has stated that on

9th April, 1993, Sub Inspector, Malkiyat Singh, Incharge, left for Delhi, Sohna and Gurgaon at 1.30 P.M. as per entries of Roznamcha. He returned to the police post on 11th April, 1993 at 6.00 A.M. On 13th April, 1993 at 12.35 P.M., Sub Inspector Malkiyat Singh left for Sohna and Gurgaon alongwith Constable Satish Kumar according to the entry in Roznamcha. He returned the police post the same day at 11.30 A.M. Dr. D.P. Kharab, Medical Officer, Civil Hospital, Jind, stepped into the witness box as DW-Z. He stated that on 16th April, 1993, Lakwinder @ Guddi daughter of Balku Ram, residence of H. No. 3703 of Urban Estate, Jind, was referred,--*vide* MLR No. RG/1/ 93 dated 13th April, 1993 for determination of her age. The girl was X-rayed of different joints of the body. He proved the X-ray films Ex. D-1 to Ex. D-4. On the basis of the X-ray reports, he gave his report which is Ex. DW-Z/A. According to this report, the age of the girl was given radiologically between 16 years six months and 17 years. He further stated that the age, as given in the report, can deviate on either side by one year and the same cannot be two years.

(13) We have heard the learned counsel for the parties at length and perused the record of the case.

(14) The learned Additional Session Judge (II), Jind, Mr. Dewan Chand, while acquitting the accused, Anil Kumar, has given the following reasons:

> "11.It was the duty of the prosecution to prove that the prosecutrix was minor at the time of the alleged occurrence. The prosecution led evidence to prove the age of the prosecutrix, but the evidence led by the prosecution is not consistent. According to the birth certificate Ex.PB the date of birth of the prosecutrix is recorded as 30th September, 1978 which comes to 14 years 6 months whereas the school certificate Ex. PF shows that the date of birth of the prosecutrix was recorded as 2nd January, 1981 and Dr. D.P. Kharab DW-2 found her age between 16 years 6th months to 17 years. The prosecutrix while appearing in the witness box on 17th January, 1995 stated her age as 14 years which shows that she was below 12 years of age on the date of alleged occurrence. From the above, it is evident that the prosecution could not prove the alleged minority of the prosecutrix. From the statement of PW-3 Dr. Renu Aggarwal it is evident that there was

no fresh bleeding and the vagina admitted two fingers but with difficulty. No bleeding on any part of external area was found present. The clothes of the persecutrix were sent to the Chemical Examiner who submitted his report Ex. DA which shows that none of the exhibits were found to be stained with semen. PW-3 Dr. Renu Aggarwal also observed that the prosecutrix had been indulging is sexual intercourse prior to her examination as is suggested from the condition mentioned by her in the M.L.R. The sequence of events narrated by the prosecutrix while appearing as PW-6 regarding her abduction and rape do not inspire confidence. According to her own statement the accused met her in the way and he asked her to accompany him to Kundan Cinema and she readily accompanied him. She was served with tea at bus stand Jind and some thing was allegedly mixed in the tea and she become semi-unconscious. No person from the tea shop was produced to prove the above facts. Further she was brought to a place which is near the culvert where she was allegedly raped. This place is also situated near the locality, but none come forward. Thereafter she was again brought to bus stand where again she was served with tea and she became unconscious and then she was brought to Sohna *via* Bahadurgarh and Gurgaon and then they remained together at Sohna and then they were standing at bus stand Sohna in the wait of the bus when they were apprehended by the police. The travelling and staying together of the prosecutrix and the accused in the circumstances of the present case leads to the inference but that thing, if any took place with the consent of the prosecutrix. There is no evidence to show the commission of rape. The prosecutrix simply stated that the accused committed bad acts with her. The above statement is not sufficient to prove the ingredient of rape. The inconsistent evidence regarding the age of the prosecutrix read with the sequence of events showing their travelling and staying together in the circumstances of the present case warrants the conclusion that the prosecutrix has attained the age of discretion and was on the verge of attaining

age of majority and nothing was done with her against her will and she left the house of her father voluntarily to join the company of the accused. The part played by the accused can be regarded as facilitating the fulfilment of desire of girl but it cannot be regarded the act or over act of the accused for inducement or deceitful means as was observed in case **Warad Rajan** *versus* **State of Madras,** AIR 1965, SC,942. To the same effect reference can also be made to **Baldeo** *versus* **State of U.P.** 1993 (1) Crimes, Allahabad High Court, 1009, even the evidence available on the file is insufficient to prove the allegations of molestation of modesty of prosecutrix".

(15) From the above it becomes apparent that the evidence with regard to the age of the girl has been discarded on the ground that it is inconsistent. He has disbelieved the prosecution case about the rape on the following four grounds:—

1. That there is no fresh bleeding and the vagina admitted two fingers.

2. That no semen was found on the clothes of the girl.

3. That PW-3, Dr. Renu Aggarwal was of the opinion that the girl had indulged in sexual intercourse prior to the medical examination.

4. That the sequence of events regarding abduction and rape do not inspire confidence.

(16) We shall discuss each one of the above conclusions in relation to the evidence produced by the prosecution. We shall demonstrate that the conclusions reached by the learned trial Court are not warranted by the evidence produced by the prosecution.

(17) A very similar situation was considered by the Supreme Court in the case of **State of Punjab** *versus* **Gurmit Singh and others.** (1) The salient propositions of law laid down in the aforesaid case may be summed up as follows :—

1. The delay in lodging of the First Information Report, if properly explained should not matter in sexual offences.

(1) AIR 1996 SC 1393

2. The testimony of the victim in cases of sexual offences is vital and unless there are compelling circumstances which necessitate looking for corroboration of her statement, the Court should find no difficulty to act on the testimony of a victim of sexual assault alone to convict.

3. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases, amounts to adding insult to injury.

4. The Court while appreciating the evidence of the prosecution may look for some assurance of her statement to satisfy its judicial conscience. Since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.

5. The evidence of a victim of sexual assault stand almost at par with the evidence of an injured witness.

6. The evidence of a victim of sexual offence is entitled to great weight, absence of corroboration notwithstanding.

7. Corroborative evidence is not an imperative component of judicial credence in every case of rape.

8. Even in cases, where there is some acceptable meterial on the record to show that the victim was habituated to sexual intercourse no such inference like the victim being a girl of "lose moral character" is permissible to be drawn from that circumstances alone.

9. Even, if the prosecutrix, in a given case, has been promiscous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in Court.

(18) The facts in Gurmit Singh's case *(supra)* were that a young girl below 16 years of age had been raped by three youngmen of the same village of which she was a resident. She was comelled to take liquor misrepresenting to her that it was juice. Thereafter she was raped by the three accused persons. She was with the accused persons from 12.30 P.M. on 30th March, 1984 till next morning when she was dropped near the village school at 6.00 A.M. The accused had pleaded that they had been falsely implicated. The trial was conducted in the Court of Mr. R.L. Anand, a designated Court under Section 14 of the Terrorist Affected Areas (Special Courts) Act, 1984. All the accused had been acquitted by the judgment and order dated 1st June, 1985. Since, it was a judgment given by the Special Court, the appeal was filed directly in the Supreme Court. In the opening paragraph, the Supreme Court has observed as follows:—

> "For what follows, the judgment impugned in this appeal, presents a rather disquietening and a disturbing feature. It demonstrates lack of sensitivity on the part of the Court by causing unjustified stigmas on a prosecutrix aged below 16 years in a rape case, by overlooking human psychology and behavioral probabilities. An intrinsically wrong approach while appreciating the testimonial potency of the evidence of the prosecutrix has resulted in miscarriage of justice.

(19) Thereafter the Supreme Court laid down the propositions which have been noticed above. In addition, the Supreme Court rejected the plea of false implication as the plea of despair not worthy of any credence. It was observed that no father could stoop so low as to bring forth a false charge of rape on his unmarried minor daughter with a view to take revenge from the father of an accused on account of pending Civil litigation. The Supreme Court held that the trial Court had unnecessarily blown out of all proportion to hold that some stray sentences in the statement of the prosecutrix that one of the witnesses had been beaten up by one of the accused. The Supreme Court again observed that the trial Court ignored that it is almost inconceivable that an unmarried girl and her parents would go to the extent of staking their reputation and future in order to falsely set up a case of rape to settle petty scores as alleged by Jagjit Singh and Gurmit Singh. Commenting on the approach of the learned trial

Court, the Supreme Court in paragraphs 13, 14 and 15 of the judgment, has observed as follows :—

> "13. The trial Court not only erroneously disbelieved the prosecutrix., but quite uncharitably and unjustifiably even characterised her as a girl "of loose morals" or "such type of a girl".
>
> 14. What has shocked our judicial conscience all the more is the inference drawn by the Court, based on no evidence and not even on a denied suggestion to the effect:
>
> "The more probability is that (prosecutrix) was a girl of loose character, she wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for the reasons best known to her she does not do so and she preferred to give company to some persons".
>
> 15. We must express our strong disapproval of the approach of the trial Court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a judge. Such like stigma have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complainant for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial. The Courts are expected to use self-restraint while recorded such findings which have larger reprecussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole- where the victim of crime is discouraged- the criminal encouraged and in turn crime gets rewarded. Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has

been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court".

(20) In paragraph 16 of the judgment, the Supreme Court further observed as follows:—

"16. As a result of the aforesaid discussion, we find that the prosecutrix has made a truthfull statement and the prosecution has established the case against the respondents beyond every reasonable doubt. The trial Court fell in error in acquitting them of the charges levelled against them. The appreciation of evidence by the trial Court is not only unreasonable but perverse. The conclusions arrived at by the trial Court are untenable and in the established facts and circumstances of the case, the view expressed by it is not a possible view .....".

(21) Showing concern with regard to the increase in crime against women in general and rape in particular, Hon'ble A.S. Anand, J., in paragraph 20 of the judgement, has observed as follows:—

"Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal intergrity, but inevitable causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault–it is often destructive of the whole personality of the victim. A murder destroys the physical body of his victim, a rapist degrades the very soul

of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars."

(22) Earlier also the Supreme Court in the case of **State of Maharashtra** versus **Chandraprakash Kewalchand Jain (2),** summarised the legal position with regard to corroboration of the statement of the prsecutrix. Ahmadi, J. speaking for the Court, observed as under :—

"15. It is necessary at the outset to state what the approach of the Court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex-offences. It is essential that the evidence of the prosecutrix should be corroborated in material particulars before the Court bases a conviction on her testmony ? Does the rule of prudence demand that in all cases save the rarest of rare the Court should look for corroboration before acting on the evidence of the prosecutrix....."

16. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime.....

17. We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violance must ordinarly be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby

(2) AIR 1990 SC 658

insult womanhood. It would be adding insult to injury to tell a woman that her story of women will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Our is not a permissive society as in some of the Western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those violate the societal norms. The standard of proof to be expected by the Court in such cases, must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity".

(23) Even earlier to this, in the case of **Bharwada Bhoginbhai Hirjibhai** versus **State of Gujrat, (3),** the Supreme Court in the words of Hon'ble M. P. Thakkar, J., has observed as follows :—

"1. To say at the beginning what we cannot help saying at the end : human goodness has limits-human depravity has none. The need of the hour however, is not exasperation."

2. The need of the hour is to mould and evolve the law so as to make it more sensitive and responsive to the demands of the time in order to resolve the basic problem : "Whether, when, and to what extent corroboration to the testimony, of a victim of rape is essential to establish the charge". And the problem has special significance for the women in India, for while they have often been idolized, adored, and even worshipped, for ages they have also been exploited

(3) AIR 1983 SC 753

and denied even handed Justice–sixty crores anxious eyes of Indian Women are therefore focussed on this problem. And to that problem we will presently address ourselves".

7. It is now time to tackle the pivotal issue as regards the need for insisting on corroboration to the testimony of the prosecutrix in sex-offences.....

9. In the Indian setting refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society....."

10. .....
Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :—(1) A girl or a woman in the tradition bound non–permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole word. (4) She would face the risk of losing then love and respect of her own husband and near relatives and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehand that it would be difficult to secure an alliance with a suitable match from a respectable or an accepatable family. (6) It would almost

ineviably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not want to avoid publicity on account of the rear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency to face the Court, to face the cross-examination by counsel for the culprit and the risk of being disbelieved, act as a deterrent.

11. In view of these factors, the victims and their relatives are not too keen to bring the culprit to books. And when in the fact of these factors the crime is brought to light there is a built in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover. We

are, therefore, of the opinion that 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 the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self preservation. Or when the "probabilities-factor" is found to be out of tune".

(24) This was the law as it stood at the time the judgment was rendered by Mr. Dewan Chand, learned Additional Sessions Judge (II), Jind, in the present case, on 13th May, 1995. All of it was ignored by the learned trial Court. The error committed by the learned trial Court in **Gurmit Singh's case** *(supra)* was repeated by the learned trial Court in the present case. The observations made by the Supreme Court with regard to the conduct of the trial and the views expressed by the trial Court, in **Gurmit Singh's case** *(supra),* have been noticed above. We are of the opinion that the judgment of the learned trial Court in the present case also shows a total lack of sensitivity by ignoring totally the harrowing experience and the hostile atmosphere which the victim of sexual assault or rape faces whilst giving evidence in Court. The scenario had been summed up by the Supreme Court in **Hirjibhai's case** *(supra).* The trial Court totally ignored the factors enumerated by the Supreme Court in the aforesaid case. The fear factors of the rape victim was reiterated by the Supreme Court in the case of **Shri Bodhisattwa Gautam** versus **Miss Subhra Chakraborty, (4),** S. Saghir Ahmad, J. speaking for the Bench observed as follows :—

"10. Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which,

(4) AIR 1996 S.C. 922

on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects."

(25) Recently, in a series of judgments, the Supreme Court has stressed the necessity of having socially sensitized judges to try cases of sexual assault and rape. In the case of **State of Karnataka** versus **Krishnappa, (5),** Dr. A. S. Anand, C.J., has observed in paragraph 15 of the judgment as follows :—

"15. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos".

(26) In the case of **Visveswaran** versus **State Rep. by S.D.M., (6),** Justice Y. K. Sabharwal, speaking for the Supreme Court has observed as follows :—

"12. Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that approach required to be adopted by Courts in such cases, has dealt with utmost sensitivity. Courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the Courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that

(5) AIR 2000 SC 1470
(6) 2003 AIR SCW 2541

every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved".

(27) We have very anxiously and carefully scrutinised the evidence produced by the prosecution. In this case, the prosecution has produced the birth certificate of the unfortunate victim of rape Ex. PB. In this birth certificate, the date of birth is recorded as 30th September, 1978. This would mean that the victim was 14 years and 7 months of age on the date she disappeared from her home. The statement made by PW–2. Hakam Singh, Statistical Assistant, who had produced the relevant entry in the birth register for the year 1978 with regard to the age of the victim has not been challenged by the respondent in cross-examination. It was not even suggested that the entry in Ex. PB is incorrect or that it did not relate to the birth of the victim. A presumption, therefore, arose under Section 114 (e) of the Indian Evidence Act, 1872 which provides as under :—

"114. Court may presume existence of certain facts :—The Court may presume the existence of any fact which it thinks likely to have happended, regard being had to the common course of natural events, human conduct and public private business. In their relation to the facts of the particular case."

Illustrations :

The Court may presume :—

(a) ... ...

(b) ... ...

(c) ... ...

(d) ... ...

(e) That judicial and official acts have been regularly performed.

(28) The rule embodied in the illustration (e) flows from the maxim omnia praesumuntur rite et solemniter esse acts. i.e. all acts are presumed to have been rightly and regularly done. In other words, in the absence of clear proof to the contrary, the trial Court ought to have relied on the birth certificate Ex. PB to determine the age of the victim. The illustration contained in Section 114 (e) of the Indian Evidence Act, simply means that if an official act is proved to have been done, it would be presumed to have been regularly done. The aforesaid view of ours finds support from a judgement of the Supreme Court in the case of **Maharaja Pratap Singh Bahadur** versus **Thakur Manmohan Dey and others, (7),**

(29) In our opinion, the learned trial Court has committed a fatal error of law in discarding the clear proof of age of the victim given in the birth certificate Ex. PB on the ground that it was inconsistent with the date of birth recorded in the School Leaving Certificate Ex. PF and the age given by the victim to PW-3. Dr. Renu Aggarwal. In our opinion, these discrepancies were of no consequence. The presumption under Section 114 (e) of the Indian Evidence Act, could only be nullified by clear and cogent evidence to the contrary. The age of the victim in the school register is based on the statement of the parent/guardians. The statement before Dr. Renu Aggarwal was made by the victim herself. At that time, she gave her age as 16 years. Yet, in Court she gave her age as 14 years. These discrepancies only go to show that the victim is only an innocent child. They are not sufficient to discard the evidence of age given in Ex. PB. DW-2, D. P. Kharab, Medical Officer, Civil Hospital, Jind, stated that the age of the victim radiologically could be said to be between 16 years 6 months to 17 years. This witness further stated that the age as given in the report can deviate on either side by one year. Therefore, even according to DW-2, Dr. D. P. Kharab, the age of victim could have been 15 years 6 months at the relevant time. In our opinion, the aforesaid statement and the report given by DW-2, Dr. D. P. Kharab, would rather support the date of birth as recorded in the birth certificate Ex. PB, than to lead to the conclusion that the victim was over 16 years of age at the relevant time. We have no hesitation in coming to the conclusion that at the relevant time, the victim was a minor.

(7) AIR 1966 SC 1931

(30) Once we come to the above conclusion, the question of consent having been given by the victim to sexual intercourse with the respondent–Anil Kumar would become wholly irrelevant. Under Section 375 of the Indian Penal Code, the offence of rape is defined as under :—

> "375 :—A man is said to commit "rape", who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :—
>
> xx xxx xxx
>
> Fifthly.—With her consent, when, at the time of giving such consent, by reasons 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 sixteen years of age".

(31) A perusal of the aforesaid section would show that the respondent has committed the offence of rape as defined under section 375 (sixthly) of the Indian Penal Code. Even if it is accepted that the victim was over 16 years of age, the respondent has committed the offence of rape as consent would be nullified under section 375 (fifthly).

(32) The learned trial Court, in our opinion, wrongly held that "the sequence of events narrated by the prosecutrix while appearing as PW-6, regarding her abduction and rape do not inspire confidence". It has come in the evidence of the victim that she had been sedated at the time she was raped. It has also come in evidence that she had been threatened when she was repeatedly raped at the house of Aunt (Bua) of the respondent. There is no reason to disbelieve the statement of the victim. Her statement in the witness box shows she succumbed to the lust of the respondent, as she had been sedated and threatened. She was kept in a separate room in the house of his aunt and repeatedly raped every night. But she did not narrate the story to anyone due to fear. The trial Court totally lost sight of the fact that the girl came from a very impoverished background. She was

illiterate. She had stated in evidence that she had attended the school for two years. Her name was struck off from the register of the school due to absence. The respondent allured her on the pretext of a good time. We are of the opinion that the learned trial Court erred in law in ignoring all the aforesaid factors, in coming to the conclusion that the evidence of the victim does not inspire confidence. The learned trial Court has wrongly empathised only the negative aspects of the evidence. No reliance could have been placed on the facts that there was no fresh bleeding and that the vagina admitted two fingers to come to the conclusion that the victim had consented to sexual intercourse. All the factors mentioned by the learned trial may well lead to a conclusion that the victim had sexual intercourse prior to her medical examination by PW–3, Dr. Renu Aggarwal. The Supreme Court has observed in **Gurmit Singh's case** *(supra)* that merely because there is evidence on the record that the victim was habituated to sexual intercourse would not lead to the conclusion that she must have consented to sexual intercourse with the rapist. In our opinion, the learned trial Court was wholly unjustified in holding that the victim must have consented because she had indulged in sexual intercourse earlier. Such a myth needs to be exploded permanently from the psyche of those judges who are entrusted with the very delicate task of conducting trials in cases relating to sexual offence/assault/rape. Accepting such a broad proposition, would mean that no mature woman accustomed to sexual intercourse can be raped. In appreciating the evidence of the prosecution, the Court should have taken special notice of the fact that the victim had narrated the events as they occurred. There were hardly any discrepancies in her evidence. There was no reason to desbelieve the girl. On the other hand the respondent pleaded false implications. He stated that the father of the victim and his father worked in the same establishment. He stated that because there were differences between the parents, he had been falsely implicated. Such a plea was summarily rejected by the Supreme Court in **Gurmit Singh's case** *(supra)*. It has been noticed by the Supreme Court in **Hirjibhai's case** *(supra)*, that a rape victim is extremely reluctant even to admit the incident. In the present case, the father of the victim initially went to the police suspecting that his daughter had been abducted by Naresh Kumar. He, therefore, made a statement that his daughter had been kidnapped by Naresh Kumar. The father made

the initial statement on the basis of the facts then known to him. Since the girl had been working in the house of Naresh Kumar, he had suspected that she may have been abducted by him. The actual sequence of events came to be known when the girl was recovered in the company of the respondent. Hence, no further action was taken against Naresh Kumar. The case against the respondent is based on the statement made by the victim of rape. In her evidence, the victim clearly stated that she had been working in the house of Naresh Kumar. He had transferred to Gohana. Naresh Kumar had suggested to her that she should go with them to Gohana as it was not possible to find a good girl like her. She candidly stated that the wife of Naresh Kumar also treated her in a good way. She also had praise for Vijay Auntie in whose house she used to work. The aforesaid facts clearly establish that the victim has given the true version of the entire epidode. There is no evidence on the record to show as to why the father and the girl would try to protect Naresh Kumar. On the other hand, the respondent has not adduced any evidence of false implication. It is patent that the plea of false implication raised by the respondent is out of desperation. We have no hesitation in rejecting the plea of false implication put forward by respondent–Anil Kumar.

(33) The learned trial Court also disbelieved the prosecution version on the ground that no person from the tea shop was produced to prove that the victim had been given the adulterated tea. It is also held by the learned trial Court that no witness has been produced from a locality near the culvert where she was allegedly raped. The learned trial Court also held that travelling and staying of the victim and the respondent leads to the inference that the victim had consented. The trial Court held that the mere statement of the victim that the respondent had committed "bad acts" is no evidence of rape. It is held that the statement is not sufficient to prove the ingredients of rape. We are constrainted to hold that the aforesaid observations are contrary to the law laid down by the Supreme Court in **Hirjibhai's case** *(supra)*, as it has been categorically held that the refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. It has also been held that the evidence of the victim of rape stands on par with the evidence of an injured witness and that the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. The learned trial Court totally ignored the glaring fact that the sexual assault or

rape is not usually committed in the presence of witnesses. The reasons given by the learned trial Court cannot be accepted on the basis of any known principles of appreciation of evidence.

(34) Compounding the earlier mistake committed about the age of the victim, the trial Court uses the same conclusion to hold that she had attained "the age of discretion" and was on the verge of attaining age of majority. The trial Court further holds that nothing was done with her against her will. She left the house of her father voluntarily to join the company of the respondent-accused. In support of the aforesaid findings, the learned trial Court pleaced reliance on a judgment of the Supreme Court in the case of **S. Varadarajan** versus **State of Madras, (8),** and a judgment of the Allahabad High Court in the case of **Baldeo** versus **State of U.P., (9).**

(35) We have perused the judgment of the Supreme Court in **Varadajan's case** *(supra).* In that case, a young girl had eloped with her lover who was her next door neighbour. The father of the girl was an Assistant Secretary to the Government of Madras in the Department of Industries and Co-operation. He had two daughters. One was studying in Madras Medical College while the other was a student of Second year B.Sc. Class in Ethiraj College. The younger girl went with the appellant in his car. They picked up a witness to go with them to the Registrar's Office to witness their marriage. Subsequently, the agreement of marriage was entered into between the appellant and the girl which was got registered. The father lodged a report with the police station that his minor daughter was missing. It was not disputed that the girl was born on 13th November, 1942 and was a minor on 1st October, the date on which she went missing. The appellant was put on trial for having committed the offence under Section 361 IPC, which is as under :—

> "Whoever takes or entices any minor under sixteen years of age if a male, or under eighten years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian is said to kidnap such minor or person from lawful guardianship".

(8) AIR 1965 SC 942
(9) 1993(1) Crimes, Allahabad High Court 1009

(36) The Supreme Court after noticing the entire facts, observed that no threat was held out to the girl. It was further held that the fact of her accompanying the appellant all along is quite consistent with her own desire to be the wife of the appellant. It was also observed that the girl was not a child of tender years who was unable to think for herself. She was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. Thereafter, the significant observations of the Supreme Court are as under :—

> ".....She was not uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area".

(37) The aforesaid observations make it abundantly clear that the Supreme Court was dealing with a case where facts and circumstances were entirely different from the facts and circumstances of the present case. The term of "age of discretion" used by the Supreme Court in the aforesaid case would not be applicable in the facts and circumstances of the present case. We are dealing with an uneducated and unsophisticated girl living in depth's of poverty. The simplicity and the modesty of her character is amply demonstrated when she describes the act of rape as "bad acts". We are of the opinion that the judgment of the learned trial Court suffers from total non-application of mind. The evidence of the prosecution has been discarded without any cogent reasons. The conclusions arrived at by the learned trial Court are perverse. None of the findings given by the learned trial Court are sustainable. We are of the opinion that the prosecution has proved its case beyond all reasonable doubt. The present appeal of the State is accepted. The acquittal recorded by the learned trial Court of the respondent–Anil Kumar, is set aside. Respondent–Anil Kumar is held guilty and convicted for the offences punishable under Sections 361, 366 and 376 IPC.

(38) Respondent–convict Anil Kumar son of Kishan Lal Arora, resident of H. No. 372, H.B. Colony, Jind, be summoned through Non-Bailable Warrants under Sections 361, 366 and 376 of the Indian Penal Code for 5th September, 2003.

(39) Put up on the aforesaid date of hearing the convict on the quantum of sentence.

ORDER DATED 17TH OCTOBER, 2003

Ms. Palika Monga, A.A.G., Haryana, *for the appellant.*

Anil Kumar–respondent Convict in Person with Rakesh Nagpal, Advocate, *for the accused–respondent.*

(40) By judgment dated 11th July, 2003, we had convicted Anil Kumar, respondent under Section 361, 366 and 376 of the Indian Penal Code.

(41) The convict Anil Kumar has been produced in Court in custody.

(42) We have heard the learned counsel for the parties on the quantum of sentence.

(43) Mr. Nagpal has submitted that a lenient view be taken in the matter of sentence as the convict–respondent is a first offender. During the pendency of the criminal proceedings, the convict has got married. He has a wife and two small children, both boys, 7 and 4 years respectively. He is a poor man. He ekes out his living by hawking fruit and vegetables. He is an illiterate man and was, therefore, unaware of the gravity of the offence committed by him. In support of the plea of leniency learned counsel for the respondent–convict has relied on the judgment of the Supreme Court in the case of **State of Himachal Pradesh** versus **Mango Ram., (10).** Learned counsel has placed particular emphasis, on the observations of the Supreme Court contained in paragraph 16 of the judgment, which are as under :—

> "16. In view of the foregoing conclusions we reverse the findings of the learned Sessions Judge which was confirmed by learned Single Judge and find that the accused is guilty of the offence punishable under Section 376 IPC. As regards the sentence, we take a lenient view for the reason that the prosecutrix and accused are related. They were both teenagers with an age difference of about 2–3 years.

(10) 2000(3) RCR (Criminal) 752

Both were immature and young. Evidence indicates no marks of violence at all on any part of the body of the prosecutrix. The incident happened in 1993. After the acquittal by passage of time, the members of the two families must have buried their hatchet if any arisen on account of this incident. The learned counsel for the respondent argued that a further order for custodial sentence at this distance of time may cause rapture to social harmony in the village life and may only help to rekindle the flames of anger which has been smouldering for so long between near relatives. Having regard to all these matters, we hold that sentence already undergone by the accused would be sufficient to meet the ends of justice and we do accordingly".

(44) Ms. Monga, learned counsel for the State however, submits that in cases of rape, especially where the victim is a minor, the Court should not show any leniency, unless some exceptional circumstances warrant, a deviation from the minimum sentence prescribed. In support of the aforesaid submission, the learned counsel has relied on three judgments of the Supreme Court rendered in the cases of **State of Rajasthan** versus **Om Parkash, (11) ; State of Karnataka** versus **Krishnappa, (supra) and State of Andhra Pradesh** versus **Polamala Raju @ Rajarao, (12).**

(45) We are of the considered opinion that the facts and circumstances of this case do not leave any scope for showing any leniency to the respondent–convict. The respondent–convict has been convicted under Sections 361, 366 and 376 of the IPC. Punishment for commission of an offence under Section 361 of the IPC is provided under Section 363 of the IPC. The aforesaid Sections are as under :—

"**361. Kidnapping from lawful guardianship**—Whoever takes or entices any minor under (sixteen) years of age if a male, or under (eighteen) years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

(11) AIR 2002 SC 2235
(12) 2000(3) RCR (Criminal) 732

Explanation.....

363. Punishment for kidnapping :—Whoever kidnaps any person from (India) or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces and woman to go from any place with intent that she may be, or knowing that it is likely that she will be forced, or seduced to illicit intercourse with another person shall be punishable as aforesaid].

376. Punishment for rape :—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and not under twelve years of age, in which cases ; he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

(46) A bare perusal of the aforesaid Sections makes it clear that on conviction under Section 361 of the IPC, the offender can be sentenced to imprisonment for a term which may extend to seven years. Under Section 366 of the IPC, upon conviction, the offender is liable to be sentenced to imprisonment for a term which may extend to 10 years. Upon conviction for rape, a mandatory minimum sentence of seven years imprisonment is prescribed under Section 376 of the IPC. The offender can be sentenced to imprisonment for life or for a term which may extend to ten years. A sentence of imprisonment for a term less than seven years can only be imposed for adequate and special reasons to be mentioned in the judgment.

(47) In **Krishnappa's case** *(supra)*, the Supreme Court was considering this very question which was posed in paragraph 1 of the judgment which is as under :—

> "Was the high Court justified, in the facts and circumstances of the case, to reduce the sentence of 10 years rigorous imprisonment imposed by the trial Court on the respondent for an offence under Section 376 IPC to 4 years R.I., while maintaining his conviction and sentence for offences punishable under sections 252, 323, 341, 363, 448 and 506 of Indian Penal Code, is the only question involved in his appeal by special leave ?"

(48) Answering the aforesaid question, the Supreme Court has held that the sentence could not be reduced on the ground that the accused–respondent was unsophisticated and illiterate citizen belonging to a weaker section of society. In that case, it was even pleaded that the respondent was a chronic addict to drinking and had committed rape on the girl while in a state of intoxication. It was also pleaded that his family comprising of an old mother, wife and children were dependent upon him. All these factors were held not to justify recourse to the proviso to Section 376 (2) of the IPC. The observations of the Supreme Court which are relevant, are as follows :—

> "16. In the instant case, the trial Court gave sufficient and cogent reasons for imposing the sentence of 10 years R.I. for the offence under Section 376 IPC on the respondent. Those reasons have impressed us. The trial Court was rightly influenced by the fact that the respondent was a

married man of 49 years of age having his own children and the victim of his sexual lust was an innocent helpless girl of 7/8 years of age. The medical evidence provided by PW–6, Dr. Shalini Devi exhibits the cruel nature of the act and the extent of pain and suffering which the victim might have undergone on her genitalia as a result of forcible clitus. The trial Court had, therefore, opined that because of the cruel nature of the act, the accused was not entitled to any leniency.

17. The High Court, however, differed with the reasoning of the trial Court in the matter of sentence and as already noticed, the reasons given by the High Court are wholly unsatisfactory and even irrelevant. We are at a loss to understand how the High Court considered that the discretion had not been properly exercised by the trial Court. "There is no warrant for such an observation. The High Court justifiefd the reduction of sentence on the ground that the accused–respondent was unsophisticated and illiterate citizen belonging to a weaker section of the society" that he was a "chronic addict to drinking" and had committed rape on the girl while in a state of "Intoxication" and that his family comprising of "an old mother, wife and children", were dependent upon him. These factors, in our opinion, did not justify recourse to the proviso to section 376 (2) IPC to impose a sentence less than the prescribed minimum. These reasons are neither special nor adequate. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. Socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence

commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of heionus crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum to the respondent. To show mercy in the case of such a heinous crime would be travesty of justice and the plea for leniency is wholly misplaced. The High Court, in the facts and circumstances of the case, was not justified in "interfering with the discretion exercised by the trial Court and our answer to the question posed in the earlier part of the judgment is an emphatic–No."

(49) Similarly, in **Om Parkash's case** *(supra),* the Supreme Court has observed as under :—

"It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39 which, *inter alia,* stipulates that the State shall, in particular, direct its policy towards securing that the tender age of the children is not abused and the children are given opportunities and facilities to develop in a healthy manner and conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment. In the present case, the victim at the time of occurrence of rape was a child aged eight years. The accused was youth aged 18 years. The Additional District an Sessions Judge found him guilty for offence under Section 376, Indian Penal Code and imposed rigorous imprisonment for seven years and fine of Rs. 1,000 and in default of payment of fine to further undergo six month's rigorous imprisonment. The High Court by the impugned judgment dated 14th November, 1995 giving to the accused the benefit of doubt acquitted him. The State is in appeal on grant of special leave."

(50) After considering the entire case law, the Supreme Court has observed that the child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscence than this. It is a crime against humanity. The aforesaid observations of the Supreme Court leave no manner of doubt that no leniency can be shown to the respondent–convict in the present case. The same view is reiterated by the Supreme Court in **Polamala Raju's case** *(supra)*, in the following terms :—

> "9. To say the least, the order contains no reasons, much less "special or adequate reasons". The sentence has been reduced in a rather mechanical manner without proper application of mind. It appears that the provisions of Section 376 (2) IPC were not at all present to the mind of the court. This Court has time and again drawn attention of the subordinate courts to the sensitivity which is required of the court to deal with all cases and more particularly in cases involving crime against women. In **State of A.P.** versus **Bedem Sundara Rao, 1995 (6)** SCC, 230, this Court said :—
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> > "In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the cirme in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane".

14. The learned Amicus (Curiae) lastly submitted that because of long time which has elapsed subsequent to the date of offence and the possibility that the prosecutrix, as also the respondent, may have got married and settled in life during the pendency of these proceedings, fine instead of sentence be imposed. We cannot agree. These factors may be relevant for consideration by the Executive or Constitutional authorities, if they chose to remit the sentence on being so approached, as opined in **Kamal Kishore** versus **State of U.P. 2000 (2), RCR (Crl.), 678: (2000) 4 SCC 502, Pr. 25 case** *(supra),* but insofar as our judicial conscience is concerned, we find no reason to go against the legislature mandate and award any lesser sentence".

(51) The aforesaid observations are sufficient to negate the plea of the learned counsel for the respondent-convict for leniency on account of the fact that he had been facing criminal proceedings since 1993. These have been held to be irrelevant consideration.

(52) In view of the above, we sentence the respondent-convict, Anil Kumar, for the offence under Sections 361/363 of the Indian Penal Code to under go three years rigorous imprisonment and to pay a fine of Rs. 1,000. In default of payment of fine he shall further undergo six months rigorous imprisonment.

(53) For the offence under Section 376 of the the Indian Penal Code, respondent-convict is sentenced to undergo ten years rigorous imprisonment and to pay a fine of Rs. 5,000. In default of payment of fine, he shall further undergo one year rigorous imprisonment. All the sentences shall run concurrently. The period, if any, spent by the respondent-convict in jail during the trial and the appeal in this Court, shall be set off from the substantive sentence mentioned above.

(55) Necessary warrants shall be issued to take the respondent-convict into custody to undergo sentence.

R.N.R.

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