

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

1	Case No.	Criminal Appeal No.32/2011 & Criminal Appeal No.119/2011
2	Parties Name	Munnalal and Jagdish Vs. State of M.P.
3	Date of Judgment	4/8/2021
4	Bench constituted of	Hon'ble Shri Justice Vivek Rusia and Hon'ble Shri Justice Shailendra Shukla
5	Judgment delivered by	Hon'ble Shri Justice Shailendra Shukla
6	Whether approved for reporting	Yes
7	Name of counsels for parties.	Ms. Sharmila Sharma, learned counsel for the appellant in CRA.No.32/2011. Ms. Seema Sharma, learned counsel for the appellant in CRA.No.119/2011. Ms. Mamta Shandilya, learned Public Prosecutor for the respondent/State.
8	Law laid down	(1) Prosecutrix in a rape case – conviction can be based only on the basis of solitary evidence of prosecutrix but such witness should be of “sterling quality”. Citation relied upon - Krishna Kumar Malik Vs. State of Haryana [(2011) 7 SCC 130] & Rai Sandeep @ Deepu Vs. State (NCT of Delhi) reported in (2012) 8 SCC 21] . (2) While deciding rape case, the Court must also evaluate the impact of such insinuation on a person accused of such offence. Citation relied upon - Raju and others Vs. State of MP [(2008) 15 SCC 133] . (3) Applicability of presumption under Section 114A of Evidence Act as it stood prior to the amendment in the year 2013 – before applying the presumption, it must be proved that sexual intercourse by the accused was committed. Barely proving commission of sexual intercourse is not sufficient.
9	Significant paragraph numbers	25 to 28

(Vivek Rusia)
Judge

(Shailendra Shukla)
Judge

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(DIVISION BENCH: HON. MR. JUSTICE VIVEK RUSIA & HON. MR.
JUSTICE SHAILENDRA SHUKLA)

Criminal Appeal No.32/2011

Munnalal @ Bicholi S/o Ramprasad
 Aged 40 years, Occ. - Driver,
 R/o – 114, New Gauri Nagar,
 Indore (M.P.)

.... Appellant

Versus

State of Madhya Pradesh
 through P.S. Heera Nagar,
 Indore (M.P.)

.... Respondent

Criminal Appeal No.119/2011

Jagdish @ Kallu S/o Tulsiram
 Aged 40 years, Occ. - Panditai,
 R/o – Gram Bhangiya,
 District - Indore (M.P.)

.... Appellant

Versus

State of Madhya Pradesh
 through P.S. Heera Nagar,
 Indore (M.P.)

.... Respondent

Heard through Video Conferencing.

For appellant: Smt. Sharmila Sharma, Advocate in CRA.No.32/2011.
 For appellant: Ms. Seema Sharma, Advocate in CRA.No.119/2011.
 For respondent: Smt. Mamta Shandilya, Public Prosecutor for State.

Whether approved for reporting :

JUDGMENT

(Delivered on 4/8/2021)

Per, Shailendra Shukla, J :-

1/ Appellants Jagdish and Munnalal have filed these separate appeals under Section 374 of Cr.P.C against the judgment dated

27.11.2010 pronounced by 16th ASJ, (Fast Track), Indore, in S.T. No.1233/2009, whereby the appellants have been convicted under Section 376(2)(G) of IPC and sentenced to Life Imprisonment with fine of Rs.2,000/- each. In lieu of payment of fine amount, they have been directed to undergo 6 months' R.I.

2/ Briefly stated the facts as set out in prosecution case are that on 20.7.2009, a report was lodged at police station Heera Nagar, Indore by the prosecutrix that she has been living with her maternal grand mother Radhabai at Ujjain whereas, her mother Varsha had left her father namely Ravi 4 years ago and since then her mother along with the brother of the prosecutrix were residing with step father Mukesh (acquitted accused) at Indore as tenant in the house of appellant Munnalal. On 5.7.2009, the prosecutrix had come with her grand mother Radhabai from Ujjain to Indore. On 20.7.2009, at about 10.00 am, her step father came to the house along with the appellants Munnalal and Jagdish and asked her mother to accompany him and took her along with him. Thereafter, the appellants went out and sat on the terrace of the house. Subsequently, after 5 to 10 minutes appellant Jagdish entered the house and asked the prosecutrix that if her father had told her that these persons would come and would do whatever they want and she would get paid for the same. Subsequently, accused Jagdish took out the clothes of the prosecutrix, tied her hands with Dupatta, kissed her cheeks and ran his hands over her body and left the room. Appellant Munnalal subsequently entered the room and forcibly committed rape upon prosecutrix and threatened her that if she discloses anything about it to her mother or brother then both of them would be killed. As per prosecutrix, she disclosed the incident to her father, but the father (Mukesh) asked her to keep quite and carry on with the same, as she will get money for it. On 5.8.2009, the prosecutrix and her grand mother came to Indore. The prosecutrix went along with her to Ujjain. Later on, when the step father of the prosecutrix rang her up on 11.8.2009 and asked her to come to Indore, she refused and when her grand mother asked the reason for refusal, she narrated the alleged incident in detail. Then grand mother

Radhabai called up the mother of the prosecutrix to come down to Ujjain and thereafter the prosecutrix lodged report against her step father and the appellants.

3/ The Investigating Officer, after lodging of FIR, commenced the investigation and sent the prosecutrix for medical examination. Subsequently, the appellants were also medically examined. The radiological report in respect of age of the prosecutrix was also conducted. The sealed swab, slides, and inner garments of appellants and prosecutrix were sent to FSL for examination. After carrying out rest of the investigation, charge sheet was filed under Section 376(2) (g) of IPC, 120B and 109 of IPC.

4/ After committal proceedings, the learned ASJ, Indore, framed charge under Section 376(2)(g) of IPC against both the appellants, i.e., Munnalal and Jagdish whereas charges under Sections 120B and 109 of IPC were framed against Mukesh. All the accused abjured their guilt and claimed innocence. The prosecution has examined 16 witnesses in support whereas, the appellants have examined 7 witnesses. The defence of the appellant Jagdish is that prosecutrix along with her mother and grand mother have falsely implicated him in conspiracy with villagers. The defence which has been taken by Munnalal is that the prosecutrix and her mother and grand mother have lodged false report against him after having collaborated with police.

5/ The grounds which have been taken by the appellants in their separate appeals conjointly speaking are that the learned Judge has erred in not considering the fact that the FIR in the instant case has been lodged after an inordinate delay of about 23 days for which no plausible explanation has been offered. It is further contended that the material omissions and contradictions appearing in the testimony of the prosecution witnesses have not been considered in true prospective and that all the independent witnesses such as Vivek Sharma (PW1), Ganesh (PW2) and Manoj (PW3) have not supported the case of the prosecution and have turned hostile, submitting that the

learned Judge has erred in drawing unwarranted inferences, the judgment of conviction and sentence has been sought to be set aside.

6/ The question for consideration is, whether in view of the submissions and the grounds raised in appeals, the appellants deserve to be acquitted and appeals deserve to be allowed?

7/ It is settled position of law that in the case of rape, the accused can be convicted only on the basis of solitary evidence of prosecutrix.

8/ In **Ranjit Hazarika Vs. State of Assam [(1998) 8 SCC 635]** the celebrated case of **State of Punjab Vs. Gurmeet Singh and others [1996(2) SCC 384]** has been cited, in which the Apex Court has held that the Court must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman will come forward in a court just to make humiliating statements against her honour, such as is involved in the commission of rape on her. Following is the relevant excerpt:-

"6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In State of Punjab v. Gurmit Singh, to which one of us (Anand, J.) was a party, while dealing with this aspect observed: (SCC pp. 395-96, para 8)

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found

to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix 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 leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

We are in agreement with the aforesaid view."

9/ Although the evidence of prosecutrix is the most vital piece of evidence against the accused, however the Apex Court has also held that such evidence must inspire confidence and the witness should be of sterling quality.

10/ In the case of **Krishna Kumar Malik Vs. State of Haryana [(2011) 7 SCC 130]** it has been laid down as under:-

"No doubt, it is true that to hold an accused guilty for commission of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires the confidence and appears to be trustworthy, unblemished and should be of sterling quality."

11/ In the case of **Rai Sandeep @ Deepu Vs. State (NCT of Delhi) reported in (2012) 8 SCC 211**, it has been described as to who

can be considered to be a sterling witness. The following excerpt is being reproduced from the above judgment:-

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

12/ It would first be appropriate to consider the statements of the prosecutrix (PW-11). She states that on the date of the incident she was staying with her mother Varsha and father Mukesh (acquitted accused) and maternal grand-mother namely Radha in the house of Mishra (appellant Munnalal Mishra) on rent. The prosecutrix states that on the date of the incident at about 10.00 AM her father had brought the appellants Munna and Jagdish to her house and then his father

Mukesh left with her mother to the market and appellants Jagdish and Munna had also gone away. Sometimes later both appellants came to her house and committed wrongful act against her. Both of them after entering the house locked the door from inside and tied up the mouth and legs of the prosecutrix with her own Dupatta. Both appellants took out the clothes of prosecutrix. The prosecutrix states that appellant Jagdish first committed the act of rape by inserting his private organ in the private organ of the prosecutrix and at that point of time appellant Munna Mishra was holding her hands. The prosecutrix further states that thereafter the same act was repeated by Munna with Jagdish holding the hands of prosecutrix. The prosecutrix states that at the time when the incident occurred, her mouth and legs were tied up and her hands had been held by the accused, therefore, she could not resist them. Prosecutrix states that due to the act of the appellants she suffered great pain and she was crying. After the act both the accused told her not to reveal this to anyone, otherwise they would kill her mother and brother. Prosecutrix states that after they went, the prosecutrix opened her mouth and legs because her hands were already open. The prosecutrix further states that after the accused persons went away, she was crying alone in her house and her mother and father Mukesh returned after 1 to 2 hours. She states that she did not rely upon her father and, therefore, did not confide about the incident with him and due to fear she also did not tell her mother. prosecutrix states that 2 to 3 days after the incident she went along with her mother to her maternal grand-mother's place at Ujjain and then the incident was revealed by her. Prosecutrix states that Mukesh, her step father, used to bring along accused Jagdish and Munna and used to serve them liquor. Prosecutrix states that Mukesh already knew that such incident would happen and he purposely took away her mother. Prosecutrix states that her mother did not know about the incident. As per prosecutrix when she told her grand-mother at Ujjain, her mother was also present and both of them took her to Police Station Heera Nagar and lodged the report Ex.P/8, on which signatures of prosecutrix are from B to B part.

13/ The prosecutrix has been cross examined and has been asked as to whether she made same statements in her FIR and police statements Ex.D/1 that both the accused entered her room, had closed the door from inside and undressed her and committed rape one after the other with both the accused present in room, she responds in affirmative but when she is confronted with her report Ex.P/8 and police statements Ex.D/1 in which no such statements have been made, she claims ignorance. She has been read over the police statements Ex.D/1 and statements made in FIR Ex.P/8 in which it has been mentioned that at first the bearded Pandit had come inside her room and had tied up her mouth and also both hands and had taken off her clothes and underwear excepting the vest worn by her, that thereafter Pandit kissed her cheeks and had ran his hands over her body and then went away. Subsequently the other accused Munna Mishra came to her room and he also kissed her and then he inserted his private organ into the private organ of the prosecutrix, due to which she suffered pain and she had cried. The prosecutrix when confronted with such statements, has denied to have made the statements and has stated that both of them had come together and had committed rape one after the other with her with both of them being present in the same room.

14/ Thus, there appears to be inconsistency in her court statements and FIR and police statements regarding the manner in which both accused persons committed act of rape against her. In court statement she states that both had committed the act together, whereas in the documents Ex.P/8 and Ex.D/1 she states that Pandit (accused Jagdish) had only undressed her, kissed her and had ran his hands over her body and did nothing more and went away and only thereafter the other accused namely Munnal Mishra had entered her room and committed rape with her.

15/ Regarding the identification of Jagdish also there is inconsistency in the statements of the prosecutrix. In examination-in-chief she states that her father Mukesh used to bring accused Jagdish and Munna to his house and used to serve them liquor, meaning

thereby that the prosecutrix knew Jagdish from before the incident. However, in para-11 of her cross-examination she states that she had not seen the bearded Pandit (Jagdish) before the incident. Then again in para-13 of her cross examination she states that she had seen Jagdish and Munna number of times with her father Mukesh. Thus, the statements of prosecutrix are inconsistent as to whether she knew Jagdish from before the incident or she had seen Jagdish for the first time on the date of the incident.

16/ Regarding the identification of Jagdish, the prosecutrix has stated that she had identified Jagdish in District Jail, Indore and her signatures on identification memo (Ex.P/5) are from A to A part. In her cross-examination in Para-16 she however states that she had seen the accused even in police station. She further states that when she had gone to District Jail for identification, she was accompanied by police. She further admits that when the identification proceedings were going on, there were police personnels also present at the spot. Such type of statements also create a dent on the credibility of the identification proceedings because if the prosecutrix had seen the accused in police station, then the identification proceedings in jail subsequently would loose its sanctity. Further, presence of police at the time of identification proceedings also breaches the sanctity of such proceedings. She denies that she had identified Jagdish by putting hand on him, however Sudeep Meena (PW-5) Naib Tehsildar has stated that prosecutrix had identified by putting her hand on his head. In cross-examination he admits that in Ex.P/5 which is the identification memo, it has not been mentioned that other persons who had been made to stand in the identification parade, were also sporting beard or not and that there is no mention of any such statement in Column No.2 of Ex.P/5.

17/ Reverting back to the statements of prosecutrix, she has stated in her deposition that she had not told Mukesh about the incident because Mukesh was not reliable, however in Ex.P/8 i.e. FIR it has been mentioned that she told her father that accused Mishra had committed wrongful act with her but her father told her to let the

accused continue with his act and this will lead to showering of money upon them.

18/ Thus, one can see that there are many contradictions and omissions in the statements of prosecutrix and this witness cannot be considered to be witness of sterling quality.

19/ The Apex Court has although underlined the importance of evidence of a rape victim who is constrained to depose in the teeth of risk to her own dignity and honour, but at the same time, the Apex Court has also evaluated the impact of such insinuation on a person accused of such offence. In the case of **Raju and others Vs. State of MP [(2008) 15 SCC 133]** it has been held that false accusation of rape can cause equal distress, humiliation and damage to the accused. Following are the relevant paragraphs of the aforesaid judgment:-

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

20/ Thus, from the aforesaid judgments of Apex Court, while the sanctity of evidence of prosecutrix has been given due importance, the court has also expressed that a false allegations of rape would also be detrimental to the interest of the accused.

21/ Hence, the evidence of prosecutrix must be carefully scrutinized before finding the same to be trustworthy and only then the conviction under Section 376 IPC can be affirmed.

22/ In the case of Krishna Kumar Malik (supra) the prosecution had failed to pass the test of prosecutrix being a sterling witness because there was delay in FIR, medical report and FSL report did not support prosecutrix and there were other omissions and contradictions in her evidence.

23/ The inconsistencies, contradictions and omissions in evidence of prosecutrix have already been described earlier. There is another inconsistency in the statements of prosecutrix as to when she had narrated the incident to her grand-mother. In para-6 of her examination-in-chief she has stated that she had narrated the incident to her grand-mother 2 to 3 days after the date of the incident. She denies that she had narrated the incident 20 to 25 days after the incident. In Ex.P/8 i.e. the FIR, the date of incident has been shown to be 20.7.2009 and the prosecutrix has been shown to have been brought by her maternal grand-mother on 5.8.2009 and subsequently the report has been lodged on 13.8.2009. Her grand-mother Radha (PW-12) in her cross-examination in para-3 states that the incident had occurred on 20.7.2009 and the incident was narrated by the prosecutrix to her on 12.8.2009 at Ujjain. She denies that she had brought the prosecutrix back to Ujjain from Indore 2 to 3 days after the incident. She states by herself that she had come from Ujjain to Indore on the occasion of Rakhi on 5.8.2009 and on the next day she had taken away the prosecutrix to Ujjain. She states that the prosecutrix narrated the incident to her mother and also to the witness on 13.8.2009. She denies that prosecutrix had narrated the incident in absence of her mother. Thus there is serious inconsistency as to when the incident was narrated by the prosecutrix to her grand-mother, which led to filing of report.

24/ It would now be appropriate to consider the evidence of Dr. Kanchan Gorhar (PW-15), who had conducted the internal examination of prosecutrix. The witness states that she was working in MY hospital in the female ward on 13.8.2009 and was second year PG student. On that day the mother of the prosecutrix had brought the prosecutrix for examination and prosecutrix had told her that on 20.7.2009 while she

was alone in her house two persons had committed rape with her and threatened her. The witness states that on examination of prosecutrix she found no external injury. On internal examination she found the hymen to be absent (the word "opened" has been used) and had given an opinion that the prosecutrix has been subjected to rape. Her MLC report is Ex.P/15 on which her signatures are from A to A part. A perusal of Ex.P/15 shows that the opinion has been mentioned in such words "it cannot be said that rape has not been done". The hymen has been shown to be absent in Ex.P/15. Thus, in Ex.P/15 the opinion has been given in such a manner so as to show that it could be the possibility that rape had been committed, whereas in her examination-in-chief the witness states that an opinion was given that rape had indeed been committed with prosecutrix. In her cross-examination she states that she had not seen any healed mark in the vagina of the prosecutrix. The witness has been confronted with remarks made by her in Ex.P/15 in Para-8 of her cross-examination. She admits that just because the hymen is absent with no other symptoms, it cannot be definitely be opined that rape was committed. She admits that the statement made by her in her examination-in-chief is based on the possibility of rape.

25/ It would be appropriate to see the impact of Section 114-A of Evidence Act as the provision stood prior to the amendment on 2013 i.e. the provision which existed when the incident had taken place. The aforesaid provision is being reproduced as under:-

"114A. Presumption as to absence of consent in certain prosecution for rape.- In a prosecution for rape under clause (a), clause(b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

26/ Thus, the prosecutrix in her evidence having stated that she had been raped and where sexual intercourse by the accused is proved, the court shall presume that she did not consent.

27/ The trial Court has misread the provision of Section 114A of Evidence Act because trial Court considered that the aforesaid presumption would apply where sexual intercourse upon the prosecutrix is found to be proved and if such prosecutrix states that she did not give her consent, then Court shall presume that she did not give consent. The trial court failed to see that as per Section 114A of Evidence Act it is not merely to be seen that sexual intercourse with prosecutrix needs to be proved but sexual intercourse **by the accused** needs to be proved before this provision may be attracted. Hence, it was imperative to prove that accused persons had committed sexual intercourse with the prosecutrix and only then the aforesaid provision would apply.

28/ In the present case the prosecutrix has stated that she was subjected to sexual intercourse without her consent and there is also a possibility that sexual intercourse was committed upon her, however this provision would not apply until and unless it is proved that the sexual intercourse was committed **by the accused** (in view of explicit words used in the aforesaid provision). Thus, the presumption against the accused would be drawn only when it is proved that they had committed sexual intercourse with the prosecutrix. In view of contradictions and omissions of the evidence of prosecutrix, a doubt has already been created in the prosecution story.

29/ Further, there is discrepancy in the prosecution story regarding the age of the prosecutrix as well. She has been shown to be below 16 years of age by the prosecution, however Dr. Vivek Yonati (PW-16) has stated that he had conducted the x-ray examination of joints of the prosecutrix on 14.8.2009 and had opined that she was aged between 17 to 19 years. The x-ray report is Ex.P/16. In cross-examination he admits that there can be variance of 3 years between actual age and the age determined through medical examination.

30/ The mother of the prosecutrix namely Varsha Kushwaha (PW-10) in para-7 states that her daughter was born on 14.6.1996 but in para-8 she states that daughter was born in 1992. Thus there is inconsistency in her statement regarding the year of birth of

prosecutrix. The father of prosecutrix namely Ravi Kushwah (DW-1) has stated that the age of the prosecutrix was 19 years. Dr. Kanchan Gorhar (PW-15) who had examined the prosecutrix on 13.8.2009, after looking at the development of dentures and on physical examination, was of the opinion that prosecutrix was below 18 years of age. As already found, Dr. Vivek Yonati (PW-16) has determined the age of the prosecutrix to be between 17 years to 19 years. Thus, there is overwhelming evidence that prosecutrix could be more than 16 years of age at the time of incident, which is against the case of the prosecution that prosecutrix was below 16 years of age at the time of incident.

31/ Having once found that the evidence of the prosecutrix in itself carries number of contradictions and omissions, however it would still be appropriate to see as to why prosecutrix has levelled allegations against the appellants.

32/ The defence of the appellants is that they have been falsely implicated in the offence as per appellant Munna Mishra. He was the landlord and mother and father of the prosecutrix were tenants, that the mother of prosecutrix used to entertain the undesirable elements in her rented portion and, therefore, other tenants residing in the same building had raised objections which led to Munna Mishra (appellant) forcibly evicting the mother of prosecutrix and Mukesh from the rented portion and due to such steps taken by Munna Mishra, the mother of prosecutrix namely Varsha Kushwaha had implicated the appellant Munna Mishra through her daughter. The appellant Munna Mishra has examined her first husband Ravi Kushwaha (DW-1) in order to throw light on the objectionable manner of living of Varsha Kushwaha, his earlier wife and Satyabhama (DW-4) who has also testified accordingly. Satyabhama (DW-4) has stated that after Mukesh rented the room to Munna Mishra and to Varsha and Pooja, some undesirable elements started frequenting the house, which was strongly protested against by witness, who asked Munna Mishra either to get the aforesaid rented portion vacated or else the witness who is also a tenant would vacate the portion. Thereafter an altercation ensued between appellant Munna

Mishra, Mukesh and Varsha. The witness states that when Mukesh and Varsha refused to vacate the portion, Munna Mishra threw their luggage out which was picked up by Varsha and Mukesh and had threatened Munna that they would implicate him in a false case. This witness has not been suggested to such cross-examination which may create a doubt about the statements made by her in examination-in-chief.

33/ Ravi Kushwaha (DW-1) who is the first husband of Varsha has also stated that the reason for separation between him and Varsha was the dubious character of Varsha as she used to establish contacts with other persons. This witness has also not been cross-examined in a manner so as to dent his credibility.

34/ The evidence of Varsha Kushwah (PW-10) assumes importance regarding such defence taken by the appellant that the case against the appellant Munna is foisted upon him due to ousting of Varsha from her rented apartment owned by Munna Mishra. Varsha Kushwah (PW-10) has stated that she had vacated the rented apartment 8 days after the incident and admits that the incident had occurred on 20.7.2009 and she had vacated the apartment by the end of July 2009. In para-13 she denies that her luggage was thrown out by Munnalal. However, it is clear that Varsha had been ousted 8 days after the incident and it is after the aforesaid ousting that the report has been lodged by the prosecutrix.

35/ Thus, there is substance in the defence of appellant Munnalal that the report against him is an act of retribution against forcible eviction of Varsha from her tenanted premises. If Varsha and Mukesh had been evicted before the end of July, then it would not be possible for Radha (PW-12) to go to the rented premises and fetch the prosecutrix from there. Thus also substantiates the probability of knitting a false narrative by the mother of the prosecutrix and her own mother aimed at implicating Munna Mishra.

36/ As far as the implication of Jagdishis concerned, the defence of Jagdish is that he is a priest in Ram temple and the government has allocated 25 Bigah of land in the name of this temple.

As per Jagdish, some villagers have been trying to tarnish his image and want to wrest the control of temple and land from the possession of Jagdish and have lodged false complaints against him. The main miscreant amongst these villagers is one Pop Singh, who used to frequent the rented apartment of Varsha and Mukesh and he was also instrumental in instigating Varsha to implicate Jagdish. Jagdish (DW-6) has examined himself stating that he had lodged complaints against Pop Singh and others before the SDO, Sanwer vide Ex.D/4, regarding which enquiry was conducted, the order-sheets of which are Ex.D/5. He states that Patwari had come to the spot in order to inquire and had prepared Panchnama and the report had been submitted, which is Ex.D/7. Witness has also examined Patwari Baliram Solanki (DW-7) who has stated that the survey numbers on which the temple and its land is situated is being administered by Collector, Indore and in cross-examination he states that since 1980 the name of the temple priest is not being recorded in revenue records and from 1980 onwards the Collector, Indore has become the administrator of temple land and SDM has appointed one Santosh as the temple priest.

37/ From the aforesaid perusal of the defence witnesses it does not appear that appellant Jagdish was given the control of temple and the land and he may have been claiming his right over the land and the temple, but the Patwari has made it clear that the land of temple is being administered by Collector, Indore and on the date of examination of Patwari Baliram Solanki on 27.10.2010, one Santosh was the officially appointed priest.

38/ From the aforesaid defence of Jagdish it appears that appellant Jagdish may have frayed the nerves of villagers because of his unwarranted claim of ownership over the land and, therefore, the complaint was made against him by some villagers, and Jagdish also lodged a complaint before the SDO and specifically named Pop Singh. As already stated Pop Singh used to visit the house of Varsha (mother of prosecutrix) and was instrumental in implicating Jagdish. A suggestion has been given to Varsha regarding Pop Singh frequenting her house, which has been denied by her. However, learned counsel

for the appellant has also drawn Court's attention to the arrest memo of appellant (Ex.P/12), in which one of the independent witnesses is Pop Singh. Thus, Pop Singh has made available himself as a witness in the arrest memo of appellant Jagdish. Learned counsel submits that this itself shows inclination on the part of Pop Singh to implicate Jagdish and get him arrested.

39/ From the aforesaid documents, enmity between Pop Singh and Jagdish is apparent. Yashwant Singh (DW-2) has stated that he knows Jagdish who is a good charactered person and false complaint has been lodged against him by Pop Singh stating that Jagdish consumes liquor and is in company of bad elements which is not true at all.

40/ The fact that Pop Singh has stood witness in the arrest memo of appellant Jagdish shows that Pop Singh was aware about the present case of rape against appellant and he entered himself as a witness of arrest. This substantiates the defence of Jagdish that Varsha may have been in communication with Pop Singh and may have implicated Jagdish at the behest of Pop Singh.

41/ Thus, both the appellants appear to have been implicated by the mother of prosecutrix. It has already been found that the evidence of prosecutrix is replete with contradictions and omissions and her version has not been credibly supported by other witnesses. The prosecution has failed to prove that appellants had committed sexual intercourse with the prosecutrix and, therefore, presumption under Section 114A of Evidence Act is not available against appellants. The prosecutrix has not been found to be a 'sterling witness' on whose evidence alone the prosecution case could have been proved.

42/ Consequently the conviction of appellants under Section 376(2)(g) of IPC cannot be sustained and appellants stand acquitted for committing offence under Section 376(2)(g) IPC. The appellants be released forthwith, if they are not required in any other case.

43/ The appeals accordingly stand allowed.

44/ Let a copy of this judgment along with original record be sent to the trial Court.

45/ The disposal of the property shall be as per the orders of the Trial Court.

46/ Signed order be kept in the file of CRA No.32/2011 and a copy thereof be placed in the file of connected CRA No.119/2011.

(Vivek Rusia)
Judge

(Shailendra Shukla)
Judge

Trilok/-

