

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

**HON'BLE SHRI JUSTICE SUSHRUT ARVIND
DHARMADHIKARI**

&

HON'BLE SHRI JUSTICE HIRDESH

ON THE 29th OF FEBRUARY, 2024

CRIMINAL APPEAL No. 887 of 2013

BETWEEN:-

1. VIKAS AND 3 ORS. S/O SHRI VIKRAM BHARTI, AGED ABOUT 22 YEARS, OCCUPATION: STUDENT KUMAR MOHALLA BETMA (MADHYA PRADESH)
2. VIKRAM S/O RADHESHYAM , AGED ABOUT 20 YEARS, OCCUPATION: STUDENT 4 AWAS COLONY BETMA (MADHYA PRADESH)
3. RAVINDRA @ RAVI S/O RAMESHWAR MANDLOI , AGED ABOUT 21 YEARS, OCCUPATION: WELDING WORK SALAMPUR BETAM (MADHYA PRADESH)
4. SANJU @ SANJAY S/O JEJRAM OCCUPATION: STUDENT BADIPURA BETAM (MADHYA PRADESH)

.....APPELLANTS

*(SHRI AVINASH SIRPURKAR, SENIOR ADVOCATE WITH SHRI SHONE SIRPURKAR - ADVOCATE FOR THE APPELLANT NOS.1, 2 AND 4)
SHRI GAURAV LAAD – ADVOCATE FOR THE APPELLANT NO.3)*

AND

**THE STATE OF MADHYA PRADESH GOVT. THRU. P.S. BETMA DISTT.
INDORE (MADHYA PRADESH)**

.....RESPONDENT

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 863 of 2013

BETWEEN:-

MONA @ MOHANLAL S/O AMBARAM, AGED ABOUT 46 YEARS,

TAMBOLI MOHALLA BETMA (MADHYA PRADESH)

.....APPELLANT

(SHRI VIVEK SINGH – ADVOCATE FOR THE APPELLANT)

AND

THE STATE OF MADHYA PRADESH GOVT. THRU. P.S. BETMA DISTT. INDORE (MADHYA PRADESH)

.....RESPONDENT

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 876 of 2013

BETWEEN:-

AMIT S/O SHRI SATISH WAGH, AGED ABOUT 25 YEARS, OCCUPATION: DRIVER KUSHWAH MOHALLA BETMA DISTT. INDORE (MADHYA PRADESH)

.....APPELLANT

(SHRI AVINASH SIRPURKAR, SENIOR ADVOCATE WITH SHRI BABLU PATEL – ADVOCATE FOR THE APPELLANT)

AND

THE STATE OF MADHYA PRADESH GOVT. THRU. P.S. BETMA DISTT. INDORE (MADHYA PRADESH)

.....RESPONDENT

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 889 of 2013

BETWEEN:-

RAJENDRA S/O GIRDHARILAL BHAMI, AGED ABOUT 32 YEARS, OCCUPATION: AGRICULTURIST MALVIYA MOHALLA BETMA (MADHYA PRADESH)

.....APPELLANT

(SHRI YASPAL RATHORE – ADVOCATE FOR THE APPELLANT)

AND

THE STATE OF MADHYA PRADESH GOVT. THRU. P.S. BETMA (MADHYA PRADESH)

.....RESPONDENT

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 954 of 2013

BETWEEN:-

1. ANSHUMAN @ ASHU AND ANR. S/O ANIRUDH WAGH, AGED ABOUT 34 YEARS, OCCUPATION: AGRICULTURE KUSHWAH MOHALLA BNETMA PS BETMA INDORE (MADHYA PRADESH)
2. GOLU @ YASH S/O PRADEEP WAGH, AGED ABOUT 23 YEARS, OCCUPATION: AGRICULTURIST KUSHWAH MOHALLA, BETMA, P.S. BETMA (MADHYA PRADESH)

.....APPELLANTS

(SHRI AVINASH SIRPURKAR, SENIOR ADVOCATE WITH SHRI SHONE SIRPURKAR - ADVOCATE FOR THE APPELLANTS)

AND

THE STATE OF MADHYA PRADESH GOVT. THROUGH PS BETMA (MADHYA PRADESH)

.....RESPONDENT

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 1024 of 2013

BETWEEN:-

SHANTILAL S/O SEVARAM KUSHWAHA, AGED ABOUT 36 YEARS, OCCUPATION: LABOUR VILL.KACHAHRI GHATI BETMA (MADHYA PRADESH)

.....APPELLANT

(SHRI VIKAS YADAV – ADVOCATE FOR THE APPELLANT)

AND

THE STATE OF MADHYA PRADESH GOVT. THRU.P.S.BETMA (MADHYA PRADESH)

.....RESPONDENTS

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 1063 of 2013

BETWEEN:-

TIPU S/O GAMMU BEG, AGED ABOUT 21 YEARS, OCCUPATION:
CONTRACTOR KUSHWAH MOHALLA BETMA P.S. BETMA (MADHYA
PRADESH)

.....APPELLANT

(SHRI MAHENDRA KUMAR SHARMA – ADVOCATE FOR THE APPELLANT)

AND

THE STATE OF MADHYA PRADESH GOVT. THRU. P.S. BETMA (MADHYA
PRADESH)

.....RESPONDENT

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 1116 of 2013**BETWEEN:-**

CHETAN PRAJAPAT S/O SHRI GENDALAL PRAJAPAT, AGED ABOUT 20
YEARS, OCCUPATION: STUDENT BETMA TEH. DEPALPUR (MADHYA
PRADESH)

.....APPELLANT

*(SHRI AVINASH SIRPURKAR, LEARNED SENIOR COUNSEL WITH SHRI
SHONE SIRPURKAR – ADVOCATE FOR THE APPELLANT)*

AND

THE STATE OF MADHYA PRADESH GOVT. THRU. P.S. BETMA DISTT.
INDORE (MADHYA PRADESH)

.....RESPONDENT

((SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

CRIMINAL APPEAL No. 1195 of 2013**BETWEEN:-**

MOHAMMAD JAVED S/O SHRI SHABBIR MUSALMAN, AGED ABOUT 21
YEARS, OCCUPATION: DRIVER KATKATPURA BETMA,INDORE
(MADHYA PRADESH)

.....APPELLANT

(MS SUDHA SHRIVASTAVA – ADVOCATE FOR THE APPELLANT)

AND

THE STATE OF MADHYA PRADESH GOVT. THRU.P.S.BETMA (MADHYA
PRADESH)

.....RESPONDENT

(SHRI K. K. TIWARI – ADVOCATE FOR THE RESPONDENT/STATE)

Reserved on : 21.09.2023
Pronounced on : 29.02.2024

These appeals having been heard and reserved for judgment, coming on for pronouncement this day, JUSTICE HIRDESH passed the following:-

JUDGMENT

All the aforesaid appeals have been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (2 of 1974) [in short Cr.P.C.] against the judgment of conviction and order of sentence dated 15.6.2013 passed by the Additional Sessions Judge, Indore in Sessions Trial No.615/2012, by which, appellants have been convicted and sentenced as mentioned below:

(i) **Appellant-Accused (Mohd.Javed)**

Section(s)	Sentence	Fine	Default stipulation
376(2)(G)IPC	Life Imprisonment	1,000/-	Additional two months R.I.
376(2)(G)IPC	Life Imprisonment	1,000/-	Additional two months R.I.
506(B) IPC	R.I. For 07 years	500/-	Additional one month R.I.

(ii) **Appellants-Accused persons (Shantilal Kushwaha, Chetan Prajapat, Vikas Bharti, Vikram Makwana, Ravindra @ Ravi Mandloi, Mona @ Mohanlal Kumrawat, Sanju @ Sanjay Mandloi, Poona @ Poonachand, Rajendra Bhami, Anshuman Wagh, Golu**

Wagh and Amit Wagh

Section(s)	Sentence	Fine	Default stipulation
376(2)(G)IPC	Life Imprisonment	1,000/-	Additional two months R.I.
376(2)(G)IPC	Life Imprisonment	1,000/-	Additional two months R.I.
506(B) IPC	R.I. For 07 years	500/-	Additional one month R.I.
506(B) IPC	R.I. For 07 Years	500/-	Additional One R.I.

(iii) Appellant-Accused (Tipu Beg)

Section(s)	Sentence	Fine	Default stipulation
376(2)(G)IPC	Life Imprisonment	1,000/-	Additional two months R.I.
376(2)(G)IPC	Life Imprisonment	1,000/-	Additional two months R.I.

Since all the aforesaid criminal appeals arise out of a common judgment, therefore, the same are being decided by this common judgment.

2. The essential details pertinent to the current appeals are as follows:

On February 18, 2012, the prosecutrix (PW-1) filed First Information Report (Ex.P-1) stating that the accused, Javed, had been threatening her over the phone and forced her to come and meet him. He warned that if she refused, he would come to her house, consume poison, and harm her family. Eight days prior, on a Friday at 01:00 p.m., Javed asked the prosecutrix to meet him in front of Kalika Temple and

threatened her of dire consequences, if she declined. The prosecutrix (PW-1) disclosed the said fact to her cousin sister (PW-2), who accompanied her to have a discussion with Javeda. Consequently, they both proceeded towards Kalika Temple, where they encountered the accused Javed and his friend (accused Tipu). While they were conversing, approximately 10-12 boys, including Vikas, Chetan, Kumhar, Dilip Kushwaha, Vikram Makwana, Golu Wagh, Ashu Wagh, Gopal Panchal, Sanju, Ravi, and 2-3 others, whom she did not recognize but could identify by their faces, approached and questioned the prosecutrix about accompanying them. At that moment, accused Vikas Bharti grabbed and tore the 'Chunari' of (PW-2). They threatened to harm both of them. Despite their refusal, the accused persons forcibly took hold of (PW-1) & (PW-2) and dragged them towards agricultural field, where they removed their 'Salwars,' thrown them on the ground, and committed rape on both of them turn by turn. Although the prosecutrix screamed and tried to raise alarm, but the accused persons paid no heed. At that juncture, Poona, Shantilal, Rajendra Bhami, and Mona Tamboli emerged from nearby fields and also committed rape upon them. They threatened both the prosecutrix of dire consequences, in case they attempted to unwrap the incident before anyone. Subsequently, both the prosecutrix returned home, fearful and unable to confide in anyone. As their suffering persisted, they eventually disclosed the ordeal to their mother, Leela Bai (PW-9), and maternal uncle, Sevaram (PW-4), before proceeding to report the matter to the police station.

3. After lodging the report, the police duly registered the FIR bearing Crime No. 66/12 for offenses punishable under sections 376(2)(g) and 506 of IPC against all the accused individuals. Subsequently, following an

investigation and upon receipt of the prosecutrix's medical report, the police apprehended all the accused persons. On 21.2.2012, the prosecutrix (PW-1) lodged a further written complaint (Ex. P-2) at Police Station Betma, District Indore, alleging that she later discovered Amit Wagh had also assaulted her. Acting upon this complaint, the Police arrested Amit Wagh on 23.02.2012. During the course of the investigation, statements of the prosecutrix were recorded on 18.12.2012 & 21.2.2012, along with statements from other witnesses. Additionally, the Police conducted further investigation, including the preparation of a 'panchnama' and the seizure of property, as evidenced by (Ex.P-81) which included a CD capturing the scene of sexual intercourse involving accused individuals Chetan and Vikram with the Prosecutrix (PW-1).

4. Following the investigation, the Police filed a charge-sheet against the accused persons for offences under sections 376(2)(g) & 506 of the IPC, as well as Sections 66-E & 67-A of the Information & Technology Act. The trial Court subsequently framed charges for offences under Sections 376(2)(g) & 506 of the IPC against the accused persons. The appellants/accused abjured guilt and pleaded for trial. Thereafter, the trial Court proceeded to record the statements of both prosecutrix and defense witnesses, and upon thorough evaluation of the available evidence, found the accused/appellant guilty of the aforementioned offences and sentenced them as mentioned in para 1 of the judgment.

5. Learned counsel for the appellants/accused in support of their case urged following contentions:-

- The judgment of conviction and order of sentence passed by the trial Court is in direct contravention of both legal principles and the factual evidence presented. The trial Court evidently failed to

adequately assess the oral and documentary evidence on record.

- The trial Court's decision to discredit the defense's narrative while crediting the testimony of prosecution witnesses is fundamentally flawed. It overlooked significant omissions and contradictions within the statements provided by the prosecution witnesses
- It is imperative to recognize that the appellants, the accused parties, are unequivocally innocent and have fallen victim to a miscarriage of justice. They have been unjustly ensnared in the alleged crime, as evidenced by the lack of substantiated evidence implicating them.
- Had the trial court properly considered the statement of the prosecutrix (PW-1) in paragraph 88 of her cross-examination, it would not have reached the conclusion as observed in the impugned judgment. In the aforementioned paragraph, the prosecutrix admitted that both her hands were free at the time of the rape, and she did not attempt to defend herself by cutting the accused. Furthermore, in paragraph 89 of her cross-examination, she acknowledged the fact of not disclosing the incident to anyone for about 7-8 days, only filing a report on the 18th of that month. She also could not recall when she get her second statement recorded . Additionally, in paragraph 90 of the impugned judgment , she refuted the claim that (Ex.P-2) was written in her handwriting, stating that it was, in fact, written by her brother.
- Prosecutrix (PW-2) in paragraph 78 of her cross-examination stated that she was not knowing accused-Amit prior to this incident. The statements recorded at the time of lodging of report were neither gone through by her nor the same were read out to her by the Police. She had not mentioned the name of accused-Amit and description of

his appearance in her police statement on the date of lodging of report. PW-2 in paragraph 80 of her cross-examination also deposed that she has falsely stated about recording of Police statement twice inasmuch as there has never been any other statement in respect of accused-Amit after recording of her first Police statement. In paragraph 81 of cross-examination PW.2 further deposed that she cannot tell the reason why police had not mentioned her statement in (Ex. D-8) to the effect that all accused persons committed rape upon her one after another.

- Sewaram (PW-4) in paragraph 6 of his cross-examination stated that he is not literate and he had read Exhibits-P/4 & P/12. He further stated that he had also gone to Police Station at the time of lodging of report, but Police did not ask him anything.
- Bherulal (PW-5) has not supported the prosecution story.
- Dr.Rekha (PW-6) in paragraph 13 of her cross-examination stated that it is true if 12-13 men commit rape upon a girl one by one at a time, then there can be bleeding and even there is possibility of sustaining injury. If such rape is committed either in field or 'Nala', there is also possibility of having marks of bruises on the back.
- Narayan Singh (PW-7) in paragraph 9 of his cross-examination stated that he does not know that in respect of each accused and in case of more than one complainant, separate identification is to be made. He admitted in para 10 that in respect of identification the age of persons is not mentioned against their names and that there are not signatures of 5 persons who were brought for identification in (Ex.P-6).
- D.S.Baghel (PW-10) in paragraph 72 of his cross-examination has

stated that it is true that in (Ex.P-1), the name of accused-Amit is not mentioned. He volunteered that whatever name complainant had informed, that are mentioned and in addition to that the prosecutrix informed about 2-3 other boys. It is also mentioned that there is no mention of description of appearance of accused-Amit and said 2-3 boys in (Ex.P-1).

- The trial Court ought to have considered that second FIR is barred by law.
- There is no explanation of lodging FIR belatedly after 08 days on 18.2.2012.
- As per prosecution, the incident took place in an open area where there bricks and stones were present, but there is no injury on the body of prosecutrix.
- As per prosecutrix, she knows accused-Mona prior to incident, but there is no explanation regarding non disclosure of his name in the FIR.
- The prosecution failed to prove its case beyond reasonable doubt. The case of prosecution is not corroborated by the medical evidence. No independent witness has been examined by the prosecution who were residing near the place of incident.
- The prosecutrix's testimony indicates that the complaint was only made once the photos and C.D. concerning to sexual encounter became public or were circulated in the market.
- The identification of the appellants is uncertain and raises doubts.
- (xviii) Despite approximately 08 days passing, the prosecutrix did not disclose the incident to her family, friends, or relatives.
- Discrepancies exist between the number of accused persons

mentioned in the FIR and the consent form of the Medical Legal Case (MLC), which complicates the case.

- The prosecution documented evidence under Section 27 of the Evidence Act regarding appellant-Sanju and Vikram on 21.2.2012. However, evidence from the Investigating Officer (PW.10) indicates that the seized articles differ from those listed in the memo.
- The recording of supplementary statements from the prosecutrix on 18.2.2012 and 21.2.2012 contradicts the provisions of the Criminal Procedure Code (Cr.P.C.). Furthermore, the additional details of a second rape mentioned during the second statement on 21.2.2012 were not disclosed in the initial statement on 18.2.2012.
- Although the prosecutrix testified about sustaining injuries during the incident, the doctor who conducted the Medical Legal Case (MLC) did not mention any injuries.
- The prosecution failed to establish a connection between the contents of the Forensic Science Laboratory (FSL) report and the appellant, either through DNA analysis or other means.
- The trial court did not consider the presence of the appellants/accused, namely Sanju @ Sanjay and Vikram, at the Government Higher Secondary School, Betma.
- The prosecutrices were of legal age at the time of the incident, suggesting the possibility of consensual participation.
- The trial court did not make any determination regarding the concurrent or consecutive running of sentences.
- The accused persons were shown to the victim prior to the Test Identification parade, raising doubts about its reliability due to discrepancies in the timing of issuance.

- The medical report submitted by the doctor stated the absence of external injuries or signs of resistance.
- The CD relied upon by the prosecution and referenced by the trial court was not provided to the appellants/accused.
- Although the FIR was a computer-printed copy, its authenticity was not established according to Section 65-B of the Indian Evidence Act.
- The victim did not report any threats from the appellant/accused.
- The victim/prosecutrix went with the co-accused voluntarily upon their invitation. The subsequent lodging of the report after the circulation of their photographs in the village, as admitted by Victim No.2 in paragraphs 33 & 51 of her statement, suggests that offenses under section 376(2)(g) and 506-B of IPC are not applicable.
- The medical report does not provide a definite opinion on forcible sexual intercourse, thus weakening the case against the appellants.
- The prosecution failed to present eyewitnesses as mentioned in the FIR.
- In paragraphs 51 & 115 of the statements, the prosecutrix mentioned encountering the appellants/accused on the way to home after the incident.

Submission:

- (i) The Trial Court failed to recognize that the alleged non-disclosure of the incident by the prosecutrix was purportedly due to threats made by the appellants. However, the FIR and statements during the investigation remain silent on this matter.
- (ii) Prosecutrix (PW-1) testified that she has written her report with a pen and signed it after reading it. However, such a report has not been

submitted along with the challan.

(iii) Despite the allegation of rape by 14 individuals, there is no external injury on the prosecutrix's body.

(iv) The Trial Court committed a grave error in its inadequate understanding of the provisions of Section 376(2)(g) of the IPC.

(v) The Trial Court erroneously convicted the appellant/accused, Tipu, despite acknowledging that while the prosecutrix was conversing with Tipu and Javed, 10-12 other boys arrived and instructed Tipu and Javed to leave the premises. Subsequently, 10-12 other individuals committed rape on the prosecutrix.

(vi) The Trial Court's decision to find the appellants/accused (Tipu) guilty under Section 376(2)(g) IPC on two counts and sentence them to undergo rigorous imprisonment twice was erroneous.

(vii) The delay of 08 days in filing the FIR indicates the prosecutrix's afterthought to falsely implicate the accused individuals.

(viii) The Trial Court failed to acknowledge the prosecution's admission, which indicates that the alleged incident took place in a crowded marketplace near Kalika Temple. Given the crowded nature of the place, it is implausible that such an incident could occur there.

(ix) Regarding appellant Javed, the provisions containing the six conditions of Section 375 of the IPC are not met. Javed was not present at the time of the incident.

(x) Appellant Mohammed Javed and prosecutrix No.1 were in relationship, but due to religious differences avoiding to get married, they would meet clandestinely. On the day of the incident, while they were meeting and conversing, other co-accused individuals arrived and forced Javed to leave. Subsequently, they engaged in sexual intercourse with the

prosecutrix. The Trial Court correctly determined that Javed did not engage in sexual intercourse with the prosecutrix but erroneously concluded that he was present at the crime scene and did not attempted to save the prosecutrix. However, prosecutrix No.2 admitted that Javed fled the scene, thus negating the possibility of Javed committing rape on prosecutrix No.1. This fact is evident from paragraphs 39 & 40 of the impugned judgment.

6. Learned counsel for the appellants cited decision in the case of **Bhurji Vs. State of M.P., 2007 (1) MPLJ 600** and stated that sentencing is a very crucial aspect and the Courts must deal with this aspect with circumspection. He further cited decision of Apex Court in Criminal Appeal No.511/2025 [**Sajal Suresh Kumar Jain Vs. State of Gujarat**] and submitted that accused/appellants are willing to accept the conviction, as recorded by the trial Court for the stated offences provided the sentence period be modified to already undergone as that would be more than 10 years as specified for the stated offence at the relevant time. He further cited decision in the case of **Rahim Beg Vs. State of U.P., 1972 Legal Eagle (SC) 247** ,the Apex Court held that absence of any injury marks on the organ of accused would point towards his innocence. He further cited decision in the case of **Ashok Kumar Vs. State of Haryana, (2003) 2 SCC 143** to contend that Apex Court held that appellant alongwith one K convicted under section 376(2)(g) of IPC for committing rape on deceased, then on facts it was not possible to draw a reasonable conclusion that appellant had raped S. Further, in the absence of any evidence of concert between K and the appellant, held that conviction recorded by the courts below was liable to be set aside.

6A. Learned counsel for the respondent/State has opposed the

contentions raised by learned counsel for the appellants and submitted that impugned judgment of conviction and order of sentence are just and proper in the facts of the case. The trial Court has properly appreciated the oral and documentary evidence available on record. Looking to the nature of allegations, manner of commission of rape and gravity of offence, the sentence imposed by the trial Court is just and proper and appellants do not deserve any leniency.

He further cited decision of *State of Rajasthan Vs. Bhawani and another, 2003 Legal Eagle (SC) 578* wherein Apex Court in paragraph 10 held as under:-

*“10. The High Court has extensively relied upon the site plan prepared by the investigating officer for discarding the prosecution case and for this purpose has referred to the place from where the accused are alleged to have entered the nohara, the place from where they are alleged to have fired upon the deceased and also has drawn an inference that the place wherefrom the accused are alleged to have fired upon the deceased, the shot could not have hit the houses on the eastern side of the nohara. Many things mentioned in the site plan have been noted by the investigating officer on the basis of the statements given by the witnesses. Obviously, the place from where the accused entered the nohara and the place from where they resorted to firing is based upon the statement of the witnesses. These are clearly hit by Section 162 CrPC. What the investigating officer personally saw and noted alone would be admissible. This legal position was explained in *Tori Singh v. State of U.P.* [AIR 1962 SC 399 : (1962) 1 Cri LJ 469] in the following words: (AIR p. 401, paras 7-8)
A rough sketch map prepared by the Sub-Inspector on the basis of statements made to him by witnesses during the course of investigation and showing the place where the deceased was hit and also the places where the witnesses were at the time of the incident*

would not be admissible in evidence in view of the provisions of Section 162 of the Code of Criminal Procedure, for it is in effect nothing more than the statement of the Sub-Inspector that the eyewitnesses told him that the deceased was at such and such place at the time when he was hit. The sketch map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of Section 162 of the Code of Criminal Procedure as it will be no more than a statement made to the police during investigation. Therefore, such marks on the map cannot be used to found any argument as to the improbability of the deceased being hit on that part of the body where he was actually injured, if he was standing at the spot marked on the sketch map.”

6B. Learned counsel further relied on the decision in the case of **State of Maharashtra Vs. Chandra Prakash Kewalchand Jain, (1990) 1 SCC 550** wherein the Apex Court held as under:-

“But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. 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 insult womanhood. Ordinarily an Indian woman would be most reluctant to level false accusation of rape involving her own reputation

unless she has a very strong bias or reason to do so.”

6C. In the case of *State of Punjab Vs. Gurmit Singh and others, (1996) 2 SCC 384*, it has been held by the Apex Court that to the evidence of a victim of sexual assault, the corroboration is not necessary. Conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration. The Court may look for some assurance of her statement to satisfy its judicial conscience. Her evidence is more reliable than that of an injured witness. She is not an accomplice. On facts, even though no corroboration is required yet there is sufficient corroboration from the medical evidence and report of the chemical examiner. In the case of involving sexual molestation it is the duty of the court to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

7. We have heard the learned counsel for the parties and perused the record and appreciated the impugned judgment of the trial Court.

8. It would be worth referring to the examination-in-chief of both the prosecutrix. Prosecutrix No.1 (PW-1) in her examination-in-chief has deposed that she resides alongwith her mother and brother at Betma. She has studied upto Class-VIth and left her studies 4-5 years ago. Her mother works as a labourer. On the date of incident i.e. 10.2.2012 when she was at home Javed was calling time and again. She knows him as he is resident of same locality. Javed used to say as to why she does not come to meet him and he will keep on making calls, if she does come to meet. Then she

disclosed about phone calls by Javed to her maternal cousin (prosecutrix No.2) and informed that he has called at Kalika Temple. Thereafter, prosecutrix No.1 alongwith her cousin went to Kalika Temple wherein Javed and Tipu met them and thereafter prosecutrix No.1 asked Javed as to why he makes call time and again. He replied that if she does not come to meet him, he will make calls time and again. Thereafter, 10-12 boys came from Betma '*Basti*' (locality). She knows them because they used to pass by her colony. She further stated that they were Vikas, Vikram, Ravi, Chetan, Dilip, Sanju, Asu, Golu, Amit, Gopal and four others. She further stated that she also know of four others who are Shantilal, Rajendra Bhavi, Mona Tamboli and Poonam Chand Bheel. Thereafter, Vikas came and asked as to what prosecutrix is doing there. She replied that she is having conversation. Then Vikas told that she has come to do non-sense with Javed and Tipu. Thereafter, Vikas told to come with them as he want to do wrong with prosecutrix. He caught hold of hand of prosecutrix No.1 and '*Chunri*' of prosecutrix No.2. Vikas took prosecutrix No.2 to the field and Vikram took her to '*Nala*'. Then they all one by one committed wrong act. At that time, she had worn '*Salwar Kurti*', which Vikram took off forcefully and committed rape upon her. Thereafter, above named boys committed rape with her one by one. She further stated that all were having Mobile cells. Vikram, Ravi and Sanju took out photographs. When prosecutrix were returning then Vikram, Chetan and Ravi told that they would repeat wrong act with prosecutrix. Upon such saying when prosecutrix shouted, persons of nearby fields came there. They all asked these persons to leave the place. Rajendra Bhavi, Mona Tamboli, Shantilal and Poonam Chand Bheel after asking these boys to leave the place, told the prosecutrix that they would also do wrong act with them. Then

Rajendra Bhavi, Mona Tamboli, Shantilal and Poonam Chand Bheel also committed wrong act with the prosecutrix. Thereafter, they threatened that if prosecutrix discloses this act to family members, they would be done away with and they will put the house on fire. They did not disclose to anyone about 7-8 days, but when they were feeling lot of pain they disclosed. Mother of prosecutrix no.1 asked as to why she remains silent. Then she narrated entire incident to mother. Then prosecutrix No.2 and her father were called and they all four went to Police Station where report was lodged. Report is Ex. P-1, on which, there is her signature over portion 'A' to 'A'. Thereafter, they were taken to the place of crime where they narrated entire incident. Thereupon, spot map was prepared which bears her signature. On the next day alongwith Police officials and mother and maternal uncle they went to MYH, Indore for X-ray and medical checkup which was performed by Dr. Rekha and there has been documentation in this regard and on Ex.P-4 there are her signature over portion 'A' to 'A'. Her statements were recorded at her home only and not at any other place. After notice she had gone for identification parade at Depalpur. Her signatures are there on (Ex.P-5) in this regard. She also identified accused-Amit Wagh as per (Ex.P-6). Her X-ray is (Ex.P-7). Upon consent before Magistrate vide (Ex.P-9) her statement were recorded as per (Ex.P-8). Police seized her photograph and prepared 'panchnama' (Ex.P-10). She knows 14 accused persons who were present in the Court.

9. Prosecutrix No.2 (PW-2) in her examination-in-chief stated that she resides in Gawali Colony, Betma for past 7-8 years and studied upto Class-7th and left studies around 4-5 years ago. She resides alongwith her father and five sisters. She does not have mother and her father is a labourer. On

the date of incident i.e. 17.2.2012 at around 01.00 pm when she was going to take bath, at that juncture prosecutrix No.1 (her cousin) came and informed that Javed is making calls again and again and called at Kalika Temple. Thereafter, we went to Kalika Temple where met with Javed and Tipu, to whom she knows and who are presently standing in the Court. Then prosecutrix No.1 asked Javed as to why he makes call, then he replied that he loves her. Prosecutrix No.1 told her that she does not love him. Thereafter, Javed started using irrelevant talks. In the meantime, 10-12 boys came from Betma colony to whom she knows. She also all 14 accused persons present in Court. She also knows their names, like Vikram, Vikas, Asu, Golu, Amit, Ravi, Sanju, Gopal, Chetan, Dilip & Poonamchand, Mona Tamboli, Rajendra Bhami and Shantilal. Out of 10-12 boys who are present in Court one Vikas caught hold of her Chunri and asked prosecutrix No.2 as to what she is doing with them, then she replied that she is talking. Thereafter, Vikas caught hold of her Chunri and took her to field and Vikram caught hold of hand of prosecutrix No.1 and took her. Vikas took off my 'Salwar' and removed his pant and committed wrong with prosecutrix No.2. All accused persons present in Court committed rape upon her one by one. Thereafter, again Vikram, Vikas and Chetan came and told they want to again do wrong. When prosecutrix shouted, then persons from nearby field came who threatened them and asked to leave the place. Then those persons also committed wrong with prosecutrix No.2. Later on, Poonam Chand, Mona Tamboli, Rajendra Bhami and Shantilal also came. Wrong act means the act which is performed between husband and wife.

10. Sevaram (PW-4) in his examination-in-chief stated that Lila Bai is his sister who asked him to accompany her to Police Station for lodging

report as some boys make calls to my niece time and again and give threat that if she does not love him he will commit suicide or he will kill her family members. Then my sister, prosecutrix No.1 & my daughter (prosecutrix No.2) had gone to lodge report at Police Station, Betma where prosecutrix no.1 lodged report as she was aware of entire incident. Prosecutrix No.1 out of fear did not disclose anything to him but narrated to my sister. My sister informed me about some boys committing wrong act, but did not inform as to how many persons did so. The day after lodging of report the Police had recorded by statements. Medical examination of my niece and daughter was conducted with our consent. The medical examination consent documents (Exs'.P-4 & P-12) of both the prosecutrix bear his signatures. He does not remember as to where medical examination was conducted either in Betma or M.Y.H. hospital, but it was done by doctors only.

This witness in paragraph 6 of his cross-examination has stated that it is false that his sister did not inform him anything. He is not literate. He had not gone through as to what is mentioned in (Exs'.P-4 & P-12). In paragraph 7 he admitted that it is true that both the prosecutrix had not sought permission for visiting Kalka temple. He volunteered that he had gone for his work. He further stated that prosecutrix had not informed him and he came to know only through his sister. He further stated in cross-examination that it is false that report has been lodged at the instructions and insistence of organization, political persons and agents. In paragraph 8 he admitted that Police Station is at a distance of half kilometer from his house. He further stated that he does not know as to whether some political persons had come to the Police Station or not. It is true that persons from Woman Commission had come his house who recorded

statement of both the prosecutrix. It is false to state that Woman Commission had asked them to lodge report. He admitted that Police obtained signatures on(Exs'.P-4 & P-12)at his home on the next date of lodging report. It is true that after this incident there was quarrel of his sister with his neighbours. In paragraph 11 he stated that it is true that since 10.2.2012 till 18.2.2010 both the prosecutrix did not inform him about the incident.

11. PW-9 (mother of prosecutrix No.1) has stated in her examination-in-chief that when daughter was keeping silent then she asked the reason whereupon prosecutrix narrated some persons did wrong act with them. Thereafter, she verified prosecutrix No.2 who also verified the same. Thereafter, she alongwith her brother and prosecutrix went to Police Station where she lodged report. Prosecutrix No.2 did not inform the names of those persons. Both prosecutrix stated that 14 accused present in court and two others against whom cases is pending in other Court committed wrong act with them. She also stated that both the prosecutrix informed her after eight days of incident when they were suffering severely. They both also informed her that accused persons threatened them of killing them and family members as also putting the house on fire. She also stated that after lodging of report at 10.30 am on 18.2.2012 the prosecutrix were taken to Government Dispensary wherefrom they referred to M.Y.Hospital for medical examination.

In paragraph 5 of her cross-examination she stated that prosecutrix No.2 is married whereas prosecutrix no.1 is unmarried. They both went to Kalka temple without informing her. The witness had left her mobile at home on 10.2.2012. She does not know as whether someone made call to prosecutrix no.1 on her mobile on that day. It is false to state that

prosecutrix No.1 was in talking terms with accused-Javed and others for last two years. In paragraph 6 she stated that both the prosecutrix were keeping silent since the date of incident till lodging of report and they were at home only and did not go out. She recorded the names of accused in Police statement as her daughter informed so to her. It is false to state the Police deliberately mentioned the names of accused persons. She voluntarily stated that her daughter identified the accused as they have committed rape with her. Since her daughter informed, therefore, she got recorded name of Mohana and others. It is true that around place of incident there are huts near Nala and field where servants stay without family. She further stated that there is pathway and no vehicle passes through from there. The temple is at a distance of half kilometer. Prosecutrix No.2 has not lodged any report, but only prosecutrix No.1 had lodged. On 10.2.2012 both prosecutrix had come by feet, but by taking breaks as their conditions was bad on account of wrong act of accused. In paragraph 7 of her cross-examination she stated that she is deposing in Court today and does not remember if earlier she has got recorded her statement before Police. She is unable to understand as to after how many days the Police made enquiry. She put her thumb impression of the report lodged. The report was not read out to her. The Police recorded statements about the report lodged. She stated that she informed to Police that both the prosecutrix told her that incident took place near Kalka temple. In paragraph 8 she stated that she cannot give reason if above aspects are not mentioned in (Ex.D-6). She also stated when both prosecutrix suffered a lot after incident, then they disclosed the same. In paragraph 9 she deposed that she has not disclosed the incident to anybody. In paragraph 10 she stated that prosecutrix did not inform about their going to Kalka

temple on account of fear. When they were suffering a lot she did not take her to hospital because it was a case of rape and hence, taken them to Police Station. No accused had threatened her. Threat was given to prosecutrix No.1 and, therefore, report was lodged in that regard also. The persons who had come to save her from accused persons, they also committed rape upon the prosecutrix. It is false to state that no one committed rape with her daughter and she had not lodged report at the Police Station. In paragraph 11 she deposed that he not literate. In paragraph 12 she stated that she knows only whatever the prosecutrix narrated to her as incident had not taken place before her. It is false that she is making statement on the instructions of Police. In paragraph 17 she deposed that the persons who committed incident with prosecutrix, their names were not known to them. The prosecutrix never met accused Golu & Anshuman. The Police had got identified the accused at Police Station itself. She also stated that both the prosecutrix had identified the accused persons who committed wrong act with them.

12. Dr.Rekha Chhari, Medical Officer, CHC, Betma, District Indore (PW-6) stated that she was posted as Medical Officer in CHC, Betma on 18.2.2012. On the said date Dashrath Singh Police Constable had brought prosecutrix No.2 for medical examination. The prosecutrix No.2 has informed in history that around 09 days ago on 10.02.2012 at about 2 p.m. about 13-14 persons committed rape upon her. She also stated that patient was normal, conscious and in senses. On external examination it is found that there were no external marks of injuries on external parts of body. On external examination of genitals there was light reddishness and blood discharge. On internal P.S. examination there was bleeding. Hymen was ruptured. Two fingers were easily entering. It was third day of menstrual

cycle. Prosecutrix informed doctor that she is unmarried. The doctor prepared examination report (Exhibit-P/8). The pubic hair of genitals were found shaved and were little bigger in size. Hymen tear was presence. Vaginal was little reddishness. There was white discharge. The victim informed the doctor that there was menstrual cycle on 20.1.2012. The doctor collected vaginal smear in Slide-A and pubic hair on Slide-B. She got red coloured 'Salwar' and black coloured underwear sealed pack and sent to the concerned Constable.

In paragraph 12 that medical query was obtained from Police Station, Betma vide Exhibit-P/51, in which, on portion "A" to "A" there is query opinion and on portion "B" to "B" there are her signatures. She gave her opinion vide Exhibits-P/50 and P/51. She obtained consent before medical examinations of both the prosecutrix vide (Exs'.P-4 & P-12).

The doctor in paragraph 13 of her cross-examination she admitted that in respect of complainants/prosecutrix she has not mentioned the period of hymen being bloody. She also stated that she cannot say how many days, months or year old it was. It is true that if 12-13 persons commit rape with a girl one by one then there is possibility of bleeding and sustaining injury. If rape is committed in field or drain ('Nala') then there is possibility of scratches on the back of victim. She also deposed that she cannot say as to for how many time there was sexual intercourse, but it has been done with prosecutrix time and again. She further stated that it not possible to her to inform as to sexual intercourse by which person the hymen got ruptured. In paragraph 16 she stated that it is wrong to state that reddishness naturally remains in genitals. In paragraph 17 she has stated at the time of MLC the prosecutrix had informed that 13-14 persons committed rape with them. But, at the time of History they have

not named the persons who committed rape with them. In paragraph 18 this witness stated prosecutrix have not sustained any external injuries. It is true that no internal injury has been found in prosecutrix. It is true that no opinion has been given by her with regard to fresh rupture or old rupture of hymen of both the prosecutrix. She has not mentioned in report that alongwith Police Constable one Lady Constable has also accompanied while bringing prosecutrix. According to (Ex.P-48), on both Slide-A and Slide-B there is mention of “pubic hair”, which is clerical error. There was pubic hair in Slide –A and vaginal in Slide-B. In paragraph 19 she stated that in query report (Ex.P-51) she intend to mention that incident is 08 days old from the date of medical examination i.e. 18.2.2012. In paragraph 20 she stated that she has not opinion about basis of commission of rape in Exhibits-P/50 & P/51. In paragraph 25 she has stated that in Exhibits-P/48 and P/49 there is no mention of appearance of any accused person.

13. Learned counsel for the appellants contended that according to First Information report the incident took place on 10.02.2012 and FIR was lodged on 18.02.2012. The application was filed before the Police on 21.02.2012 and delay in lodging the FIR was not explained. So, the FIR is doubtful. It is true that according to the prosecution story the incident took place on 10.02.2012 and FIR was lodged on 18.02.2012. According to FIR the delay in lodging FIR was fear of accused persons and, therefore, prosecutrix did not dare to come to the Police Station till 18.02.2012.

14. Prosecutrix (PW.1) stated in paragraph 8 of her examination-in-chief that after doing wrong act (rape) the accused persons gave threat that if they disclose the incident to anyone or family members, they will kill them to death and put the house of fire. After 7-8 days when they suffered severe pain, then she told to her mother and thereafter they went to lodge

the FIR.

15. In the case of *Ramdas and others Vs. State of Maharashtra*, [Appeal (Criminal) 1156-1158 of 2005 decided on 07.11.2006] the Apex Court held that it is not doubt that:-

“mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the Court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of totality of the evidence, the Court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge he report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the Police Station immediately. The time of occurrence, the distance to the Police Station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that may not even be aware of their right to report the matter to the Police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the min of the Court i.e. the initial hesitation of the victim to report the matter to the Police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts

which may cast a stigma on her for the rest of her life. These are case where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the Police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another.”

Thus, mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact.

16. In the present case, in FIR the prosecutrix stated that due to threat given by the accused they could not dare to come to the Police Station for lodging the FIR. In paragraph 8 she also stated when they were suffering from severe pain then only after 7-8 days she stated this fact to her mother. So, as above discussion, consideration of statements, and taking into account the totality of circumstances, the delay in FIR is no fatal to the case.

17. Learned counsel for the appellants, namely, Javed and Tipu submitted that appellants had not given any threat to the prosecutrix or his family members. The appellants are falsely implicated by the prosecutrix under political pressure. They further submit that prosecutrix had not narrated about the involvement of the appellant in the offence and either in examination-in-chief or in cross-examination. He further submitted that

the trial Court in paragraph 39 has observed that appellants have not committed any offence with the prosecutrix and, thus, conviction of the appellant is bad in law and deserves to be set aside. He further submitted that the appellants had no role to play, whatsoever in the rape of prosecutrix. However, Prosecutrix No.1 is in relation with appellant-Javed and there is no statement or element of commission of offence of sexual intercourse against the appellants. According to the statement of prosecutrix (PW.1), there is no evidence against the appellant.

18. In paragraph 21 the prosecutrix No.1 (PW-1) stated that Javed gave threat in her mobile after that if she tells to any family member then she will be done away with. She further stated that it is true that she had talk with Javed on mobile. She has not narrated this fact in the FIR. She further stated that this fact was narrated by her at the Police Station 18.2.202012. But, this fact is neither written in the FIR (Ex. P-1) nor in the statement recorded under section 164 Cr.P.C. (Ex.P-8). Therefore, this fact is omitted from the FIR and Exhibit-P/8 which is statement under section 164 of Cr.P.C. He further stated in paragraph 22 of her cross-examination that she understands that if anyone quarrels and gives threat, then one must file complaint before the Police. But, she has not lodged report against Javed at the Police Station. She further admitted that Javed wanted to marry her but her parents were not ready to marry her with Javed because was Muslim and she was Hindu.

19. The prosecutrix No.2 (PW-2) in paragraph 2 of her examination-in-chief has stated that PW.1 went to meet appellants-Javed and Tipu near Kalka Temple where both the appellants met them. Prosecutrix No.1 (PW-1) told to the appellants as to why they are making calls again and again and harassing them. Then accused-Javed told that he has fallen in love

with her. But, prosecutrix told that she does not live him. Thereafter from Betma side about 0-12 persons came and started abusing appellants-Javed and Tipu and then took away both the prosecutrix.

20. Thus, considering the evidence of both the prosecutrix, namely PW-1 & PW-2 the appellants-Javed and Tipu have not taken part in committing gang rape with both the prosecutrix.

21. In this regard , it would be apt to refer to section 376(2)(g) of IPC, which reads as under:-

“(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.]”

22. The trial Court held the both the above appellants guilty under the provisions of section 376(2)(g) of IPC. In the case of **Ashok Kumar Vs. State of Harayana** [Criminal Appeal No.374/2002 decided on 17.12.2002] the Apex Court held that

“act of communal rape has to be in furtherance of their common intention. That common intention pre-supposes prior concert as there must be meetings of minds, which may be

determined from the conduct of the offenders which is revealed during the course of action. After examining the circumstances relied upon by the prosecution to indicate concert, thus mere presence of the appellant could not establish that he had shared a common intention with the co-accused to rape the prosecutrix.”

23. It is further submitted by learned counsel for the appellants that trial Court has failed to establish that the present appellant share common intention with other co-accused. Moreover that intention (*mens rea*) being the essential ingredient for any offence and is absent on part of the present appellant (Javed). Even the appellant was not charged with offence of abetment in the present case nor there was any evidence to the effect that the appellant has abetted or suppressed information to the Police. Since the appellant was not aware of the knowledge that the co-accused had intention of committing rape upon the prosecutrix and thus there was no question of making any report to the Police. It is also submitted that the said incident took place on 10.02.2012 and the FIR was registered on 18.02.2012 and thus there was delay in lodging the FIR in the present case which has become fatal for the prosecution against the appellant.

24. From perusal of deposition of both the prosecutrix (PW-1 & PW-2), it is clear that there is no evidence against the appellants that they were aware or have knowledge that co-accused had an intention to commit rape upon the prosecutrix. So, considering the evidence of PW-1 & PW-2 after examining the circumstances relied upon by the prosecution to indicate that mere presence of appellants would not establish that they share common intention with the co-accused to commit rape upon the

prosecutrix.

In view of the above discussion, the trial Court has failed to appreciate that the appellants, Javed and Tipu had common intention with other co-accused persons. Moreover, the intention is essential ingredient for any offence and it is absent in the case of appellants-Javed and Tipu. So, in view of the above discussion, in the considered opinion of this Court the prosecution has failed to prove the charge against appellants-Javed and Tipu for offence under section 376(2)(g) of IPC. Therefore, the conviction of these appellants (Javed and Tipu) is not proper and it is set aside. They are acquitted of the above charge.

25. Learned counsel for the appellant, namely, Ravi, Sanjay, Chetan, Vikas and Vikram submitted that prosecutrix had lodged FIR on 18.02.2012 and then filed additional facts on 21.02.2012, which have been exhibited as Ex.P-1 & P-2 wherein prosecutrix stated that rape was committed twice. They further submitted that clothes were seized from appellants, namely, Sanjay and Ravi. According to memorandum Ex.P-41 & P-44 and seizure memo (Ex. P-83 & P-82) were prepared after 08 days, which have no relevance. He cited evidence of prosecutrix (PW-1 & PW-2). Learned counsel further submitted on perusal of paragraphs 87, 88, 93, 101 & 103 of Prosecutrix No.1 (PW-1) and evidence of Prosecutrix No.2 (PW-2), it is found that prosecution story is unreliable.

26. Learned counsel for the appellants, namely, Sanjay @ Sanju and Vikram submitted that they are not present on the spot and they were in school at that time. So, the appellants have taken the plea of *alibi* and examined the Defence Witness No.3 (Rajendra Kumar Devda) who stated in his deposition that he was Incharge of Government Higher Secondary School, Betma and certificate (Ex.D-14) has been issued by Bhanwar Lal Khawal. He further submitted that Sanjay s/o Tejram, Vikram s/o

Radheshyam are regular students of Class-XIth of the School. He further stated that school runs in two shifts i.e. first from 07.00 am to 12 noon and second shift from 12 noon to 05.00 pm. According to attendance register (Ex.D-15), they were present in the school. But, in the cross-examination he stated that he has not filled the attendance of appellants in register. He has no knowledge of attendance of appellants.

27. In this regard, judgment passed by the Apex Court in the case of **State of Maharashtra Vs. Narsingrao Gangaram Pimple, (1984) 1 SCC 446** is worthy of referenced wherein it has been held that it is well established that *plea of alibi* must be proved with certainty so as to completely exclude the possibility of presence of person concerned at the place of occurrence. On perusal of evidence of Rajendra Kumar Devda (DW-3), it was found that he was not aware about the presence of appellants in the school at the time of occurrence. So, possibility of presence of appellant cannot be completely excluded. After perusal of evidence of DW-3, it is clear that he is not reliable and his evidence is not supported by the document produced by him, because he has not filled the attendance register in respect of appellants. In view of aforesaid decision of the Apex Court it is found that *plea of alibi* which has been taken by the appellants was not proved and possibility of presence of appellants concerned at the place of occurrence cannot be excluded. Thus, this plea has not substance and hence, cannot be accepted.

28. Considering the evidence in relation to appellants, namely, Vikas, Vikram, Sanjay, Ravi & Chetan the prosecutrix (PW-1 & PW-2) have clearly stated in their evidence that these accused have committed rape upon them. The Investigating Officer D.S.Baghel (PW-10), seized the CD from accused/appellant-Vikas. When said CD was played and physically

verified with 'panchnama' (Ex.P-93), it was found from picture of said CD that accused-Chetan and Vikram were committing rape with the prosecutrix and accused/appellant-Ravi & Vikas were standing near to them and suggesting the procedure how to commit rape to appellant-Vikram and Chetan. Thus, from physical verification through CD (Ex.P-93), the presence of appellant/accused, namely, Chetan, Vikas, Vikram & Sanjay is proved and it has also been found proved that they committed rape.

29. Learned counsel for the appellant submitted that prosecutrix (PW-1 & PW-2) changed their version in the cross-examination. But, it was found that PW-1 & PW-2 were cross-examined at length and it is true that there are some omissions and contradictions in the evidence of PW-1 & PW-2. In the case of **Ram Vs. State of M.P., (1999) 2 J.L.J 354,** it has been held that:-

“in lengthy cross-examination some omissions and contradictions may be the outcome of the evidence. The Apex Court in paragraph 24 of the aforesaid judgment observed that when eye witness is examined at length, then it is quite possible for witness to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two

witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.” So, in view of aforesaid and in the opinion of this Court, these omissions and contradictions shall not effect the substantial part of evidence of prosecutrix (PW-1 & PW-2).

30. Considering the evidence of Dr.S.K.Jain (PW-3) who examined appellant-Vikas and found abrasions on his left knee and left elbow. He also found abrasions on left part of the body of accused/appellant. This appellant has not given sufficient explanation to rebut how the injuries were caused to him.

31. Thus, considering the evidence of prosecutrix (PW-1 & PW-2), Investigating Officer (PW-10) and CD (Ex.P-93), it is clear that prosecution has established the case against appellants, namely, Chetan, Vikas, Vikram, Ravi & Sanjay beyond reasonable doubt.

32. Learned counsel for the appellants- Anshuman @ Ashu and Golu submitted that trial Court has not properly appreciated the evidence of prosecutrix no.1 & 2 (PW-1 & PW-2), when they made omnibus statements against appellants that they have committed rape upon them one after another. The prosecutrix in paragraph 115 of her statement clearly stated that after the incident, while they were returning to home, the appellant-Anshuman @ Asu and Golu met them on the way. It is further submitted that trial Court brushed aside the statement this witness on unwarranted inference. He further submitted that trial Court erred in law that accused cannot get any benefit for the lapses on the part of investigating agency by getting the accused persons identified by PW-1 and PW-2 after arrest of appellants at the Police Station. It is further submitted that this lapse on the part of Police goes a long way to demonstrate how the Police was creating evidence to implicate the

accused persons and thus very foundation of investigation is based on created evidence. It is the duty of Police Officer to investigate the matter and conclude the evidence and not to create the evidence.

33. On the other hand, learned counsel for the State has submitted that prosecutrix (PW-1 & PW-2) have elaborately supported the prosecution version and trial Court has rightly held the appellants guilty for the offences.

34. After hearing the arguments and perusal of evidence of PW-1 who clearly stated in paragraph 4 of her examination-in-chief that Golu and Ashu @ Anshuman came with other people and committed rape. Therefore, names of these witnesses were mentioned in the FIR (Ex.P-1). Learned counsel submitted that prosecutrix (PW-1) in paragraph 115 of her cross-examination has stated that when she and PW-2 were returning home then these appellants were standing on the way and met them. On perusal of statement of PW-1 in paragraph 115 she stated thus:-

“ये सही है कि आरोपी आसू एवं गोलू मेरे साथ घटनक्रम होने के बाद आए थे। ये सही है कि घटनक्रम के बाद जब मैं घर वापस लौट रही थी तो आरोपी आसू और गोलू रास्ते में मिले थे।”

On perusal of statement and version of prosecutrix, the presence of these appellants on the spot was not doubtful. PW-2 clearly stated in her examination-in-chief that accused/appellants committed rape upon her one by one. It is true that PW-2 also admitted that when they were returning home accused-Ashu & Golu met them on the way. But, these statements did not give assistance to the accused/appellants because prosecutrix (PW-1 & PW-2) have clearly stated their names in FIR (Ex.P-1) and clearly stated in their evidence that these people have committed rape upon them.

On this point, they are not substantially rebutted in their cross-examination. So, meeting of these witnesses on the way while returning back does not create any doubt or ambiguity in the statements of the prosecution witnesses (PW-1 & PW-2). Learned counsel further submitted that while deposing before Juvenile Justice Board the prosecutrix (PW-2) in cross-examination (Ex. D-7) had not deposed regarding commission of rape by appellant-Anshuman and Golu. But, this statement does not help the appellant because in Juvenile Justice Board, the trial was running for juvenile and not for these appellants. So, the prosecution had no opportunity to put their version before the Juvenile Justice Board.

35. In the case of *Prem Prakash Vs. State of Harayana, AIR 2011 SC 2677*, it has been held that the entire statement of the prosecutrix is to be seen without referring and emphasizing on single line, as that would frustrate the purpose of justice. So, considering the evidence of PW-1 & PW-2, it is clear that there is mention of names of accused/appellants in the FIR and they categorically stated in their evidence that these appellants, namely, (Anshuman & Golu) committed rape upon them and remain substantially unrebutted in this regard in their cross-examination. So, in the considered opinion of this Court, the prosecution has proved its case against appellants-Anshuman @ Ashu and Golu.

36. Learned counsel for the appellant-Amit submitted that according to prosecutrix No.1 (PW-1), he knew appellant (Amit) prior to the incident, but she has not mentioned the name of appellant in the FIR (Ex.P-1). He further submitted that appellant has no nexus with the aforesaid offence and he is maliciously confined and booked for the offence. He cited paragraph 88 of the cross-examination of the prosecutrix (PW-1) and submitted that statement of prosecutrix (PW-1) clearly goes to show that

prosecutrix narrated false story before the Court. He also cited paragraph 89 to contend that there are so many contradictions and omissions in the evidence of PW-1 & PW-2 as regards appellant-Amit.

37. Considering the evidence regarding appellant-Amit, it is found that it is true that prosecutrix has not mentioned the name of this appellant in the FIR (Ex. P-1). But, she has mentioned name of appellant-Amit in Ex.-P-2 after three days. She stated in Ex. P-1 that there were 2-3 boys whose names she does not know, but she identify them by their faces. Considering the evidence of prosecutrix (PW-1), it was found that her evidence was recorded on 21.08.2012 after six months from the date of incident and at that time in paragraph 4 she stated that she knows appellant-Amit. It does not mean that at the time of incident she knows the name of appellant-Amit. In cross-examination and Ex. P-2 she mentioned the name of Amit and stated that she came to know the name of appellant - Amit later on.

38. In examination of accused under section 313 of Cr.P.C. appellant-Amit stated that after 2-3 day of the incident the prosecutrix demanded money. When he denied to do so, she also included her name. But, appellant neither lodged any complaint in this regard nor dare to give defence on this point. So, considering the evidence of prosecutrix (PW-1 & PW-2), it has been found that testimony of prosecutrix are reliable against appellant-Amit.

39. In the case of ***Dharshan Singh @ Bhasuri Vs. State of Punjab, AIR 1983 SC 554***, the Apex Court has held that the fact that name of the other accused are not mentioned in the FIR was atleast a circumstance which the prosecution has to explain, though no rule of law stipulates that accused whose name is not mentioned in the FIR is entitled to be acquitted

Similar view has been also been taken by the Apex Court in the case of *Vinod G.Asrani Vs. State of Maharashtra, AIR 2007 SC 1253* wherein it has been held that there is no hard-and-fast rule that the first information report must always contain the names of all persons who were involved in the commission of an offence. Very often the names of the culprits are not even mentioned in the FIR and they surface only at the stage of the investigation. Similar view has been taken in the case of *State of Maharashtra Vs. Mohd.Sajid Husain Mohd.S.Husain, AIR 2008 SC 155* by taking into account its previous judgment. It is equally trite law that it is always not necessary to mention the names of all accused in FIR. The FIR cannot be encyclopaedic. Thus, mere non-mentioning of name of appellant-Amit in FIR (Ex. P-1) does not give him right of acquittal. The prosecutrix had identified him in Court and before Tehsildar in identification parade. So presence of appellant-Amit at the time commission of crime is not doubted.

40. Learned counsel for the appellants, namely, Rajendra, Mona @ Mohanlal and Shantilal submitted that prosecutrix does not know appellant-Shantilal and Mona @ Mohanlal. There is no evidence of DNA regarding rape. In the evidence regarding appellant- Shantilal, Mona @ Mohanlal and Rajendra, it has been found that rape was committed upon the prosecutrix by two groups. After analysis of report (Ex.P-1) and (Ex. P-2) and evidence of prosecutrix (PW-1 & PW-2), it is found that two groups of appellant had committed gang rape upon both the prosecutrix. According to the FIR, when group of 10-12 boys committed rape thereafter appellants-Shantilal, Mona @ Mohanlal and Rajendra came there and they also committed rape upon both the prosecutrix. Both the prosecutrix identified these appellants in identification parade. They

identified before the Naib Tehsildar in jail and also indentified them in Court during evidence. Appellant-Mona @ Mohanlal was identified by the prosecutrix in Depalpur Jail. So, as above discussion regarding all the appellants, it was found that two groups of appellants separately committed gang rape upon two prosecutrix and therefore, there is statement of PW-1 in regard to prosecutrix (PW-2) that she does not know what happened with prosecutrix No.2 (PW-2). This only refers to the fact that two different groups committed rape upon the prosecutrix. Both the prosecutrix cannot narrate the incident minutes in respect of each other. One prosecutrix cannot give minute narration of incident as to what happened with another prosecutrix. One prosecutrix can only give minute narration as to what incident occurred with her. She can give details of incident in respect of another prosecutrix on the basis of information collected by another prosecutrix.

41. In view of above discussion and considering the evidence of PW-1 and PW-1 and other evidence on record, this Court is of the opinion that prosecution is able to prove offence against all the accused persons except appellants – Javed and Tipu. Thus, trial court has not committed any error in finding the appellants guilty except appellants -Javed and Tipu for the offence in question. **Hence, the conviction for the offence under Section 376 (2)(G), Section 376 (2)(G), Section 506(B) and Section 506(B) of IPC awarded by the trial court against appellants - (1) Shantilal Kushwaha (2) Chetan Prajapat (3) Vikas Bharti (4) Vikram Makwana (5) Ravindra @ Ravi Mandloi (6) Mona @ Mohanlal Kumrawat (7) Sanju @ Sanjay Mandloi (8) Poona @ Poonachand (9) Rajendra Bhami (10) Anshuman Wagh (11) Golu Wagh and (12) Amit Wagh is upheld.**

42. In light of the aforesaid discussion, in the considered opinion of this Court, trial court has committed error in holding the **appellant – Javed guilty under Section 376 (2)(G), Section 376 (2)(G) and Section 506(B) of IPC and appellant -Tipu under Section 376 (2)(G) and Section 376 (2)(G) of IPC, therefore, their conviction and sentence are set aside and they are acquitted from all the charges for the aforesaid offence. Their bail bonds stand discharged.**

43. Learned counsel for the appellants submitted that appellants- (1) Shantilal Kushwaha (2) Chetan Prajapat (3) Vikas Bharti (4) Vikram Makwana (5) Ravindra @ Ravi Mandloi (6) Mona @ Mohanlal Kumrawat (7) Sanju @ Sanjay Mandloi (8) Poona @ Poonachand (9) Rajendra Bhami (10) Anshuman Wagh (11) Golu Wagh are in jail since 19.02.2012 and 21.02.2012 respectively till today and prayed for modification of their sentence to the period already undergone by them as more than minimum of 10 years period was specified for the aforesaid offence at the relevant point of time.

44. Considering the offences committed by the appellants, in the considered opinion of this Court, it is not a fit case to accept the prayer made by learned counsel for the appellants for modifying the jail sentence of the appellants to the period already undergone by them till today, hence, his prayer is rejected.

45. **Resultantly, the appeal filed by appellants- (1) Shantilal Kushwaha (2) Chetan Prajapat (3) Vikas Bharti (4) Vikram Makwana (5) Ravindra @ Ravi Mandloi (6) Mona @ Mohanlal Kumrawat (7) Sanju @ Sanjay Mandloi (8) Poona @ Poonachand (9) Rajendra Bhami (10) Anshuman Wagh (11) Golu Wagh and (12) Amit Wagh is hereby dismissed and their conviction and sentence passed by the**

trial court is hereby upheld to meet the ends of justice. Appellant-Amit Wagh is on bail. His bail bond is hereby cancelled. He is directed to surrender before the trial Court immediately for undergoing remaining part of the sentence, failing which the trial Court shall take suitable action as per law under intimation to this Court.

46. Copy of this judgment along with the record of the trial court be sent to the trial court for information and necessary action. Since, appellants are serving jail sentence, they be intimated about the outcome of this appeal through Superintendent of Jail and a copy of the judgment be also supplied to him through Superintendent of Jail.

**(S.A. Dharmadhikari)
Judge**

**(Hirdesh)
Judge**

RM/N.R.