# HIGH COURT OF MADHYA PRADESH: JABALPUR

**(Division Bench)**

## Criminal Appeal No. 541/2000

**State of Madhya Pradesh** .....Appellant
through P.S. Bilkhiria, Bhopal

Versus

**Mohammad Shahid** & Another .....Respondents

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**CORAM**:

**Hon'ble Shri Justice Hemant Gupta, Chief Justice**
**Hon'ble Shri Justice Atul Sreedharan, Judge**

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**APPEARANCE**:

Mrs. Namrata Agrawal, Government Advocate for the appellant/State.

Mr. S.C. Datt, Senior Advocate with Mr. Siddharth Datt & Ms. Kishwar Khan, Advocates for the respondents.

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**Whether Approved for Reporting**: Yes

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**Law Laid Down**:

- Evidence as to the cause of death is relevant not only in relation to the cause of death of the person making the statement but also to the circumstances of the transaction which resulted in death. In the suicide note when the prosecutrix has tried to convey that the accused were hungry (for sex) and that she became their food (victim), it clearly indicates that she was violated and that she did not want to live life of disgrace. The entire reading of the dying declaration does not absolve the accused though she said that they be not punished. Such suicide note is to be treated as dying declaration and is admissible under Section 32 of the Evidence Act, 1872.

***Relied -*** *(2015) 8 SCC 494 (Tejram Patil v. State of Maharashtra);*
*(1984)4 SCC 116 (Sharad Birdhichand Sarda v. State of Maharashtra)*
*AIR 1958 SC 22 (Khushal Rao v. State of Bombay);*
*AIR 1939 PC 47 (Pakala Narayana Swami v. Emperor);*
*AIR 1928 Patna 162 (Lalji Dusadh v. Emperor).*
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- The statement made by the victim soon after the incident is relevant in terms of Section 157 of the Act. It will have corroborative value. Thus, the statement of the victim to her brother Nilesh (PW-7), Kashi Singh (PW-1) "at or about the time when the fact took place" are admissible in terms of first part of Section 157 of the Act whereas, statement made to Investigating Officer Manoj Sharma (PW-14), "an authority legally bound to investigate the fact" is relevant in terms of second part of Section 157 of the Evidence Act to corroborate the other evidence on record.

  ***Relied*** *- (2000) 5 SCC 30 (State of Rajasthan v. N.K. the accused);*

  *(1998) 2 SCC 372 (State of T.N. v. Suresh);*

  *AIR 1983 SC 911 (Sheikh Zakir v. State of Bihar);*

  *AIR (39) 1952 SC 54 (Rameshwar v. State of Rajasthan).*

- Even if the victim was found to be habitual to sexual intercourse as there were no injuries on her person; and she was more than 18 years of age, does not allow the accused to violate her and would also not mean that she had consented for being violated by the accused. The evidence of the witnesses and the statement of the accused under Section 313 of CrPC does not show that accused knew the victim and that she voluntarily submitted to the accused. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. Therefore, in view of the statement of her brother and suicide note, the question of consent does not arise.

  **Relied -** *(2013) 7 SCC 278 (Ganga Singh v. State of Madhya Pradesh);*
  *(2012) 7 SCC 171 [Narender Kumar v. State (NCT of Delhi)];*
  *(2004) 1 SCC 421 (State of Punjab v. Ramdev Singh);* and
  *(2000) 5 SCC 30 (State of Rajasthan v. N.K. the accused).*

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**Significant Paragraphs**: 25 to 27, 31 to 34, 36, 39, 40, 45 to 48, 50 to 54, 58

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Reserved on: 22.10.2018

# J U D G M E N T

(Pronounced on this 1st day of November, 2018)

**Per: Hemant Gupta, Chief Justice**:

The present appeal by the State is against an order passed by the learned Sixth Additional Sessions Judge, Bhopal in Sessions Trial No.357/1998 acquitting the respondents for the offences under Sections 366, 376(2)(g) of the Indian Penal Code, 1860.

2. The learned Trial Court returned a finding that there is no reliable evidence on record regarding kidnapping of the prosecutrix and forcible intercourse with her. The learned Trial Court further found that the only evidence which is available on record is that the prosecutrix was found with the accused and even if the accused have committed intercourse, it is with her consent, as she was more than 18 years of age. The prosecutrix was taken in a car but the fact that she has not objected to go with the accused in car shows her consent in having relationship with the accused.

3. The prosecution was initiated on the basis of the statement of the prosecutrix “M”, aged about 18 years given to PW-14 SHO- Manoj Sharma at 0.10 a.m. on 18.10.1998 on the basis of which an FIR (Ex.P-23) was lodged for the offence punishable under Sections 366 and 376(2)(g) of the IPC. The statement is that on 17.10.1998, at about 6.00 p.m. she has gone with her brother to Vegetable Market. Her brother is working in the tea-shop of Manoj Kushwaha. After meeting her brother, she was standing at bus stand at about 7.00 p.m. to take Mini-bus to reach her house. At that time,

two boys alighted from a blue-colour Maruti car, who gave their names as Mohammad Shahid and Mohammad Shamim and said that they know her brother. They disclosed the name of her brother as well and said that they will drop her home. Believing their statement, she sat in their car. When the car crossed Patra bridge then these people sped away the car. She objected, but they closed the glass window panes. They threatened her and told her to keep quiet. They kept moving in the city for some time. After some time, they went to Raisen Road and took a road, which was going towards an agricultural land. Under threat, Shahid and Shamim, in turn, raped her in the car. On way back, their car got stuck on the *Kaccha* path. They threatened her not to raise any noise and tried to seek help to take out the car from the soft ground. They stopped a Mini bus. Some people from the bus and the policemen came to the spot. She told them entire story and was brought to the police station. She disclosed the car number as MP09-HB-1927.

4. On the same day, at about 5 a.m. she was medico-legally examined by Dr. Sushma Nigam (PW-11). The report is Ex.P-20. There was old-ruptured hymen and that she was habitual to sexual intercourse as per the said report. The vaginal slides were prepared. The accused were arrested on 18.10.1998 at 1.55 am vide arrest memo (Ex. P-14). Accused Mohammad Shamim suffered a disclosure statement (Ex. P-15) at 00.40 am on 18.10.1998 that he can get his underwear recovered which is kept near the rear seat of car number MP09-HB-1927, which is standing on Raisen road on the *Kaccha* portion of the road. Ex. P-17 is the recovery memo of the underwear of the accused Shamim taken out by him from the rear seat of the car. Accused Mohammad Shamim in Ex. P-8 addressed to Medical Officer,

Central Jail Hospital, Bhopal, *inter alia*, stated that an unknown girl aged about 18-19 years asked for lift from them. She stated that if Rs.1000/- are not paid, she will raise hue and cry. When they turned car back, the car got stuck in the agricultural field. In the meantime, 3-4 constables alighted from a passenger bus and took them to police station. They denied doing anything wrong with the girl and that they have not taken bath and nor changed the clothes.

5. Accused Mohammad Shahid suffered a disclosure statement (Ex. P-16) at 00.35 am on 18.10.1998 that he can get the documents of his car bearing registration No. MP09-HB-1927 recovered from the glove box of the car which is standing on Raisen road on the *Kaccha* portion of the road. Ex. P-13 is the recovery memo of the documents which Shahid has taken out by himself from the glove box of the car. Ex. P-9 is the statement of accused Shahid on the similar lines made to Medical Officer Central Jail on 22.10.1998 and that he has also not taken bath nor changed the clothes.

6. Manoj Sharma (PW-14) is the SHO and the Investigating Officer, who deposed that FIR (Ex.P-23) was written by him on the statement of the prosecutrix. He prepared site plan (Ex.P-5) in the presence of witnesses and arrested the accused. He deposed that on the statement of Shamim, his underwear was taken in possession from underneath the rear seat vide disclosure statement (Ex.P-15). On the basis of disclosure statement of accused Shahid, car number MP09-HB-1927 was taken in possession vide memo Ex.P-16 and also the car and the documents of vehicle vide memo Ex.P-13. Mohammad Shahid was asked to remove his underwear, which was

taken in possession vide memo Ex.P-18. He sent the vaginal slide and underwear of the accused for forensic science examination vide memo Ex.P-25. The report of the Forensic Laboratory is Ex.P-26.

7. Dr. D.S. Badkul (PW-8) has conducted medico-legal examination of accused – Shamim at about 11.15 a.m on 22.10.1998. He is the one who prepared report Ex.P-8 in respect of Shamim and Ex.P-9 in respect of Shahid, who was examined by him at 11.25 am on the same day. The doctor has given report Ex.P-8 and P-9 that the accused were capable of performing sexual intercourse.

8. In report Ex.P-26, it has been found that *Salvar* of the prosecutrix contained in packet (A), vaginal slide in packet (B), underwear of accused Mohammad Shahid in packet (C) and underwear of accused Mohammad Shamim contained in packet (D) were found with stains of semen but the quantity of samples were not sufficient for serological examination of the semen.

9. The victim committed suicide and left a suicide note (Ex.P-6) dated 22.10.1998. The suicide note is in Hindi whereas its English translation reads as under:

"22.10.1998

> I, "M", no one is responsible for my death. I am myself responsible. My family members and others should not be held responsible after my death as I am committing suicide on my own. Because neither I want to live life of disgrace nor you (Police) would permit me to live gracefully. I asked to not to publish this incident in newspaper but the news was published in the newspaper though I have requested you to not to do. You would have still done the same. It is much better that if I am not alive then neither me or my parents shall

> suffer disgrace. I withdraw my statement. Please release those boys. It was my fault that I sat in their vehicle, being enticed. Though they were drunk but I was in my senses. It is commonly said that if food is served before any hungry person he would not leave it uneaten. I sat in their vehicle by mistake and they apprehended me to be a girl of loose character. Whatever happened to me has ruined my life, now I don't want to ruin the life of the boys by punishing them. I request you to leave them and do not harass my parents and my brother by any means.
>
> Written by me : "M"
>
> Signed in English
>
> Daughter of xxx
>
> I had mixed sleeping pill in my mother's food and therefore she is in sound sleep. She had no clue regarding my death. So do not try to interrogate my mother in any manner otherwise, I will not leave you even after my death."

10. Sohan Lal Pandey, Assistant Sub Inspector has been examined as PW-9. He has taken the dead body in his possession on 23.10.1998 vide memo Ex.P-10. He also took in possession writing Ex.P-6, paper and a pen handed over by Nilesh, brother of the deceased. The recovery memo is Ex.P-7. He also took in possession two *Dupattas* vide memo Ex.P-12.

11. After completion of investigation, the accused were made to stand trial.

12. The prosecution, in order to prove the offence under Section 366 and 376(2)(g) of the IPC, examined the brother of the deceased, Nilesh (PW-7). He deposed that two days before Diwali, his sister told him that when she was standing on the bus stand, two persons came and disclosed his name to her and that they will drop her to her home. Those persons took her in a car to a jungle whereas the policemen came and took them to police station where his sister lodged a report. She told him that these persons committed

rape with her. She disclosed their names as Shahid and Shamim. After 2-3 days, his sister committed suicide in the house itself. The suicide note Ex.P-6 written by his sister was found by him lying on the table, which was handed over to the police. Such suicide note was taken in possession vide Ex.P-7. In the cross-examination, he stated that he has studied up to 7th class and that Ex.P-6 was not sealed on the day, it was recovered. He reiterated that his sister told the name of the persons who took her in car are Shahid and Shamim. He denied the suggestion that the prosecutrix was depressed after the news came in the newspaper. A perusal of the statement would show that no question was put to the brother of the deceased that such suicide note is not written by her. The witness has deposed that after the death of his sister he found a suicide note written in her handwriting which was taken in possession.

13. Madanlal (PW-6) is the father of the deceased. He deposed that his son Nilesh told him about the sexual assault on her daughter. He tried to counsel her but she was keeping quiet and after five days, she committed suicide.

14. Apart from the statement of the brother, who is a witness of oral dying declaration made to him, the prosecution examined PW-2 Mohd. Shahid, the conductor of the Mini-bus. He deposed that about four months back, at about 10-11 p.m. he was coming in a bus from Raisen to Bhopal. Between Bilkhiria and Khajuri, he saw both the accused standing. They stopped the bus and sought their help as their car had stuck in the agricultural field. In the bus, there were 4-5 constables, who were on patrol

duty. He deposed that there was a girl in the car who was standing with the accused. On his asking, the girl told him that she has come with the accused for a visit. The witness was declared hostile. In cross-examination by the public prosecutor, he deposed that there was a passenger in the vehicle who kept sitting in the vehicle and that the girl did not disclose anything in his presence.

15. PW-3, Pyare is the driver of the Mini-bus. He deposed that at about 11.00 p.m. he was driving Mini-bus from Raisen and two persons stopped the vehicle. The police constables sitting in the bus alighted along with the conductor. No conversation has taken place in his presence.

16. Kashi Singh (PW-1) is one of the constables, who were on patrol duty. He deposed that at about 10.30 p.m., they went for patrol duty from Police Station Bilkhiria, and when they reached near Pammi Farm, then accused present in court stopped the bus and sought help from the driver for removal of Maruti car stuck in the agricultural fields. Car number was 1927. A girl was standing with the accused. On having a suspicion, he asked the name of the persons, who disclosed their names as Shamim and Shahid. In response to the question as to the purpose of the visit to that place, the answer was just roaming about. He deposed that both the accused were drunk. The girl in the car disclosed her name and said that the accused have forcibly brought her. When the prosecutrix gave such statement, the bus and the driver have left the place. He, along with the accused and the victim, came to the police station and produced her before the Station House Officer. In cross-examination by the public prosecutor, he stated that when

he asked the accused that who is this girl, they said that she is their sister but the girl told him that the accused have forcibly brought her. In further cross-examination he deposed that the victim has not disclosed that she was sexually assaulted at the site but this fact she stated in the police station. He deposed that there was nobody else when the accused and the victim were interrogated except him and Kishan Singh (PW-4). In further cross-examination by the accused, he deposed that he has not seen any breakage in the car and the girl came out of the car when she saw them. She did not volunteer anything but disclosed when they asked from her. They came to police station in that car only.

17. Kishan Singh (PW-4) was also in the patrol party along with Kashi Singh (PW-1). He deposed that at about 10.30 p.m., near a Poultry Farm, two boys stopped the bus and sought help for taking out their car. He, Kashiram and some passengers alighted from the bus and saw that in car there was one girl. The boys had consumed liquor. The girl told them that the two boys are her brother and that no action be taken else their Diwali will get spoiled. Since they had a doubt on the statement, they took the boys and the girl to the police station in truck and left the car at that place only. The accused are the persons who stopped their vehicle on that night. The witness was declared hostile and in cross-examination by the public prosecutor. He denied giving the statement that the victim has disclosed that she was sexually assaulted.

18. Chhaganlal (PW-10), is an agriculturist, who deposed that around four months back, at 11.00 p.m. in the night, he had gone to leave Omkar

Singh on his field. He saw a Maruti car stuck in the field away from the road and that a Mini-bus was standing on the road. The police constables were standing. A panchnama was prepared but he has not seen any girl nor has he gone near the car. The police has taken the car vide recovery memo Ex.P-13, to which he is signatory. He does not know the accused nor were such accused seen at the place of occurrence. He denied that the car or the underwear of the accused was recovered in his presence.

19. PW-12 is Onkar Singh – another agriculturist. He also saw a car stuck in the field in which one girl was sitting and also the Mini-bus was standing on the road. Two-three policemen were also standing. He does not know who was the girl nor identified the accused. He denied that accused was interrogated by the police but admitted his signature on memo Ex.P-15 and P-16. He also admitted his signature on recovery memo of car, underwear and papers Ex.P-13, P-17 and P-18. The witness was declared hostile.

20. With this evidence on record, the learned Trial Court returned a finding that the presence of the accused with the victim is proved but not of sexual assault.

21. Learned counsel for the appellant-State argued that the findings recorded by the learned Trial Court are perverse, inasmuch as, the admissible evidence has not been taken into consideration and the benefit of acquittal has been wrongly granted. It is argued that the suicide note is admissible in evidence in terms of Section 32 of the Evidence Act, 1872 (for short “the Act”), as it is in evidence of circumstances of transaction, which led to her

death. Learned counsel relies upon a judgment of the Privy Council in **Pakala Narayana Swami v. Emperor, AIR 1939 PC 47**. She also relied upon a judgment of the Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra**, **(1984) 4 SCC 116** and a decision of the Patna High Court in **Lalji Dusadh v. Emperor, AIR 1928 Patna 162**.

22. Learned counsel for the appellant-State also submitted that the statement of the victim to her brother Nilesh (PW-7) and Kashi Singh (PW-1) are relevant in terms of first part of Section 157 of the Evidence Act, 1872 (for short "the Act") whereas statement given to Investigating Officer Manoj Sharma (PW-14) is relevant in respect of second part of Section 157 of the Act. Reliance is placed upon the judgments of the Supreme Court rendered in **Rameshwar s/o Kalyan Singh v. The State of Rajasthan, AIR (39) 1952 SC 54**; **Sheikh Zakir v. State of Bihar, AIR 1983 SC 911**; **State of T.N. etc. v. Suresh and another etc. (1998) 2 SCC 372** and **State of Rajasthan v. N.K.** the accused, **(2000) 5 SCC 30.**

23. On the other hand, learned senior counsel for the respondent reiterated the argument raised before the Trial Court that the suicide note does not name the accused, therefore, in absence of identity of the accused in the suicide note, the findings recorded by the Trial Court cannot be said to be unwarranted. It is also argued that as per the medical evidence, the victim was habitual to sex and she was more than 18 years of age, therefore, the findings recorded by the Trial Court that the prosecution has only proved the presence of the accused with the victim and not the sexual assault, cannot be said to be perverse which may warrant interference in the appeal against the

acquittal. Learned senior counsel for the respondent relies upon Supreme Court decision in **Sudhakar and another v. State of Maharashtra, (2000) 6 SCC 671**.

24. We find that the findings of the learned Trial Court are based on the perverse appreciation of evidence, which are not sustainable in law. The evidence against the accused can be discussed under the following heads.

**A. <u>Identification of the Accused:</u>**

25. Kashi Singh (PW-1), police constable, who was on patrol duty, has identified both the accused, who have disclosed their name to this witness when their car was stuck in the agricultural fields. He also deposed that both the accused were drunk. In cross-examination, he admitted that the fact that she was sexually assaulted by the accused was told by her in the police station when he accompanied the accused and the victim to the police station. She was in Police Station at about 00.10 a.m., that is soon after the occurrence at about 11.00 p.m. She was medically examined at 5.00 a.m. in the morning. The disclosure statements of the accused were recorded at about 11.15 p.m. and 11.25 p.m. on 17.10.1998. The statement of the said witness is to the effect that he came with the accused and the victim in the car of the accused itself.

26. Kishan Singh (PW-4) is another constable, who was on patrol duty. He has deposed that the boys who have stopped the bus are the accused in Court and they had consumed liquor. There is discrepancy in his version that the victim told the witness that the accused are her brother and that no action

be taken else their Diwali will get spoiled. However, we find that such discrepancy is of no consequence. Inasmuch as, even if the victim has stated that the accused are her brother but the fact that she stated that no action be taken against them else their Diwali will get spoiled leads to unnatural relation between them.

27. Mohd. Shahid (PW-2), the conductor of Mini-bus deposed that it was at around 10-11 p.m. that the bus was stopped by two accused, present in court. She did not disclose to him that she has been sexually assaulted. Pyare (PW-3), the driver of the Mini-bus has not alighted from the bus and he has not identified either the accused or the victim. Kishan Singh (PW-4) deposed that he was on the patrol duty and was asked to help the accused in taking out their car at around 10.30 p.m. Both the boys were drunk though the girl told them that she is their sister. He identified the accused as the persons, who stopped the bus. Even the learned Trial Court has returned a finding that the accused were in the company of victim in the night of 17th October, 1998 from about 7 p.m. to 11 p.m.

28. Thus, the presence of the accused with the victim is proved from the testimony of Kashi Singh (PW-1) and Kishan Singh (PW-4) as well as Mohd. Shahid (PW-2), conductor of the Mini-bus, who deposed that the accused were the one, who stopped the bus. Kashi Singh (PW-1) and Kishan Singh (PW-4) have proved the presence of the girl with the accused. The said girl was the one, who was taken by Kashi Singh (PW-1) to the police station, who has deposed the manner of occurrence to the Investigating Officer, Manoj Sharma (PW-14).

**B. <u>Whether Suicide Note can be treated as Dying Declaration</u>:**

29. Nilesh (PW-7), brother of the victim has also produced the suicide note (Ex.P-6) written by the deceased, taken in possession vide memo Ex.P-7 on 23.10.1998 at about 7.30 am. Her dead body was taken in possession on 23.10.1998 vide Memo Ex. P-10. The time of death is mentioned as 22/23.10.1998 before 3.00 am. In the suicide note (Ex.P-6) dated 22.10.1998, she has written that she does not want to live the life of disgrace nor the police will permit her to live gracefully. She has stated that to avoid disgrace to her and her parents, she is taking this step. She stated that it was her fault that she sat in their vehicle. They were drunk and that she sat in their vehicle by mistake and they thought that she is the girl of loose-character. In the suicide note she is categorical that she will not be able to live a life of disgrace. She stated that it will be better if she dies rather than to live a life of disgrace to her and her family members. She has stated that both of the accused had liquor and that whatever has happened to her has disrupted and ruined the life and that she does not want to ruin the life of the boys by punishing them. She was violated on 17.10.1998. She committed suicide after four days. From her suicide note, it is clear that she was violated and that she does not want to live life of disgrace. She has tried to convey that the accused were hungry (for sex) and that she became their food (victim). The entire reading of the dying declaration does not absolve the accused though she said that they be not punished.

30. The judgment relied upon by the learned counsel for the appellant in **Lalji Dusadh** (supra), was a case of trial for an offence under Sections 392

and 397 of the IPC wherein the dying declaration was found to be admissible. It was held that the words of Section 32 of the Act are very wide and it is not necessary that the charge should be one of homicide. The evidence as to the cause of death was relevant to the charge of robbery and consequently the cause of death i.e. the assault committed by the appellant came in question in the trial. The Court held as under:-

> "..... A further legal point is taken with regard to the dying declarations. It is contended that so far as the charges for the offences under Sections 392 and 397 are concerned the dying declarations are not admissible under Section 32(1) of the Indian Evidence Act inasmuch as the cause of the deceased's death does not come in question in the trial of those charges. It is contended that on this point the Indian law is the same as the English Law and that a dying declaration as to the cause of the death is only admissible when the causing of the death is the subject of the charge. I cannot agree with this view. The words of Section 32 are very wide and it is not necessary that the charge should be one of homicide. The evidence as to the cause of death was relevant to the charge of robbery and consequently, the cause of death, that is to say, the assault committed by the appellant, came in question in the trial. Before the Indian Evidence Act was enacted it was held in Queen v. Bissorunjun Mookerjee (1866) 6 W.R. Cr. 75 that there was no necessity in India for following the very narrow rule of English Law and that a dying declaration could be used as evidence in a charge of rape. One of the illustrations to Section 32 of the present Indian Evidence Act expressly provides for such evidence where the charge is not culpable homicide but rape.
>
> Moreover, in this case the dying declaration was also admissible under Section 8 of the Indian Evidence Act as a part of the res gestae. A statement made by the deceased immediately after the robbery regarding the robbery and also regarding the assault committed in the course of the robbery was admissible though the person who made it cannot be called to depose to it on oath. The truth in Sections 8 and 32 of the Indian Evidence Act may overlap in some cases, but they provide for different and distinct conditions. A statement, for instance, which would not be admissible under Section 8 may be admissible under Section 32."

31. The judgment of the Privy Council in **Pakala Narayana Swami** (supra) is the celebrated judgment in respect of the statements, which are admissible under Section 32 of the Evidence Act. The Court held as under:-

> ".....It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction : general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. ..... "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than "res gestae". *Circumstances must have some proximate relation to the actual occurrence.....*"

32. In **Khushal Rao v. State of Bombay, AIR 1958 SC 22**, the Supreme Court held that Section 32 of the Evidence Act has been made by the Legislature as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that evidence which has not been tested by cross-examination, is not admissible. It was held that the dying declaration is exception to such rule. It was also held that there is no rule of law that a dying declaration unless corroborated by independent witness is not to be acted upon and made the basis for conviction.

> "**11**. The legislature in its wisdom has enacted in Section 32(1) of the Evidence Act that "when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's

death comes into question", such a statement written or verbal made by a person who is dead (omitting the unnecessary words) is itself a relevant fact. This provision has been made by the legislature, advisedly, as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that evidence which has not been tested by cross-examination, is not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death, has been accorded by the legislature, a special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight. It may also be shown by evidence that a dying declaration is not reliable because it was not made at the earliest opportunity, and, thus, there was a reasonable ground to believe its having been put into the mouth of the dying man, when his power of resistance against telling a falsehood, was ebbing away; or because the statement has not been properly recorded, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement. These may be some of the circumstances which can be said to detract from the value of a dying declaration. But in our opinion, there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction. No decision of this Court, apart from the decision already noticed, has been pointed out to us as an authority for the proposition that a dying declaration, in order to be acted upon by a court, must be corroborated by independent evidence.....

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**16**. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

**17**. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the

> conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

33. The Supreme Court in **Sharad Birdhichand Sarda** (supra), after review of all the cases delineated the scope of Section 32(1) of the Evidence Act when it said as under:-

> "**21**. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:-
>
> (1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.
>
> (2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For

instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross- examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

34. The judgment referred to by learned senior counsel for the respondent in **Sudhakar**'s case (supra) has, in fact, held as under:-

"**5**. Section 32 of the Evidence Act is an exception to the general rule of exclusion of the hearsay evidence. Statement of a witness, written or verbal, of relevant facts made by a person who is dead or cannot be found or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense, are deemed relevant facts under the circumstances specified in sub-sections (1) to (8). Sub-section (1) of Section 32 with which we are concerned, provides that when the statement is made by a person as to the cause of his death or as to any circumstances of the transaction which resulted in his death, being relevant fact, is admissible in evidence. Such statements are commonly known as dying declarations.

> Such statements are admitted in evidence on the principle of necessity. In case of homicidal deaths, statement made by the deceased is admissible only to the extent of proving the cause and circumstances of his death. To attract the provisions of Section 32 for the purposes of admissibility of the statement of a deceased, it has to be proved that:
>
> (*a*) The statement sought to be admitted was made by a person who is dead or who cannot be found or whose attendance cannot be procured without an amount of delay and expense or is incapable of giving evidence.
>
> (*b*) Such statement should have been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Evidence Act.
>
> As distinguished from the English law, Section 32 does not require that such a statement should have been made in expectation of death. Statement of the victim who is dead is admissible insofar as it refers to the cause of his death or as to any circumstances of the transaction which resulted in his death. The words "as to any of the circumstances of the transaction which resulted in his death" appearing in Section 32 must have some proximate relation to the actual occurrence. In other words, the statement of the deceased relating to the cause of death or the circumstances of the transaction which resulted in his death must be sufficiently or closely connected with the actual transaction. Due weight is required to be given to a dying declaration keeping in view the legal maxim *nemo moriturus praesumitur mentiri* i.e. a man will not meet his maker with a lie in his mouth. To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of the statement as a fact. If it is in writing, the scribe must be produced in the court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement. However, in cases where the original recorded dying declaration is proved to have been lost and not available, the prosecution is entitled to give secondary evidence thereof."

Such judgment arises out of the fact where the deceased has made a statement after about five-and-a-half months and still further, the statement Ex.P-9 does not directly state regarding the cause of death. Therefore, the

judgment referred to by the learned counsel for the respondent is of no help to the argument raised.

35. The Supreme Court in **Tejram Patil v. State of Maharashtra, (2015) 8 SCC 494** has held that dying declaration is admissible not only in relation to the cause of death of the person making the statement and also to the circumstances of the transaction which resulted in death.

36. The suicide note which is a dying declaration and just on the day of writing of such letter and five days of the occurrence, the dead body was taken in possession at about 9.30 a.m. on 23.10.1998 vide memo Ex.P-10 and the time of death is mentioned as 22/23.10.1998 before 3.00 am in the intervening night of 22nd and 23rd October, 1998. However, the suicide note is corroborated by the other evidence on record, which we discuss hereinafter.

37. In view of the evidence on record, the statement Ex.P-6 in the handwriting of the victim proved by Nilesh (PW-7) is a dying declaration, as she died on the same day, which fact is evident from the memo Ex.P-10 having been prepared around 9.30 a.m. on 23.10.1998, wherein the time of death is mentioned as “before 3.00 a.m. on 23.10.1998”. The argument that the suicide note does not name the accused, is of no consequence, as the presence of the victim with the accused at the place of occurrence is proved from the statement of Kashi Singh (PW-1), Kishan Singh (PW-4) and also Manoj Sharma (PW-14), who recorded the first information report. The suicide note has to be read as a whole and not a line can be picked up from out of context. She is referring to the accused as she is the one who has taken

lift in the car and that she cannot take disgrace. The disgrace is the violation of her person.

**C. <u>Relevancy of the Statement of the Victim under Section 157 of the Evidence Act, 1872</u>:**

38. Section 157 of the Act makes it clear that the previous statement made by a victim is admissible in evidence if it is made at or about the time when the fact took place or before any Authority legally competent to investigate the fact. Section 157 of the Act reads as under:-

> **"157. Former statements of witness may be proved to corroborate later testimony as to same fact**.— In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

39. Nilesh (PW-7), brother of the deceased, has made a statement that his sister told him that she was forcibly taken by accused Shahid and Shamim and that the constables have taken her to the police station. The statement made by the deceased to her brother is relevant evidence in terms of Section 157 of the Evidence Act. The writing in the suicide note (Ex.P-6) that the accused were drunk is corroborated by the statement of Kashi Singh (PW-1) and Kishan Singh (PW-4). Kashi Singh (PW-1) stated that the victim told him in the police station that she was sexually assaulted. The statement of Kashi Singh made by the victim soon after the incident is relevant in terms of Section 157 of the Act. Similarly the statement made by brother of the victim is also relevant in terms of said provisions.

40. Manoj Sharma (PW-14), the Investigating Officer, has recorded the FIR. The statement of the victim recorded by PW-14 is part of the

investigations, which is relevant in terms of Section 157 of the Act. The said provision contemplates that any former statement made by a witness relating to the fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, is relevant.

41. The provision of Section 157 of the Act has been examined by the Supreme Court in a judgment in **Rameshwar**'s case (supra). The Court held as under:-

> **"24.** Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise,
>
> > "many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences) "could never be brought to justice."
>
> *** *** ***
>
> **27**. Section 157 states that---
>
> > "In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."
>
> The section makes no exceptions, therefore, provided the condition prescribed, that is to say, "at or about the time etc." are fulfilled there can be no doubt that such a statement is legally admissible in India as corroboration. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source may not be high, but in view of section 118 its legal admissibility as corroboration cannot be questioned. To state this is, however, no more than to emphasise that there is no rule of thumb in these cases. When corroborative evidence is produced it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand its weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind may be more than enough

> in itself to justify acceptance of the complainant's story. It all depends on the facts of the case.
>
> *** *** ***
>
> **29**. The first question is whether this delay fulfills the "at or about" condition. In my opinion, here also there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. It was suggested that the child could have complained to some women who were working in the neighbourhood, but that would not be natural in a child. She would be frightened and her first instinct would be to run home to her mother. The High Court was satisfied on these points and so am I. Consequently, the matter does fall within the ambit of section 157 read with section 8, Illustration (j).”

42. In another judgment, arising out of rape of eight years old girl, rendered in **Sheikh Zakir**’s case (supra), it was held that the statement made by the complainant to her husband immediately after the incident was found to be admissible under Section 157 of the Evidence Act. It was held to have corroborative value. The relevant extract of the judgment reads as under:-

> **“9**. A reading of the deposition of the complainant shows that it has a ring of truth around it. Section 133 of the Indian Evidence Act says that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But the rule of practice is that it is prudent to look for corroboration of the evidence of an accomplice by other independent evidence. This rule of practice is based on human experience and is incorporated in illustration (b) to section 114 of the Indian Evidence Act which says that an accomplice is unworthy of credit unless he is corroborated in material particulars. Even though a victim of rape cannot be treated as an accomplice, on account of a long line of judicial decision rendered in our country over a number of years, the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration. (Vide Rameshwar v. State of Rajasthan (AIR 1952 SC 54); Gurucharan Singh

v. State of Haryana (AIR 1972 SC 2661); and Krishan Lal v. State of Haryana, (AIR 1980 SC 1252)). It is accepted by the Indian Courts that the rule of corroboration in such cases ought to be as enunciated by Lord Reading C.J. in King v. Baskerville, (1916) 2 KB 658. Where the case is tried with the aid of a jury as in England it is necessary that a Judge should draw the attention of the jury to the above rule of practice regarding corroboration wherever such corroboration is needed. But where a case is tried by a judge alone, as it is now being done in India, there must be an indication in the course of the judgment that the judge had this rule in his mind when he prepared the judgment and if in a given case the judge finds that there is no need for such corroboration he should give reasons for dispensing with the necessity for such corroboration. But if a conviction is based on the evidence of a prosecutrix without any corroboration it will not be illegal on that sole ground. In the case of a grown up and married woman it is always safe to insist on such corroboration. Wherever corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in very detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both. The trial court has in the case before us found that the evidence of the complainant had been corroborated in material particulars by the evidence of Sheikh Lafid (P.W. 1), Juman Nadaf (P.W. 2) and Jitrai (P.W.4) the husband of the complainant. The High Court also has acted on the evidence of these witnesses. Sheikh Lafid (P.W. 1) has stated that he saw the appellant on the body of the complainant and that the complainant had also told him about the crime. Juman Nadaf (P.W. 2) has stated that when he heard the cry of the complainant at the time of occurrence, he saw the appellant fleeing away from that place. The trial court and the High Court have not found any good ground to discard their testimony. Jitrai (P.W. 4) has told the court that the complainant had mentioned to him all the details of the incident within a short while after it took place. Rama Kant Thakur (P.W 5.), the lawyer who drafted the complaint has stated that he had prepared the complaint which contains all the particulars of the offence under the instructions of the complainant. Apart from the evidence of Sheikh Lafid (P.W. 1) and Juman Nadaf (P.W. 2) about what they saw, the statement made by the complainant to her husband immediately after the incident is admissible under section 157 of the Indian Evidence Act and has a corroborative value. After considering carefully the entire material

> before us including the evidence of the witnesses examined pursuant to the order made by this Court earlier in the light of the submissions made at the Bar we are of the view that the judgment of the High Court does not call for any interference under Article 136 of the Constitution."

43. In **State of T.N. v. Suresh** (supra), the Court held that the section envisages two categories of statements of witnesses which can be used for corroboration. First is the statement made by a witness to any person "at or about the time when the fact took place". The second is the statement made by him to any authority legally bound to investigate the fact. It was held as under:-

> "**26**. The section envisages two categories of statements of witnesses which can be used for corroboration. First is the statement made by a witness to any person "at or about the time when the fact took place". The second is the statement made by him to any authority legally bound to investigate the fact. We notice that if the statement is made to an authority competent to investigate the fact such statement gains admissibility, no matter that it was made long after the incident. But if the statement was made to a non- authority it loses its probative value due to lapse of time. Then the question is, within how much time the statement should have been made? If it was made contemporaneous with the occurrence the statement has a greater value as res gestae and then it is substantive evidence. But if it was made only after some interval of time the statement loses its probative utility as res gestae, still it is usable, though only for a lesser use.
>
> **27**. What is meant by the expression "at or about the time when the fact took place"? There can be a narrow view that unless such a statement was made soon after the occurrence it cannot be used for corroboration. A broader view is that even if such statement was made within a reasonable proximity of time still such statement can be used for corroboration. The legislature would not have intended to limit the time factor to close proximity though a long distance of time would deprive it of its utility even for corroboration purposes.
>
> **28.** We think that the expression "at or about the time when the fact took place" in Section 157 of the Evidence Act should be understood in

> the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Section 157 of the Act. The test to be adopted, therefore, is this; Did the witness have the opportunity to concoct or to have been tutored? In this context the observation of Vivian Bose, J. in Rameshwar vs. The State of Rajasthan (AIR 1952 SC 54) is apposite:
>
> > "There can be no hard and fast rule about the 'at or about the' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected *in the circumstances of the case and before there was opportunity for tutoring or concoction*".
> >
> > (Emphasis supplied)
>
> **29**. Here when PW-1 disclosed to his brother-in-law (PW6) on 24-6-1987 about his version of the occurrence we have not come across anything to indicate that PW-1 was either tutored or influenced by anybody during the interregnum. Looking at the statement from that perspective we are inclined to treat it as a corroborative piece of evidence giving us a reassurance regarding the truth of PW-1's evidence in court so far as the persons involved in the episode are concerned."

44. In a judgment rendered in **N.K. the Accused** (supra), the prosecutrix has narrated the incident to a woman and to her father. The statement of the father was found to be admissible and relevant under Section 157 of the Evidence Act. The relevant extract from the judgment reads, thus:-

> "**19**. ..... Having finished his act the accused left her alone and took to his heels. The prosecutrix was weeping. She narrated the incident to a woman described as "the wife of Udai Singh" and to her father in quick succession. The statement of the father of the prosecutrix corroborates her in all material particulars and is admissible in evidence and relevant under section 157 as her former statement corroborating her testimony as also under Section 8 of the Evidence Act as evidence of her conduct....."

45. Thus, the statement of the victim to her brother Nilesh (PW-7), Kashi Singh (PW-1) are admissible in terms of first part of Section 157 of

the Act whereas, statement made to Investigating Officer Manoj Sharma (PW-14) is relevant in terms of second part of Section 157 of the Evidence Act to corroborate the other evidence on record.

**D. <u>Whether the Victim was Consenting party</u>:**

46. The learned Trial Court has returned a finding that the victim was more than 18 years of age and has consented to have sex with the accused. Such inference is based upon the statement of Dr. Sushma Nigam (PW-11) which is to the effect that she was habitual to sex and that there are no injuries on her person. Even if the victim was habitual of sex but that does not mean that she consented to have sex with the accused.

47. The question of consent does not arise in view of statement of Nilesh (PW-7) and her suicide note (Ex.P-6). Even if she is habitual to sexual intercourse but that does not mean that she consented for being violated by the accused.

48. The question: as to whether absence of injuries on the prosecutrix is sufficient to infer consent, has been found to be untenable. In the case of **N.K. the Accused** (supra), the Court held as under:-

> "**18**. Absence of injuries on the person of the prosecutrix has weighed with the High Court for inferring consent on the part of the prosecutrix. We are not at all convinced. We have already noticed that the delay in medical examination of the prosecutrix was occasioned by the factum of the lodging of the F.I.R. having been delayed for the reasons which we have already discussed. The prosecutrix was in her teens. The perpetrator of the crime was an able bodied youth bustling with energy and determined to fulfill his lust armed with a knife in his hand and having succeeded in forcefully removing the victim to a secluded place where there was none around to help the prosecutrix in her defence. The

injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In Sheikh Zakir vs. State of Bihar (1983) 4 SCC 10, absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In Balwant Singh vs. State of Punjab (1987) 2 SCC 27, this court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In Karnel Singh vs. State of M.P. (1995) 5 SCC 518 the prosecutrix was made to lie down on a pile of sand. This court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply common sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished."

49. In **N.K. the Accused** (supra), it was further held that the prosecutrix complaining having been a victim of offence of rape is not an accomplice after the crime. It was held that there is no rule of law that her testimony cannot be acted without corroboration in material particulars. In the present

case, though the victim has died but her dying declaration, as reproduced above, clearly proves that she was violated by the accused when she sat in the car driven by them. The identification of the accused is beyond doubt from the testimony of Kashi Singh (PW-1), Kishan Singh (PW-4) as well as by Nilesh (PW-7), the names having been disclosed by the victim to him.

50. In another judgment in **Narender Kumar v. State (NCT of Delhi)**, **(2012) 7 SCC 171**, the Supreme Court has held that even in cases where there is some material to show that the victim was habitual of sexual intercourse, no inference of the victim being a woman of "easy virtues" or a woman of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of. The relevant extracts from the said decision read as under:-

> "**20**. It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

> **21**. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, *if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence*, direct or substantial (*sic* circumstantial), which may lend assurance to her testimony. (Vide *Vimal Suresh Kamble* v. *Chaluverapinake Apal S.P.* [(2003) 3 SCC 175] and *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283]).
>
> *** *** ***
>
> **26**. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a woman of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide *State of Maharashtra* v. *Madhukar Narayan Mardikar* [(1991) 1 SCC 57]: *State of Punjab* v. *Gurmit Singh* [(1996) 2 SCC 384]: and *State of U.P.* v. *Pappu* [(2005) 3 SCC 594]).
>
> **27**. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.
>
> **28.** The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

51. The Supreme Court in its decision in **State of Punjab v. Ramdev Singh**, **(2004) 1 SCC 421**, has held that even if it is accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any

person to rape her. It is the accused who was on trial and not the victim. The Court held as under:-

> **"13**. … Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. …
>
> **14**. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do."

52. In another judgment rendered in **Ganga Singh v. State of Madhya Pradesh, (2013) 7 SCC 278**, the fact that the accused have not stated in their statements under Section 313 of the Code of Criminal Procedure, 1973 (for short "the CrPC") that sexual intercourse was with the consent of the victim, therefore, the Court was not correct in recording the finding that there was consent. The Court held as under:-

> "**16**. We further find that the appellant has not taken a defence in his statement under Section 313 of the Criminal Procedure Code that the

> sexual intercourse was with the consent of PW-5. Instead, he has denied having had any sexual intercourse with PW-5 and has taken a stand that he has been falsely implicated on account of a quarrel between him and the husband of PW-5. Yet, the trial court held that there was proof of sexual intercourse between the appellant and PW-5, but the sexual intercourse was with the consent of PW-5. We are of the considered opinion that as the appellant had not taken any defence of consent of PW-5, the trial court was not correct in recording the finding that there was consent of PW-5 to the sexual intercourse committed by the appellant and should have instead considered the defence of the appellant that he had been falsely implicated because of a quarrel between him and the husband of PW-5. We have, however, considered this defence of the appellant but find that except making a suggestion to PW-2, the appellant has not produced any evidence in support of this defence. As PW-2 has denied the suggestion, we cannot accept the defence of the appellant that he was falsely implicated on account of a quarrel between the appellant and the husband of PW-5."

53. Thus, even if the victim was habitual to have sexual intercourse, it does not allow the accused to violate her. The evidence of the witnesses and the statement of the accused under Section 313 of CrPC does not show that accused knew the victim and that she voluntarily submitted to the accused. The accused have offered no explanation in their Section 313 statement as to why the prosecution witnesses have deposed against them. The material witnesses except the brother of the victim are independent witnesses, who have no axe to grind against the accused and in fact, there is no such suggestion as well.

**E. <u>Medical Evidence:</u>**

54. The vaginal slide prepared by PW-11, Dr. Sushma Nigam has human spermatozoa and on the underwear of the accused, there are stains of sperm. From the writing Ex.P-8 and P-9 given to the Medical Officer, the accused

have categorically stated that they have not changed their clothes nor they had taken bath. Such statement is accepted by the accused in their statement under Section 313 of the CrPC. The underwear of Shahid was taken in possession after the same was got removed from the accused whereas underwear of the other accused Shamim was recovered from the back seat of the car.

55. The vaginal slide was prepared by Dr. Sushma Nigam (PW-11) at about 5 a.m. on 18.10.1998 i.e. almost within six hours of the occurrence, which is said to have taken place between 7 p.m. to 11 p.m. The FIR was lodged at 0.10 a.m. on 18.10.1998. The accused were arrested at 1.55 a.m. on 18.10.1998. Before the arrest, accused Shamim suffered a disclosure statement (Ex.P-15) at 00.40 a.m. on 18.10.1998 that he can get his underwear recovered. The underwear of the other accused Shahid was taken in possession after he was asked to remove the underwear. In the statement under Section 313 Cr.P.C. the accused have accepted having made such statement as correct. In the FSL Report (Ex.P-26), *Salvar* of the prosecutrix in Packet (A), vaginal slide in packet (B), underwear of accused Mohd. Shahid in packet (C) and underwear of accused Mohd. Shamim in packet (D) were found with stains of semen but the quantity was not sufficient for serological examination of the semen. Keeping in view the proximity of preparation of vaginal slide and also the recovery of undergarments of the accused and the fact that the same was found to be stained with semen, corroborates the version of the victim given to the Investigating Officer, Manoj Sharma (PW-14), Kishan Singh (PW-1) and to her brother Nilesh (PW-7) apart from the dying declaration contained in suicide note (Ex.P-6).

56. The vaginal slide was prepared within six hours of the occurrence and such vaginal slide is found to have spermatozoa. The underwear of the accused also have stains of human semen. Such underwear were also taken in possession soon after the occurrence. Therefore, medical evidence corroborates the other evidence, as discussed hereinabove.

**F. <u>Scope of Interference in Appeal against Acquittal</u>:**

57. The Supreme Court in **State of Uttar Pradesh v. Munshi, (2008) 9 SCC 390** set aside the order of acquittal passed by the High Court on the ground that it is not only cryptic but also non-reasoned. In the present case, the learned Sessions Judge has reproduced the statements but granted benefit of doubt to the accused on the ground that it was a case of consent of the victim only because in the medical report she was found to be habitual to sex.

58. In **N.K. the Accused** (supra), the Supreme Court held that an unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. The extract from the Judgment reads as under:-

> **"9**. Having heard the learned counsel for the parties we are of the opinion that the High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should

escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat (1983) 3 SCC 217,* this Court observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion. We need only remind ourselves of what this Court has said through one of us (Dr A.S. Anand, J. as his Lordship then was) in *State of Punjab* v. *Gurmeet Singh (1996) 2 SCC 384* (SCC p. 403, para 21):

> "[A] rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case."

59. In a three Judge Bench judgment in **Criminal Appeal No.913/2016 (Hemudan Nanbha Gadhvi v. State of Gujarat)**, the appeal filed by the accused was dismissed. The Supreme Court examined the appreciation of the evidence of hostile witness and the fact that the prosecurtrix turned hostile. The Court held as under:-

> "**8**.....The observations with regard to hostile witnesses and the duty of the court in State vs. Sanjeev Nanda, 2012 (8) SCC 450 are also considered relevant in the present context:
>
> > "101.....if a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."
>
> **9**. A criminal trial is but a quest for truth. The nature of inquiry and evidence required will depend on the facts of each case. The presumption of innocence will have to be balanced with the rights of the victim, and above all the societal interest for preservation of the rule of law. Neither the accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it the theatre of the absurd. Dispensation of justice in a criminal trial is a serious matter and cannot be allowed to become a mockery by simply allowing prime prosecution witnesses to turn hostile as a ground for acquittal, as observed in *Zahira Habibullah Sheikh vs. State of Gujarat, (2006) 3 SCC 374 and Mahila Vinod Kumari vs. State of Madhya Pradesh, (2008) 8 SCC 34*. If the medical evidence had not confirmed sexual assault on the prosecutrix, the T.I.P. and identification therein were doubtful, corroborative evidence was not available, entirely different considerations may have arisen.
>
> **10**. It would indeed be a travesty of justice in the peculiar facts of the present case if the appellant were to be acquitted merely because the prosecutrix turned hostile and failed to identify the appellant in the dock,

in view of the other overwhelming evidence available. In *Iqbal vs. State of U.P.,(2015) 6 SCC 623*, it was observed as follows:

> "15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter of dacoity and the alleged weapons used in the commission of the offence."

> **11**. The corroboration of the identification in T.I.P is to be found in the medical report of the prosecutrix considered in conjunction with the semen found on the clothes of the prosecutrix and the appellant belonging to the Group B of the appellant. The vaginal smear and vaginal swab have also confirmed the presence of semen. A close analysis of the facts and circumstances of the case, and the nature of the evidence available unequivocally establishes the appellant as the perpetrator of sexual assault on the prosecutrix. The serologist report was an expert opinion under Section 45 of the Evidence Act,1872 and was therefore admissible in evidence without being marked an exhibit formally or having to be proved by oral evidence."

60. In view of the evidence on record and the judgment referred to by the learned counsel for the parties, we find that the judgment passed by the learned Trial Court granting benefit of doubt to the respondent is clearly perverse, untenable and defeats the cause of justice.

61. Consequently, the impugned judgment of the Trial Court is set aside. The appellants are convicted for an offence punishable under Section 376(2)(g) of the IPC and sentenced to undergo imprisonment for life, as the violation of the victim has ultimately led to her death. The respondents-accused (1) Mohammad Shahid s/o Sattar and (2) Mohammad Shamim s/o

Matesh Mohammad shall surrender themselves forthwith within a week to serve the sentence, failing which they shall be taken into custody.

62. In the result, the appeal succeeds and stands **allowed**.

**(HEMANT GUPTA)**
**CHIEF JUSTICE**

**(ATUL SREEDHARAN)**
**JUDGE**

*S/*