

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

**BEFORE
JUSTICE SUJOY PAUL
&
JUSTICE ACHAL KUMAR PALIWAL
ON THE 6th OF JULY, 2023**

CRIMINAL APPEAL No. 6781 OF 2021

BETWEEN :-

**AJAY, S/O MOHAN LAL, AGED ABOUT 19
YEARS, OCCUPATION :- LABOUR, R/O
INDRA COLONY, TIMARNI, DISTRICT
HARDA (MADHYA PRADESH)**

....APPELLANT

(BY SHRI ADITYA SINGH - ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH,
THROUGH P.S. TIMARNI, DISTRICT
HARDA (MADHYA PRADESH)**

.....RESPONDENT

(BY SHRI YOGESH DHANDE - GOVERNMENT ADVOCATE)

*This appeal coming on for hearing this day, JUSTICE SUJOY
PAUL passed the following:*

J U D G M E N T

This Criminal Appeal filed under Section 374(2) of Criminal Procedure Code (Cr.P.C.) assails the judgment dated 21/10/2021 passed in Special Case No.100050/2016 by learned IIIrd Additional Sessions Judge/Special Judge (Protection of Children from Sexual Offences Act) Harda, District Harda, M.P. whereby appellant was held guilty for

committing certain offences and directed to undergo the sentence which are mentioned hereinbelow in a tabular form :-

Convicted under Section	Sentenced to undergo
376 (2)(i) of IPC	R.I. for 10 years with fine of Rs. 500/- and in default to suffer additional R.I. for 01 month.
376 (2)(n) of IPC	R.I. for 10 years with fine of Rs. 500/- and in default to suffer additional R.I. for 01 month.
376 (2)(g) of IPC	R.I. for 20 years with fine of Rs. 500/- and in default to suffer additional R.I. for 01 month.
506 Part-II of IPC	R.I. for 7 years with fine of Rs. 500/- and in default to suffer additional R.I. for 01 month.
3/4 of the Protection of Children from Sexual offences Act 2012	R.I. for 7 years with fine of Rs. 1000/- and in default to suffer additional R.I. for 01 month.
With the direction that all sentences shall run concurrently.	

2. In short, the case of the prosecution is that the prosecutrix lodged a report in Police Station that on 25.8.2016 at around 9 PM, she was sitting in front of her house. The Child in Conflict with Law (CICL) came there and caused a scratch on her right hand and when she screamed, CICL fled away. After almost half an hour, the CICL came back with the appellant. The CICL opened the door of appellant's house and appellant forcibly took the victim inside the house. Thereafter, both of them sexually assaulted her and that incident continued upto 3 O'clock in the night. The victim came back to her adjacent house and informed about the incident to her mother.

3. Next day, she lodged the FIR in Crime No. 381 of 2016 in the P.S. Timarni, District Harda. The victim was subjected to MLC. The samples from her private part and undergarments were taken and sent for examination to Forensic Science Laboratory (FSL). After the investigation, the *chalan* was filed. In turn, the matter travelled to the Court below in the Special Sessions Case. The appellant abjured the guilt and pleaded innocence. The Court below framed six questions for its determination, recorded the statements of nine prosecution witnesses and three defence witnesses. After recording the evidence and hearing the parties, the Court below passed the impugned judgment of conviction which is subject matter of challenge in this appeal.

Contentions:-

4. Shri Aditya Singh, learned counsel for the appellant submits that he is assailing the impugned judgment mainly on six counts. The *first* ground of attack is based on the statement of victim. It is submitted that the victim's statement was recorded before the Juvenile Justice Board (J.J.B.) by the concerned Magistrate. The CICL was permitted to cross-examine the victim. In her deposition, she candidly deposed before the J.J.B. that no such incident had taken place. The said statement shows that if at all the victim was aggrieved, she was aggrieved because of conduct of CICL. Being CICL, he was tried before a different forum and his case was decided by the judgment dated 27.9.2017 in Case No.82 of 2016. He was not directed to undergo any sentence. If the statement of victim given in the Court is examined in juxtaposition to her statement given before the J.J.B., it

will be crystal clear that there are serious inconsistencies and contradictions, which makes her statement untrustworthy. In absence of a sterling quality deposition by the victim, it will not be safe to approve the conviction on the basis of statement of victim alone. In support this argument, Shri Aditya Singh, learned counsel for the appellant placed reliance on **(2011) 7 SCC 130 (Krishan Kumar Malik vs. State of Haryana)**, **(2012) 8 SCC 21 [Rai Sandeep vs. State (NCT of Delhi)]** and **(2016) 10 SCC 506 (Raja and others vs. State of Karnataka)**. In addition, he placed reliance on a recent Division Bench judgment of this Court in **Dinesh Yadav Vs. State of M.P. (Criminal Appeal No.728 of 2019 decided on 12/04/2023)**.

5. The *second* ground is relating to medical evidence. By placing reliance on the MLC, Shri Singh, learned counsel for the appellant submits that this report does not conclusively prove that any sexual assault had actually taken place on the victim. Indeed, it only gives a suggestion that ‘the possibility of sexual assault cannot be ruled out’. Thus, it cannot be said with utmost certainty that any sexual assault had actually taken place.

6. The age determination of victim by the Court below also became subject matter of criticism in the *third* ground. Learned counsel for the appellant submits that Section 94 of Juvenile Justice Act, 2015 provides the parameters to determine the age of an accused/victim. Section 94 became part of statute book in the year 2015 and certain documents/ossification test were recognized to determine the age of a victim. In the instant case, the prosecution has followed a method which is totally unknown to law. The statement of Forest Range

Officer (PW-8) and a certificate issued by him became foundation for determining the age of the victim. This deposition and certificate issued has no legal sanctity and determination of age on that basis is not sustainable. Thus, the prosecution could not establish the age of the victim. Hence, the provision of POCSO Act cannot be pressed into service.

7. *Fourthly*, the story of prosecution is called in question on the ground of improbability. To canvass the above point, it is submitted that the statements of victim (PW-2), her mother (PW-5) and V.P. Singh, S.I. (PW-7) leaves no room for any doubt, that incident had taken place on the day of *Janmashtmi* Festival. All the residents were going for attending the function in a nearby temple. This is clear from the spot map also. By placing heavy reliance on the statement of victim and his mother, Shri Aditya Singh submits that they clearly and candidly admitted that wall between their house and the appellant's house where incident had allegedly taken place, is common. Both of them also admitted that if somebody talks in one house, the voice travels to the adjacent house. In this view of the matter, it is highly improbable that gang-rape had taken place in the adjacent house and even no whisper is heard in the house next to it. Moreso, when the houses were in a crowded area and the date of incident was a festival day.

8. In support of this contention learned counsel for the appellant placed reliance on following judgments of High Courts and the Supreme Court : **2017 SCC OnLine Del 9197 [State (GNCT of Delhi) vs. Aleem], (2007) 6 AIR Bom R 690 (Shiva alias Prashant**

vs. State of Maharashtra) and (2006) 10 SCC 92 (Sadashiv Ramrao Hadbe vs. State of Maharashtra).

9. To elaborate, it is submitted that victim stated that she remained in the custody of appellant and CICL between 9 PM to 3 AM and was sexually assaulted during that duration. The mother of the victim stated that she came back home at around 12 PM and went to sleep. This conduct of victim's mother is unnatural. The cross-examination of victim in the Court makes it clear that appellant was not involved in the incident and he has been falsely arraigned. On the basis of this improbable story, it was not proper to hold the appellant as guilty.

10. The *fifth* ground is based on the FSL report. It is submitted that as per the said report, it was found that human semen were found in the undergarment of the victim. However, no DNA test was conducted in the instant case. In absence thereof, it could not be established with accuracy and precision as to whose semen was found in the undergarment of the victim. CICL was aged about 15 years and 9 months and he was not directed to undergo any sentence by the Juvenile Court considering his age. In absence of DNA report, the prosecution could not establish that the said FSL report connects the appellant with commission of crime.

11. Even if the FSL report, an incriminating material was produced by the prosecution, it cannot be used against the appellant is the *sixth* submission forcefully raised by Shri Aditya Singh. By placing reliance on the judgment of Supreme Court reported in (2007) 12 SCC 341 (**Ajay Singh vs. State of Maharashtra**), it is submitted that the Court below while putting question under Section 313 of Cr.P.C. has not

taken pains to confront the appellant with this piece of incriminating material i.e. FSL report. In absence thereof, the FSL report cannot be a reason to hold the appellant as guilty. Lastly, he placed reliance on the statements of Sunita Bai (DW-1), Sunil Rajput (DW-2) and Vidyanand Malviya (DW-3). They, in one voice, described the nature of incident and Court below has not considered the said defence statements in proper perspective.

12. *Per contra*, Shri Yogesh Dhande, learned Government Advocate supported the impugned judgment and relied on various paragraphs of the statements of witnesses and the judgment.

13. Shri Yogesh Dhande, learned Government Advocate urged that the incident had taken place in the intervening night of 25.08.2016 and 26.08.2016. F.I.R. (Ex.P-2) was promptly lodged on 26.08.2016 at 10:00 AM. The MLC (Ex.P-1) was also conducted on the same date wherein it was opined that commission of sexual assault cannot be ruled out. The prompt lodging of F.I.R. and MLC shows that incident had taken place and appellant was not falsely arraigned.

14. Shri Dhande placed heavy reliance on the spot map to urge that it shows that there exists a gap between the house of the appellant and that of the victim. The wall of both the houses is not common. There is no reason to disbelieve this spot map.

15. Learned Government Counsel by placing reliance on **(1983) 3 SCC 217 (Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat)**, **(1996) 2 SCC 384 (State of Punjab vs. Gurmit Singh)** and **(2019) 16 SCC 759 (State of H.P. vs. Manga Singh)** urged that plight of a minor

victim must be understood in the backdrop of Indian circumstances. He submits that previous two judgments of Supreme Court cited above were considered in **Manga Singh (supra)**. A conjoint reading of these judgments and principles laid down therein leaves no room for any doubt that conviction can be recorded solely on the basis of statement of the prosecutrix. The Court below has not committed any error of law in relying on the statement of prosecutrix which is supported by the MLC and the FSL reports.

16. Shri Yogesh Dhande has taken pains to contend that incident had taken place in two spells. In the first part, CICL alone came and misbehaved with the victim whereas in the second part, he came alongwith the present appellant. The statement of victim recorded before the JJB is confined to the first portion which relates to the overt-act of the CICL. Thus, there exists no contradiction/omission which benefits the present appellant.

17. Learned Government Advocate further submits that since it is a case of gang rape, the test/evidentiary parameter should be different. Since victim has no animosity with the appellant, there was no reason as to why she will falsely arraign the present appellant. He further submits that before lodging the FIR, taking assistance of mother and uncle is a natural thing and for this reason her story cannot be disbelieved.

18. The statements of Dr. Rajesh Meena (PW-3) and Dr. Pushpa Deshmukh (PW-1) were referred to submit that appellant was capable of intercourse and possibility of sexual assault was not ruled out.

19. In rejoinder submission, Shri Aditya Singh, learned counsel summarised his argument by submitting that there are serious contradictions in the statement of victim, if compared with her statement recorded before the JJB. The MLC report only creates a suspicion and does not conclusively prove about commission of any sexual assault. Moreso, when no internal or external injuries were found on the person of the victim. Since FSL report was not confronted with appellant under Section 313 of Cr.P.C., it cannot be used against the appellant. DNA test was not conducted. Spot map cannot prevail over the ocular evidence given by the victim and her mother because they are the residents of the house and are the best witnesses to state regarding existence of singular wall between the two houses. The age of victim could not be established and hence, POCSO Act cannot be pressed into service. In absence of statement of the victim of sterling quality and improbability of the incident, the prosecution story is liable to be discarded.

20. The parties confined their arguments to the extent indicated above.

21. We have heard the parties at length and perused the record.

Findings :-

Whether statement of PW-1 is of unimpeachable quality :-

22. The victim in the case of CICL deposed her statement before the JJB. The following portion of her statement needs reproduction :-

“मैं विधिविवादित किशोर को जानती हूँ। मैं चौथी तक पढ़ी हूँ मैं वर्तमान में 12 साल की हूँ। आज से लगभग 5-6

माह पहले रात्रि लगभग 9 बजे खाना बनाकर घर के सामने पाल पर बैठी थी जंगल उर्फ आशीष नाम का लड़का यानि विधिविवादित किशोर आया और मुझे नौचा उसके बाद वह चला गया फिर आधा घंटा बाद अजय के साथ आया फिर अजय के घर का ताला जंगल ने खोला फिर जंगल ने मुझे घर के अंदर ढकेल दिया फिर अजय ने पहले मेरे साथ गलत काम किया फिर जंगल ने गलत काम किया। दोनो ने मेरे कपड़े उतार दिये थे फिर दोनो ने मेरे साथ गलत काम किया था। अजय और आशीष ने अपने कपड़े उतार लिये और मेरे कपड़े उतारने के बाद मेरे स्तन दबाये थे और मेरी पेशाब की जगह अपनी पेशाब की जगह डाली थी फिर दोनो ने कहा कि अपने घर चली जा फिर मैं रात 03 बजे अपने घर आ गई थी और फिर अपनी मां को पूरी बात बताई फिर हम लोग रिपोर्ट करने चले गये थे रिपोर्ट प्र0पी0 01 जिसके ए से ए भाग पर मेरे हस्ताक्षर है । पुलिस घटना स्थल पर गई थी और घटना स्थल मौका नक्शा प्र0पी0 02 बनाया था।

यह बात सही है कि सभी मकानों की दीवारे मिट्टी की है और एक मकान में कोई चिल्लाई तो आवाज दुसरे मकान में जाती है। यह बात सही है कि उसके बीच में रोड है और रोड के उस साईड भी मकान है यह बात सही है कि मैं टिमरनी में पढ़ी हूँ मैंने अब पढ़ना छोड़ दिया है मुझे मेरी जन्म तारीख याद नहीं यह बात सही है कि मैं लगभग 18 साल की हूँ ६ टना के समय मेरी उम्र लगभग 18 साल की थी यह बात सही है मेरा उस दिन जंगल से विवाद हुआ था यह बात सही है कि थाने में झगड़े की रिपोर्ट करने गई थी यह बात सही उस समय अजय नहीं था अकेला जंगल ही था यह बात सही है कि मुझे जंगल ने और अजय ने जबरजस्ती नहीं रोका था।

यह बात सही है कि मुख्य परीक्षण में जो बताया है कि वह मेरी मम्मी के कहने पर बता रही हूँ। यह बात सही है कि मुझे मम्मी ओर पुलिस वालों ने कहा था कि मुख्य परीक्षण में बताई बात कहकर बताना यह कहना सही है कि मेरे साथ ऐसी कोई घटना नहीं हुई थी छोटा सा विवाद हुआ था। यह बात सही है कि प्र0 पी0 01 में पुलिस ने क्या लिखा मुझे पढ़कर नहीं सुनायी उसमें क्या लिखा था मुझे बता नहीं यह बात सही है कि मोहल्ले में सभी लोग 10-11 बजे सोते हैं

पुलिस ने मेरे कोई बयान नहीं लिये है यह बात सही है मेने रिपोर्ट मम्मी के कहने पर की थी।”

(Reproduced as such)

23. When victim entered the witness-box and deposed her statement before the Court below, she was confronted with her previous statement recorded before the JJB. A plain reading of her statement dated 14.12.2016 recorded before the JJB shows that in examination-in-chief, she deposed about the misbehaviour of CICL. In addition, in clear terms, she deposed that CICL and appellant took him to the house of appellant forcibly and thereafter both of them sexually assaulted her. In para-2 of her cross-examination, she admitted that her house is a hut like *Kachcha* house. On the date of incident, she was aged about 18 years and had a quarrel with CICL. In the last paragraph, she clearly deposed that she is deposing as per the direction given by her mother and police personnel. It was admitted by her that no incident had taken place with her. Indeed, a small dispute only had taken place. What Police has written in Ex.P-1 was not read over to her and she merely signed it. Lastly, she deposed that she lodged the report at the instance and the direction of her mother.

24. In her Court statement, victim (PW-2) in para-4 clearly admitted that there is a common *Kachcha* wall between the house of appellant and her house. The voice/conversation easily travels from one house to another house. In para-6 of her cross-examination, she deposed that her initial dispute was with CICL. Later on, appellant allegedly came at the scene of crime. She, in the first breath, stated that her age is 19-20 years and in the second breath, stated that her age is 16 years. In para-

7, she deposed that after discussion with Dayal Mama and mother, they decided to lodge a report in Police Station and report was lodged as directed by Dayal Mama. She also admitted that the incident had taken place on the day of *Janmashtmi* and the people of *Mohalla* were attending the function at Tidkiyan Baba temple till 12 O'clock in the night. Thus, pivotal question is that if we read the statement of victim given before the JJB with her statement recorded by the Court, whether it can be said that her testimony is of unimpeachable character.

25. This is trite that conviction can very well be recorded on the basis of sole testimony of the prosecutrix provided such testimony inspires confidence. Para-10 of the judgment of **Manga Singh (supra)** cited by Shri Dhande, Government Advocate makes its clear that only such statement which inspires confidence can become solitary basis for conviction.

26. Before dealing with the facts of the case, it is apposite to remind ourselves about the *litmus test* laid down by Supreme Court regarding the sterling quality of a witness, the Apex Court in **Rai Sandeep (supra)** opined as under:-

“22. In our considered opinion, the **“sterling witness”** should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What

would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness.”

(Emphasis Supplied)

The other judgments cited on this aspect by Shri Aditya Singh are in the same line reiterating same principle.

27. If the testimony of present appellant is examined on the anvil of principle laid down in the aforesaid cases, it will be clear that her statement cannot be treated to be of unimpeachable/sterling quality. The statement should be of a very high quality and no amount of cross-examination could cause a dent on such statement. In the instant case, in our considered opinion, there exists a consistency of inconsistency in the statement of the prosecutrix. Before the JJB, she narrated

her age differently than the age mentioned by her before the Court. Thus, as per her own statement, it is doubtful whether she was a minor at the time of incident. During the cross-examination before the JJB, she admitted that a small incident had taken place and she has given a different shape to the said incident. We have carefully examined her examination-in-chief before the JJB in contrast to the cross-examination and we are unable to persuade ourselves with the line of argument of Shri Dhande, learned Government Advocate that her cross-examination is related to and confined to only such part where CICL had misbehaved with her. Indeed, a careful comparison of examination-in-chief and cross-examination makes it crystal clear that she narrated the entire incident (which includes role of present appellant) in her examination-in-chief and then candidly admitted in the cross-examination before the Juvenile Justice Board that a small incident had taken place.

28. Similarly, her statement does not inspire confidence that she was forcibly picked up at around 9:00 PM from a busy area where *Kachcha* houses are situated in a dense population. A conjoint reading of her and her mother's statement makes it clear that house of appellant and victim had common partition wall and the noise/voice travels from one house to another. Thus, it is difficult to believe that a young girl was forcibly taken by the appellant to the adjacent *Kachcha* house and she was subjected to gang rape from 9:00 PM to 3:00 AM and nobody could notice it or hear the voice. She also did not raise

alarm to save her. This is also a relevant factor which creates doubt about her testimony.

29. In a case of this nature, we are unable to hold that statement of the victim was of a sterling quality which can be accepted as such without raising any eyebrows. Indeed, her statement is full of flaws, inconsistencies and contradictions and such statement cannot become sole foundation to give stamp of approval to the judgment of conviction.

The Medical Evidence:-

30. The victim was subjected to medical examination on 26.08.2016. Medical report (Ex. P/1) in no uncertain terms makes it clear that no internal or external injuries were found on her body. A doubt was created by the doctor stating that possibility of sexual assault cannot be ruled out. Thus, in our considered view, Medical report merely creates a doubt and cannot be treated to be a clinching evidence regarding commission of rape on the victim. Thus, medical evidence does not conclusively support the ocular evidence.

Age determination:-

31. We find substantial force in the argument of Shri Aditya Singh regarding erroneous method of determination of age of the victim. He rightly pointed out that there exists a statutory method of determining the age of the victim in the JJ Act. The determination of age on the basis of evidence of Forest Range Officer is totally unknown to law. Forest Range Officer, is a stranger so far date of birth of a student is

concerned. Thus, on the basis of statement of said officer (PW-8) and the documents prepared by him, we are unable to hold that the Court below was justified in determining the age of the victim. Thus, the age of victim could not be ascertained in accordance with law and with accuracy and precision. Resultantly, provisions of POCSO Act are not attracted.

Improbability:-

32. So far question of improbability is concerned, the various courts have considered this aspect in sufficient detail. In **(2018) 18 SCC 695 (Dola Alias Dolagobinda Pradhan and another vs. State of Odisha)** Apex Court poignantly held that -

“If the evidence of the victim does not suffer from any basic infirmity and the “probabilities factor” does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration, except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.”

(Emphasis Supplied)

In the same judgment in Para 13, it was held thus :

“13. From the aforementioned admissions of the victim, it is clear that the scene of offence is a busy area wherein a number of buses ply, many shops and residential houses exist, and a school is also situated. The scene of offence is near a circle wherein buses pass through frequently. The business in that area generally ends only at 10.00 p.m., which means that the area in question is a very busy area till 10.00 p.m. According to the prosecution, both the accused

persons lifted the victim forcibly from the road, sometime between 7.00 and 8.00 p.m. and took her from that busy area and committed the offence of rape on her. Such a story put forth by the prosecution which prima facie appears to be improbable needs to be proved by the prosecution beyond reasonable doubt. Though both the courts concurrently concluded against the accused persons, we, in order to satisfy our conscience, have gone through the evidence on record.”

(Emphasis Supplied)

33. Interestingly, in below mentioned paras of same judgment, the Apex Court again considered the medical evidence and injury marks on the victim. The relevant paras are reproduced as under :-

“15. Curiously, the victim has not sustained any injury except some bruises on her cheeks. Her clothes were not even soiled with mud. In her cross-examination, she admitted that there was a tussle at the time of the alleged incident, and that she tried to save herself. She also stated that both the accused persons physically lifted her from the spot, and her bangles had been broken, by which she had sustained bleeding injuries on her hands. Furthermore, she said that she also sustained marks of violence on her hands. She did not sustain any injury on her knee, breasts and buttocks. She stated that she has no acquaintance with the accused persons and she did not have any kind of dealings with them. She further admitted that she had worn eight bangles on each of her hands and all her bangles on the right hand were broken and only one bangle of the left hand remained unbroken, and that all the bangles were broken at the spot of offence.

16. Although the prosecutrix admitted that she sustained bleeding injuries on her hand because of the shattering of eight bangles worn by her on her right hand and seven bangles on her left hand, and had marks of violence present on her body, the medical records do not support the said version. The report of the medical examination is at Ext. 4. It is clearly mentioned in the said report that there is a bruise mark measuring half a centimetre, which can be caused by a hard and sharp object, on the right cheek. No other mark of injury was seen anywhere on the body. There is no injury on the breasts, there is no internal injury on any part of the body and no injury was found on the vulva, pelvis and vagina. There are no signs of injury on the thighs as well. Except for one bruise on cheek which measures half a centimetre, no other injury was found on the victim and the same is clear from the medical report (Ext. 4).

17. Thus, medical evidence does not support the case of the prosecution. The doctor (PW 4), who examined the victim, however, has deposed that there were four bruises, each measuring half a centimetre on the left cheek and four bruises each measuring half a centimetre on the right cheek. The doctor opined that the injuries are simple in nature and might have been caused by a hard and sharp object. The doctor did not find any other injury on the body of the victim. There was no injury on the back side of the body of the victim. Although the doctor has deposed in the

examination-in-chief that the injuries could have been caused by human bite, he has admitted in his cross-examination that he has not mentioned the shape of the injuries in his report. He further admitted that a bruise can be caused by a blunt object like stone, wood, fist-blow, etc. and can also be caused by a fall. While a bruise is always accompanied by swelling, an abrasion caused by a human bite is elliptical or circular in form, and is represented by separated marks corresponding to the teeth of the upper and lower jaw. If we were to believe that the abrasion was caused by a bite, the same should have been elliptical or circular in form. The said material is not forthcoming from the records.”

(Emphasis Supplied)

34. In the instant case, we find force in the argument of appellant that incident is improbable because (i) If incident takes place between 09:00 P.M. to 03:00 A.M. in the *Kachcha* house adjacent to victim's house wherein wall of both the houses was common, the residents of adjacent house will certainly notice it. (ii) The day of incident was a festival day (Janmashtmi). (iii) The prosecutrix and her mother clearly admitted that the neighbours/*mohallwalas* were attending the function till 12:00 in the night. Hut where incident had allegedly taken place is situated in a densely populated area. (iv) The stand of victim's mother (PW-5) is also peculiar wherein she states that when she came back to her home at around 12 O'clock, she could not find the victim. She thereafter retired and slept. When victim came back to her home at around 3 O'clock she came to know about the incident. This conduct of mother cannot be treated to be a normal conduct because if a young

girl was missing, it will be difficult for the mother to go to sleep. (v) No internal and external injuries were found on the body of victim who was allegedly sexually assaulted by two persons for about six hours. (vi) In view of existence of improbability factor, some credible medical evidence could have provided strength to the prosecution story. In absence thereof, as held by Apex Court in **Dola Alias Dolagobinda Pradhan (supra)**, the story of prosecution is not worthy of credence. In view of serious inconsistencies and contradictions in the statements of victim, in our opinion, it is highly improbable that such an incident had taken place in the adjacent house of prosecutrix. Moreso, when both the houses have common wall and voice travels from one house to other uninterruptedly. The prosecutrix has not cried for help when she was forcibly taken by appellant.

Statement under Section 313 of Cr.P.C.

35. The Apex Court in its recent judgment reported in **2023 SCC OnLine SC 609 Raj Kumar Vs. State (NCT of Delhi)** considered its previous judgments and culled out the principles which reads thus:-

“17. The law consistently laid down by this Court can be summarized as under:

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered.”

(Emphasis Supplied)

Similar view is taken in *(2023) 5 SCC 522 (Premchand vs. State of Maharashtra)*.

36. In the instant case, the Court below has miserably failed to frame and put any question relating to FSL report to the appellant. The said report is certainly an incriminating material which should have been confronted with the appellant. In absence thereof, since said report became reason/foundation for conviction, it has certainly caused prejudice to the appellant.

37. Thus, in absence of confronting the appellant with FSL report under Section 313 of the Cr.P.C., in our opinion, said report cannot be used against the appellant. In the peculiar factual backdrop of this case, the matter cannot be remanded for confronting the appellant with FSL report under Section 313 of Cr.P.C. for the simple reason that as per the said report, the human semen were found on the undergarment of the victim. No DNA test was conducted. The Apex Court in **(2019) 12 SCC 460 (Rajendra Pralhadrao Wasnik vs. State of Maharashtra)** held as under:-

“54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53-A and Section 164-A CrPC. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly of the view that where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution.”

(Emphasis Supplied)

This judgment is recently followed by Supreme Court in **Cr.A. No.361-362 of 2018 (Chotkau vs. State of U.P.)** decided on 29.09.2022.

38. The case of CICL has already been decided by the Children’s Court. In absence of any clear finding as to whose semen was found on the undergarment of prosecutrix, no useful purpose would be served in

remanding the matter for aforesaid purpose. Thus, in our view, the FSL report cannot be used to affirm the conviction of the appellant.

39. We will be failing in our duty if argument of Shri Yogesh Dhande, learned Government Advocate relating to absence of previous enmity, assistance of mother/uncle etc. are not considered. Merely, because no previous enmity could be established, the story of prosecution cannot be mechanically accepted. Whether it is a case of gang rape or a case of singular rape, the legal parameters and basic evidentiary parameters needs to be satisfied with utmost clarity. The prosecution in the instant case could not satisfy the said test and could not establish its case beyond reasonable doubt. Thus, we are unable to hold that in a case of gang rape conviction can be recorded without establishing the prosecution's case beyond reasonable doubt.

40. In view of foregoing analysis, in our opinion, the Court below has certainly committed an error in convicting the appellant. Thus, the impugned judgment dated 21.10.2021 is **set aside** by giving benefit of doubt to the appellant. If the presence of appellant is not required in the prison for any other offence, he be released forthwith.

41. The Criminal Appeal is **allowed** to the extent indicated above.

(SUJOY PAUL)
JUDGE

(ACHAL KUMAR PALIWAL)
JUDGE