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KRISHAN KUMAR MALIK
v.
STATE OF HARYANA
(Criminal Appeal No. 1252 of 2011)

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JULY 04, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Penal Code, 1860:

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ss.376(2)(g) and 366 – Abduction of PW-9 (prosecutrix) from her aunt's house and subsequent gang-rape – Eight accused – Solitary evidence of the prosecutrix – Six accused convicted under s.366 while accused-appellant and another accused convicted under both s.366 and s.376(2)(g) – Conviction of appellant – Justification – Held: Not justified – The evidence of the prosecutrix did not inspire confidence – She did not mention the name of appellant in the FIR, instead she described him as Gitta (Short statured) with beard, even though she was aware of his name - No explanation was offered by her in this regard – Initially the prosecutrix reported that there were in all 10 persons but later on she deposed that there were only eight persons and at some place she narrated that only 7 persons were there –During investigation, the prosecutrix was taken to the area, to point out the Kothi, where she was said to have been subjected to rape, but she failed to identify the said kothi, which fully belies her case – All through, the prosecutrix described appellant as gitta (short statured) man with beard, whereas he was in fact 5' 6" tall and thus by no stretch of imagination, he could be called a gitta (short statured) man – Also, no spot maps were prepared either by the Naib Tehsildar or by the Investigaing Officer – This was a lacuna on the part of the investigating agency and prosecution, the benefit of which must accrue to the Appellant – According to the prosecutrix, she was abducted from the house of her aunt where her husband and sons were also

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present, but the prosecution did not examine the aunt or her husband, their sons or any of their neighbours – No plausible and valid reasons were given for their non-examination – There were several significant variations in material facts in the s.164 statement of the prosecutrix, her s.161 statement (Cr.P.C.), FIR and deposition in Court – The mother and sister of the prosecutrix were not examined, even though their evidence would have been vital as contemplated under s.6 of the Evidence Act as they would have been Res Gestae witnesses – High Court, on the same set of evidence acquitted two accused, without assigning any cogent, valid or specific reasons for it whereas on the same very set of evidence, the Appellant was found guilty – Why the same benefit could not have been bestowed to the Appellant has not been dealt with specifically in the impugned judgment of the High Court – In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the Appellant – This lacuna on the part of the prosecution proves to be fatal and goes in favour of the Appellant – Appellant is a physically handicapped person to the extent of 55% as per Doctor's Report – This handicap would have been much better identification of the Appellant, which the prosecutrix did not mention at all – There were thus various shortcomings, irregularities and lacuna on the part of the prosecution – Appellant accordingly acquitted.

Evidence Act, 1872 – s.6 – Res gestae witness – Held: The statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or immediately thereafter.

Code of Criminal Procedure, 1973 – s.53A – Allegation of rape – Effect of incorporation of s.53A CrPC – Held: After incorporation of s.53A in CrPC w.e.f. 23.06.2006, it has become necessary for the prosecution to go in for DNA test

A *in such type of cases, facilitating the prosecution to prove its case against the accused – Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the accused – In the* B *instant case, in the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the accused-appellant – This lacuna on the part* C *of the prosecution goes in favour of the accused-appellant – Medical Jurisprudence.*

According to the prosecution, the prosecutrix PW-9 along with her younger sister 'R' had gone to meet their aunt 'B', and while they were talking to each other at the D **house of 'B', the accused persons came there and forcibly lifted prosecutrix and put her in a Maruti Van and then took her to a separate room in a vacant Kothi where accused 'KKM' and another accused 'K' subjected her to forcible sexual intercourse while the other accused** E **fondled with her body parts. It was alleged that subsequently the prosecutrix managed to escape from the her aunt's house whereafter she narrated the entire incident to her mother and sister 'S' after which they went to the Police Station to lodge an FIR.**

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The trial court convicted all the eight accused under Section 366 and in addition to it, convicted accused 'KKM' and three other accused 'V', 'KT' and 'K', under Section 376(2)(g)of the IPC as well. On appeal, the High Court acquitted 'V' and 'KT'. The conviction of the other G **accused was maintained by the High Court. Thus out of the initial eight accused, six were held guilty under Section 366 IPC while 'KKM' and 'K' were held guilty under both Section 366 and Section 376(2)(g) IPC. The instant appeal was filed by only 'KKM'.**

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The question which arose for consideration was whether there existed sufficient, cogent, valid, reliable and trustworthy evidence to hold the appellant 'KKM' guilty of committing the offences of abduction and rape on the prosecutrix or whether he had been falsely implicated.

Allowing the appeal, the Court

HELD:1.The prosecutrix P.W.9 had not mentioned the name of the Appellant in the FIR, instead she described him as Gitta (Short statured) with beard, even though she was aware of his name. No explanation has been offered by her in this regard. The number of people who were with the prosecutrix during the abduction and subsequent rape, has not been conclusively ascertained. The Prosecutrix admitted in her cross examination that she had come to know the names of all the accused during the course of occurence, as they were taking each other's names. If that be so, then why she did not name the Appellant in the FIR is a million dollar question? These ommissions speak volumes against her and her credibility stands shaken. It is also to be noted that initially she reported that there were in all 10 persons but later on she deposed that there were only eight persons and at some place she narrated that only 7 persons were there. When she had ample time to count the number of persons then why this wavering in the number of persons. These acts or omissions of Prosecutrix cannot be said to be minor contradictions as these are very relevant pieces of evidence. Because of such contradictions, an agile and active court can differentiate between genuine cases from the frivolous and concocted ones. The role of courts in such cases is to see, whether the evidence available before the court is enough and cogent to prove the accused guilty. [Paras 15, 16 and 17] [788-E-F; 789-A-D]

2. From the record it is established that PW-9 was

A member of a Musical Concert Party, which used to perform at various functions. Her photographs and video recording fully reflects it, yet she had the audacity to deny this fact. It is also pertinent to mention, if she had really met her mother and sister 'S' at the Bus Stop in B Kurukshetra then, why her mother or her sister 'S' was not examined by the Prosecution. Thus story of meeting them at Kurukshetra Bus Stop is wholly unreliable and it appears to be concocted. [Para 18] [789-E-F]

C 3. The medical evidence shows that the Labia Majora and Labia Minora of PW-9 were healthy and had no marks of injury. Hymen had old healed tear and the same was not red hot or tender and did not bleed on touching. Vagina admitted two fingers easily. P.W.6(Dr.) further opined in her cross-examination that PW-9 might be D habitual to sexual intercourse prior to the alleged incident. Her Medico Legal Report and medical evidence further reveal that she had not received any significant injuries on other parts of her body and injuries on her private parts were much less as mentioned by her in the FIR, E except for the cheek bite. [Para 19] [789-G-H; 790-A]

4. PW-9 had travelled certain distance in the Maruti Van after her alleged abduction but she did not raise any alarm for help. This shows her conduct and behaviour F during the whole process and render her evidence shaky and untrustworthy. The statement of the prosecutrix that in all 11 persons were there in the Maruti Van renders it further doubtful as it would be extremely difficult for 11 persons to be accommodated in the Maruti Van, the G seating capacity of which is only 5. [Paras 20, 21] [790-B-C]

5. During the course of investigation, the prosecutrix was taken to the area, to point out the Kothi, where she was said to have been subjected to rape, but she failed H to identify the said kothi. PW-9 was alleged to have been

abducted during broad day light, thus her failure to identify the kothi, fully belies her case. [Para 22] [790-D]

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6. On the account of various serious contradictions in the statement of prosecutrix and her actions, it can be safely concluded that she was certainly not telling a gospel truth. The solitary evidence of the prosecutrix to bring home the charge of abduction and commission of rape by the appellant does not inspire confidence and is not of sterling quality. It is neither prudent nor safe to hold the appellant guilty of commission of the said offence. [Paras 23,24] [790-E-G]

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7. No identification parade was conducted to identify the Appellant as the description given by prosecutrix about the details did not match with his appearance. All through, she has been describing the Appellant as gitta (short statured) man with beard, whereas a statement before the Bench has been made by the counsel for Appellant, after verification from the Appellant's wife, that he is 5' 6" tall. This fact has been independently corroborated by the jailor's report on this specific query. Even though a man having height of 5' 6" cannot be said to be tall but by no stretch of imagination, he could be called a gitta (short statured) man. PW-9 was already shown the Appellant and other accused at the Police Station, after they were arrested. Thus, her dock identification in Court had become meaningless. [Paras 25, 26] [790-H; 791-A-C]

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8. No spot maps were prepared either by the Naib Tehsildar or by the Investigaing Officer to show the size of the room where the incident allegedly happened. If the size of the room was so small then it could not have been possible to accommodate 7 persons and also allowing the Appellant to commit the offence of rape. This was a lacuna on the part of the investigating agency and prosecution, the benefit of which must accrue to the

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A Appellant. PW-11, Inspector/ SHO had not gone to see the spot at all, which he admitted in his cross-examination. This certainly reflects and shows the casual manner in which the investigation was conducted. The statement of PW-13, Sub Inspector, further goes to show that not only B the prosecutrix but even the I.Os failed to locate the site where offence of rape was said to have been committed. [Paras 27, 28, 29] [791-D-F, H; 792-A-C]

9. Though according to the prosecutrix, she was abducted from the house of her aunt 'B' where, apart from C the above two ladies, the husband and sons of 'B' were also present, the prosecution did not examine either 'B' or her husband, their sons or any of their neighbours. No plausible and valid reasons have been given for their non-examination. [Para 30] [792-D-E]

D 10. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling E quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed there are several significant F variations in material facts in her S.164 statement, S.161 statement (Cr.P.C.), FIR and deposition in Court. Thus, it was necessary to get the evidence of the prosecutrix corroborated independently, which they could have done either by examination of her sister or 'B', who were G present in the house at the time of her alleged abduction. Record shows that 'B' though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant. [Paras 31, 32] [792-F-H; 793-A-B]

H 11. As per the FIR lodged by the prosecutrix, she first

met her mother and sister at the bus stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Indian Evidence Act, 1872 as they would have been Res Gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness. In the narrative of PW-9, it is amply clear that 'B' and 'R' were stated to be at the scene of alleged abduction. Even though 'B' may have later turned hostile, 'R' could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best person to lend support to the prosecution story invoking Section 6 of the Act. Section 6 of the Act has an exception to the general rule where-under, hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of *res gestae* must have been made contemporaneously with the act or immediately thereafter. In the case on hand, PW-9 had met her mother and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which prosecution had conducted the investigation then the trial. This lacuna has not been explained by the prosecution. The prosecution has not tried to complete this mssing link so as to prove it, beyond shadow of doubt, that it was Appellant who had committed the said offences. [Paras 33, 35, 36] [793-D-E; 794-C-F]

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A Black's Law Dictionary – referred to.

12. The High Court, on the same set of evidence acquitted two accused, without assigning any cogent, valid or specific reasons for it whereas on the same very set of evidence, the Appellant has been found guilty. Why the same benefit could not have been bestowed to the Appellant has not been dealt with specifically in the impugned judgment. The prosecution also adopted a peculiar mode in the case as only after the first statement of prosecutrix was recorded under Section 164 of the Cr.P.C. before Judicial Magistrate, First Class, Kurukshetra, her further statement under Section 161 of the Cr.P.C. was recorded. In fact, the procedure should have been otherwise. This further shows that right from the beginning the prosecution was doubtful on the trustworthiness of the prosecutrix herself. Precisely that was the reason that she was first bound down by her statement under Section 164 of the Cr.P.C. [Paras 37, 38, 39] [794-G-H; 795-A-B]

13. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the Appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the Appellant. Appellant is a physically handicapped person to the extent of 55% as per Doctor's Report, and this fact is not controverted by the prosecution. This much of handicap of any person would be easily noticeable. In fact, this would have been much better identification of the Appellant, which the prosecutrix did not mention at all. On account of the aforesaid shortcomings, irregularities and lacuna on the part of the prosecution, it will not be safe to convict the Appellant. [Paras 40, 41, 42] [795-C-F]

14. Now, after the incorporation of Section 53(A) in the Criminal Procedure Code, w.e.f. 23.06.2006, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006 (as in the instant case where the incident occurred in 1994), even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences. Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the Appellant. [Paras 44, 46] [796-C-F]

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Taylor's 2nd Edn. (1965) *Principles and Practice of Medical Jurisprudence* **– referred to.**

15. Looking to the matter from all angles, this Court is of the considered opinion that the conviction of the Appellant cannot be upheld. The Appellant is acquitted of all the charges. [Para 47] [796-H; 797-B]

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1252 of 2011.

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From the Judgment & Order dated 27.03.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 338-SB of 1996.

Jaspal Singh, Sanjeev Anand, Yakesh Anand, Nimit Mathur, Vikram Anand for the Appellant.

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Roopansh Purohit, Ramesh Kumar (for Kamal Mohan Gupta) for the Respondent.

The Judgment of the Court was delivered by

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A **DEEPAK VERMA, J.** 1. Leave granted.

2. In all, eight accused were charged and prosecuted for commission of alleged offences under Section 366 and 376 (2) (g) of the Indian Penal Code (hereinafter shall be referred as 'I.P.C.') for abducting prosecutrix and then committing rape on her. Trial Court after appreciation of evidence on record found all the eight accused guilty for commission of offence punishable under Section 366 and in addition to it, found present Appellant (accused) Krishan Kumar Malik, Vijay Dua, Krishan Takkar and Krishan @ Kaka, guilty for commission of offences under Section 376 (2) (g)of the IPC. The said four accused were awarded a sentence of ten years R.I. and a fine of Rs. 2000/- each and in default of payment of such fine to undergo further R.I. for a period of one year. These four convicts were sentenced further to undergo R.I. for a period of five years for the offence punishable under Section 366 of the I.P.C and to pay a fine of Rs. 1,000/- each and in default of payment of fine to further undergo R.I. for six months. Two other accused were convicted solely under Section 366 of the IPC, and being ladies, leniency was shown and they were awarded a sentence of three years R.I. and a fine of Rs. 1000/- each, in default whereof, to undergo R.I. for six months each. The remaining two accused, Sandeep and Dheeraj were convicted under Section 366 of the IPC as well and the Trial Court sentenced them each to 5 years R.I., and a fine of Rs. 1000/- in default of payment of which a further period of 6 months R.I. would come into effect.

3. Feeling aggrieved by the judgment and order of conviction recorded by Additional Sessions Judge, Kurukshetra in Sessions Case No.52 of 1994 decided on 24.04.1996, Criminal Appeal No. 324-SB of 1996 (filed by two female accused) and Criminal Appeal No. 338-SB of 1996 was filed by remaining six convicted accused in the High Court of Punjab and Haryana at Chandigarh. Since both the appeals arose out of the same judgment, they were heard analogously and were disposed off by a common impugned judgment on 27.03.2009.

4. Learned Single Judge after going through the records and appreciating the evidence available, partly allowed Criminal Appeal 338-SB of 1996, qua Vijay Dua and Krishan Kumar Takkar, and acquitted them of all the charges levelled against them. They were accordingly directed to be set at liberty. Thus out of the initial eight, only the remaining six accused were found to have committed offences under Section 366 and, in addition, the Appellant and Krishan @ Kaka were also found to have committed offences under Section 376 (2) (g) of the IPC, by the High Court.

5. The present appeal has been filed by Krishan Kumar Malik only, one of the accused. We were given to understand that on account of paucity of funds and various other reasons, other convicted accused have not preferred any appeal. However on enquiries being made from the office, it came to our notice that both the Special Leave Petition as well as the Review Petition filed by one of the two female accused Hardevi were dismissed by this Court. Thus, in the present appeal, we are only required to consider whether there existed sufficient, cogent, valid, reliable and trustworthy evidence to hold the Appellant guilty of the aforesaid offences. To come to the said conclusion, it is necessary to deal with the bare facts of the prosecution.

6. Thumbnail sketch of instant case is as follows: Prosecutrix, PW-9, was a resident of Saraswati Road, Pehowa and was said to be aged about 17 years at the time of the commission of the said offence by the accused. She had passed her 10th class. Her father had expired few years prior to the date of the incident. Prosecutrix has two younger sisters by the names, Sangeeta and Ritu. Ritu was said to be aged 8 years at the time of the incident. She alongwith her mother, Narayani Devi, and sister, Sangeeta, was running a small book stall from their house. As she was having vacation in her school, she alongwith her mother and sisters, after closing the book shop, came to Darra Khera in Thanesar to meet her maternal

A aunt (mausi), about 15 days before the incident. On the date of incident, they were staying with their mausi.

7. On 23.06.1994, at about 1.00 p.m., prosecutirx went with Ritu, her Sister to Sector 13, Kurukshetra to meet her aunt B Bimla, wife of Des Raj. While they were talking to each other at about 2.00 p.m., accused Hardevi (Bua), her daughter Heena, Heena's husband Sonu and Heena's brother Dheeraj accompanied by six boys, whose names were not known to the prosecutrix, came to the house of her aunt, Bimla. Thereafter, C they forcibly lifted prosecutrix and put her in a blue Maruti Van. Even though, lot of hue and cry was raised by her as well as by her aunt, her aunt's husband, neighbours and others but no one came forward to help her. She was then taken to a vacant Kothi near a bridge. After reaching the said Kothi, she was taken to a separate room, and was subjected to alleged forcible D sexual intercourse by a hefty man who was being called as Kaka and by another man, who was gitta (short statured), having a beard. They committed the alleged crime after removing her clothes. There were Six more persons sitting in the said room, while two of them committed rape on her one after the other E as stated above. Remaining six were also allegedly fondling with her body parts. Some of them inserted finger in her anus and some of them gave tooth bite on her cheek. The family of her so called Bua and others were sitting in the adjoining room where the incident had taken place.

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8. Thereafter, all of them took her forcibly in the same Maruti Van to Radaur to the in law's house of her Bua, Hardevi. All the six boys left her there. Thereafter, her Bua after cutting prosecutrix's hair gave her a beating with sandals. As soon as G she got an opportunity, she escaped from the said house and boarded the bus by which she reached Kurukshetra. At Kurukshetra she met her mother Narayani and sister Sangeeta. She then narrated the whole incident to them after which they went to the Police Station to lodge an FIR. FIR was recorded at Police Station, Manesar on 24.06.1994 at 12.30 a.m. In the H

said FIR, the same story was mentioned by the prosecutrix stating that ten persons had participated in the commission of the said offence. But the name of the Appellant was not mentioned and instead he was described as Gitta (short statured) with a beard.

9. On the strength of the said FIR, investigation machinery was set into motion and prosecutrix was sent for medical examination. On 24.06.1994, at 3.30 a.m. Prosecutrix was examined by P.W-6, Dr. Sushma Saini, Medical Officer, LNJP Hospital at Kurukshetra. Her medical report and evidence would be discussed at a later stage. Statement of prosecutrix under Section 164 of the Criminal Procedure Code, (hereinafter shall be referred to as 'Cr.PC') was recorded by Shri Jagdeep Jain, RCS, Judicial Magistrate, 1st Class, Kurukshetra on 27.06.1994. Thereafter on 28.06.1994 her further statement was recorded under Section 161 of Cr.PC. A perusal of both the aforesaid statements clearly indicates that she has given the name of the present Appellant Krishan Kumar Malik as the perpetrator, describing him as short statured person.

10. The FIR lodged by prosecutrix was also sent to local Magistrate on 24.06.1994 at 2.20 a.m. During the course of investigation, all the accused were arrested. After completion of investigation, the accused were put on trial for commission of the said offence before Additional Sessions Judge, Kurukshetra. They pleaded not guilty and requested for a judicial trial.

11. In order to bring home the charges levelled against the accused, the prosecution had examined 14 witnesses on its behalf. Defence also examined 5 witnesses on their behalf. On appreciation of evidence available on record, the trial court convicted the Appellant and the remaining 7 accused mentioned hereinabove and awarded sentences to all of them.

12. Subsequently, as has been previously stated, in appeals preferred by all the 8 accused, before the High Court

A two of them namely Vijay Kumar and Krishan Kumar Takkar were acquitted and conviction of remaining accused was upheld. However, this appeal has been preferred by only Krishan Kumar Malik.

B 13. We have accordingly heard Mr. Jaspal Singh, learned Senior Advocate, ably assisted by Mr. Sanjeev Anand, learned counsel for the Appellant and Mr. Roopansh Purohit with Mr. Ramesh Kumar learned counsel for the Respondent State and have perused the record.

C 14. The basic and foremost question that arises for consideration in this appeal is whether the present Appellant had committed the offence of abduction and rape on the prosecutrix on 23.06.1994 or whether he has been falsely implicated.

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15. With intention to proceed further and complete the journey to reach the destination, we would first like to consider the evidence of prosecutrix threadbare. She was examined as P.W.9. Admittedly she had not mentioned the name of the Appellant in the FIR lodged by her promptly, instead she
E described him as Gitta (Short statured) with beard, even though she was aware of his name. No explanation has been offered by her in this regard.

16. According to the prosecutrix, only two accused had
F sexual intercourse with her and other four were sitting in the room fondling with her body parts. It may be pertinent to point out that the number of people who were with the prosecutrix during the abduction and subsequent rape, has not been conclusively ascertained. This point has been explored in detail
G in the next paragraph. This appears to be quite improbable as there were admittedly other rooms, where they could have sat so as to allow the Appellant to do the act in privacy. It is not her case that due to shortage of time or accomodation this method was adopted.

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17. The Prosecutrix admitted in her cross examination that she had come to know the names of all the accused during the course of occurence, as they were taking each other's names. If that be so, then why she did not name the Appellant in the FIR is a million dollar question? These ommissions speak volumes against her and her credibility stands shaken. It is also to be noted that initially she reported that there were in all 10 persons but later on she deposed that there were only eight persons and at some place she narrated that only 7 persons were there. When she had ample time to count the number of persons then why this wavering in the number of persons. These acts or omissions of Prosecutrix cannot be said to be minor contradictions as these are very relevant pieces of evidence. Because of such contradictions, an agile and active court can differentiate between genuine cases from the frivolous and concocted ones. The role of courts in such cases is to see, whether the evidence available before the court is enough and cogent to prove the accused guilty.

18. From the record it is established that she was member of a Musical Concert Party, which used to perform at various functions. Her photographs and video recording fully reflects it, yet she had the audacity to deny this fact. It is also pertinent to mention, if she had really met her mother Narayani and sister at the Bus Stop in Kurukshetra then, why Narayani or her sister Sangeeta was not examined by the Prosecution. Thus story of meeting them at Kurukshetra Bus Stop is wholly unreliable and it appears to be concocted.

19. Medical evidence shows that her Labia Majora and Labia Minora were healthy and had no marks of injury. Hymen had old healed tear and the same was not red hot or tender and did not bleed on touching. Vagina admitted two fingers easily. P.W.6 Dr. Sushma Saini further opined in her cross-examination that she might be habitual to sexual intercourse prior to 23.06.1994. Her Medico Legal Report and medical evidence further reveal that she had not received any significant

A injuries on other parts of her body and injuries on her private parts were much less as mentioned by her in the FIR, except for the cheek bite.

20. Admittedly, she had travelled certain distance in the Maruti Van after her alleged abduction but she did not raise B any alarm for help. This shows her conduct and behaviour during the whole process and render her evidence shaky and untrustworthy.

21. The statement of the prosecutrix that in all 11 persons C were there in the Maruti Van renders it further doubtful as it would be extremely difficult for 11 persons to be accommodated in the Maruti Van, the seating capacity of which is only 5.

22. During the course of investigation, the prosecutrix was taken to the area, to point out the Kothi, where she was said D to have been subjected to rape, but she failed to identify the said kothi. It may be recalled that she was alleged to have been abducted during broad day light, thus her failure to identify the kothi, fully belies her case.

E 23. These are some of the salient features of the lop sided story of the prosecutrix, more so, when it has not been corroborated by any other evidence. On the account of various serious contradictions in the statement of prosecutrix and her actions, it could be safely concluded that she was certainly not telling a gospel truth.

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24. Needless to say the solitary evidence of the prosecutrix to bring home the charge of abduction and commission of rape by the Appellant does not inspire confidence and is not of sterling quality. In our opinion, it is neither prudent nor safe to G hold the Appellant guilty of commission of the said offence. We hold so, on account of many other circumstances, which are against the prosecution, narrated hereinbelow:

25. Admittedly, no identification parade was conducted to identify the Appellant as the description given by prosecutrix H about the details did not match with his appearance. All

through, she has been describing the Appellant as gitta (short statured) man with beard, whereas a statement before the Bench has been made by learned counsel for Appellant, after verification from the Appellant's wife, that he is 5' 6" tall. This fact has been independently corroborated by the jailor's report on this specific query. Even though a man having height of 5' 6" cannot be said be tall but by no stretch of imagination, he could be called a gitta (short statured) man.

26. Admittedly she was already shown the Appellant and other accused at the Police Station, after they were arrested. Thus, her dock identification in Court had become meaningless.

27. No spot maps were prepared either by the Naib Tehsildar or by the Investigaing Officer to show the size of the room. If the size of the room was so small then it could not have been possible to accommodate 7 persons and also allowing the Appellant to commit the offence of rape. If the size of the room could have been verified, then the very genesis of commission of the offence by the Appellant would fall flat. This could have been possible to ascertain only if spot map had been prepared. This was a lacuna on the part of the investigating agency and prosecution, the benefit of which must accrue to the Appellant.

28. PW-11, Sohan Singh, Inspector/ SHO had not gone to see the spot at all. He has admitted this in the following manner in his cross-examination:-

> "Since I have never visited house No. 919/13, no site plan of that house was prepared. Because the prosecutrix herself has not stated the number of house. She was even unable to identify this house. I did not take the prosecutrix in house No. 919/13 inspite of the fact disclosed by accused on 27.6.1994."

This certainly reflects and shows the casual manner in

A which the investigation was conducted.

29. PW-13, Sub Inspector Ramji Lal, has also admitted this fact by making the following statements:

B *"However, Sneh Lata was not in a position to locate the place of the incident. Thereafter, I took her to Radaur. Even in Radaur she was not able to locate the place where she was criminally assaulted."*

This further goes to show that not only the prosecutrix but C even the I.Os failed to locate the site where offence of rape was said to have been committed.

30. According to the prosecutrix, she was abducted from the house of Bimla Devi where, apart from the above two ladies, husband of Bimla Devi, Des Raj and sons of Des Raj and D Bimla Devi were present. They had raised hue and cry for help at the time of abduction. Many neighbours had come out of their houses but surprisingly enough prosecution has not examined either Bimla Devi or her husband, their sons or any of their neighbours. No plausible and valid reasons have been given E for their non-examination.

31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and F should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed G there are several significant variations in material facts in her S.164 statement, S.161 statement (Cr.P.C.), FIR and deposition in Court.

32. Thus, it was necessary to get her evidence corroborated independently, which they could have done either

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by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. Record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant.

33. As per the FIR lodged by the prosecutrix, she first met her mother Narayani and sister at the bus stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Indian Evidence Act, 1872 (for short "The Act") as they would have been Res Gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness. There is no dispute that she had given full and vivid description of the sequence of events leading to the commission of the alleged offences by the Appellant and others upon her. In that narrative, it is amply clear that Bimla Devi and Ritu were stated to be at the scene of alleged abduction. Even though Bimla Devi may have later turned hostile, Ritu could still have been examined, or at the very least, her statement recorded. Likewise, her mother could have been similarly examined regarding the chain of events after the prosecutrix had arrived back at Kurukshetra. Thus, they would have been the best person to lend support to the prosecution story invoking Section 6 of the Act.

34. We shall now deal with Section 6 of the Act, wich reads as under:

"6. Relevancy of facts forming part of same transaction – Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Black's Law Dictionary defines Res Gestae as follows:

(Latin: "things done") The events at issue, or other events

A contemporaneous with them In evidence law, words and statements about the res gestae are usually admissible under a hearsay exception (such as present sense impression or excited utterance).

B The said evidence thus becomes relevant and admissible as res gestae under Section 6 of the Act.

35. Section 6 of the Act has an exception to the general rule where-under, hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of C Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as forming part of res gestae must have been made contemporaneously with the act or D immediately thereafter.

36. Admittedly, she had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it E proper to get their statements recorded. This shows the negligent and casual manner in which prosecution had conducted the investigation then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this mssing link so as to prove it, beyond F shadow of doubt, that it was Appellant who had committed the said offences.

37. Learned Single Judge of the High Court, on the same set of evidence has acquitted two accused, without assigning any cogent, valid or specific reasons for it whereas on the same G very set of evidence, the Appellant has been found guilty. Why the same benefit could not have been bestowed to the Appellant has not been dealt with specifically in the impugned judgment.

38. Prosecution also adopted a peculiar mode in the case H as the first statement of prosecutrix was recorded under

Section 164 of the Cr.P.C. on 27.06.1994 before Judicial Magistrate, First Class, Kurukshetra. Only thereafter on 28.06.2004, her further statement under Section 161 of the Cr.P.C. was recorded.

39. In fact, the procedure should have been otherwise. This further shows that right from the beginning the prosecution was doubtful on the trustworthiness of the prosecutrix herself. Precisely that was the reason that she was first bound down by her statement under Section 164 of the Cr.P.C.

40. The Appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the Appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the Appellant.

41. It is pertinent to mention here that Appellant is a physically handicapped person to the extent of 55% as per Doctor's Report, and this fact is not controverted by the prosecution. This much of handicap of any person would be easily noticeable, which Appellant failed to mention at all. In fact, this would have been much better identification of the Appellant, which the prosecutrix did not mention at all.

42. On account of aforesaid shortcomings, irregularities and lacuna on the part of the prosecution, in our considered opinion, it will not be safe to convict the Appellant.

43. With regard to the matching of the semen, we find it from Taylor's 2nd Edn. (1965) Principles and Practice of Medical Jurisprudence as under:-

> "Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should

A always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa B in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have C been 3 and could have been 4 months."

44. Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the Appellant.

D 45. Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case E against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, F but they did not do so, thus they must face the consequences.

46. We have also gone through the orders of dismissal pased by this Court in Crl.M.P. No. 9646 on 15.06.2009 as also of the Review Petition dated 05.11.2009 filed by Smt. Hardevi. Admittedly, the said orders passed in the SLP and Review G Petition by this Court did not assign any reasons for the dismissal, thus it would not be proper and safe for us to place reliance thereon.

47. Thus, looking to the matter from all angles, we are of H the considered opinion that the conviction of the Appellant

cannot be upheld. A

48. Thus, appeal is hereby allowed. Judgment and order of conviction as recorded by the trial court and confirmed by learned Single Judge of the High Court qua the appellant are hereby set aside and quashed. The Appellant is acquitted of all the charges. B

49. He be set at liberty forthwith if not required in any other criminal case.

B.B.B. Appeal allowed. C