

Delhi High Court

Rajesh @ Bobby vs State (N.C.T. Of Delhi) on 4 February, 2003

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CrI. A. No. 97/2003

% Judgment reserved on: 26.10.2009 Judgment delivered on 17.05.2010

Rajesh @ Bobby Petitioner Through: Mr. B. K. Sharma, Advocate

versus

State (N.C.T. of Delhi) Respondent Through: Mr. Sanjay Lao, APP

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may Yes be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported Yes in the Digest?

KAILASH GAMBHIR, J.

1. By the present appeal filed under Section 374 of Cr.P.C., the appellant assails the order passed by the Court of Addl. Sessions Judge, KKD Courts dated 4.2.2003 whereby the CrI. A. No. 97/2003 pg. 1 appellant has been convicted of offences under Section 376/363/366 IPC and sentenced to undergo R.I for 7 years and to pay a fine of Rs 2500/- and in default to undergo R.I for six months for offences under Section 363/366 IPC.

2. A conspectus of facts relevant for deciding the present petition are that Ram Swaroop, father of prosecutrix Prem Lata, lodged an FIR on 19th September, 1994, stating that he resided with her daughter in House No.119, Gali No.8, Brahm Puri, Delhi and he generally stayed away from the house due to job requirements. Rajesh, the appellant, lived nearby and he used to tease Premlata, which was complained by Ram Swaroop to appellant's father, but in vain. That on 16.9.1994 at 9.30 p.m. Rajesh enticed Prem Lata away from the lawful custody of her parents to some place and despite efforts, she could not be traced and thus he had approached the police. It was stated by the prosecutrix before the learned Magistrate on 24.09.1994 that the appellant wanted to marry her and took her to various places and raped her twice and finally due to financial stringency he (appellant) brought her CrI. A. No. 97/2003 pg. 2 back to Delhi. Prem Lata returned to her sister's house and her sister reported the matter to the Police and a case was registered u/s 376/363 IPC. Rajesh vamoosed and was not heard for a long time and was proceeded against in absentia. The appellant was arrested on 29.10.2001 and produced before the court where charges were framed u/s 363/366/376 IPC against him.

3. During the course of the trial the prosecutrix Prem Lata gave various colours to her version of the incident. She sang in different tunes in 1994, 1999 & 2002 in her statements. However, taking the totality of the incident before him, the learned Magistrate vide order dated 4.02.2003 convicted the appellant of offences u/s 376/366/363 IPC. Feeling aggrieved with the said order, the present appeal has been preferred.

4. Mr. Balbir Krishan Sharma, counsel for the appellant submitted that the case was committed to the Court of Sessions before the arrest of the appellant. The statement of Ram Swaroop, the father of the prosecutrix, was recorded as PW 1 under Section 299 Cr.P.C on 3.7.1999. Similarly, the CrI. A. No. 97/2003 pg. 3 statement of Prem Lata, the prosecutrix was also recorded on 23.7.1999 under Section 299 Cr.P.C. In the said statement of the prosecutrix, she clearly deposed that she had left her house of her own accord with Rajesh and nothing

wrong happened with her during the period of her stay with him. She also deposed that she came back to her house of her own accord. Counsel further submitted that the prosecutrix on the date of examination before the court on 23.7.1999 gave her age as 25 years which would mean that she was of 19 or 20 years of age on the alleged date of occurrence of rape i.e on 16.9.1994.

5. Mr. Sharma further submitted that the prosecutrix did not support the story of the prosecution as well as her own statement recorded under Section 164 Cr.P.C. Counsel also submitted that even the sister of the prosecutrix, PW 1 did not support the story of the prosecution. Counsel further submitted that even PW 2 Prabhawati, mother of the prosecutrix did not support the prosecution story. She clearly denied that in her statement u/s 161 Cr.P.C that she had stated Crl. A. No. 97/2003 pg. 4 to the police that her daughter Prem Lata was kidnapped or was raped by the said accused Rajesh @ Bobby. Counsel also submitted that even father of the prosecutrix, Ram Swaroop PW 2, turned hostile as he neither supported the case of the prosecution nor his own statement recorded u/s 161 Cr.P.C. Counsel also submitted that PW 4 Prem Lata, prosecutrix, deliberately disclosed her age to be of 19 years in the statement recorded by the Id. Addl. Sessions judge on 20.4.2002 and if the said age of the prosecutrix is taken as the correct age then her age on the date of the occurrence would come to be 11 years which is not even the case set up by the prosecution. Counsel further submitted that from the cross- examination of PW 4, it would be evident that the prosecutrix was above the age of 16 years. The contention of the counsel for the appellant was that in her cross-examination she deposed that she was 8th pass and had left her school about 12-13 years from the date of the said deposition i.e. 20.4.2002 which clearly means that the prosecutrix was in any case above 16 years of age, if her admission in the school is taken to be at the age of 5-6 years. Counsel further submitted that in Crl. A. No. 97/2003 pg. 5 her statement, the prosecutrix clearly stated that she had been visiting various places along with the appellant travelling in a bus, rickshaw during which period she came across many people but did not lodge any complaint against the accused Rajesh. The prosecutrix had also gone to the village and met many people there. Counsel further submitted that PW 5, R.K. Sitara also turned hostile as he did not support the case of the prosecution by clearly stating that he never stated to the police that the appellant accused had come to his shop with a girl. Counsel further submitted that the date of birth certificate which was proved on record by PW 7 SI Anil Sharma as PW 7/B was of no relevance as the said birth certificate was in respect of one Prem Lata d/o Ramesh Kumar while the name of the prosecutrix's father was Ram Swaroop. Counsel also submitted that the PW 8 who was working as Vice Principal, G.G.S.S. School, Gautam Puri, Delhi confirmed that the birth certificate was issued in favour of Prem Lata daughter of Ramesh Kumar, but as far as Prem Lata daughter of Ram Swaroop is concerned, he was unable to disclose any detail with regard to the fact as Crl. A. No. 97/2003 pg. 6 to whether prosecutrix alone was a student in the school.

6. Counsel further submitted that the prosecution failed to examine the concerned gynaecologist who had examined the prosecutrix after the incident. Counsel also submitted that in her examination PW 10, Dr. Poonam Yadav, clearly disclosed that LMP of the prosecutrix was 16.9.1994 and if the said menstruation period is taken into account, then there could not have been any sexual intercourse between 16.9.1994 to 18.9.1994. Counsel further submitted that PW 10 also deposed that no marks of violence were seen and no scientific examination of the vaginal discharge or of the undergarments of the prosecutrix was carried out by the prosecution. Counsel also submitted that the hymen of the prosecutrix was torn with old tear which could admit one finger easily and two fingers with difficulty which would show that the prosecutrix was in the habit of having sex prior to the date of the alleged incident of rape. Counsel also submitted that the said witness also explained that the old tear would mean the sexual assault may Crl. A. No. 97/2003 pg. 7 be 2/3 months old. She also clearly deposed that the injury was not caused to the prosecutrix immediately.

7. To support his case, counsel placed reliance on the following judgments:

1. Lal Mandi vs. The State of West Bengal JT 1997 (10) SC 586
2. Divakar Neelkantha Hegde & Ors. Vs. The State of Karnataka JT 1996 (7) SC 63

3. Chander Pal vs. The State 1997 JCC 425 (Delhi)

4. Mohar Singh@ Pappu vs. State 103(2003) DLT 421

8. On the other hand, Mr. Sanjay Lao, APP for the State, supported the decision of the sessions court.

9. I have heard learned counsel for the parties and perused the records.

10. One of the cardinal principles of criminal jurisprudence is that the accused is presumed to be innocent until proved guilty by the prosecution. Another golden thread which runs through the veins of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, CrI. A. No. 97/2003 pg. 8 one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Apex Court in the case of Kali Ram Vs. State of Himachal Pradesh (1973) 2 SCC 808 very eloquently set forth the principles governing rules of criminal jurisprudence. It would be pertinent to reproduce the relevant paras from the said judgment here:

"Observations in a recent decision of this Court, Shivaji Saliabrao Bobade and Anr. v. State of Maharashtra Cr. App. Ho. 26 of 1970, decided on August 27, 1973 to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

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CrI. A. No. 97/2003 pg. 9 Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable : it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations

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It needs all the same to be reemphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction

in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. As observed on page 3 of the book entitled "The Accused" by J.A. Coutts 1966 Edition, "When once it is realised, however, that the public interest is limited to the conviction, not of the guilty, but of those proved guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved the public interest and the interest of the accused alike require an acquittal.

Crl. A. No. 97/2003 pg. 10 It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilized society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether

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The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahabrao Bobade and Anr. (supra) as is clear from the following observations :

Certainly it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distinction between 'may be' and 'must be' is long and divides vague

conjectures from sure considerations."

11. It is a settled legal position that even the uncorroborated testimony of the prosecutrix can be held to be sufficient to sustain the conviction of an accused of rape, but then such testimony should be unflinching, consistent and infallible and inspire the confidence of the court to believe her version. However, where such sole testimony of the prosecutrix is Crl. A. No. 97/2003 pg. 11 inconsistent, then the same by itself cannot be relied upon unless it is corroborated by other circumstantial evidence including medical evidence, otherwise it will be difficult for the court to sustain conviction for an offence of rape. Before dwelling any further to elucidate the law on the matter, it would be appropriate to deal with the facts and circumstances of the case at hand. The prosecution in the present case had examined as many as 11 prosecution witnesses including the prosecutrix Prem Lata as PW-4. A glance of the stand of these witnesses is as follows:

ï · PW-1, Rani, is the sister of the prosecutrix, who in her cross- examination clearly deposed that she never made any statement before the police. She had also deposed that she was not told by her sister that she was kidnapped by the accused Rajesh and that the accused had raped her. ï · On the same lines, mother of the prosecutrix i.e. PW-2 Prabhawati and father of the prosecutrix, PW 3 Ram Swaroop also did not support the prosecution case.

ĩ · PW-4, Prem Lata, the prosecutrix, in her deposition before the Court accused Rajesh for committing rape only once at the CrI. A. No. 97/2003 pg. 12 house of his maternal uncle.

ĩ · PW-5, R.K Sitara, is the driver of the tempo who knew nothing about the case.

ĩ · PW-6 is Mr. V.P. Khandpal, Advocate, who was then working as MM at KKD courts and had recorded the statement of the prosecutrix u/s 164 Cr.P.C.

ĩ · PW-7 is the SI Anil Sharma who had moved an application to the school to obtain the birth certificate of the prosecutrix. ĩ · PW-8, Shri Shyam Sunder Varshe, was the Vice-Principal of the GGSS School, Gautam Puri, wherefrom the alleged date of birth certificate was obtained by the police. ĩ · PW-9 was the officer of the police station who had registered the FIR in question.

ĩ · PW-10, Dr. Poonam Yadav, appeared in the witness box to prove the MLC and lastly PW-11 was the I.O. of the case.

12. From the aforesaid prosecution evidence adduced on record, there is no support coming forth to the case set up by the prosecution that the act of rape was committed upon the prosecutrix. So far the prosecutrix is concerned, she herself failed to prove her case and she did not appear to be CrI. A. No. 97/2003 pg. 13

consistent and firm on her own stand. The prosecutrix appeared before the sessions court to give her evidence for the first time on 23.7.99 and she completely denied the prosecution case by taking a contrary stand to the one taken by her before the Magistrate under Section 164 of the Cr.P.C on 24.9.94. The prosecutrix again appeared on 20.4.2002 where she supported the story of the prosecution. It would be thus quite apparent that the prosecutrix was not consistent in her stand. It is also quite noticeable that there was no direct corroboration so far the prosecution case as set up by the State is concerned. The sequence of evidence of the prosecutrix is that she for the first time gave her statement on 24.9.94 u/s 164 of Cr.P.C where she stated that the accused Bobby wanted to marry her and took her away from her house and raped her twice. She explained the whole sequence of events as to how he took her out of Delhi to various places including his maternal uncle's house and raped her and then due to financial distress came back to Delhi. The second time when she gave her statement was on 23.7.99 before the ADJ where she stated that she had left her house in September, 1994 and nothing CrI. A. No. 97/2003 pg. 14 wrong had happened with her and that she came back to her house on her own. It is to be paid heed to the fact that she completely denied the prosecution story and her own statement u/s 164 Cr.P.C. The next is the statement given by her on 20.4.2002 before the court where she stated that the accused kidnapped her and raped her once, but on her cross examination she stated that she was raped twice and that she had given her earlier statement at the instance of the police and that she went on to explain the whole incident. Hence, analyzing the above evidence, there are clear cut material contradictions in the statements made by the prosecutrix. There is distinction between a "discrepancy" as opposed to a "contradiction" found in the testimony of the prosecutrix. While minor discrepancy or variance in the evidence will not make the prosecution's case doubtful, but contradiction in the statement of the witness is fatal for the case. The normal course of human conduct understandably is that while narrating a particular incident there may occur minor discrepancies, but the yardstick would be different when there are contradictions staring blatantly from the testimony of the CrI. A. No. 97/2003 pg. 15 witness to believe it to be the hallmark of truth of her testimony. Hence, on critically scrutinizing the evidence of the prosecutrix, the contradictions go to the root of the prosecution story which cannot be overlooked and therefore she does not appear to be a witness of sterling quality on whose sole testimony a conviction can be sustained. The Apex Court has in the case of Ramdas & Ors. vs. State of Maharashtra (2007) 2 SCC 170 , Vimal Suresh Kamble vs. Chaluverapinake Apal S.P & Anr. (2003) 3 SCC 175 and Suresh N. Bhusare and Ors. vs. State of Maharashtra (1999)1 SCC 220 when faced with the situation where the only piece of evidence available was the inconsistent sole testimony of the prosecutrix, thought it prudent to give the benefit of doubt to the accused. Similarly, in the present case, I do not find that circumstances are such that evidence of the prosecutrix is of such a quality that there is cast no shadow of doubt over its veracity. In a recent judgment of

the Apex Court in Abbas Ahmed Choudhary vs. State of Assam (MANU/SC/1966/2009) it held that:

"We are conscious of the fact that in a matter of rape, CrI. A. No. 97/2003 pg. 16 the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."

13. In the present case, the prosecution failed to examine Dr. Anjana Gulati who had examined the prosecutrix after the alleged incident. Also, not only the gynaecologist PW 10 Dr. Poonam Yadav who was examined but even the MLC which was proved on record as Ex. PW10-A, does not support any sexual assault on the prosecutrix. As far as the MLC is concerned, no marks of injury were found either on the private parts or on the body and further hymen was torn with old tear and admitted one finger easily and two fingers with difficulty. The LMP was 16.9.94 and no marks of any other violence were found on the body of the prosecutrix. In the case of Ram Nivas vs. State of Karnataka 1994 SCC (Cri) 503 the court was faced with a somewhat similar situation where also the evidence rested on the testimony of the prosecutrix along with medical evidence, the court declined to place reliance on them. It was held that: "The case mainly rested on the evidence of

prosecutrix, PW 1. The way she narrated the whole CrI. A. No. 97/2003 pg. 17 occurrence appears to be highly doubtful and looks as no such rape has taken place. She says that she cried and tried to wriggle out but neither on her nor on the accused any injuries were found. She further gave so many details as to how the accused is said to have committed rape and she categorically stated that the accused had intercourse fully with her against her will. The doctor who examined her did not find any spermatozoa. The fact that no spermatozoa was found would go to show that no such occurrence had taken place. The doctor, further admitted that he could not give exact opinion whether rape had taken place or not because of the absence of spermatozoa in the smear and since she was married woman for five years her hymen will not be intact. The accused was also examined by a doctor on the next day and doctor did not find any injury suggesting a forcible rape. We need not go into the fact whether it was a case of rape or consent. But we are not prepared to place any reliance on her evidence itself. It is true, that the courts below have accepted her evidence. But to satisfy ourselves we have examined her evidence minutely and the same is highly

untrustworthy. In these circumstances we give benefit of doubt to the appellant. The appeal is allowed accordingly and the accused shall be released."

Yet again, in the case of Bibhishan vs. State of Maharashtra (2007) 12 SCC 390, the Apex Court when confronted with a similar situation where there was no injury on the body parts of the prosecutrix and the doctor deposed that she was habitual to sexual intercourse, the court gave the benefit of doubt to the accused and acquitted him. Also, it was held by the Apex Court in the case of Lalliram & Anr. Vs. State of Madhya Pradesh (2008) 10 SCC 69 that: CrI. A. No. 97/2003 pg. 18 "It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra v. State of Orissa¹ where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the

prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar v. State of

Haryana)"

Thus, absence of injury found on the private parts and on the body of the prosecutrix and with the hymen torn with old tear which easily admitted one finger would possibly show that not only the fact that the prosecutrix was habitual to sexual intercourse but in any case the commission of rape on the alleged date cannot be established.

14. In view of the blatant infirmities present in the testimony of the prosecutrix and the case of the prosecutrix not drawing support either from the medical evidence or other evidence, it would be difficult to accept the story of the prosecution that the accused Rajesh@Bobby had committed rape on the prosecutrix. The Apex Court in the case of Radhu vs. State of Madhya Pradesh (2007)12 SCC 57 dealing with a case where the medical evidence was not convincing enough and it CrI. A. No. 97/2003 pg. 19 was presented with the sole testimony of the prosecutrix held that:

"The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

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We are thus left with the sole testimony of the prosecutrix and the medical evidence that Sumanbai had an abrasion on the left elbow, an abrasion on her arm and a contusion on her leg. But these marks of injuries, by themselves, are not sufficient to establish rape, wrongful confinement or hurt, if the evidence of the prosecutrix is found to be not trustworthy and there is no corroboration.

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The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place." It is no doubt a settled legal position that if the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may CrI. A. No. 97/2003 pg. 20 lend credence to her testimony, short of corroboration required in the case of an accomplice. But what is to be done when the court is faced with the situation when being alive to its responsibility and sensitive to the nature of the offence of rape, it does not find any reliable evidence. This dilemma was gauged by Justice S. Ratnavel Pandian and was clearly stated in the case of Madan Gopal Kakkad vs. Naval Dubey (1992) 3 SCC as:

"There are a series of decisions to the effect that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming." But, in the case at hand, it is to be noted that where the medical evidence is not forthcoming and without testing the truthfulness of the testimony of the prosecutrix, the fact remains that the "probability factor" operates against her.

15. Another issue which was taken into consideration and dealt by the learned sessions court was about the exact age of CrI. A. No. 97/2003 pg. 21 the prosecutrix. In her statement recorded on 24.9.94, u/s 164 Cr.P.C, the prosecutrix did not disclose her age. In her statement before the court of Additional Sessions Judge on 23.7.99, she disclosed her age to be 25 years. When the prosecutrix appeared again before the sessions court on 20.4.2002 she mentioned her age to be about 19 years. In her cross-examination the prosecutrix could not disclose the name of her school she studied in and also failed to disclose the age of her sisters and brothers. The prosecution placed reliance on the birth certificate proved on record as Ex. PW 7/A. On the other hand, the defence clearly disputed the correctness of the said birth certificate taking the stand that the said certificate did not pertain to the prosecutrix as name of the father as given in the certificate is different from the actual name of the father of the prosecutrix. The Sessions Court gave undue importance to the address of the prosecutrix mentioned in the certificate even though the name of the father in it did not tally with the exact

name of the father. The correct name of the father of the prosecutrix is "Ram Swaroop" while in the certificate the name of the father mentioned was "Ramesh Crl. A. No. 97/2003 pg. 22 Kumar". The learned trial court also lost sight of the fact that the certificate was endorsed by the school on the application submitted by the police and in the said application the address is mentioned by the police and not by the school authorities. Another glaring fact is that PW-8, Sh. Sham Sunder, the then Vice-Principal of GGSS School , Gautam Puri, in his cross- examination clearly deposed that he could not say that the prosecutrix, daughter of Ram Swaroop, studied in the school. The certificate also does not record as to when the prosecutrix secured admission in the school and when she had left the same. Although once having reached the conclusion that the prosecution failed to prove the commission of the said offence of rape upon the prosecutrix, then the age of the prosecutrix is below 16 years or not at the time of the incident will become totally inconsequential, yet on having an overall view of the inconsistent stand taken by the prosecution with regard to her exact age and in the absence of any ossification or pathological tests conducted by the prosecution to ascertain the age of the prosecutrix coupled with the said uninspiring school certificate, it cannot be accepted that the age of the prosecutrix was Crl. A. No. 97/2003 pg. 23 below 16 years.

16. Although, each case rests on its own facts and thus what is important is the impact of the totality of the evidence on the court. However, the case of Ram Murti vs. State of Haryana 1970(3) SCC 21 where the fact situation was akin to the case at hand as the prosecutrix gave divergent statements with regard to her age, the medical evidence showed that she was used to sexual intercourse and the rupture of the hymen was old coupled with the no independent corroborative evidence in support of the incident, the Apex court while acquitting the accused held that:

"The prosecutrix has made several divergent

statements. Keeping in view the medical evidence which shows that the prosecutrix had been used to sexual intercourse, in order to accept her statement that she was compelled, threatened or otherwise induced to go with the appellant, there should, in our opinion, be corroboration of some material particular from some independent source and her bare

statement cannot be considered sufficient to sustain the appellant's conviction. It is true that according to the Courts below the appellant has exploited his position both as a medical practitioner and as a teacher and he has been having for some time past illicit intimacy with Satnam Kaur. But the charge in the present case consists of what is stated to have happened between March 24 and March 80, 1985 when she is not shown to be under 18 years of age. In those days we do not find any evidence of inducement, threat or compulsion on the part of the appellant towards the prosecutrix. There is thus no evidence on the record on which the offence under Section 366, Crl. A. No. 97/2003 pg. 24 Indian Penal Code can be sustained against the appellant The appeal is, therefore, allowed and the appellant acquitted".

Deriving wisdom from the above stated decision of the Apex court, in the final analysis of the gamut of all the facts and circumstances and the evidence set out by the prosecution, this court is finding it difficult to have faith in the testimony of the prosecutrix that any sexual assault as alleged was committed on her in view of the fact that her narration of the incident becomes infirm on account of being contradicted by her own tip toeing stand coupled with lack of medical evidence. It is a case where I am not satisfied that the testimony of the prosecutrix is the gospel truth on which implicit reliance can be blindly placed.

17. Hence, in the light of the aforesaid legal position, the order of conviction and the order of sentence dated 4.2.2003 are set aside and the appellant is accordingly acquitted. May 17, 2010 KAILASH GAMBHIR, J Crl. A. No. 97/2003 pg. 25