

(2014) 09 SHI CK 0041

In the High Court Of Himachal Pradesh

Case No : Criminal Appeals Nos. 662/2008 & 1/2009

Anil Kumar

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 04-09-2014

Acts Referred:

Arms Act, 1959 — Section 25, 25, 26, 27, 28
Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Evidence Act, 1872 — Section 134, 24, 24, 25, 25
Penal Code, 1860 (IPC) — Section 201, 302, 34, 376(2)(g), 392

Citation : (2014) 3 ShimLC 1229

Hon'ble Judges : Sanjay Karol, J; Piar Singh Rana, J

Bench : Division Bench

Advocate : Satyen Vaidya and Anup Chitkara, Advocate for the Appellant; B.S. Parmar, Ashok Chaudhary, Additional Advocates General and Vikram Thakur, Deputy Advocate General, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Sanjay Karol, J.—Both these appeals, arising out of common judgment passed by the trial Court, are being disposed of as such.

2. Appellants-convict Anil Kumar and Sanjay Rana, hereinafter referred to as the accused, have assailed the judgment dated 4.10.2008, passed by Additional Sessions Judge, Sirmour District at Nahan, Himachal Pradesh, in Sessions Trial No. 2-N/7 of 2007, titled as State of Himachal Pradesh v. Sanjay Rana and another, whereby they stand convicted for having committed offences punishable under the provisions of Section 302 read with Section 34 of the Indian Penal Code and Section 376(2)(g) of the Indian Penal Code, and sentenced both of them to undergo rigorous imprisonment for life and pay fine of Rs. 10,000/- each, in relation to offence punishable u/s 302 read with Section 34 of the Indian Penal Code; and rigorous imprisonment for ten years and pay fine of Rs. 20,000/- each, in relation to offence punishable u/s 376(2)(g) of the Indian Penal

Code, and in default of payment of fine to further undergo imprisonment for a period of one year each.

3. As the record reveals, it is the case of prosecution that on 22.8.2006, Jaswant Singh (PW-25), posted as Chowkidar in the Forest Department, spotted a dead body. He immediately informed Ms Reeta Devi (PW-3), Pradhan of the concerned Gram Panchayat - Haripul Khol, who visited the spot and telephonically informed the police at Police Post Majra, District Sirmaur (H.P.) about the same. ASI Tara Chand (PW-1), visited the spot, conducted spot investigation, and sent Rukka (Ex. PW-1/A), on the basis of which FIR No. 32/06, dated 22.8.2006 (Ex. PW-29/G), under the provisions of Sections 302, 201 of the Indian Penal Code and Section 25-54-59 of the Arms Act, was registered at Police Station, Paonta Sahib (H.P.), by Inspector Khazana Ram (PW-29). Ram Singh (PW-2), who also had independently spotted the dead body same day, and had informed Ms Reeta Devi (PW-3) about the same, was associated by ASI Tara Chand as a witness. From the clothes of deceased, two chits were recovered and taken into possession vide Memo dated 22.8.2006 (Ex. PW-1/D). Two empty cartridges (Ex. P-2 & P-3) were found and recovered from the spot. Inquest report (Ex. PW-1/E) was prepared and dead body sent for postmortem, which was conducted by Dr. Piyush Kapila (PW-18), who issued postmortem report dated 24.8.2006 (Ex. PW-18/A), based on reports dated 13.6.2006 (Ex. PA), and 28.12.2006 (Ex. PB and PC) of the Chemical Examiner. Doctor opined that deceased had died as a result of injuries sustained by a fire arm (rifle). Viscera of the deceased brought by Constable Krishna Nand (PW-5), deposited with MHC Raghubir Singh (PW-22) as also other seized articles were sent for chemical analysis by Inspector Narveer Singh (PW-31), through LHC Naresh Kumar (PW-16) to the Forensic Science Laboratory, Junga.

4. Independently on 22.8.2006 itself, vehicle bearing No. HR-70-2394 (INDICA) was recovered near the PNT Ground Saharanpur, within the jurisdiction of Police Station, Saharanpur (UP). This was so done by SI Shyo Raj (PW-21), Police Station, Prabhari Control Room, District Bijnaur (U.P.).

5. Since 19th of August, 2008, Rajesh Kumar (deceased) was found missing from home, as such, when his brother Parvesh Kumar (PW-4) called Naresh Kumar (PW-23), he was told that on 19.8.2006 Rajesh Kumar had telephonically informed that he would be visiting his girl friend, i.e. the prosecutrix (PW-6). On 21.8.2006, both Parvesh Kumar and Naresh Kumar contacted the prosecutrix, who informed them that she never met Rajesh Kumar either on 19th or thereafter. Parvesh Kumar, who is a police official, took up the matter with the concerned police officials and on 21.8.2006 lodged missing report with the concerned Police Station. On 22.8.2006, Parvesh Kumar learnt about recovery of a dead body, which he identified it to be that of Rajesh Kumar, vide Memo (Ex. PW-1/H), dated 24.8.2006. Dead body was totally mutilated.

6. During the course of investigation of the instant FIR, prosecutrix disclosed certain revealing facts. On 26.8.2006, she got her statement (Ex. PW-6/A)

recorded before Shri Pankaj Gupta (PW-9), Judicial Magistrate 1st Class, Paonta Sahib, Himachal Pradesh, under the provisions of Section 164 of the Code of Criminal Procedure, to the effect that Rajesh Kumar (deceased), who was her friend, on 19.8.2006 telephonically informed her that he would be visiting her at Barada (place in District Ambala, Haryana), where she resides. Whereafter she left with Rajesh Kumar in his car for Paonta Sahib. Same day, accused Sanjay Rana had desired of meeting her. But she refused. Later accused Sanjay Rana alongwith two other persons, came on his motorcycle and intercepted the car which was stopped. Rajesh Kumar was dragged out of the car and Sanjay Rana asked him to hand over his valuables. Since nothing was found, one of the persons accompanying Sanjay Rana, fired a gun shot on the head of Rajesh Kumar. Another shot, on the asking of Sanjay Rana, was fired at Rajesh Kumar who died on the spot. Also Sanjay Rana tried to kill her with a pistol. The gun was shot but it could not be fired. Thereafter dead body of Rajesh Kumar was thrown in the nearby gorge and she was taken away in the car. After reaching Nahan-Paonta road, Sanjay Rana and his two companions raped her. Later on she was dropped at her home.

7. Based on such statement Sanjay Rana was arrested on 2.9.2006 by Inspector Khazana Ram (PW-29), who on suspicion also arrested accused Anil Kumar and Gurvinder Singh on 7.9.2006 and 8.9.2006 respectively.

8. On 10.9.2006, accused Sanjay Rana made a disclosure statement (Ex. PW-8/A), in the presence of Suleman (PW-8) and Sita Ram (not examined), and got recovered the car [which in fact stood already recovered by the police in District Saharanpur (UP)]. For proper identification of accused Anil Kumar and Gurvinder Singh, on 11.9.2006, police attempted to have the Test Identification Parade conducted in the presence of Shri Pankaj Gupta (PW-9). However, it was not consented to, as allegedly, identity of the accused already stood revealed to the witnesses. On 12.9.2006, accused Anil Kumar made a disclosure statement (Ex. PW-12/A), in the presence of Tanuj Sharma (not examined) and Naresh Kumar (PW-12), on the basis of which he got recovered motorcycle vide Memo (Ex. PW-11/A), in the presence of Shakir Khan (PW-11) and Ranjit Singh (not examined). On 13.9.2006, accused Gurvinder Singh made a disclosure statement (Ex. PW-10/A) and got recovered mobile phone (Ex. P-6) of the deceased, country made pistol (Ex. P-7) and two live cartridges (Ex. P-8 and Ex. P-9).

9. Initial investigation was conducted by ASI Tara Chand (PW-1). He handed over the case file to SI Gurdeep Singh (PW-28) who conducted the same till 1.9.2006, when he handed over the file to Inspector Khazana Ram (PW-29) who also associated ASI Shakir Khan (PW-11) alongwith himself. Report of the FSL (Ex. PA to PC) was obtained by the police. Police also took on record bill (Ex. PW-30/A) of purchase of mobile of the deceased. Prosecutrix was got medically examined from Dr. Daljeet Kaur, who issued MLC (Ex. PW-20/B). Accused were also got medically examined from Dr. K.D. Bhatt (PW-19).

10. Investigation revealed complicity of the accused persons in the alleged crime.

Hence, challan was presented in the Court for trial.

11. All the accused were charged for having committed offences punishable under the provisions of Sections 302, 392, 506, all read with Section 34 of the Indian Penal Code, Section 376(2)(g) of the Indian Penal Code and Section 25 of the Arms Act, to which they did not plead guilty and claimed trial.

12. Accused Gurvinder Singh jumped his bail and was declared as a proclaimed offender. As such, trial concluded only against the remaining two accused, i.e. Sanjay Rana and Anil Kumar.

13. In order to establish its case, prosecution examined as many as thirty-one witnesses and statements of the accused under the provisions of Section 313 of the Code of Criminal Procedure were also recorded, in which they took plea of innocence and false implication. Additionally, accused Sanjay Rana took defence of being falsely implicated by the prosecutrix, who refused to return Rs. 50,000/- so borrowed from him. However, no evidence in defence was led.

14. Based on the testimonies of witnesses and material on record, trial Court convicted the accused for having committed offences punishable under the provisions of Sections 302 read with Section 34 of the Indian Penal Code and 376(2)(g) of the Indian Penal Code and sentenced them as aforesaid. Hence, the present appeal by the accused persons.

15. Noticeably, trial Court acquitted both accused Sanjay Rana and Anil Kumar of the offences punishable under the provisions of Sections 392 & 506, both read with Section 34 of the Indian Penal Code and Section 25 of the Arms Act.

16. Since State has not assailed the judgment of acquittal passed by the trial Court, we require only to examine the correctness of findings, resulting into conviction, of offences punishable under the provisions of Sections 302, read with Section 34 of the Indian Penal Code and 376(2)(g) of the Indian Penal Code.

17. Conviction is based on following findings of fact: (i) testimony of prosecutrix, trustworthy and inspiring in confidence, stands corroborated by other evidence on record; prosecutrix had no motive to falsely implicate the accused; (ii) identity of the accused stands proved and established by the prosecution; (iii) possibility of prosecutrix being subjected to rape was not ruled out by the doctor; (iv) accused Sanjay Rana failed to establish his defence; (v) recovery of incriminating articles, i.e. vehicle (Indica), motorcycle and pistol & cartridges stands established by the prosecution through the testimonies of independent and reliable witnesses, thus link evidence was complete; and (vi) evidence led is trustworthy, inspiring in confidence, lending credence to the prosecution story, which stands established beyond reasonable doubt.

18. We have heard learned counsel for the parties and perused the record so placed on record by the prosecution.

19. The apex Court in *Lal Mandi Vs. State of West Bengal*, , has held that in an

appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to an accused.

20. Identity of the deceased is not in dispute. Postmortem of dead body was conducted by Dr. Piyush Kapila (PW-18). From his testimony, it is evident that Board of Doctors was constituted. Observation made by the Doctor(s) reads as under:

"The external appearance of the dead body was as follows:-

Dead body of male, well built, 6 feet in length, in highly decomposed condition, full of maggots of first and second generation and more on face and neck, body bloated due to gases of decomposition (face, external genitalia) tuft of black hair present on back of the head with rest of the hair missing, face and scalp blackened and parchmented with eye balls missing from the sockets, multiple skin slips with deglobing of skin of both hands. Deceased wore pair of brown socks, black jeen, black shirt, white undershirt, blue underwear, gold ring with green stone and silver ring with blue stone. There was no evidence of any hole present in the clothings.

LIST OF EXTERNAL INJURIES

Due to advance purification and maggots no injuries were appreciable externally except two rounded boles as described.

(1) A-round hole in the left mandible (5 cm from mid-line) region of the face with 1 cm diameter, 3 cms. medial and down wards from left lobule 15 cms. From top of skull with lots of maggots coming out from the hole. Blackning, tatting, or abrasion of dust collar could not be found due to decomposition changes. On dissection underlying tissues, there is a fracture of mandible in the lower side with bullet recovered from the right side of the neck in the para-vertebral region at the level of C-5.

(2) Another round hole 1 cm diameter, 8 cm. from top of the skull, 7 cm. from left pinna over left side of the skull in the parieto occipital region with lots of maggots coming out. However, on dissection no hole in the skull or any other track could be found. It is further stated that another bullet which was shown by the X-ray was recovered from the body during the handling of the post-mortem examination. Both the bullets were marked as Bullet-A and Bullet-B, sealed and were sent for further examination. The rest all organs were in moderate decomposition state.

CAUSE OF DEATH

After the examination we were of the opinion that deceased died as a result of rifled fire arm injuries."

(Emphasis supplied)

21. Due to advance purification and maggots no injuries were appreciable, except two rounded holes. He opined that Injury No. 1 could have been caused with bullets (Ex. P-10 and P-11). However, on Injury No. 2, no specific opinion could be given as to whether it could have been caused by a bullet or not. In fact he volunteers to state that "such type of holes could be made by Maggots artifacts)".

22. Before we deal with the testimony of the prosecutrix, we shall first deal with other evidence on record, linking the accused to the crime in question.

23. Khazana Ram (PW-29) states that on 10.9.2006, accused Sanjay Rana made a disclosure statement (Ex. PW-8/A) and got recovered car, accused Anil Kumar made disclosure statement (Ex. PW-12/A) on 12.9.2006 and got recovered a Motor Cycle and accused Gurvinder Singh made disclosure statement (Ex. PW-10/A) and got recovered weapon of offence, cartridges and mobile.

24. In *Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh*, , the apex Court held as under:

"51. In *State, Govt. of NCT of Delhi Vs. Sunil and Another*, , almost a similar contention has been negated by this Court in Para 19 of the report. The learned judges held:

"..recovery of an object pursuant to the information supplied by an accused in custody is different from the searching endeavour envisaged in Chapter VII of the Code."

55. Section 27 starts with the word "provided". Therefore, it is a proviso by way of an exception to Sections 25 and 26 of the Evidence Act. If the facts deposed u/s 27 are not voluntary, then it will not be admissible, and will be hit by Article 20(3) of the Constitution of India. [See *The State of Bombay Vs. Kathi Kalu Oghad and Others*,].

56. The Privy Counsel in *Pulukori Kottaya vs. King Emperor*, [1947 PC 67] held that Section 27 of the Evidence Act is not artistically worded but it provides an exception to the prohibition imposed under the preceding sections. However, the extent of discovery admissible pursuant to the facts deposed by accused depends only to the nature of the facts discovered to which the information precisely relates.

57. The limited nature of the admissibility of the facts discovered pursuant to the statement of the accused u/s 27 can be illustrated by the following example: Suppose a person accused of murder deposes to the police officer the fact as a result of which the weapon with which the crime is committed is discovered, but as a result of such discovery no inference can be drawn against the accused, if there is no evidence connecting the knife with the crime alleged to have been committed by the accused."

25. Apex Court in *Brijpal Singh v. State of M.P.*, (2012) 11 SCC 219, had the

occasion to deal with a case where there was contradiction between the oral evidence and the report of Ballistic Expert. The Court held as under:

".....Then we notice that the prosecution has not bothered to clarify the report of the ballistic expert even though the same was contradictory to the oral evidence which creates a very serious doubt in our mind as to the presence of the eyewitnesses at the place of incident....."

26. In *Anter Singh Vs. State of Rajasthan*, , the apex Court construing the provisions of Sections 24 to 27 of the Evidence Act, held as under:

11. The scope and ambit of Section 27 of the Evidence Act were illuminatingly stated in AIR 1947 67 (Privy Council) in the following words, which have become locus classicus :

"It is fallacious to treat the "fact discovered within the section as equivalent to the object produced : the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house does not lead to the discovery of a knife : knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which stabbed A.", these words are inadmissible since they do not related to the discovery of the knife in the house of the informant." (p. 77)

12. The aforesaid position was (1963 (2) again highlighted in *Prabhoo v. 182) Prabhu Vs. State of U.P.*, .

13. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases in the background events proved therein is not always free from difficulty. It will, therefore, be worthwhile at the outset, to have a short and swift glance at Section 27 and be reminded of its requirements. The Section says:

"27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

14. The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this Section qualifies, to any extent. Section 24, also. It will be seen that the first condition necessary for bringing this Section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the

information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible, The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly" relates "to the fact thereby discovered" and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly" or remotely related to the fact discovered. (See *Mohmed Inayatullah Vs. The State of Maharashtra*, .

15. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in *Pulukuri Kottaya's case* (supra) and in *Udai Bhan Vs. The State of Uttar Pradesh*, .

The various requirements of the Section can be summed up as follows :

- (1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.
- (2) The fact must have been discovered.
- (3) The discovery must have been in consequence of some information received from the accused and not by accused"s own act.
- (4) The persons giving the information must be accused of any offence.
- (5) He must be in the custody of a police officer.
- (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.
- (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

27. Weapon of offence (Ex. P-7), i.e. Katta (a country made pistol and not a rifle) was allegedly recovered on the basis of disclosure statement (Ex. PW-10/A) (Page-290), made by accused Gurvinder Singh. But what is significant is the report (Ex. PA) of the FSL dated 13.6.2007 (Page-319). Cartridges (Ex. P-8 and P-9) and gun (Ex. P-7) could not be connected to the crime. As per opinion of the expert, though weapon is capable of being fired, but on the basis of microscopic comparison of fired cartridges, with that of test fired cartridges, they were not fired from the same. On comparison, recovered empty cartridges were also not fired from the seized weapon.

28. We find the prosecution version of accused Sanjay Rana having made a disclosure statement (Ex. PW-8/A), which led to recovery of incriminating articles, not to be inspiring in confidence at all. Disclosure statement (Ex. PW-8/A) recorded in the presence of Suleman (PW-8) and Sita Ram (not examined) simply records that the vehicle was abandoned at Saharanpur (Uttar Pradesh). Now Suleman (PW-8) is a resident of Saharanpur, State of Uttar Pradesh. He had no business to be present at Police Station, Paonta Sahib (H.P.), where such disclosure statement (Ex. PW-8/A) (Page-286) was recorded. Be that as it may, Sanjay Kumar (PW-7), a police official posted at Police Station, Paonta Sahib, states that police party straightway went to Police Station Janakpuri (Saharanpur), from where they got the vehicle (Indica-No. HR-70-2394) recovered. Record does not reveal that intimation of the said vehicle having been impounded by the police at Police Station, Janakpuri (Saharanpur) was sent to the police at Paonta Sahib or anywhere within the State of Himachal Pradesh. It was not required to be so done, for the vehicle was registered in the State of Haryana and not in Himachal Pradesh. Hence, on what basis police straightway went to Police Station, Janakpuri (U.P.), has not been explained. It is not the case of either of the police officials that they first searched for the vehicle on the spot, gathered information locally and then went to the Police Station. If police was already aware of the vehicle having been impounded, then relevancy and significance of disclosure statement (Ex. PW-8/A) pales into insignificance and becomes inconsequential. Also, SI Shyo Raj (PW-21), in whose presence the vehicle was initially impounded, was not taken to the spot of recovery. Thus, recovery cannot be said to have been effected on the basis of disclosure statement of accused Sanjay Rana.

29. Discovery of incriminating articles alleged to have been recovered by the accused is inadmissible in evidence, if the police already knew where they were hidden. (See: Aher Raja Khima Vs. The State of Saurashtra, ; and Thimma and Thimma Raju Vs. State of Mysore,).

30. Motor Cycle was recovered on the basis of disclosure statement (Ex. PW-12/A) (Page-293), made in the presence of Naresh Kumar (PW-12) and Tanuj Sharma (not examined). Police recovered the same vide memo (Ex. PW-11/A) (Page-291). We find that both Shakir Khan (PW-11) and Naresh Kumar (PW-12) are police officials and no independent witness was associated by the police. Why

so? has not been explained. That apart, prosecutrix does not disclose the number or the make of the motorcycle. Recovery of motorcycle itself is rendered doubtful from the testimony of Shakir Khan (PW-11), according to whom no enquiry about the ownership of the house, from where it was recovered, was made by the police. Also, according to this witness, Ranjeet Singh was already present on the spot. Now, Ranjeet Singh was not examined in Court and why would a witness not proceed with the police party or reach the spot prior to recovery, has not been explained at all. To us, it appears that prior to recovery, police was already aware of the spot where the motorcycle was lying. Hence, recovery cannot be said to have been effected in the manner prosecution wants us to believe.

31. From the conjoint reading of testimonies of police officials, who investigated the matter, it is apparent that spot investigation at the place where body was recovered was conducted by Tara Chand (PW-1). He prepared inquest report, recovered used cartridges and took into possession dead body. He conducted investigation only till 27.8.2006, when case file was handed over to the Investigating Officer Gurdeep Singh (PW-28), who in turn conducted investigation till 1.9.2006 and handed over the file to Inspector Khazana Ram (PW-29). It has also come on record that w.e.f. 12.8.2006 police official Shakir Khan (PW-11) was associated during investigation. Gurdeep Singh (PW-29) had also associated Tara Chand (PW-1) during the period of his investigation.

32. Now, Gurdeep Singh (PW-28) states that on 26.8.2006, statement of prosecutrix (Ex. PW-6/A) was got recorded before Shri Pankaj Gupta (PW-9), Judicial Magistrate 1st Class, Paonta Sahib. He also recorded statement of the concerned Magistrate.

33. All the police officials (witnesses), who conducted the investigation, admit that on 22.8.2006, prosecutrix was brought by the police from Police Station, Barada (Haryana) to Police Station, Paonta Sahib (H.P.). Inspector Khazana Ram (PW-29) admits that prior to recording of her statement (Ex. PW-6/A), prosecutrix was interrogated and she had been disclosing names of different persons, and not the accused, responsible for murder of Rajesh Kumar. During investigation conducted by Tara Chand (PW-1) and Gurdeep Singh (PW-28), prosecutrix disclosed that she was neither aware of, nor familiar with deceased Rajesh Kumar. Also Gurdeep Singh (PW-28), who was posted at Police Post Majra, states that during interrogation, prosecutrix had told names of "different persons responsible for murder of Rajesh Kumar". Even in her statement (Ex. PW-6/A) so recorded under the provisions of Section 164 of the Code of Criminal Procedure, she neither names nor discloses identity of persons accompanying accused Sanjay Rana. Gurdeep Singh (PW-28) states that on 22.8.2006 itself they informed the police at Police Station, Barada, of recovery of a dead body. His version, if not false, is not corroborated by any material. Questions, which arise for consideration, are: why would police do such a thing? Is it that brother of the deceased was a police official? Is it that brother of the deceased, who is a police official, knew of the relationship which the deceased had had with the

prosecutrix? Is it that prosecutrix herself was a suspect? Is it that police was suspecting someone else in the alleged crime? Both the Police Stations fall in different States having distinct and different territorial jurisdiction. After all, she did not disclose names of the accused persons till the time of recording of her statement on 26.8.2006. These facts would acquire significance, rendering the prosecution case to be extremely doubtful, if not false, when one would examine the testimony of the prosecutrix and conduct of the police officials.

34. Accused Sanjay Rana was arrested on 2.9.2006. He did not make any extra-judicial confession or disclosure statement, disclosing identity of his accomplices in the crime. Accused Anil Kumar was arrested on 7.9.2006 and accused Gurvinder Singh was arrested on 8.9.2006. Prosecutrix has not disclosed the material on the basis of which police arrested these two persons. Also there is nothing on record to establish acquaintance or prior friendship inter se the accused persons. It has nowhere come on record that the accused were otherwise not available or had absconded. Then on what basis, these persons were arrested, remains unexplained.

35. Prosecutrix admits to have known only accused Sanjay Rana from before. She was not aware about the identity of his accomplices (two in number). Accused Anil and Gurvinder Singh refused to give their consent for the Test Identification Parade. They did not participate in the same. Accused Anil Kumar got recorded his statement (Ex. PW-9/A) before Shri Pankaj Gupta (PW-9) to the effect that police had already got their photographs clicked and shown to the witnesses. Significantly, it is not the case of the parties that the place where alleged crime took place there was light. Prosecutrix also does not state that accused were calling each other by name. Murder and rape took place in the middle of night and in darkness. Then how accused Anil Kumar, whose identity was not known, if not in doubt, be linked to the crime.

36. All these facts may not be sufficient to render the prosecution case to be false or doubtful, but what is disturbing is the stoic silence of the prosecutrix, for a period of six-seven days, in naming the accused. The alleged incident took place during the night intervening 19th and 20th August, 2006, yet only on 26.8.2006, for the first time, she revealed complicity of the accused Sanjay Rana in the alleged crime. This was despite extensive interrogation and after naming certain other persons in the crime.

37. Prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of crime. If for some reason Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. If the totality of the circumstances appearing on the record of the case disclose that prosecutrix does not have a strong motive to falsely involve the person charged, Court should ordinarily have no hesitation in accepting her

evidence. [State of Maharashtra Vs. Chandraprakash Kewalchand Jain,]. But here she is a witness to a crime of murder.

38. In *Vadivelu Thevar Vs. The State of Madras*, , the apex Court held as under:

"11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act, has categorically laid it down that "no particular number of witnesses shall, in any case, be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after the consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England both before and after the passing of the Indian Evidence Act 1872, there have been a number of statutes as set out in Sarkar's "Law of Evidence" -9th Edition, at pages 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized on S. 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted." Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a

single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution."

[See also: Gulam Sarbar Vs. State of Bihar (Now Jharkhand), ; Veer Singh and Others Vs. State of U.P., ; R. Shaji Vs. State of Kerala, ; Kusti Mallaih v. State of Andhra Pradesh, (2013) 12 SCC 680; Jagdish Prasad and others v. State of M.P., (1995) SCC (Cr.) 160; Sohrabkhan v. State of Madhya Pradesh, 1992 Supp (2) SCC 173; and AIR 1989 236 (SC)].

39. The apex Court in Govindaraju @ Govinda Vs. State by Sriramapuram P.S. and Another, , held as under:

"25. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.

26. Reference in this regard can be made to the cases of Joseph Vs. State of Kerala, . Even in the case of Jhapsa Kabari and Others etc. Vs. State of Bihar, , this Court took the view that if the presence of a witness is doubtful, it becomes

a case of conviction based on the testimony of a solitary witness. There is, however, no bar in basing the conviction on the testimony of a solitary witness so long as the said witness is reliable and trustworthy.

27. In the case of Jhaphsa Kabari (supra), this Court noted the fact that simply because one of the witnesses (a 14 years old boy) did not name the wife of the deceased in the fardbayan, it would not in any way affect the testimony of the eye-witness i.e. the wife of the deceased, who had given graphic account of the attack on her husband and her brother-in-law by the accused persons. Where the statement of an eye-witness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy."

40. Importantly, in her statement (Ex. PW-6/A), prosecutrix does not name accused Anil Kumar or Gurvinder Singh but reveals name of one Rakesh to be an accomplice of Sanjay Rana. Hence, in Court, she denies having done so. The Magistrate (PW-9) has deposed that statement (Ex. PW-6/A), as disclosed by the prosecutrix, was recorded in verbatim. The statement is in Hindi. Hence either of the witnesses has deposed falsely. Also who is this Rakesh? Investigating agencies have not thrown any light ruling out his complicity in the crime.

41. Still the question, which arises for consideration, is as to whether testimony of the prosecutrix, in relation to the crime, inspires confidence or not? For her testimony alone may be sufficient to hold the accused guilty, if she has spoken the truth? Is she a trustworthy witness? Is her testimony free from contradictions, improvements, embellishments, improbabilities, exaggerations?

42. Dr. Daljeet Kaur (PW-20) opined that though prosecutrix was capable of sexual intercourse, but whether intercourse took place on 19.8.2008 or not could not be ascertained. Also, no marks of injury were on the body of the prosecutrix.

43. In her examination-in-chief, prosecutrix (PW-6) states that on 19.8.2006, her friend Rajesh Kumar (deceased) called on her telephone, informing that he would be coming to meet her at Barada. Same day at 6.30 p.m., he again called to inform that he would be reaching at 9 p.m. Same day accused Sanjay Rana twice called on her telephone, expressing his desire of meeting her alongwith his two friends. She conveyed her regrets, on account of prior engagement. At about 9.30 p.m., after reaching Barada, deceased again called her on her phone. She met him and they left Barada, in a car (Indica) for Paonta Sahib (H.P.) via Jagadhari (Haryana). At Jagadhari, deceased enquired of a shorter route and was advised to go via Bilaspur (Haryana). On their way, they bought cold drinks from a shop. After covering some distance they reached a barrier (Check Post), which was closed. On the information furnished by one old man who was standing there, Rajesh Kumar woke up the attendant of the barrier, who opened the same, thus they proceeded with their onward journey. However, after reaching Kular forest Office, deceased decided to return as he was feeling tired. After some

time, their vehicle was intercepted by Sanjay Rana, who came in a motorcycle with his two companions. They were dragged out of the car. Sanjay Rana and his accomplices asked Rajesh Kumar to hand over his valuable articles. He was also searched. She objected to the same. When nothing was recovered, one boy, an accomplice of Sanjay Rana, fired a gun shot on the head of Rajesh Kumar who fell down. On the asking of Sanjay Rana, another bullet was fired at Rajesh Kumar. His dead body was thrown in the gorge. Same person, after reloading the gun came towards her and pulled the trigger but the gun could not be fired. At that, Sanjay Rana asked the said boy to spare her, saying that she was a coward. Thereafter, accused Sanjay Rana made her sit in the car, which was taken on a Kacha road near the bridge on Nahan-Paonta Sahib road, where she was robbed and raped by all the three persons. Sanjay Rana and another person, left on a motorcycle towards Paonta Sahib and at about 4.30 a.m., Gurvinder dropped her home in the car. For the reason that she was sick and frightened, she did not narrate the incident to anyone. On 20.8.2006, Naresh Jadeja (PW-23) called her on her phone and enquired about the whereabouts of Rajesh Kumar. She told him that she did not know any Rajesh Kumar. When he again called on her phone, she gave her address as she wanted to narrate the events to him. On 21.8.2006, Naresh Kumar, Parvesh Kumar and his parents came with certain other persons, including police officials from Barada and started abusing her. She was taken to Police Station Barada for interrogation, from where she was taken to Police Station, Paonta Sahib. Later, on 26.8.2006 she got her statement recorded.

44. From the perusal of cross-examination part of her testimony, one finds that she was extensively interrogated, detained and kept in police custody from 22.8.2006 upto 26.8.2006 at different Police Stations. She states that she used to "sleep in the night with a lady constable in the police station". During this period, she was extensively interrogated at Police Station, Paonta Sahib. She further states that her "husband was also brought to police station, Paonta Sahib and he also stayed there, but he was not interrogated". She admits that she had been telling the police that on 19.8.2006, she was not in the company of deceased Rajesh Kumar. She admits to have had physical relationship with Sanjay Rana and certain other persons known to him. She admits to have been in regular touch with Sanjay Rana. She admits to have been arrested in a case of murder in relation to which she was also detained for six months.

45. To us, version of this witness does not inspire confidence at all. She knew Sanjay Rana from before. Her explanation of not naming Sanjay Rana, out of fear, is uninspiring in confidence. Her version that two shots were fired from the gun is not corroborated by any link evidence. In fact, as per report, gun used for murdering the deceased is not the one produced in Court. She may have been frightened on the day of the incident. It is not her case that Sanjay Rana was a man of bad character, yielding power or influence. He was not known to be a criminal or had links with the underworld. She had no reason not to disclose the incident, after reaching home to her son or husband. Accepting her statement to

be true, that she was frightened, and as such could not disclose the incident to Naresh Kumar out of fear, she could have conveniently disclosed the same to her husband, neighbours or Naresh Kumar when he called her second time. She states that she gave details of her address to Naresh Kumar, as she had wanted to tell him "everything", but does not explain the reason of not doing so, despite the fact that police was present there. She was kept in custody for more than four days. Even during that time, she did not disclose the incident or names of the accused. Why so? has not been explained. It is not that anyone had threatened, intimidated or exercised undue influence over her.

46. Why is it that police arrested the accused much after recording of statement of the prosecutrix, has not been explained. To us, it appears that prosecutrix having criminal antecedents herself was a suspect and in police custody, under duress made her statement falsely implicating the accused. One cannot lose sight of the fact that brother of the deceased is a police official.

47. Version of the prosecutrix that deceased was shot as no valuables could be found, does not inspire confidence at all, for a gold ring was there in the finger of the deceased at the time of recovery of dead body. Accused could have easily removed the same. Also they had no motive to kill the deceased. It is not that Sanjay Rana was in love with the prosecutrix and detested her friendship with the deceased.

48. At this juncture, it be only observed that version of the prosecutrix is not supported or corroborated by any telephonic conversation allegedly having taken place between her; Sanjay Rana; deceased or other witnesses. We may observe that relevant piece of evidence, with regard to mobile calls has not been placed on record by the police/prosecution. Best evidence to establish the prosecution case has been withheld from the Court. After all, call records of the calls made by accused Sanjay Rana, prosecutrix and the deceased could have been made available to establish the date, time and places of movement of the deceased as also the prosecutrix. Also, prosecution has not examined anyone to corroborate her version of having travelled on the Jagadhari Road or the place where dead body was recovered. She purchased cold drinks from a shop, met an old man, who guided them to a person who opened the barrier. Any one of them could have been associated to establish presence of this witness on the spot. But none were either associated during investigation or examined in Court. Also, it has nowhere come on record that accused Sanjay Rana was in know of the route which the deceased and the prosecutrix had taken to proceed towards Paonta Sahib. After all, even according to the prosecutrix they had taken a diversion from the normal route.

49. According to the version so disclosed by Parvesh Kumar (PW-4) and Naresh Kumar (PW-23), deceased had informed Naresh Kumar that he was going to see the prosecutrix at Barada. When deceased did not return home, his whereabouts were enquired from the prosecutrix and she denied having known any Rajesh Kumar. Accordingly, matter was reported to the police and on 22.8.2006 police

from Police Stations, Sangrur and Barada interrogated the prosecutrix. Version of Parvesh Kumar that on 21.8.2006, he lodged missing report with the police is not proved on record. That apart, witness states that on 22.8.2006, they were informed at Police Station Barada that dead body was recovered within the territorial jurisdiction of Police Station, Paonta Sahib (Himachal Pradesh). There is nothing on record to establish that Police Station Paonta Sahib had sent intimation to this effect to all the Police Stations, including the police outside the State of Himachal Pradesh. To us, it appears that Parvesh Kumar (PW-4), brother of the deceased, who admits to be an employee of the Police Department, had been exercising undue influence and thus taken the police officials to the house of the prosecutrix, both from Police Station Sangrur as also Police Station, Barada, for as on 21.8.2006 or 22.8.2006, Parvesh Kumar (PW-4) had no positive information about the death of his brother.

50. Khazana Ram (PW-29) categorically admits that with effect from 22.8.2006 itself, prosecutrix was being interrogated in connection with murder of Rajesh Kumar. In our considered view, investigation conducted by this witness is extremely shoddy, rendering the prosecution version to be extremely doubtful. This witness did not take into possession mobile phone of the prosecutrix. He did not even enquire about her phone number. Prosecution case that on 19.8.2006, prosecutrix had spoken with the deceased or that accused Sanjay Rana had spoken with the prosecutrix, on telephone, was also not got verified by him. He did not deem it appropriate to collect evidence, proving the version of the prosecutrix with regard to her stay with deceased at a hotel at Kala Amb or all the places where prosecutrix passed through, including the barrier, or persons from whom prosecutrix purchased groceries.

51. Pistol, mobile and cartridges were allegedly recovered on the basis of disclosure statement (Ex. PW-10/A) of accused Gurvinder Singh, recorded in the presence of Raja Ram (PW-10) and Surrender Singh (PW-13). As already observed, pistol (Ex. P-7) recovered is not linked to the crime. As per report of the FSL, neither the gun nor the cartridges recovered from the spot of crime stand connected with the commission of offence.

52. In Ram Narain Singh Vs. State of Punjab, , the apex Court held as under:

"7.Thus a combined reading of the evidence of Dr. Walia the medical expert and Mr. J.K. Sinha, Ballistic expert, clearly establishes that the deceased died of two gunshot injuries and the prosecution has not been able to explain this important circumstance. For these reasons, therefore, the evidence of the two eye-witnesses Surjit Singh and Joginder Singh is wholly inconsistent with the medical evidence as also the evidence of ballistic expert and must be rejected on that ground, alone, apart from other inherent improbabilities which appear in their evidence and which have already been pointed out."

"14. Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this

is a most fundamental defeat in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. In Mohinder Singh Vs. The State, this Court observed in similar circumstances as follows:

"In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle."

It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case."

53. Prosecution has tried to establish that deceased Rajesh Kumar had purchased the mobile, so recovered by the police, from Virender Gupta (PW-30) who produced Bill (Ex. PW-30/A). However, falsehood has no legs but leaves its foot prints. Intriguingly mobile recovered is of make "Motorola", whereas Bill pertains to mobile make "Nokia".

54. In our considered view, findings returned by the trial Court are erroneous and perverse and cannot be said to be born out from the record. Evidence oral and documentary cannot be said to have been correctly and completely appreciated by the Court below, while returning the findings of guilt of the accused, in relation to the charged offence. We do not find the version of the prosecutrix to be inspiring in confidence at all. Prosecutrix cannot be said to be a witness of unimpeachable credit. Her testimony is full of serious infirmities and it would be too risky to convict the accused on such weak and redolent evidence. Accused stand acquitted of the charges of criminal intimidation, which findings have not been assailed by the State. Version of the prosecutrix had to be accepted or discarded in totality. It is not a case where wheat is to be separated from the chaff, as prosecutrix cannot be said to be a trustworthy witness. Also, her version is not corroborated by any link evidence. To the contrary it stands belied. Prosecutrix herself was a suspect. Despite extensive interrogation, she refused to divulge names of the accused, at the first instance. In Court, she falsely denied having named Rakesh as one of the accomplices of accused Anil Kumar. Also, identity of the accused could not be established in accordance with law. The link evidence also cannot be said to have been proved in accordance with law.

55. From the evidence on record, as discussed herein above, it cannot be said that the present accused persons, in furtherance of their common intention committed murder by causing death of Rajesh Kumar; and gang raped the prosecutrix.

56. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

57. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 4.10.2008, passed by Additional Sessions Judge, Sirmour District at Nahan, Himachal Pradesh, in Sessions Trial No. 2-N/7 of 2007, titled as State of Himachal Pradesh v. Sanjay Rana and another, is set aside and accused Sanjay Rana and Anil Kumar are acquitted of the charged offences. They be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to them accordingly. Release warrants be immediately prepared.

Appeal stands disposed of, so also pending application(s), if any.