
(2017) 10 DEL CK 0246

In the Delhi High Court

Case No : Criminal Appeal No. 89 Of 2014

Mohd. Ishtar @ Istak & Anr

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 25-10-2017

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 374
Indian Penal Code, 1860 — Section 34, 376, 376(2)(g), 506(2)

Citation : (2017) 10 DEL CK 0246

Hon'ble Judges : Sangita Dhingra Sehgal, J

Bench : Single Bench

Advocate : Sitab Ali Chaudhary, Arvind Kumar, Ashok Kumar Garg

Final Decision : Dismissed

Judgement

Sangita Dhingra Sehgal, J

1. The present appeal has been instituted by the appellants under Section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") against the impugned judgment dated 13.11.2013 and order on sentence dated 18.11.2013 passed by the Court of Additional Sessions Judge (hereinafter referred as "ASJ"), Special Fast Track Court (North West District), Rohini Courts, Delhi in case FIR No. 187/2011 registered at Police Station - Kanjhawala, New Delhi, whereby the appellants were convicted under Section 376(2)(g) and 506 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentenced to undergo rigorous imprisonment of ten years and a fine of Rs.10,000 for the offence punishable under Section 376(2)(g) IPC and in default of payment of fine, to further undergo two years rigorous imprisonment. The appellants were further sentenced to undergo rigorous imprisonment of five years with a fine of Rs.5000/- for the offence punishable under Section 506 of IPC and in default of payment of fine the appellants shall further undergo rigorous imprisonment for one year.

2. The case of the prosecution as observed by the ASJ, vide its order dated 13.11.2013 is : -

"That on 01/08/2011, SI Rajesh Kumar on receipt of DD No.26A in the Police Station Kanjhawala met the complainant/prosecutrix and made inquiries from her who told about the committal of galat kaam with her, on which she, accompanied by L/Constable Anita, was taken to Sanjay Gandhi Hospital where her medical examination was got conducted vide MLC No. 1073/11, on the MLC the doctor has endorsed,

"Brought for medical examination as victim in case of sexual assault today". The sealed pullindas handed over by doctor after her medical examination were taken into police possession. Thereafter, prosecutrix accompanied by L/Constable Anita came back to the Police Station, where NGO Anuradha was also found present. In the presence of NGO Anuradha, prosecutrix (namely withheld being a case u/s 376 IPC) W/o Ram Milan R/o Umed Master Ka Makan near Hira Lal School, Madan Pur Dabas, Delhi, permanent address; Dev Raha, PS- Jatara, District Teekamgarh (M.P.) made the statement which is to the effect that, she along with her family lives on rent and does the labour work (Mehnat Mazdoori Ka Kaam) with her husband. Today on 01/08/2011 she was at her house only as for the last 2-3 days she was not getting any work and today at about 11:00-12:00 noon in the day time she was going to collect her balance wages and was passing through 35 Foota road and when on that road she reached near Masjid situated on that road, on the way, two persons namely Mohd. Mustkim and Mohd. Ishtar who does the masonry work, to whom she was knowing previously met, who after alluring her, took her in that house where they used to work (Aaj Dinank 01/08/2011 Ko Main Ghar Par Thi Kyonki Pichle Do Teen Se Koi Kaam Nahi Mil Raha Tha Main Aaj Waqt Kareeb 11:00-12:00 Baje Din Apni Pehle Ki Bakaya Mazdoori Lene Ke Liye 35 Foota Road Par Ja Rahi Thi Ki Jab Main Us Road Par Stith Masjid Ke Paas Pahunchi To Mujhe Raste Mei Do Shakhs Jinke Naam Mohd. Muskeen Va Mohd. Ishtar hain Jo Dono Raaj Mistry Ka Kaam Karte Hain Va Jinko Mian Pehle Se Jaanti Hu Mujhe Mile Aur Behla Fusla Kae Mujhe Us Ghar Mei Le Gae Jahan Ye Dono Kaam Karte The) and where firstly Mustkim and then, Mohd. Ishtar committed galat kaam with her and when she tried to save herself from them, on which Mustkim pressed her mouth and threatened if she tried to scream then they will kill her and thereafter, they turn by turn had committed galat kaam with her, then Mohd. Ishtar threatened her to go silently to her house if she tried to disclose the incident to anyone, he will kill her (Jahan Par Pehle Mustkim Ne Mere Muh Daba Diya Aur Dhamki Di Ki Yadi Chilaane Ki Koshish Ki To Jaan Se Maar Denge Iske Baad Jab In Dono Ne Bari Bari Mere Sath Galat Kaam Kar Liya To Mohd. Ishtar Ne Kaha Ki Ja Chup Chap Ghar Chali Ja Yadi Tune Kisi Se Batane Ki Koshish Ki to Jaan Se Maar Dunga) and she from there came to her house and when she had reached at her house, her husband had also come to house for eating the food and she told all about the incident to her husband (Main Wahan se Chup Chap Apne Kamre Par Aa Gai Jab Mai Ghar Aai To Mera Gharwala Bhi Khane K Liye Kamre Par Aaya Hua Tha Maine Apni Aap Beeti Apne

Gharwale Ko Batai). After too much thinking over the matter thereafter her husband brought her to the Police Station at about 5:45 p.m. where she told all about the incident (Jo Kaafi Vichar Karne Ke Baad Mera Pati Mujhe Waqt Kareeb 05:45 Baje Sham Thana Le Kar Aaya Jahan Bhi Maine Aaj Beeti Batai). From there she along with Lady Constable was sent to Sanjay Gandhi Hospital and her medical examination was got conducted and after her medical examination she has come back to the Police Station at about 11.15 p.m. where her statement has been recorded. She has heard her statement and is correct. On the basis of the statement, from the inspection of MLC and the circumstances on finding that offences u/s 376/506/34 IPC appeared to have been committed, the case was got registered and the investigation was proceeded with. During the course of investigation the site plan of the place of incident was prepared at the instance of prosecutrix. On the pointing out of the prosecutrix both the accused Mohd. Ishtar @ Ishtak and Mohd. Mustkin @ Mustkim were arrested. Their medical examinations were got conducted and the sealed pullinda handed over by the doctor after their medical examination were taken into Police Possession and were deposited in the Malkhana. Section 376(2)(g) IPC was added in the case. The sealed exhibits were sent to FSL.

Upon completion of necessary further investigation challan for the offence u/s 376(2)(g)/506 IPC was prepared against the accused Mohd. Ishtar @ ishtak and Mohd. Mustkin @ Mustkim and was sent to the court for trial."

3. Charge for offences under Section 376(2)(g) and 506 of IPC was framed against the appellants on 19.12.2011 to which they pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution examined 14 witnesses and proved certain documents. The statements of both the appellants were recorded under Section 313 of the Cr.P.C, wherein they denied all the charges against them and pleaded false implication. In support of their case, they examined 3 witnesses.

5. Learned counsel for the appellants contended that the Trial Court had erred in holding the appellants guilty for the charged offences and the judgement rendered by the Trial Court is perverse; that there are glaring contradictions in the statements of the prosecutrix recorded at different stages; that the prosecutrix and the appellants were well acquainted with each other as they worked together as daily wagers in a construction company; that there was an ongoing dispute between the prosecutrix and the appellants with regard to payment of wages for which she falsely implicated the appellants in the present case; that the alleged place of incident is situated near a Masjid having a huge gathering of people where the commission of the alleged offence was impossible; that the prosecution even failed to examine independent witnesses i.e. local people around the alleged place of incident; that though the distance between the police station from the residence of the prosecutrix was about 3Kms., the prosecutrix took 1½ hours to reach the police station which casts serious doubt

on her allegations; that there was no material on record in order to ascertain that the sexual intercourse was committed by the appellants; that the prosecution case was neither supported by medical evidence nor by scientific evidence; that the testimonies of defence witnesses have not been dealt with in a right prospect.

6. Rebutting the contentions of the learned counsel for the appellants, learned Additional Public Prosecutor for the State, submitted that the impugned judgement does not call for any interference; that there were no inherent contradictions in the testimony of the prosecutrix nor did the same suffer from material discrepancies; that abrasions were found on the right leg of the prosecutrix during her medical examination; that the prosecutrix did not protest under the threat of the appellants and hence mere absence of injury on the internal and external parts of her body is not conclusive of the fact that she has not been subjected to rape; that the prosecution was able to prove its case beyond any reasonable doubt. Under the circumstances, it was submitted that there is no merit in the appeal and hence the same be dismissed.

7. I have heard learned Counsel for the parties and have also perused the material available on record.

8. At this juncture, it is necessary to scrutinise the evidence(s) which have emerged on record.

9. The law is well settled that conviction can be based on the sole testimony of the prosecutrix, if the same is found to be worthy of credence and can be relied upon in the absence of further corroboration.

Hence, it is relevant to rummage through the testimonies of the Prosecutrix (PW-1), who during her examination-in-chief deposed as under:

"In the year, 2011 at the time of incident I was residing in the house of Umed Master near School in village Madanpur Dabas, Delhi. My husband does maisnary work and I also work as a labour. It was an incident of first day of month, month and the year I do not remember. For 2/3 days I was on rest and had not gone to my work and on that day I was going from 35 feeta road in the Madanpur village to take my due wages of the labour from the contractor where I had worked whose name I do not remember at about 12:00 noon or 1:00 pm. In the gali of the 35 feeta road when I was passing where accused Mushatkin and Mohd. Ishtar were doing maisenary work known to me both of them caught hold of me and took me inside the room where they were working. Accused Mushatkin pressed my mouth and accused Ishtar threatened me if I raised my alarm I would be killed. Both accused Mushtakin and Mohd. Ishtar committed "galat kaam" upon me. Galat kaam i mean what is being done by husband to his wife. Firstly, Mohd. Ishtar committed the galat kaam upon me and thereafter accused Mushtkin committed galat kaam upon me and thereafter both the accused persons threatened and intimidated me and asked me to go silently to my house. At about 1:00 or 1:30 pm my husband came to the house and then I narrated

the whole incident to him. Thereafter, I along with my husband had gone to the police station at about 5:00 or 6:00 pm. My statement was recorded at the police station, the same is Ex.PW1/A which is right thumb impressed by me at point A. Then I was medically examined by the police in SGM Hospital in the same night. My clothes which I was wearing at the time of the incident were seized by the doctor. My statement u/s 164 CrPC was also got recorded by the police.

XXXX The statement u/s 164 CrPC shown to the witness who identifies the same to have been made by her and the same is EXPW1/B and right thumb impressed by her at point A & B. XXXX

Accused Mushtkin and Ishtar are present in the court (correctly identified).

On the same night I joined investigation and pointed out the place of incident and police prepared the site plan at my instance and arrested both the accused Mushtkin and Mohd. Ishtar who were found sleeping there. The arrest memos of accused Mushtkin and Ishtar are ExPW1/C and PW1/D respectively which have been right thumb impressed by me at point A...."

During her Cross Examination, the prosecutrix deposed as under: -

"XXXX It is wrong to suggest that I have deposed falsely as no such incident could have taken place in the 12:00 to 1:00 hours. It is wrong to suggest that I was previously knowing the accused persons. It is wrong to suggest that I was previously knowing both accused very well or that my dues/ wages were pending payable by the accused persons and for taking the same, I had gone to the accused persons. It is wrong to suggest that there was a money dispute between me and the accused persons and for this reason, I have falsely implicated the accused persons. It is wrong to suggest that no incident could have taken place in the house as the labourers must have been working here. Vol. In the said house, only the two accused persons are working at that time. It is wrong to suggest that no incidence of rape took place with me.XXXX

I did not know the name of both the accused persons prior to the incident. Vol. after the date of incident I came to know the name of the accused persons as Mustkin and Ishtiyar. I along with my husband had gone to the police station at about 5 pm for lodging the report. The police station is situated a far place from my house. It is wrong to suggest that it had taken 19 minutes time only from my house to reach at the police station. It is correct that accused were arrested at my instance in the night time by the police.XXXX"

10. The primary contention of the learned counsel for the appellants is that there are several contradictions in the statements of the prosecutrix recorded at different stages. Therefore, the first issue which calls for determination by this Court is whether there exists any contradiction in the statements of the prosecutrix and if so whether the contradictions are material enough to cast doubt on the veracity of the prosecution narrative.

11. The first contradiction as pointed out by the learned counsel for the

appellants is with regard to the fact as to how the prosecutrix was taken to the alleged place of crime.

12. As perused from the records, the prosecutrix in her statement recorded under Section 164 Cr.PC, she had mentioned that at around 12 p.m., when she was going to collect her due wages from Mir Vihar, she met the accused persons on her way, whom she knew from before and had a conversation with them. On asking by the accused persons, she informed them that she was going to collect her remaining wages from Mir Vihar. Accused Mushtakim asked her to come along with them and on refusal, accused Mustakim forcefully kept his hand on her mouth and asked her to accompany and also threatened to kill her if she refuses. Thereafter, they took her away.

13. Further, when the prosecutrix appeared as PW-1, she deposed that "In the gali of the 35 Foota Road when I was passing where accused Mushtakim and Mohd. Ishtar were doing maisenary work know to me both of them caught hold of me and took me inside the room where they were working."

14. On bare reading of the above statements made by the prosecutrix during the course of recording of the evidence, it is seen that the prosecutrix has named the appellants and assigned them a specific and definite role in the incident. Further, the fact that she was threatened by the appellants while she was crossing 35 foota road and was thereafter forcibly taken away to the place of commission of crime, has remained consistent. The contradictions seen herein are minor contradictions that are not material enough to affect the case of the prosecution.

15. The second contradiction highlighted by the counsel for the appellants is that the prosecutrix and the appellants knew each other much prior to the alleged incident as they previously worked together as daily wagers in a construction company and were involved in a dispute with regard to wages.

16. PW-1 in her statement under Section 161 Cr.P.C. has stated that "Main in dono ko Mohd. Mushtkim or Ishtar ko kuch mahine se janti thi. In sardiyon mein maine 10-12 din in dono ke sath thekedar ke liyen kaam kiya tha."

Further, during her examination in chief she stated that "For 2/3 days I was on rest and had not gone to my work and on that day I was going from 35 feeta road in the Madanpur village to take my due wages of the labour from the contractor where I had worked whose name I do not remember at about 12:00 noon or 1:00 pm. In the gali of the 35 feeta road when I was passing where accused Mushatkin and Mohd. Ishtar were doing maisenary work known to me both of them caught hold of me and took me inside the room where they were working."

In Cross-Examination she stated as "It is wrong to suggest that I was previously knowing both accused very well or that my dues/ wages were pending payable by the accused persons and for taking the same, I had gone to the accused persons.....It is wrong to suggest that there was a money dispute between

me and the accused persons..... I did not know the name of both the accused persons prior to the incident. Vol. after the date of incident I came to know the name of the accused persons as Mustkin and Ishtiyar..."

17. As such, the testimony of the prosecutrix finds substantial corroboration from the testimony of the prosecution witness PW-2 Ram Milan (Husband of the Prosecutrix). who deposed on similar lines as under: -

"I was working as a mason. On 01.08.2011 as usual I went to my work place and in the lunch time when I returned to my house my wife was weeping. I asked the reason of weeping and she has stated that accused Mushtakin and Mohd. Ishtar had committed galat kaam with her. Galat kaam I mean rape. I was astonished to listen this and set in the house lonely. My children also started weeping. At about 5:00 or 5:45pm I took my wife to the police station. Police had lodged the report on the basis of the statement of my wife. My wife was also got medically examined by the police from Sanjay Gandhi Hospital and we returned at our house and I joined the investigation and accompanied the police officials to the place where my wife was raped and both accused Mushtakin and Mohd. Ishtar were apprehended as were found sleeping, at the instance of my wife. I had also accompanied my wife to the court where her statement was recorded by the Magistrate. I can identify both the accused if shown to me. Accused persons present in court today (correctly identified)."

During cross examination, PW-2 Ram Milan (Husband of the Prosecutrix), stated as under: -

"The incidence is of dated 01/08/2011. I had returned to the house on the date of incident in the lunch time at about 1:30pm.

Q: What your wife had told to you at that time when you had returned to the house in the lunch time, on the date of incident?

A. She was weeping and I asked her as to what has happened, on which she has stated that Ishtaq and Mushtakin had committed galat kaam with her. I took her to PS Khanhawala at about 5:00pm and met the police officials and told them all about the incident.

The police station was at a distance of 3-4 kilometers from our house. We went to the PS by bus. It took about 1-1/2 hours to reach at the PS from our house by bus. My wife was not working with Ishtaq and Mushtakin. No wages were lying balance of my wife with Ishtaq and Mushtakin. Vol. She had gone to collect her wages from the other side where she had worked earlier and when she was passing through a gali, she was caught by Ishtaq and Mushtakin. It is wrong to suggest that both Ishtaq and Mushtakin are the masons (raj mistri) and it is they, who had got the work to my wife at the site, of which she had gone to collect her wages. It is wrong to suggest that accused ishtaq and Mushtakin have been falsely implicated in this case as there was some altercation (noka jhoka) on the issue of giving the wages. It is wrong to suggest that no galat kaam had

ever been committed by the accused persons with my wife. It is further wrong to suggest that of the happening of the altercation (noke jhoke) after three hours thereof, in a planned manner, both the accused have been falsely implicated in the case. It is wrong to suggest that I am deposing falsely."

18. Also the husband of the prosecutrix/PW-2 has stated in his cross-examination that "My wife was not working with Mohd. Ishtar and Mustkim and no wages lying balances of my wife with accused persons..... She had gone to collect her wages from the other side where she had worked earlier and when she was passing through a gali, she was caught by Ishtaq and Mushtakin." It is clear that both the prosecutrix and her husband have stated that there was neither any dispute regarding wages between the prosecutrix and the appellants nor the prosecutrix knew the appellants prior to the incident. Even on scrutiny of the statements made by the defence witnesses it is set out that the present contention holds no ground.

19. Further, the statements of other prosecution witnesses corroborate with that of the prosecutrix and PW-2 with respect to the fact of time and place of the alleged incident, reporting of the said incident in the police station, joining of investigation with the police officials, arrest of the appellants at the instance of the prosecutrix and medical and scientific examination.

20. PW-4 ASI Ashok Kumar deposed as under :-

"On 01.08.2011 I was posted as duty officer in police station Kanjhwala and was on duty from 5:00pm and 9:00am. On that day at about 5:50 pm one Munni Devi w/o Ram Milan along with her husband Ram Milan came in the police station and got registered DD No. 26A. Thereafter, copy of the same was handed over SI Rajesh Kumar who proceeded for SGM Hospital along with Constable Anita and complainant Munni Devi. Information was also given to NGO. Today I brought the original DD register. The copy of the DD no. 26A is Ex.PW4/A(OSR).

On the same day at about 11:45pm I received a rukka from SI Rajesh Kumar himself and on the basis of which and on my instruction FIR No. 187/11 under Section 376/506/34 IPC was registered. After registration of the FIR I handed over copy of FIR and original rukka to Constable Rohtash for handling over to SI Rajesh. Today I have brought the original FIR register. The copy of the FIR is Ex. PW4/B bearing my signature at point A(OSR) I also made endorsement on the rukka which is Ex, PW4/C bearing my signature at point A."

21. PW-6 Constable Dheeraj (Police Station Alipur) deposed as under: -

"On 01.08.2011 I was posted as constable in police station Kanjhwala. On that day in the night at about 11:45pm, I along with SI Rajesh, constable Harinder, complainant Munni Devi and her husband remained in the investigation of the present case and reached at the spot i.e. 35 foota road near Bali Masjid, Madanpur Dabas, Meer Vihar, Delhi where complainant had pointed out the place of occurrence. IO prepared the site plan. The two accused persons namely Mohd.

Mushtkin nad Mohd. Ishtar were apprehended at the instance of the complainant, they were interrogated and arrested. Accused were taken to SGM Hospital, Mangolpuri where they were medically examined. After medical examination, doctor handed over the exhibits of both the accused and I handed over the same to the IO. Same were seized vide memo Ex.PW6/A and EX.PW6/B respectively. Thereafter, accused were sent to police lock up. Both the accused are present in the court today."

22. PW-8 Manshur Ansari (Owner of the house) deposed as under:-

"I am the owner of the house where the alleged incident had taken place. At that time the house C-129 Mir Vihar, Madan Pur Dabas, Delhi was under construction and the construction was going on under the supervision of contractor (thekedar) Manjoor. He is now not available."

23. PW-9 Ct. Rotash deposed as under:-

"On the intervening night of 01/02.08.2011 I was posted at PS Kanjhawla. On that day I was on emergency Duty from 8:00pm to 8:00am. On that day at about 12:45am (night) DO has given me copy of FIR and original Tehrir to handed over the same to IO SI Rajesh Kumar who was present at 35 foora road near Masjid Madan Pur Dabas. I went there and found that two persons were apprehended by Ct. Harender and Ct. Dheeraj along with SI Rajesh Kumar. I handed Over copy of FIR and original Tehrir to SI Rajesh Kumar to whom further investigation was marked. My statement was also recorded by IO."

24. PW-10 Investigating Officer SI Rajesh Kumar deposed that: -

"On 01.08.2011 I was posted as sub inspector in PS Kanjhawla. On that day DD No. 26A, a copy of which is already exhibited as ExPW4/A was handed over to me. Complainant Munni Devi met in the PS along with her husband. On inquiry, Munni Devi told me that rape has been committed upon her so I along with lady Ct. Anita took Munni Devi to SGM Hospital for medical examination. She was medically examined and after her medical examination, doctor handed over the pullindas containing the exhibits which were seized by me vide memo Ex. PW10/A, bearing my signature at point A. We came back in the PS. NGO Anuradha was called and she did the counselling of the complainant Munni. I recorded her statement already Ex. PW/A and attested her thumb impression at point A, bearing my signature at point B. I prepared the rukka Ex. PW10/B, bearing my signature at point A. Rukka was handed over to Duty Officer for registration of FIR. Thereafter, I along with Munni, her husband, Ct. Dhiraj and Ct. Harender reached at the spot i.e. newly constructed house 35 foota roas near Balli Masjid, Madanpur Dabas, Mir Vihar, Delhi and there at the instance of the complainant. I prepared the site plan Ex. PW1/F, bearing my signature at point B. The two accused Md. Mushtkin and Md. Ishtar were apprehended at the instance of the complainant. They were interrogated and arrested vide arrest memo already Ex. PW1/C and ExPW1/D, their personal search were conducted vide memo Ex.PW10/C and EXPW10/D, bearing my signature at point A. Accused were taken to SGM

Hospital for medical examination. Complainant was instructed to reach in PS in the noon. Both the accused were medically examined and after their medical examination, doctor handed over the pullindas containing their exhibits which were seized vide memo Ex. PW6/A and Ex.PW6/B, bearing my signature at points B. Thereafter, we came back to PS and the case property was deposited in the malkhana and the accused persons were sent to police lockup.

...XXX I moved an application for recording statement of complainat/prosecutrix u/s 164 CrPC which is Ex. PW10/A/G, bearing my signature at point A. Her statement got recorded and thereafter I obtained the copy of the same vide application Ex. PW10/H, bearing my signature at point A. I recorded the statement of witnesses...XXXX ...XXX Both the accused are present in the court today (correctly identified)...XXX"

During Cross Examination, PW-10/ SI Rajesh Kumar stated as under: -

"DD No. 26A was handed over to me at about 5:50pm. There is a distance about 4/5 km between the police station and place of occurrence. The rape was committed upon prosecutrix between 11:00am to 12:00 noon. It took five minutes to reach from PS to the place of occurrence by vehicle. Complainant reached at PS at about 5:40-5:45 pm. Complainant told that after the arrival of her husband she has come to the PS to lodge the report. It is wrong to suggest that there was a dispute between the complainant and accused regarding the wages and later on a false case has been registered against the accused persons. It is wrong to suggest that I did not visit the spot or that all the proceedings were done in the PS. On the one side of the place of occurrence there are houses and on the other side there is vacant plots. No other person were present at the spot which was a under construction building except accused persons. When I visited the spot no construction work was going on at that time. I do not remember the complete name of Tehkedar today. I cannot say as to whether two masons and three labourers were working at that time in that house. It is wrong to suggest that all the proceedings had conducted in the PS without visiting the spot as deposed or that no incident as alleged ever took place or that a false case has been foisted upon the accused persons...XXX"

25. PW-12 W.Ct Anita deposed as under: -

"On 01.08.2011 I was posted as constable in PS Kanjhawla. On that day at about 5:50 pm IO SI Rajesh handed over to me complainant Munni w/o Ram Milan for her medical examination. I took her in SGM Hospital where she was medically examined and after medical examination, doctor handed over the pullinda containing the exhibits. We came back to police station and I handed over pullinda to IO which were seized vide memo Ex.PW10/A, bearing my signature at point B. IO recorded the statement of complainant in the present of NGO Anuradha and got the FIR registered."

26. The statement of the prosecutrix narrates the entire incidence as to how she was sexually assaulted by the appellants and she has remained consistent,

unfettered and invariable during recording of her statements. On perusal of the above statements, it can be seen that there are no material contradictions in the statements of the prosecutrix and the facts regarding the commission of the crime upon her has remained constant and intact. Moreover, it is also to be taken in account that even if there were some minor contradictions, the same were never questioned to her by the counsel for the appellants during is also corroborated with that of other prosecution witnesses. Keeping in view the above, it is a well settled proposition of law that contradictions in the statement of the witness is fatal for the case, however, minor discrepancy or variance in evidence will not make the prosecution case doubtful. In the present case, the testimony of the prosecutrix inspires confidence and can be totally relied upon despite minor contradictions.

27. In *Narayan Chetanram Chaudhary & Anr. vs State Of Maharashtra* (CRL.A.25-26/2017), the Apex Court inter-alia observed as under: -

"There is bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefore should not render the evidence of eye-witnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not failing within a set pattern is unproductive and a pedantic exercise."

28. The next issue which requires determination is whether the medical and the scientific evidences support the case of the prosecution.

29. In the MLC of the prosecutrix, the examining doctors PW-3 Dr.Brijesh Singh, and PW-7, Dr. Aditi (the gynaecologists), have stated that there was "no external injury/ mark on the vital parts of the prosecutrix , however, an Abrasion 4 X 1 cm on right leg antreolateral aspect."

30. The appellants were also taken to the hospital for medical examination and their MLC were prepared according to which there was nothing to suggest that they were incapable of performing the act of the sexual intercourse.

31. It is to be recalled here that the prosecutrix had mentioned in her statements that she was threatened by the appellants that if she tried to raise an alarm she

would be killed by them. Therefore, in these circumstances there is every possibility that the prosecutrix out of fear of death might have not resisted to the extent so as to withstand any injury on her body. Therefore, mere absence of injuries either as a mark of resistance to the advances allegedly made by the appellants or as internal injuries, would not by itself discard the testimony of prosecutrix. Each case requires to be examined on its own facts and circumstances. It is a settled proposition that injury is not sine qua non to prove the offence of sexual act, provided the evidence of the victim does not suffer from any basic infirmity and the probability factor does not render it unworthy of credence.

32. In *Ranjit Hazarika v. State of Assam*, reported in (1998) 8 SCC 635, it was stated that:

"Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons"."

33. In *Wahid Khan vs. State of M.P.* reported in (2010) 2 SCC 9, it was held as: -

"It has been a consistent view of this Court that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.

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It is appropriate in this context to reproduce the opinion expressed by Modi in *Medical Jurisprudence and Toxicology* (Twenty Second Edition) at page 495 which reads thus :

"Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not

is a legal conclusion, not a medical one."

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Similarly in Parikh's Textbook of Medical Jurisprudence and Toxicology, 'sexual intercourse' has been defined as under:

"Sexual intercourse.- In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

28.If the aforesaid facts are kept in mind, it cannot be disputed that the act of the appellant would certainly constitute an offence of rape and leaves no amount of doubt in our mind."

34. Let us now examine another significant piece of evidence which is the CFSL Report exhibited as Ex. PX, which states that there was presence of human semen on exhibit "S-1(a)(ii)"(Petticoat of the prosecutrix seized vide seizure memo Ex. PW10/A), exhibit "S-1(d)"(Cotton wool swab on a wooden stick of the prosecutrix, seizure memo ExPW10/A), and exhibit "S-2"(underwear of accused Mohd. Ishtak, seizure memo Ex. PW6/A). On analysis of this report, it is seen that there was presence of human semen on the petticoat of the prosecutrix and in the undergarment of the accused Mohd. Ishtar@Istak.

35. After the perusal of the above facts, it is to be seen that similar views were taken in the case of Nannu Gupta @ Bablu v State reported in 2010 II AD (Delhi) 117, semen was found on the underwear of the accused. There was no explanation from the accused as to how the semen came on his underwear, therefore, it was held that the inference is that semen came on his underwear when he attempted to commit rape with the prosecutrix. In the instance case, semen was detected not only on the underwear of the appellant/ Mohd. Ishtar@Istak but also on prosecutrix and no explanation has been given by the appellant for presence of semen on his and victim"s clothes. Therefore, it is another strong corroborative piece of evidence against the appellants.

36. In the facts and circumstances of the present case, it is clear that alleged incident had taken place. Merely because the prosecutrix was a helpless victim who was by force prevented from offering serious physical resistance, cannot be disbelieved. Therefore, on the combined reading of medical and ocular evidences in the light of present facts and circumstances of the case, it can be said that the evidences adduced herein are fully established.

37. Now proceeding further, the next issue involved in the present case is whether reliance can be placed on the case of the prosecution in the absence of any independent witnesses.

38. Counsel for the appellants contended that the alleged incident is stated to have taken place in broad day light near a Masjid having huge gathering of

people, however the prosecutrix did not raise any hue and cry to gather the people present around the place of incident. Also the prosecution has not examined any independent witness(es) i.e. the local people on or around place of incident and the working labourers, in support of their allegations. The said contention cannot be accepted on the basis of the judgement given by this court on similar lines which categorically states that non examination of the independent witness is not fatal to the case of the prosecution. In *Ram Dev v State of NCT of Delhi*(Crl. Appeal No.61/13) it was stated that

"The next contention of Learned Counsel for the Appellant is that the evidence of the prosecution is not worthy of credence for the reason that the incident allegedly took place in a thickly populated area at the rooftop. Despite that, there is no independent witness to hear the cries of the prosecutrix. The absence of independent witness, in my opinion, is not a reason to discard the testimony of the prosecutrix which is corroborated by the medical evidence as well as forensic evidence, i.e., report of CFSL."

13 Further, In the case of *Jawahar v. State* reported in (2007) ILR 2 Delhi 146, it was observed as under: -

"As far as non association of public witnesses at the time of recovery is concerned, I consider that this is not an infirmity sufficient to throw out the case of the prosecution. It is very hard these days to get association of public witnesses in criminal investigation. Investigation itself is a tedious process and a public witness, who is associated, has to spend hours at the spot. Normally, nobody from public is prepared to suffer any inconvenience for the sake of society. The other reason for the public witness not readily agreeing to associate with investigation is harassment of public witness that takes place in the courts. Normally a public witness should be called once to depose in the court and his testimony should be recorded and he should be discharged. But experience shows that adjournments are given even in criminal cases on all excuses and if adjournments are not given, it is considered as a breach of the right of hearing of the accused. These adjournments are specifically taken by counsels for accused persons, when witnesses are present, just to see that witnesses get harassed by calling them time and again. The excuses normally given in the courts are : the counsel having urgent personal work, left the court; death of some near relatives etc; the counsel being busy in arguing other matter in other court or cross examining other witness in some other court. This attitude of the courts of sending witness back is a major cause of harassment which discourages public from associating in the investigation of any case. Since the police is faced with this handicap, the police cannot be blamed for not associating public witness. There is no presumption that the police witnesses are not credible witnesses. The testimony of every witness, whether from public or police, has to be judged at its own merits and the court can believe or disbelieve a police witness considering the intrinsic value of his testimony. Police witnesses are equally good witnesses and equally bad witnesses as any other witness and the

testimony of police witness cannot be rejected on the ground that they are official witnesses."

Therefore, it is a well settled principle of law that mere non association of the independent witness itself is no ground to throw out the entire case of the prosecution.

39. In light of the facts and circumstances of the present case, this Court finds no reason to view the testimony of the prosecutrix with doubt, disbelief or suspicion. The evidence adduced so far, by the prosecution, does persuade this court to uphold the guilt of the appellants. The medical and scientific evidence on record also lends assurance to her statement and is sufficient to satisfy the judicial conscience. This Court is therefore satisfied that, implicit reliance can be placed upon the testimony of prosecutrix. Thereby, the circumstances stand conclusively proved by the unimpeachable testimonies of the prosecution witnesses. In view of the settled legal principle, testimony of the prosecutrix herself is sufficient to bring home the guilt of the appellants which, in the instant case, finds corroboration from the narration of the entire incident to her husband, medical as well as scientific evidence, as such the Trial Court rightly convicted the appellants by holding that the prosecution has succeeded in establishing the case beyond reasonable doubt.

40. Hence, on no count does the impugned judgment call for any interference. The Trial Court has fully appreciated the evidence placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Moreover the appellants, have committed the heinous offence of rape for which they deserve no leniency and shall undergo the remaining part of the sentence as awarded by the Additional Sessions Judge.

41. The conviction of the appellant under Section 376(2) (g) and 506(2) of IPC and sentence awarded thereunder is upheld.

42. Under the circumstances, the appeal being bereft of merit is dismissed.

43. Records of the Court below be sent back forthwith along with the copy of the order.

44. Copy of this order be sent to the concerned Tihar Jail Superintendent for information.