
(2006) 11 GUJ CK 0063

In the Gujarat High Court

Case No : Criminal Appeal No's. 77 and 247 of 2003

Poladi Yakubkhan @ Nini Rahmetkhan

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 08-11-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 365, 376(2), 395

Citation : (2007) 2 GLR 1211

Hon'ble Judges : K.A. Puj, J; A.M. Kapadia, J

Bench : Division Bench

Advocate : Sadhna Sagar, in Criminal Appeal No. 247 of 2003 and M.J. Buddhahatti, in Criminal Appeal No. 77 of 2003, for the Appellant; K.P. Raval, APP, for the Respondent

Final Decision : Allowed

Judgement

A.M. Kapadia

1. These two Criminal Appeals u/s 374 of the Code of Criminal Procedure ("the Code" for short) are directed against the judgment and order dated 25.11.2002 rendered in Sessions Case No. 420 of 2002 by the learned Additional Sessions Judge, Fast Track Court, Patan, by which the appellants ("accused" for short) of both these appeals have been convicted for the offences punishable under Sections 365, 376(2)(g) and 395 of the Indian Penal Code ("IPC" for short) and sentenced to suffer R.I. for 4 years and fine of Rs. 500/- i.d., S.I. for three months for the commission of the offence punishable u/s 365 IPC, R.I. for 10 years and fine of Rs. 1,000/- i.d., S.I. for six months for the commission of the offence punishable u/s 376(2)(g) and R.I. for 5 years and fine of Rs. 1,000/- i.d., S.I. for six months for the commission of the offence punishable u/s 395 IPC. It is also ordered that all the substantive sentences shall run concurrently.

2. The case of the prosecution, as disclosed from the FIR and unfolded during trial, in short, is as under:

2.1. On 28.3.2001, the complainant-prosecutrix (Mrs. X for short) of village Kahoda, had domestic quarrel with her husband and she left the house at 7.00 P.M., for going to her parental home at Khodambha, Taluka Mandvi, District Surat. She walked down to Siddhpur Bus Depot at about 10.00 P.M., and waited upto 11.30 P.M. at the bus stop but the bus did not arrive. At that time, four boys approached her. Apprehending mischief, she started to walk away from bus depot towards Rasul Lake gate. At that time she was followed by two rickshaws. In the first rickshaw, four persons were sitting. They forcibly dragged her inside the rickshaw and the rickshaw was driven towards Siddhpur Town. Thereafter she was dragged in a house situated near railway track by 5 to 6 persons, they repeatedly raped her upto 1.00 A.M., on 29.3.2001 and threatened to kill her. Thereafter they again took her in the rickshaw to the river bed of Saraswati River, robbed off her golden and silver ornaments consisting of golden kada, ear rings, silver mangal sutra and silver anklets and all of them flee in the auto rickshaws.

2.2. As per further narration of Mrs. X, the accused were put on bush-shirts, jersey and pants of different colours and they were talking by names inter-se. She also stated that as she was having severe pain, she laid down in the river bed upto early morning and thereafter approached Siddhpur Police Station and lodged FIR which was registered vide C.R. No. I-52 of 2001 and the offence was registered.

2.3. Pursuant to the registration of the FIR, investigation was put into motion. PW.26, Nanjibhai Sarjibhai Ninama, Police Inspector-Investigating Officer, Ex.56, visited the scene of the offence and drew up the Panchnama in presence of Panchas. He also summoned the officers of Forensic Science Laboratory ("FSL" for short) and in their presence mattress and one bed-sheet were recovered in the presence of Panchas. The prosecutrix - Mrs. X was sent for medical check up to Community Health Centre, Siddhpur with the assistance of a Lady Police Constable. Thereafter the panchnama of the person of the complainant Mrs. X was drawn. Her clothes were recovered in presence of panchas. Further statement of the complainant Mrs. X was also recorded in presence of Panchas. On the basis of her statement, statement of one alleged eye witness, P.W.2, Shambhubhai Charabhai, Ex.14, was recorded. Statement of the husband of the victim was also recorded. The accused were arrested and their clothes were recovered in presence of panchas and they were sent for medical check-up to Community Health Centre, Siddhpur. The muddamal articles which were looted from the complainant were also recovered from the accused by drawing discovery panchnama. Thereafter the clothes, mattress and bed-sheet were sent to FSL for chemical analysis. On receipt of the report from the FSL and medical report, incriminating evidence was found against the accused and, therefore, they were charge-sheeted in the Court of learned JMFC, Patan.

2.4. As the offences punishable under Sections 365, 376(2)(g) and 395 are exclusively triable by the Court of Sessions, the learned JMFC, Patan committed

the case to the Court of Sessions, Patan where it was registered as Sessions Case No. 420 of 2002.

2.5. The learned Additional Sessions Judge, Fast Track Court, Patan, to whom the case was made over for trial, framed charge against the accused for commission of offences of kidnapping, gang-rape and dacoity. All the accused pleaded not guilty to the charge and claimed to be tried and thereupon they were tried by the trial court in Sessions Case No. 420 of 2002.

2.6. To prove the culpability of the accused, the prosecution has examined as many as 26 witnesses, the details of which have been mentioned in paragraph 7 of the impugned judgment and order. They are as under:

P.W. No. Name Ex. No. 1 Complainant-Prosecutrix Mrs. X 11 2 Shambhubhai Cheharbhai Rabari 14 3 Chandanji Bhupatji Thakore Panch witness 15 4 Dineshji Somaji Thakore Panch witness 17 5 Javanji Ramtuji Thakore Panch witness 18 6 Laxmanji Panaji Thakore Panch witness 20 7 Amarsinh Banaji Rajput Panch witness 21 8 Bhartiben Narangiri Goswami Panch witness 23 9 Piyushkumar Bhogilal Raval Panch witness 24 10 Arvindbhai Jethalal Nai Panch witness 26 11 Sureshkumar Chandumal Sindhi Panch witness 27 12 Kantibhai Keshabhai Vaghri Panch witness 29 13 Sirajbhai Ahmedbhai Shaikh Panch witness 30 14 Mustakkhan Mahmadkhan Panch witness 32 15 Rameshji Shankarji Zala Panch witness 33 16 Bhurabhai Chimanlal Shukla Panch witness 35 17 Amarsing Nathaji Thakore Panch witness 37 18 Gandaji Manaji Thakore Panch witness 40 19 Pathan Azizkhan Mahmadkhan Panch witness 41 20 Vaghaji Keshaji Darbar Panch witness 44 21 Baldevsinh Gambhirsinh Vaghela Panch witness 45 22 Joitaram Nathalal Patel Panch witness 48 23 Pravinbhai Mavjibhai Solanki Panch witness 49 24 Dr. Rahimbhai Ibrahimbhai Memon Medical Officer 50 25 Babulal Kantilal Solanki PSI 54 26 Nanjibhai Surjibhai Ninama Investigating Officer 56

2.7. The prosecution has also produced a number of documents and relied upon the contents of the same, the details of which have been narrated in paragraph 8 of the impugned judgment and order. They are as under:

S. No. Particulars Ex. No. 1 Original complaint of the complainant 12 2 Panchnama of the scene of offence 16 3 Panchnama in respect of themuddamal recovered from the scene of offence 19 4 Panchnama of the person of the complainant 22 5 Panchnama of the person of the accused 25 6 Panchnama in respect of the recovery of cloth of the accused Yakubkhan Rahematkhan 28 7 Panchnama in respect of the recovery of the cloth of accused Arifkhan Husainkhan 31 8 Discovery panchnama in respect of the rickshaw used in the commission of the crime and silver "sher" 34 9 Panchnama in respect of the muddamal identified by the complainant 36 10 Discovery panchnama at the instance of accused Bhavuji Diluji in respect of the golden ornament 38 11 Discovery panchnama at the instance of accused Poladi Yakubkhan Rahematkhan in respect of the silver "sher" 39 12 Discovery panchnama at the

instance of accused Chhanaji in respect of mangal sutra 42 13 Recovery panchnama of hair from the rickshaw 43 14 Panchnama in respect of the scene of offence as shown by the accused Arifkhan 46 15 Discovery panchnama at the instance of accused Arifkhan in respect of ear-ring and two small "ghooghari" 47 16 Medical certificate of complainant Mrs. X 52 17 Medical certificate of complainant Mrs. X 53 18 Depute order 55 19 Yadi written to the doctor 57 20 Yadi written to the Medical Officer 58 21 Note relating to forwarding muddamal 59 22 Receipt issued by FSL having received the muddamal 60 23 Forwarding letter of FSL 61 24 Report of FSL 62 25 Report of Serology Department 63 26 Report of FSL 64 27 Medical Certificate of accused Ashok Madhuji 65 28 Medical Certificate of accused Arifkhan 66 29 Medical Certificate of accused Bhavuji Diluji 67 30 Medical Certificate of accused Prahladji Amarsing 68 31 Medical Certificate of accused Yakubkhan 69 32 Medical Certificate of accused Chhanaji Kanuji 70

2.8. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement u/s 313 of the Code. In their further statement, they stated that the police constable Muljibhai called all of them to the police station and thereafter in their presence the complaint of the victim Mrs. X was recorded and registered and thereafter all of them were arrested illegally without there being any offence committed by them. They also stated that they did not know anything about the said incident and they have been falsely implicated in a case of gang-rape. However, they did not lead any evidence nor did they examine any witness in support of their defence.

2.9. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court has held that the testimony of the complainant Mrs. X inspires confidence and her evidence gets corroboration from medical evidence. Besides this, Ex. 65 to 70, which are certificates issued by the medical officer who examined the accused, before whom they have given history that they had committed sexual intercourse with consent of female partner on 28.3.2001, also give corroboration to prosecution case. Therefore, the trial court has observed that there is no reason to disbelieve the prosecution witnesses. The trial court has, therefore, held that the complicity of the accused for committing kidnapping, gang-rape and dacoity is proved, therefore, the accused are held guilty of the offences with which they are charged and accordingly recorded the order of conviction against them for commission of the offences punishable under Sections 365, 376(2)(g) and 395 IPC and sentenced them accordingly to which reference is made earlier in this judgment. It is this judgment and order of conviction and sentence which is now on the anvil of scrutiny before this Court in these two appeals i.e., Criminal Appeal No. 247 of 2003 filed by A-5 and A-6 and Criminal Appeal No. 77 of 2003 filed by A-1 to A-4.

3. Mr. Buddhabhatti, learned advocate of the appellants in Criminal Appeal No.

77 of 2003 and Ms. Sadhna Sagar, learned advocate of the appellants of Criminal Appeal No. 247 of 2003, have taken us through the oral as well as documentary evidence which are on record and assailed the judgment and order of conviction and sentence by submitting that there is no reliable, trustworthy and clinching evidence which would unerringly lead to the conclusion that the accused have committed the crime of kidnapping, gang-rape and dacoity. The oral testimony of prosecutrix - Mrs. X is bristled with a lot of contradictions and omissions. She has given a total go-by to the complaint which she herself has lodged before the police officer and there is material variance in the complaint as well as in her oral testimony before the court. She has given different versions in the complaint and in her oral testimony. She has changed the scene of the offence. They have further submitted that it is true that sole testimony of the prosecutrix in a case of gang-rape can be based for conviction of the accused if it inspires confidence of the Court, but in instant case, according to them, the sole testimony of the prosecutrix Mrs. X is not sufficient to establish the case of gang-rape against the accused as the medical evidence does not corroborate the oral testimony of the prosecutrix Mrs. X. According to them, the entire incident is got up. It is also contended by them that it might be true that the accused might have committed sexual intercourse with her but it was with her consent and connivance as the prosecutrix was a consenting party to it. It is also high-lighted by them that the past of the prosecutrix is shabby. She and her husband both were involved in prohibition cases. Therefore, possibility that the accused might have been wrongly roped in a false case of gang-rape with some ulterior motive, cannot be ruled out. Further more, identity of the accused is also not established. There is neither any name or any description about the accused nor there is any mention that the accused were previously known to the prosecutrix. However, the six accused persons were brought to the police station and thereafter the complaint was recorded. No test identification parade was conducted before the Executive Magistrate.

3.(i) So far as the recovery of muddamal articles which were allegedly looted from the prosecutrix by the accused by drawing recovery panchnama is concerned, according to them, the panchnama has not been proved as none of the panch witnesses has supported the prosecution case with regard to recovery of the muddamal from the accused which were allegedly looted from the prosecutrix Mrs. X by the accused.

3.(ii) According to them, taking the over all view of the matter and considering the entire evidence on record and more particularly in view of the fact that the evidence of the prosecutrix does not inspire confidence as it is highly improbable and unbelievable, the impugned judgment and order deserves to be quashed and set aside by acquitting the accused of the offences with which they were charged by giving them benefit of doubt. They, therefore, urged to allow the appeals by quashing and setting aside the impugned judgment and order and thereby to acquit the accused of the offences with which they were charged, by giving them benefit of doubt.

3.(iii) In support of the aforesaid submissions, they have relied upon the following reported decisions of the Supreme Court:

(a) State of Maharashtra Vs. Abdul Hafiz Faroki and Others,

(b) Ram Nivas v. State of Karnataka 1994 SCC 503.

4. In counter submission, Mr. K.P. Raval, learned Additional Public Prosecutor for the respondent State of Gujarat, has supported the case of the prosecution and submitted that no interference is called for in the impugned judgment and order of conviction and sentence recorded against the accused. According to him, no case is made out by the accused to take a different view in the matter than the view taken by the trial court. He has submitted that the prosecutrix Mrs. X in her deposition has clearly stated that all the accused, one after the other, committed rape upon her. She has narrated the entire incidence in her deposition and on the basis of her deposition, charge of gang rape against the accused is proved. It is also submitted by him that the oral testimony of the prosecutrix gets corroboration from her own complaint as well as medical evidence as semen and blood stains were found in the mattress, bed-sheet and clothes of the accused as well as the prosecutrix. Therefore, according to him, the case of gang-rape against the accused has been duly proved.

4.(i) So far as the evidence with regard to dacoity is concerned, Mr. Raval, learned APP has submitted that after ravishing the prosecutrix in a house near railway track, the accused took her to the river bed and robbed off her golden and silver ornaments which were recovered from the accused by drawing panchnama. It is true that the panchnama has not been supported by the panchas but the panchnama has been proved by the evidence of the prosecutrix as well as the police officer and, therefore, there is no reason to disbelieve the case of the police officer.

4.(ii) To canvass the proposition that conviction can be based on the sole testimony of the prosecutrix without insisting for corroboration if the evidence of the prosecutrix inspires confidence of the Court, Mr. Raval, learned APP has relied upon the following three decisions of the Supreme Court:

(a) Kamalanantha and Others Vs. State of Tamil Nadu,

(b) State of M.P. Vs. Dayal Sahu,

(c) State of Uttar Pradesh Vs. Pappu alias Yunus and Another,

4.(iii) On the aforesaid premises, it is submitted by him that the trial court has rightly convicted and sentenced the accused for commission of offences of kidnapping, gang-rape as well as dacoity and, therefore, the impugned judgment and order does not warrant any interference of this Court and according to him, the appeals filed by the accused deserve to be dismissed. He, therefore, urged to dismiss the appeals.

5. We have considered the submissions advanced by Mr. Buddhabhatti and Ms.

Sadhna Sagar, learned advocates of the accused and Mr. KP Raval, learned APP for the respondent - State of Gujarat. We have more carefully undertaken a very close and critical scrutiny of the evidence of the prosecutrix Mrs. X and the evidence of the medical officer who examined her after the alleged incident. We have also perused the impugned judgment and order and the evidence on record. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

6. The charge against the accused is that on 28.3.2001 they followed the prosecutrix at about 11.30 P.M. in two auto rickshaws and kidnapped her and took her to a house situated near railway track where they committed gang-rape upon the prosecutrix, upto 1.00 A.M. on 29.3.2001. They also threatened her. Thereafter they took her to Saraswati river bed and robbed off her golden and silver ornaments consisting of golden kada, ear rings, silver mangal sutra and silver anklets.

7. To prove this charge, the prosecution has examined and relied upon the evidence of P.W.1, prosecutrix Mrs. X, at Ex.11, which is at page 58 of the paper book.

7.(i) In her oral testimony she has stated that she is staying with her family at village Kahoda. Her parental home is at Khodambha, Taluka Mandvi, District Surat. Thakore Jayantiji Kesaji is her husband. She married with him since more than twelve years. When Jayantiji came to Surat City for labour work, she got acquainted with him. Her first marriage took place with Jivanbhai. He belonged to Mahudi village. Her marriage with Jayantiji is her second marriage. No child is born out of the said wedlock. Rajesh is her son born out of her first marriage and after getting married with Jayantiji, she brought Rajesh with her to village Kahoda and he is staying with her.

7.(ii) The incident took place about thirteen months back. On that day she left her house to go to her parental house at Surat. On that day she had a quarrel with her husband and because of that she left for Surat in the evening. When she left Kahoda, it was about 7 O'clock in the evening. From Kahoda to Siddhpur Bus depot she walked. When she reached Siddhpur Depot, it was 10 O'clock at night. After reaching Siddhpur Bus Depot, on inquiry when it came to know that the bus had already gone, she decided to go back to Kahoda village. Two rickshaws were standing outside the bus depot and she decided to go in one of the rickshaws to village Kahoda. She did not know to whom the rickshaw belonged. There were two persons sitting in the rickshaw in which she was travelling and another rickshaw came behind. The driver of the first rickshaw in which she was travelling took the rickshaw towards the river in Siddhpur. There was no house at that place. In the first rickshaw, accused Nos. 5 and 6, who are present in court, were sitting and she identified them and those accused have given their name in Court as Yakubkhan and Arifkhan. The rickshaw was driven by the accused who had put on white shirt (accused Yakubkhan) and after

reaching the river bed first of all they looted her golden and silver ornaments such as golden kada, ear rings, silver mangal sutra and silver anklets.

7.(iii) After looting her, the accused Yakubkhan started molesting her. Yakubkhan removed her sari and "chanio" and made her to sleep in the river bed. Thereafter Yakubkhan removed his pant and slept over her with shirt and underwear on him. Thereafter she stated that he removed his underwear also before he slept over her. Thereafter Yakubkhan started biting on her breast and also pinching on her body. Thereafter he raped her. He raped her for half an hour. Thereafter, Arifkhan who is sitting on the bench of the Court and put on check shirt, removed his underwear and raped her. Thereafter he did not do anything. After she was raped by the aforesaid two accused, rest of the four accused arrived there. Thereafter Ashok, who is sitting second on the bench and who had put on check shirt, raped her. Thereafter remaining three accused had also raped her. She identified the accused in the Court.

7.(iv) The incident in question took place between 12 mid-night to 1 A.M. Thereafter all the accused flee from the place in their rickshaws and she had gone to Siddhpur on foot. At that time it was about 2 O' clock at night. At that time the officer was present in the Court and Head Constable Muljibhai who belonged to her village was also there. The officer had put on khakhi dress. She informed the officer about the incident and lodged the complaint. After seeing the complaint she stated that it is her thumb impression that is on complaint which is at mark 10/2 which is exhibited vide Ex.12.

7.(v) Because she was raped by the accused, she had pain on her back and she was bleeding. She was sent to hospital and the doctor treated her. She informed the doctor that she was raped and she has pain.

7.(vi) After lodging the complaint the police again called her at the police station and showed her the ornaments which she identified. At the time of incident, one person came to save her whose name she did not know.

7.(vii) In her cross-examination, she has clarified that the place where she reached at the night of the incident after the incident, on foot, was not the court but it was police station. At that time Head Constable Muljibhai who belonged to her village was present in the police station and at that night he brought about 5 to 15 rickshaw drivers. Initially he brought two rickshaw drivers. They gave the names of other rickshaw drivers. She had no love affairs or illicit relations with any of the accused prior to the incident. Prior to the incident there was no occasion on which she had gone with any of the accused. Prior to the incident she even did not know any of the accused. Even on the date of incident, she did not know any of the accused by name. She has stated that it is true that after the incident the Head Constable Muljibhai brought various rickshaw drivers and thereafter name of the accused came to be known. She has stated that it is not true that there was no occasion of identifying the accused in the office of Mamlatdar. She has also stated that it is not true that there was no identification

parade held in the office of the Mamlatdar. She has also stated that it is true that from 2 O'clock at night till 8 A.M. the police has taken her complaint. She has also stated that it is true that after the accused were arrested, at about 8 A.M. the police has taken her complaint. She has also stated that it is not true that any of the accused had not done wrong with her nor looted her ornaments on the day of the incident and only on the basis of suspicion the accused were identified.

7.(viii) She has stated that it is not true that she is doing the business of selling liquor. She has stated that it is true that earlier case was filed against her for selling liquor and she had gone to jail. She has also stated that it is true that about 7 to 8 cases relating to prohibition were filed against her and her husband. She has also stated that it is not true that she is saying lie that the present accused had done wrong with her and looted her ornaments on the day of the incident. She has also stated that it is not true that her ornaments were mortgaged and after getting those ornaments back from the place where the ornaments were mortgaged they were wrongly shown to be recovered from the accused.

This is the sum and substance of the oral testimony of the prosecutrix Mrs. X.

8. For the alleged incidence, she lodged a complaint which is on record at Ex.12, page 62 of the paper book. In her complaint, she has narrated that on 28.3.2001 she had a quarrel with her husband and she left the house at 7 P.M. for going to her parental home at Khodambha, Taluka Mandvi, District Surat. She walked down to Siddhpur bus depot at about 10.00 P.M. and waited upto 11.30 P.M. at the bus stop but the bus did not arrive. At that time, four boys approached her. Apprehending mischief, she started to walk away from the bus depot towards Rasul Lake Gate. At that time she was followed by two rickshaws. In the first rickshaw four persons were sitting. They forcibly dragged her inside the rickshaw and the rickshaw was driven towards Siddhpur Town. Thereafter she was dragged in a house situated near railway track by 5 to 6 persons and they repeatedly raped her upto 1 A.M. on 29.3.2001 and threatened to kill her. Thereafter again they took her in rickshaw in the river bed of Saraswati river, robber off her golden and silver ornaments consisting of golden kada, ear rings, silver mangal sutra and silver anklets and all of them flee in the auto rickshaws.

9. On a comparative analytical study of the oral testimony of P.W.1, prosecutrix, Mrs. X, at Ex.11, page 58 of the paper book and the complaint lodged by her before the police, it is seen that she has narrated a different story in the complaint. She has stated in the complaint that four boys approached her at the bus stand and apprehending mischief she started walking away from the bus depot towards Rasul Lake gate. At that time she was followed by two rickshaws. In the first rickshaw, four persons were sitting. They forcibly dragged her inside the rickshaw and the rickshaw was driven towards Siddhpur Town. Thereafter she was dragged in a house situated near railway track by 5 to 6 persons, they repeatedly raped her upto 1 A.M. on 29.3.2001 and threatened to kill her. Thereafter they again took her in rickshaw in the river bed of Saraswati river,

robbed off her golden and silver ornaments consisting of golden kada, ear rings, silver mangal sutra and silver anklets and all of them flee in the auto rickshaws.

9.(i) If we read her testimony before the Court, she has stated that when she reached Siddhpur depot, it was 10 O'clock at night. After reaching Siddhpur bus depot, on inquiry when it came to know that the bus had already gone, she decided to go back to Kahoda village. Two rickshaws were standing outside the bus depot and she decided to go to village Kahoda in one of the rickshaws. Two persons were sitting in the rickshaw in which she was travelling and another rickshaw came behind. The driver of the first rickshaw in which she was travelling took the rickshaw towards the river in Siddhpur. There was no house at that place. After reaching there, accused Nos. 5 and 6 looted her golden and silver ornaments. Thereafter accused No. 5 Yakubkhan started molesting her. Thereafter Yakubkhan raped her for half an hour in the river bed. Thereafter accused No. 6, Arifkhan raped her. After that rest of the accused arrived there and they also raped her.

9.(ii) If this is the state of affairs of the evidence of the prosecutrix, then it has to be deduced that she has given a total go-by to the complaint filed by her which is at Ex.12, page 62 of the paper book, while deposing before the Court. There is variance in respect of the place of alleged rape and the sequence of incidence in the complaint lodged before the police as well as in the deposition of the prosecutrix before the Court. It may be noted that she has not been declared hostile. It is not understood as to why she has given a total go-by to the complaint lodged before the police and deposed a different story changing the sequence of incident and the place of offence, etc., before the Court.

9.(iii) On perusal of the evidence on record as it stands, according to this Court, the prosecutrix Mrs. X is not a witness of sterling quality. The story given by her is highly improbable and unbelievable.

10. It is settled proposition of law by catena of decisions of the Supreme Court that conviction can be based on the sole testimony of the prosecutrix without insisting for corroboration if the evidence of the prosecutrix inspires confidence of the Court. In the case of (i) Kamalanantha's case (supra), (ii) Dayal Sahu's case (supra) and (iii) Pappu's case (supra), the Supreme Court has reiterated the same proposition of law. In instant case, in view of the foregoing discussion of the evidence of the prosecutrix, as she has given a total go-by to the version in the complaint and deposed a different story before the Court, she cannot be branded as a witness of sterling quality and on the basis of her sole testimony, conviction cannot be recorded without insisting for corroborative evidence. Therefore, we have to examine the testimony of other witnesses also to see whether the testimony of the prosecutrix gets corroboration from any independent witness.

11. In this connection, the prosecution has placed reliance on the evidence of P.W.24, Dr. Rahimbhai Ibrahimkhan, Ex.50, which is at page 119 of the paper

book. He has, inter alia, testified that on 29.3.2001 he was on duty as Medical Officer, Community Health Centre, Siddhpur. At that time one lady constable Anilaben, Buckle No. 33 brought the prosecutrix Mrs. X with police yadi for medical check up. He checked her up and at that time she gave the history that on 28.3.2001 at about 11 P.M. about 5 to 6 persons kidnapped her from rickshaw and took her to one cabin near Nala and out of that two persons caught hold of her and ravished her. Thereafter they took her to river bed and looted her ornaments. The doctor has further testified that during her external examination there was no injury mark on her face, breast, neck, buttocks, knees, ankles, elbows and hands. On internal examination, no injury mark was found on her genital organ, prepuce, glans, scrotum, labia majora, franeum, forchatte. Old hymenal rupture was noticed. On microscopic examination of the smear slide spermatozoa was not found. He was unable to give opinion as to whether within last 48 hours she was subjected to sexual intercourse and stated that it could be given after receipt of the report of the FSL. He has further testified that as per the report of FSL, she was subjected to sexual intercourse within last 48 hours. He has issued certificates which are on record at Ex.51, 52 and 53. He has admitted in cross-examination by the learned advocate of the accused that if somebody ravishes a lady against her wish then obviously the lady would protest take defence and in that case, violence marks would be be visible on the body of the victim. In this case he could not notice any mark of violence on the body of Mrs. X.

12. A comparative analytical study of the oral testimony of the prosecutrix Mrs. X and P.W.25, Dr. Rahimbhai Ibrahimhai, Ex.50, at page 119, the story narrated by the prosecutrix Mrs. X in her oral testimony and in her own complaint does not get corroboration. The medical evidence is in conflict with the version of the prosecutrix as there was no mark of violence on any part of her body. The evidence further reveals that there was no mark of violence or injury on any part of her body when she was examined by the doctor at 12.00 noon on 29.3.2001. The doctor has admitted that on microscopic examination no spermatozoa in vaginal swab was found present. Nothing was found in the nail. He has also admitted that the victim would resist forcible intercourse but no such sign was found on the prosecutrix. No blood was found in her private part. The doctor has admitted in cross-examination that no sign of violence or torn clothes or broken bangles was found.

13. So far as the medical certificates issued by Dr. Rahimbhai Ibrahimhai are concerned, the history written in Gujarati is not in the hand writing of the doctor. It is apparent from the record that it was subsequently written in small space. In view of this also the history given by the prosecutrix before the doctor that she was ravished by six persons cannot be accepted.

14. Thereafter the prosecution has examined and relied upon the evidence of P.W.2, Shambhubhai Charabhai, Ex.14, which is at page 65 of the paper book. This witness was allegedly present at the time of incident and came to rescue the

prosecutrix. He has not supported the prosecution case and, therefore, he was declared hostile. He was thereafter cross-examined by the learned APP. During his cross-examination he stuck to the version which he has narrated in the examination in chief that he does not know anything about the incident.

15. The prosecution thereafter examined and relied upon the evidence of P.W.8, Bhartiben Naranbhai, Ex.23, page 76 of the paper book, who is a panch witness to the panchnama of the person of the prosecutrix Mrs. X. In her presence the panchnama of the cloths put on by the prosecutrix was made. She has testified that there was biting marks on the breast of the prosecutrix and pinching marks were also present on her body.

16. As discussed earlier, from the medical evidence of Dr. Rahimbhai Ibrahimbhai, it is seen that no injury mark was found present on the person of the prosecutrix. Therefore, evidence of Bhartiben Naranbhai cannot be relied upon to come to the conclusion that there was biting marks on the breast of the prosecutrix and marks of pinching were also found present on the body of the prosecutrix.

17. The prosecution thereafter has relied upon the FSL report to prove that there were semen marks present on the cloths of the accused as well as the prosecutrix, mattress and bed sheet. A perusal of the FSL report reveals that there were marks of semen and blood. But that fact itself cannot be a decisive factor that the prosecutrix was subjected to gang rape by the accused, more particularly in view of the oral testimony of the prosecutrix which does not inspire the confidence of the court and does not get corroboration from independent evidence.

18. The story of the prosecution as narrated through the prosecutrix is highly improbable and unbelievable. If a lady is ravished by six persons for about one hour, her body and private part would certainly show marks of violence, tearing and severe bleeding. The marks of violence would be more prominent on back, elbow, breast and private part. In instant case, even her clothes were not torn.

19. It has also come in evidence that the police officer had brought the accused persons to the police station and the complaint of the prosecutrix was recorded thereafter. Therefore identity of the accused is not established. There is also no evidence on record to suggest that the prosecutrix knew the accused previously. No T.I. Parade was held before the Executive magistrate.

20. It may be appreciated that the panch witnesses have also not supported the panchnamas and the prosecution did not get any help from them to establish its case and to prove that the muddamal ornaments allegedly looted were recovered from the accused by drawing a discovery panchnama.

21. In the case of State of Maharashtra v. Abdul Hafiz Faroki and Ors. (supra), the Supreme Court was concerned with the alleged rape by eight persons and that too twice and that the accused had pushed prosecutrix out of running train

after giving kicks. In paragraph 4 of the said judgment, the Supreme Court has observed as under:

Section 4. We have carefully gone through the evidence of PW 1, Rukmani and PW 2, Kesarbai. Judging it on the ground of probability, their version that 8 persons had committed rape on Kesarbai and that too twice does not appear to be correct. In the first information report given by PW 1, Rukmani her version was that Kesarbai was taken into the latrine of the compartment and therein the accused had committed rape on her. In her evidence before the Court she changed her version and she and Kesarbai both stated that rape was committed on her not inside the latrine but inside the compartment on the floor in between two berths. Kesarbai at the time of the incident was aged 20 years. The evidence shows that she was not carrying on well with her parents and she had left Village Kekatumra with her aunt Rukmani two days before the date of the incident. They did not have money to purchase tickets and, therefore, they were travelling without tickets. That was the reason why they had to get down at Akola Railway Station and stay there for the whole day. They had boarded the train at Akola for going to Wardha at 12 midnight without purchasing tickets possibly believing that they will not be caught at night. However, the Ticket Checker caught them and, therefore, they were required to get down at Pulgaon. They stayed at Pulgaon for the whole day and boarded the train for going to Chandrapur at 9.00 p.m. Neither PW 1, Rukmani nor PW 2, Kesarbai have stated why they wanted to go to Chandrapur. Neither Kesarbai nor her aunt had more than three rupees when they left Village Kekatumra. According to the evidence of PW 1, Rukmani after the accused had committed rape on Kesarbai they had pushed her giving kicks upto the door of the compartment and then had thrown her out of the compartment when the train was passing through the Wardha Railway Yard and was only a short distance away from the Station. Kesarbai has also stated that she was pushed out of the running train. If really 8 persons committed rape on Kesarbai and that too twice and had pushed her out of the running train after giving kicks then some injuries would have been found on her person. But except for a small incised wound on her right hand and some minor superficial abrasions no other injury was found on her person. If Kesarbai was really thrown out of the train while it was passing through the Railway Yard and was taken forcibly by A-1 and A-2 to the nearby hillock then she would have raised some shouts. But that is not her evidence. That appears to be the reason why the High Court held that possibly Kesarbai had gone with A-1 and A-2 willingly and with an ulterior motive both of them had falsely involved the accused. Considering the infirmities in the prosecution evidence, it cannot be said that the view taken by the High Court is unreasonable and calls for any interference by this Court.

22. In the case of *Ram Nivas v. State of Karnataka* (supra), the prosecution case mainly rested on the evidence of the prosecutrix. As per the evidence, spermatozoa was absent. No injuries were found on the prosecutrix or on the accused suggesting forcible intercourse. The prosecutrix being a grown up married woman, the doctor was unable to give any opinion whether rape had

been committed or not. The evidence of the prosecutrix was found to be highly untrustworthy. In these circumstances, it was held that the accused were entitled to the benefit of doubt.

23. Applying the principles laid down by the Supreme Court in the aforesaid two judgments to the facts of the present case, it has to be held that the evidence of the prosecutrix Mrs. X is not of sterling quality. She has given total go-by to the complaint filed by her before the police while giving testimony before the Court. She has changed the place of incidence and sequence of events. She has not shouted for help even when six persons allegedly tried to commit intercourse with her. There was no mark of injury found on her body even though it was alleged that she was forcibly ravished by the accused persons against her wish. It may be noted that she has admitted that she and her husband are doing liquor business and against them 7 to 8 prohibition cases were filed and once she had been convicted and sent to jail in connection with a prohibition case. Therefore her past is shabby and her oral testimony does not get any support from the medical evidence as well as other independent witnesses. The panchas also did not support the panchnamas. If really six persons had committed rape on her and that too in river bed, then some injury would have been found on her person but there was no injury found on her person. No spermatozoa was found. Therefore possibility that she was a consenting party for facilitating the accused for having sexual intercourse with her with ulterior motive and she has falsely involved the accused in the case, cannot be ruled out. In these circumstances, the prosecution has failed to prove the charge against the accused beyond reasonable doubt and a doubt is raised upon the prosecution case and, therefore, the accused are entitled to the benefit of doubt.

24. Seen in the above context, we find that the prosecution has failed to prove the charge levelled against the accused beyond reasonable doubt and, therefore, the impugned judgment and order deserves to be quashed and set aside by allowing these appeals and thereby acquitting the accused of the offences with which they are charged by giving the benefit of doubt to them.

25. For the foregoing reasons, both the appeals succeed and accordingly they are allowed. The impugned judgment and order dated 25.11.2002 rendered in Sessions Case No. 420 of 2002 by the learned Additional Sessions Judge, Fast Track Court, Patan convicting and sentencing the accused for commission of the offences punishable under Sections 365, 376(2)(g) and 395 of the IPC is quashed and set aside. The accused are acquitted of the offences with which they are charged by giving benefit of doubt.

The accused are in jail. Therefore, they are ordered to be set at liberty forthwith if they are not required in connection with any other case.

Fine, if any paid by the accused, shall be refunded to them.