

(2018) 10 MP CK 0026

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 80, 92, 133 Of 2007

Yusuf Khan & Anr

APPELLANT

Vs

State Of Madhya Pradesh

RESPONDENT

Date of Decision : 04-10-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 90, 366, 375, 376(2), 392, 506B
Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 — Section 11, 13
Code of Criminal Procedure, 1973 — Section 164
Evidence Act, 1872 — Section 114A

Citation : (2018) 10 MP CK 0026

Hon'ble Judges : G.S. Ahluwalia, J

Bench : Single Bench

Advocate : RK Sharma, MK Chaudhary, RVS Ghuraiya

Final Decision : Allowed

Judgement

(1) This Common Judgment shall also dispose of Criminal Appeal No.80/2007 filed by Kashiram and Criminal Appeal No.92/2007 filed by Devi Singh.

(2) These Criminal Appeals have been filed against the judgment and sentence dated 12th January, 2007 passed by Special Judge (MPDVPK Act), Gwalior in Special Sessions Trial No.13/2006, by which the appellants have been convicted under Sections 376(2) & 366 of IPC r/w Section 13 of MPDVPK Act, 1981 and have been sentenced to undergo the rigorous imprisonment of ten years and a fine of Rs.500/- for offence under Section 376(2) of IPC, rigorous imprisonment of ten years and a fine of Rs. 500/- for offence under Section 366 of IPC r/w Section 13 of MPDVPK Act, 1981 respectively with default imprisonment. Both the sentences have been directed to run concurrently.

(3) The necessary facts for the disposal of the present appeals in short are that the complainant Mullo Bai made a written complaint to the Superintendent of Police on the allegation that she along with the prosecutrix, who is her daughter-

in-law, had come to Jorasi Temple at about 01:00 pm for worship purposes. They deboarded the bus on the main road which was slightly away from the Temple and, therefore, they were standing there in order to enquire from the by-passers about the road to the temple. After sometime, three persons came on two motorcycles and asked them as to why they are standing all alone. Then the complainant and the prosecutrix informed them that they want to go Jorasi Temple for worship, but they are not aware of the road. Then, these three persons told them they are also going to the said Temple. Accordingly, the complainant Mullo Bai and the prosecutrix took lift on the motorcycles. The prosecutrix sat on one motorcycle, whereas the complainant sat on another motorcycle. The motorcycle on which the prosecutrix was sitting, was ahead of the motorcycle on which the complainant Mullo Bai was sitting. After covering some distance, the person who was driving the motorcycle on which the complainant was sitting, stopped the motorcycle and requested the complainant to get down from the motorcycle as the motorcycle was not working properly. It is alleged that the moment the complainant got down from the motorcycle, the person who was driving the motorcycle, went towards Gwalior at a high speed. Before the complainant could understand the things, both the motorcycles went away and the complainant continued to cry and shout on the road. She was continuously weeping on the road, therefore, one motorcycle driver left her at Chandrabadani Ke Nake. On the basis of this complaint, FIR was lodged at Serial No.0 and later on, it was registered at Crime No.1/2003 which is Ex.P6. On 14/01/2003, the prosecutrix was recovered from the Railway Station Sheopur and recovery memo Ex.P5 was prepared. The spot map was prepared and after recording the statements of the witnesses and getting the prosecutrix medically examined, the police filed the charge sheet for offence under Sections 376, 366/34, 392, 506-B of IPC r/w Section 11/13 of the MPDVPK Act against the appellants and four other acquitted accused persons, namely, Prem Narayan, Ramdayal, Raju and Mahendra.

(4) The trial Court by order dated 26/04/2004 framed charges under Section 366 of IPC r/w Section 13 of MPDVPK Act, under Section 376(2) of IPC and under Section 392 r/w Section 13 of MPDVPK Act against appellant Devi Singh, and framed charges under Section 366 r/w Section 13 of the MPDVPK Act and under Section 376(2) of IPC against appellants Yusuf Khan and Kashiram.

(5) The appellants abjured their guilt and pleaded not guilty.

(6) The Prosecution, in order to prove its case, examined Hari Shankar (PW1), Mullo Bai (PW2), prosecutrix (PW3), Nand Kishore (PW4), Dr. Archana (PW5), Dr. R.K. Sharma (PW6), Ramjilal (PW7), Bhikram (PW8), Mahesh (PW9), MA Raghuvanshi (PW10), Nand Kishore (PW11), Manoj Mishra (PW12), Yashwant Singh (PW13), SS Khan (PW14), Subhash Sharma (PW15), Ramesh Chand (PW16), Satish Samadhiya (PW17), Arvind Singh Dangi (PW18) and Pratap Singh Yadav (PW19). The appellants examined Jagdish Singh (DW1) and Mansingh Sharma (DW2) in their defence.

(7) The Trial Court, by judgment and sentence dated 12th January, 2007 passed in Sessions Trial No. 12/2006, acquitted co-accused Prem Narayan, Ramdayal, Raju and Mahendra, but convicted the appellants for offence under Sections 376(2) & 366 of IPC r/w Section 13 of MPDVPK Act, 1981 and sentenced them to undergo the rigorous imprisonment of 10 years and a fine of Rs.500/- for offence under Section 376(2) of IPC, rigorous imprisonment of ten years and a fine of Rs.500/- for offence under Section 366 of IPC r/w Section 13 of MPDVPK Act, respectively with default imprisonment. Both the sentences have been directed to run concurrently.

(8) The acquittal of co-accused Prem Narayan, Ramdayal, Raju and Mahendra has not been challenged either by the complainant or by the State, therefore, any reference to these acquitted co-accused persons, would be in the context of the allegations made against the appellants only.

(9) Challenging the conviction and sentence passed by the trial Court, it is submitted by the learned senior counsel for the appellants that admittedly, the appellant Kashiram is the son-in-law of acquitted co-accused Prem Narayan. One Mohan Singh had three sons and one daughter, namely, Preetam, Ramdayal, Prabhu Dayal and Ramkali. The co-accused Prem Narayan is the husband of Ramkali and appellant Kashiram is the son-in-law of co-accused Prem Narayan. It is also undisputed that Ramdayal lodged a report with regard to murder of his father Mohan Singh. The co-accused Raju who has been acquitted is the son of Preetam Singh. Thus, it is clear that Ramdayal is the son of Mohan Singh, the co-accused Raju is the grandson of Mohan Singh and appellant Kashiram is grandson-in-law of Mohan Singh (son-in-law of the daughter of Mohan Singh) have been made accused, out of which Prem Narayan, Raju and Ramdayal have been acquitted. It is submitted that Mohan Singh was killed by the husband and sons of Mullo Bai (PW2). Mullo Bai (PW2) has also admitted that Mohan Singh is the brother of father-in-law of Mullo Bai (PW2). It is also undisputed that the husband and all five sons of Mullo Bai (PW2) have been convicted and sentenced for ten years imprisonment and their appeal is pending before the High Court. Thus, it is submitted that the appellants have been falsely implicated merely because husband and sons of Mullo Bai (PW2) were prosecuted for committing murder of Mohan Singh, and husband of the prosecutrix, namely, Ramjilal was also prosecuted for murder of Mohan Singh. Although maxim "falsus in uno, falsus in omnibus" has no application in India, but where the parties are on inimical terms and husband and sons of Mullo Bai (PW2) were being prosecuted for committing murder of Mohan Singh, then the complainant and the prosecutrix had a strong motive to falsely implicate the appellants. It is further submitted that if the evidence of the prosecutrix (PW3) is considered in the light of strong motive, then it would be clear that the prosecutrix and the complainant have deliberately falsely implicated the appellants and thus, the evidence of the prosecutrix (PW3) and Mullo Bai (PW2) is not trustworthy and accordingly, the appellants are entitled to be acquitted. It is further submitted that although appellants Yusuf Khan and Devi Singh are not related to appellant Kashiram, but

once the evidence of the prosecutrix is found to be untrustworthy and unreliable, then the appellants Devi Singh and Yusuf Khan are also entitled to be acquitted.

(10) Per contra, it is submitted by the counsel for the State that the motive is a double-edged weapon and if it provides a motive for false implication, then at the same time, it provides a strong motive for the accused to commit an offence. It is true that the witnesses have admitted that husband and sons of Mullo Bai (PW3) were prosecuted for committing murder of Mohan Singh and they have been convicted and sentenced to imprisonment of ten years but the fact that when the husband and sons of Mullo Bai (PW2) had killed Mohan Singh, then this would also provide a strong motive for the appellants to commit rape on the prosecutrix, the wife of one of the co-accused, who has been convicted for murder of Mohan Singh, so that they can take revenge from the family of Mullo Bai (PW2) as well as from the family of prosecutrix (PW3).

(11) Heard the learned counsel for the parties.

(12) Before adverting to the merits of the case, this Court would like to consider that whether the complainant as well as the appellants were on inimical terms or not?

(13) Mullo Bai (PW2), in her cross-examination, has admitted in paragraph 9 that for murder of Mohan Singh, her husband and five sons including Ramjilal have been sentenced to undergo imprisonment of ten years. She has also admitted that the deceased Mohan Singh was the brother of father-in-law of this witness. She has also admitted that at the time of incident, her husband and all the sons were in jail. She has also admitted that Preetam, Ramdayal, Prabhu Dayal and Ramkali are the sons and daughter of Mohan Singh. She has also admitted that the acquitted co-accused Prem Narayan is the husband of Ramkali and the appellant Kashiram is the son-in-law of acquitted co-accused Prem Narayan/Ramkali. She has also admitted that the acquitted co-accused Ram Dayal is the son of Mohan Singh and he had lodged the report and the acquitted co-accused Raju is the grand-son of Mohan Singh, although she has denied for want of knowledge that whether acquitted co-accused Raju was the witness of murder Mohan Singh or not. She further denied that the acquitted co-accused Mahendra was the witness of murder of Mohan Singh and that this witness and her family members had attacked the acquitted co-accused in the Court premises. She further denied that any complaint was made to the Presiding Judge and the Police Station in this regard.

(14) Similarly, the prosecutrix (PW3) has admitted that the deceased Mohan Singh is the uncle of her father-in-law. She has also stated that Mohan Singh had three sons and one daughter. Further, she denied the relationship of the appellant Kashiram with the acquitted co-accused Prem Narayan. However, she admitted that her husband Ramjilal, her father-in-law and her brothers-in-law have been convicted and sentenced to undergo imprisonment of ten years for committing murder of Mohan Singh. However, she denied for want of knowledge

that the acquitted co-accused Ramdayal was the complainant in the case of murder of Mohan Singh and the acquitted co-accused Raju and Mahendra were the witnesses. She admitted that her husband and her father-in-law have filed a criminal appeal before the High Court, which is pending. A suggestion was given to this witness that a false FIR has been lodged with an intention to compel the witnesses of murder to compromise the matter, which was denied by her. However, one thing is clear that Mohan Singh who is the father of mother-in-law of the appellant Kashiram was killed by husband and sons of Mullo Bai (PW2)/ husband of the prosecutrix (PW3) and they were prosecuted and convicted.

(15) The next question would arise in the present case is that whether a false report has been lodged with an intention to compel the appellants and the acquitted co-accused persons to enter into a compromise or the appellants, in their turn, with an intention to take revenge of the murder of Mohan Singh, have committed this offence. Therefore, it would be necessary to consider the evidence of Mullo Bai (PW2) and the prosecutrix (PW3).

(16) The prosecutrix (PW3) has stated that the complainant Mullo Bai (PW2) and the prosecutrix (PW3) were going to Jorasi Temple for offering prayer and they boarded a bus from Dabra Bus Stand and alighted from the bus at a distance of 2-3 feet from temple. The persons who had come on two motorcycles, offered lift but it was not accepted by these witnesses and they said that they would go by walking. Then, it was replied by those persons that there is no issue. However, thereafter, these witnesses sat on the motorcycles. The prosecutrix (PW3) was sitting on a motorcycle which was in front and her mother-in-law sat on the motorcycle, which was following the first motorcycle. The person, who was driving the motorcycle on which the prosecutrix was sitting, drove the motorcycle at a high speed, whereas the person who was driving the motorcycle on which Mullo Bai (PW2) was sitting, reduced the speed. When the prosecutrix (PW3) insisted them to stop the motorcycle, then by showing a gun they compelled her to keep quite. Thereafter, third person who was on the another motorcycle, also came there after dropping her mother-in-law (Mullo Bai) in the midway. One person caught hold of the hand of the prosecutrix and another compelled her to take some medicine and thereafter, she lost her conscious. When she regained her consciousness, she found herself in a hut constructed near the bridge where she was kept for two days. She was subjected to rape. When she requested them to leave her, then on gun point they threatened her to follow the dictations of the accused persons. Thereafter, on the same day, at about 08:00-09:00 pm, the appellants took her to a temple where four persons also came there and they too committed rape on her. Seven persons had inserted their male organs. She was kept in the temple for 15-16 days. Thereafter, they took her to Morar from where they took her to Sheopurkalan. The accused persons also snatched the amount of Rs.150/- and silver chain. After reaching Sheopur, she was left at Railway Station. While she was weeping at Railway Station, the police reached there and enquired as to why she was weeping. The entire incident was narrated by her to the police and she was taken to Sheopur Police Station and on the next day, her

mother-in-law also reached Sheopur. She has stated that appellants Yusuf Khan and Devi Singh were sharing the motorcycle on which she was sitting, whereas the motorcycle on which her mother-in-law, namely, Mullo Bai (PW2) was sitting, was being driven by appellant Kashiram. A specific suggestion was given in cross-examination that with an intention to pressurize the appellants a false case has been registered against the accused so that they may enter into a compromise, which was denied by her. She has further stated that the persons who had come on the motorcycle had covered their faces and only their eyes were visible. When the attention of this witness was drawn towards the omission in the case diary statement Ex.D2 with regard to the allegation that while she was sitting on the motorcycle, the appellants had pointed a gun towards her as a result of which she remained quite, but she could not explain for such omission. Further attention was drawn towards the omission in her case diary statement that the motorcycle was diverted to Kacha road, and another person who was on the second motorcycle also reached there, but she could not explain the reason of such omission. Her attention was also drawn towards the omission in case diary statement Ex.D2 as well as her statement under Section 164 of CrPC Ex. D4, with regard to the allegation that one person caught hold of her and another person gave a medicine and thereafter she fell unconscious, then she could not explain the reason of such omission. Similarly, omission in her case diary statement Ex.D1 and statement recorded under Section 164 of CrPC Ex.D4 with regard to her allegation that when she regained consciousness, she found herself in a hut constructed near the bridge was also pointed out, but she could not narrate the reason. Her attention was drawn towards the omissions in her case diary statement Ex.D2 and statement under Section 164 of CrPC to the effect that when she requested the appellants to leave her, then a gun was pointed towards her and she was threatened to act as per their dictations but she could not narrate the reason for such omission. The prosecutrix (PW3) could not tell the details of temple where she was kept and even could not tell the name of God of whose idol was installed. She has stated that she had stayed in the temple for 15-16 days. However, she stated that she used to ease herself in the temple itself and never went outside the temple. She further stated that she was raped on the floor of the temple and because of resistance, she had suffered certain injuries but certain omissions were there in her case diary statement Ex.D2 and statement under Section 164 of CrPC Ex.D4. She has further stated that from Morar she was taken to Sheopurkalan on Rail but on her way from Sheopurkalan she did not narrate the incident to anybody because she was under threat. The attention of this witness was drawn towards the omissions in her police case diary statement Ex.D2 and statement under Section 164 of CrPC Ex.D4 with regard to threat given by the appellants as a result of which she did not tell the incident on the way while she was being taken from Morar to Sheopurkalan Railway Station but she could not explain the reason. She has further stated that she stayed at Sheopurkalan Railway Station for about half an hour and she did not go anywhere. However, she could not explain the omissions in her case diary statement Ex.D2 and statement under Section 164 of CrPC

Ex.D4 to the effect that when the police at the Railway Station enquired as to why she was weeping, then she gave an information to the police and thereafter, she was taken to the police station Sheopur and on the next day her mother-in-law Mullo Bai (PW2) reached Sheopur. She also could not explain the omissions in her case diary statement Ex. D2 and statement under Section 164 of CrPC Ex.D4 with regard to the fact that appellants Yusuf Khan and Devi Singh were on the motorcycle on which she was sitting, whereas appellant Kashiram was driving the motorcycle on which Mullo Bai (PW2) was sitting. She has further stated that because of rape she had suffered injuries in her private part and such injuries were shown to the doctor and she has denied that as the husband of prosecutrix (PW3) and other in-laws are in jail on the allegation of committing murder of Mohan Singh, therefore, a false case was registered so as to pressurize the appellants and acquitted co-accused persons, who are the witnesses in the case of murder of Mohan Singh.

(17) Mullo Bai (PW2) has stated about the incident with regard to going to Jorasi Temple and offering lift by three persons on two motorcycles and thereafter, leaving her in the midway. In cross-examination, Mullo Bai (PW2) admitted that she went to the Office of Superintendent of Police after three days of the incident.

(18) Nand Kishore (PW4) has stated that his mother along the prosecutrix had gone for worship purposes to Jorasi Temple at 11:00 to 12:00 pm and on the next day, his mother came back and informed that three persons have taken away the prosecutrix (PW3).

(19) Dr. Archana (PW5) had medically examined the prosecutrix and she did not find any external injury. The MLC report is Ex.P3.

(20) Ramjilal (PW7), husband of the prosecutrix, has admitted that he was prosecuted for murder of Mohan Singh and has been convicted and sentenced to 10 years imprisonment and an appeal has been filed. He has further stated that from the month of January, 2001 till May, 2003, he was in jail and the prosecutrix (PW3) is his wife and Mullo Bai (PW3) is his mother and in the year 2003 itself, he was told by his mother in the jail itself that three persons have taken away his wife and the prosecutrix has been recovered after 14-15 days from the Railway Station Sheopurkalan. This witness has admitted that the acquitted co-accused Ramdayal and Mahendra were the witnesses of murder of Mohan Singh. However, he admitted that acquitted co-accused Prem Narayan and Raju used to come along with Ramdayal to watch the trial of these witnesses for murder of Mohan Singh.

(21) Bhikaram (PW8) is the husband of Mullo Bai (PW2). He has admitted that he was prosecuted for murder of his uncle Mohan Singh and has been sentenced to ten years imprisonment along with his sons and they have filed an appeal before the High Court and have been released on bail. He has stated that Mullo Bai (PW2) had come to jail to meet him and informed that the prosecutrix has gone to some where but he was not told that who had taken her and where she has

been taken. The prosecutrix was recovered after 25-20 days from Sheopurkalan and he was informed by Mullo Bai (PW2) that the prosecutrix has been recovered. However, he expressed his ignorance about who had taken the prosecutrix. He was declared hostile by the prosecution and he denied that he was ever told by his wife Mullo Bai that the appellants had taken away the prosecutrix and she was raped by them. He further stated that because of enmity, acquitted co-accused Ramdayal had abducted the prosecutrix. In cross-examination, this witness has stated that only after his release on bail, he was told by his wife that the prosecutrix was abducted by the acquitted co-accused Ramdayal and he has further stated that he was never told by his wife about the commission of offence by any of the other accused except Ramdayal.

(22) Mahesh (PW9) is the brother of the prosecutrix and he has stated that he was told that three persons taken away the prosecutrix.

(23) M.A Raghuvanshi (PW10) has stated that on 15/01/2005, he was given the case diary, for recovery of the prosecutrix. He went to Sheopurkalan and came back to Gwalior. The prosecutrix was sitting inside the courtyard of Police Station and her recovery memo is Ex.P5. The prosecutrix was sent for medical examination and thereafter, she was allowed to go along with her mother-in-law. The statement of the prosecutrix was recorded. In cross-examination, this witness admitted that he has not produced Rojnamcha with regard to his departure and arrival. He has stated that he had recorded his arrival in Rojnamcha in Sheopur. It was further stated that a message was sent by the Town Inspector, Sheopur on wireless and that is why he had gone to Sheopurkalan. He was pointed out about the omissions in the case diary statements of the prosecutrix and this witness has stated that the entire statements of the prosecutrix were recorded as per her disclosure and nothing was added or omitted.

(24) Nand Kishore (PW7) is the witness who had delivered counter-copy of the First Information Report to the Court of JMFC, Dabra.

(25) Manoj Mishra (PW12) is the investigating officer, who had partially investigated the matter. He had recorded the statements of the witnesses. He had prepared the spot map of the temple and had arrested some of the accused persons. In cross-examination, he admitted that everyday people come to temple in question for offering worship. He admitted that he had enquired from the visitors and residents of the locality but they expressed their ignorance about rape of a lady.

(26) Yashwant Singh (PW13) had seized the sealed packet brought by Constable Nand Kishore vide seizure memo Ex.P10 and he had also seized, the sealed pocket by Constable Raghuvir Singh vide seizure memo Ex.P11.

(27) M.S.Khan (PW14) had arrested the appellant Devi Singh vide arrest memo Ex. P11 (it appears that by mistake the seizure memo and arrest memo have been marked as Ex. P11).

(28) Subhash Sharma (PW15) is the witness of arrest memo Ex.P11. He had put his signature on arrest memo Ex.P11 but he did not support the prosecution case and was declared hostile.

(29) Ramesh Chand (PW16) is the person who is alleged to have conducted the Test Identification Parade of the silver chain, allegedly recovered from the possession of appellant Devi Singh but he did not support the prosecution case and was declared hostile.

(30) Satish Samadhiya (PW17) is the Investigating Officer who had found the prosecutrix at Railway Station Sheopur and had brought the prosecutrix to the police station Sheopur. An information was sent to Control Room Gwalior and Police Station Biloua vide Ex.P15 and recovery of the prosecutrix was mentioned at serial No. 668 of Rojnamcha Sahna.

(31) Arvind Singh Dangi (PW18) has stated that spot map Ex. P17 of the place where the complainant and the prosecutrix had deboarded the bus, was prepared on the instructions of Mullo Bai (PW2). The statements of the witnesses were recorded. The seized articles were sent to Forensic Science Laboratory, Sagar vide Ex. P18 and the FSL report is Ex. P19. In cross-examination, he had admitted that the spot map Ex. P17 was prepared on the instructions of Mullo Bai (PW2) and the incident is of the Highway road which is having traffic. Three more hotels are situated near the place of incident and the temple of Hanumanji is also situated there. Various shops of Prasad were situated near the place of incident. He admitted that he did not record the statements of owners of Hotels or owner of Prasad shops or owners of the fields or the Pujari of the temple. He further admitted that the witnesses of the spot map Ex.P17 are the residents of a place where is about one kilometer away from the place of incident. He further admitted that none of the locality and carrying on the business were made witnesses. On his own, he gave an explanation that shop owners or the Pujari of the Temple were not interested in getting involved in the matter. Omissions in the statement of Mulla Bai(PW2) were pointed out to this witness, who has stated that the statement of Mulla Bai Ex.D3 was recorded as per her disclosure and nothing was added or omitted.

(32) Thus, it is clear that the entire prosecution evidence is based on the evidence of the prosecutrix (PW3) and the corroborative piece of evidence of Mullo Bai (PW2). The appellants have examined Jagdish (DW1) and Man Singh (DW2). Man Singh (DW2) is the Pujari of Radhakrishna Temple situated in village Guthina where the prosecutrix (PW3) is alleged to have remained /stayed for 15-16 days. This witness has stated that he opens the temple and offer prayer from 07:00 - 09:00 am and thereafter, offer payer from 06:00 to 09:00 pm and thereafter he used to close the temple and various persons used to visit the temple for offering their prayer. He has further stated that nothing had happened in the temple. About four years back, the police had come and enquired from him whether any lady had come or not and he had informed the police that no lady had come. On question put by the Court, it was clarified by this witness that

no lady had stayed in the temple. A specific question was put to him whether any lady was kept in the temple or not, then he replied that no lady was kept. He has stated that he had not seen any of the accused except the appellant Devi Singh because he is resident of same village. In cross-examination, he had admitted that the entire premises of the temple is of about 20x30 sq. ft. The temple has an open corridor, thereafter, there is a room where deity has been installed. The area of room in which the deity is installed is about 8x8 sq.ft. That room has one door and the people used to offer their prayer from the corridor and perform rounding off (parikrama). He has further stated that the house of the appellant Devi Singh is situated at a distance of 250-300 feet from the temple.

(33) Jagdish Singh (DW1) has stated that Man Singh Sharma (DW2) is the Pujari of the temple. He has stated that anybody who comes to the temple would be visible from his house. Nothing had happened in the temple in the month of December and January. If somebody stays in the temple, then he would be visible from his House. He further admitted that he had told the police that no incident had taken place.

(34) It is well-established principle of law that the prosecutrix cannot be treated as an accomplice and her evidence should be treated as an evidence of injured. The sole testimony of the prosecutrix is sufficient to record the conviction of the accused persons, provided, her evidence inspires the confidence of the Court. In case, if the Court is of the view, that the conviction cannot be recorded, on the sole testimony of the prosecutrix, then it can look for corroboration, and if the Court comes to a conclusion that the evidence of prosecutrix is not reliable, then the accused cannot be convicted.

(35) The Supreme Court in the case of Kuldeep K. Mahato Vs. State of Bihar reported in (1998) 6 SCC 420 has held as under :-

"11. Then coming to the conviction of the appellant under Section 376 IPC, although both the courts below have held after accepting the evidence of the prosecutrix as being truthful that the appellant had forcibly committed the rape, we are of the opinion that the said finding is unsustainable. The prosecutrix had sufficient opportunity not only to run away from the house at Ramgarh but she could have also taken the help of the neighbours from the said village. The medical evidence of Dr Maya Shankar Thakur, PW 5 also indicates that there were no injuries on the person of the prosecutrix including her private parts. Her entire conduct clearly shows that she was a consenting party to the sexual intercourse and if this be so, the conviction of the appellant under Section 376 IPC cannot be sustained. There is one more additional factor which we must mention that it is not the case of the prosecutrix that she was put in physical restraint in the house at Ramgarh, with the result that her movements were restricted. This circumstance also goes to negative the case of forcible intercourse with the prosecutrix by the appellant."

The Supreme Court in the case of Mohan Lal Vs. State of Rajasthan reported in

(2002) 10 SCC 14 has held as under :

"14. We have noticed these omissions and contradictions in her cross-examination only with a view to test the credibility of this witness because the conviction of the appellant is based primarily on her evidence. We find that in the course of investigation, she had not stated that she was forcibly pushed inside the room of the appellant; or that the appellant had slapped her and out of fear she did not raise a hue and cry; or that after the appellant went away, she was not permitted to leave by the wives of the two brothers of the appellant but on the contrary she had hidden herself inside the room after having been seen by PW 5. Moreover, her statement in the course of investigation that on earlier occasions she had been paid Rs 50 by the appellant and that she had tea with them on the day of occurrence as well, creates a serious doubt about the truthfulness of the version of the prosecutrix and we find it unsafe to rely upon her testimony to convict the appellant. Not only this, the case of the prosecution even otherwise does not appear to be credible and it appears that the father of the prosecutrix, PW 2 on discovering that the prosecutrix was involved with the appellant, after due deliberations, lodged a report implicating the appellant.

15. PW 5 undoubtedly is a cousin of the prosecutrix. He lived in the house adjacent to the house of the appellant and it is the prosecution case that anyone in the courtyard of the appellant can be seen from the house of PW 5. The case of the prosecution is that when the prosecutrix first attempted to run away and was in the courtyard, she was seen by PW 5. The evidence is not clear as to whether PW 5 had identified the prosecutrix. There is, however, no doubt that the prosecutrix had seen PW 5. If PW 5 had identified the prosecutrix there is no reason why he did not immediately come to her rescue seeing that the appellant had forcibly pushed her inside his room. If he had not identified the girl, as being the prosecutrix, there appears to be no reason for his asking his brother PW 3 to call PW 2, father of the prosecutrix. Learned amicus curiae submitted that the prosecutrix having seen PW 5, hid inside the room of the appellant to avoid identification, and this is what she stated in her statement in the course of investigation. This only fits in with the case of the defence that though she was a consenting party, she was afraid that her cousin, PW 5 may come to know of the clandestine affair and expose her. PW 5, it was submitted, called her father because he may have thought that the father of the prosecutrix should take whatever steps he may consider necessary as his daughter was involved. From the evidence of PW 2, the informant, it appears that PW 5 did not disclose to him the fact that the girl he had seen in the house of the appellant was his daughter, yet PW 2, the informant, called two other persons and only thereafter entered the house of the appellant. These facts do tend to support the case of the defence that the prosecutrix having been seen by PW 5 in the house of the appellant despite best efforts to conceal herself, the latter called her father and her father along with PW 5 and two others thereafter went to the house of the appellant.

16. So far as the last part of the prosecution case is concerned, namely, the recovery of the prosecutrix from the room of the appellant, the evidence supports the case of the defence that the prosecutrix was hiding behind the ladies when her father and others came to her rescue. The normal conduct of the prosecutrix in such circumstances would have been to rush to the persons who came to her rescue and not to hide behind the two ladies said to be the wives of the brothers of the appellant.

17. All these facts lead us to seriously doubt the truthfulness of the case of the prosecution and we are satisfied that the prosecution has failed to prove its case beyond reasonable doubt."

The Supreme Court in the case of Amar Bahadur Singh Vs. State of U.P. Reported in (2011) 14 SCC 671 has held as under :-

"5. We find merit in this plea. We find that under the circumstance the possibility that rape could have been committed on her in the presence of so many members in a small house is difficult to believe. On the contrary the findings of the High Court that the prosecutrix was a consenting party appear to be correct and it was perhaps when the accused and the prosecutrix had been caught red-handed that the story of rape had been cooked up, to salvage some of the family honour. This is often the tendency in such matters. The High Court has therefore gone completely wrong in dismissing the appeal even after its categorical observations."

The Supreme Court in the case of Kaini Rajan Vs. State of Kerala reported in (2013) 9 SCC (Cri) 858 has held as under :-

"12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. (See State of H.P. v. Mango Ram.)

14. This Court examined the scope of Section 375 IPC in a case where the facts

have some resemblance with the one in hand. Reference may be made to the judgment of this Court in *Deelip Singh v. State of Bihar*. In that case, this Court examined the meaning and content of the expression "without her consent" in Section 375 IPC as well as whether the consent given by a woman believing the man's promise to marry her, is a consent which excludes the offence of rape. This Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent i.e. the accused, could give rise to the misconception of fact. While applying this principle to a case arising under Section 375 IPC, this Court held that the consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90 IPC. This Court further held that: (SCC p. 104, para 28)

"28. ... If on facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of [the second clause of Section 375 IPC]."

In the facts of that case, this Court held, that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. The Court held that she came to the decision to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the first information report. The Court noticed that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act.

15. In *Ramdas v. State of Maharashtra* this Court held that: (SCC p. 179, para 23)

"23. ... the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity."

16. *Vijayan v. State of Kerala* was a case where the complaint was made by the prosecutrix after the alleged commission of rape on her by the accused. At the time of making the case, the prosecutrix was pregnant for about seven months. This Court did not place reliance on the sole testimony of the prosecutrix. The Court noticed that flaw that no DNA test was conducted to find out whether the child was born out of the said incident and the accused was responsible for the said child.

17. *K.P. Thimmappa Gowda v. State of Karnataka* was a case where the accused had assured the prosecutrix that he would marry her and had sexual affair, which was repeated on several occasions as well. But he did not marry and she became

pregnant. That was a case where there was delay of eight months in filing the complaint. The accused was given the benefit of doubt holding that it would not be possible to conclude that the alleged sexual act was committed without the consent of the prosecutrix.

18. We have already referred to the evidence of PW 2 to PW 4 and that their consistent version is that PW 2 had previous acquaintance with the accused being her elder brother's friend for a period of more than two years before the date of incident. The place of the alleged incident and the time is very crucial, so far as this case is concerned. It was early morning at 8.30 a.m. and the place of the alleged incident was on the side of a public road. If she had made any semblance of resistance or made any hue and cry it would have attracted large number of people from the locality. Further the first information report, as already indicated, was lodged after a period of 10 months of the alleged incident. All these factors cast some shadow of doubt on the version of PW 2."

The Supreme Court in the case of *Alamelu and another vs. State, Represented by Inspector of Police* reported in AIR 2011 SC 715 has held as under :-

"45 .The High Court concluded that even if one was to exclude the evidence given by PW3, the conviction for abduction and rape by Sekar could be recorded on the sole evidence of PW2. Undoubtedly, the testimony of victim of sexual assault stands at par with testimony of an injured witness, and is entitled to great weight. Therefore, corroboration for the testimony of the victim would not be insisted upon provided the evidence does not suffer from any basic infirmities and the probability factors do not render it unworthy of credence. This Court in *Rameshwar v. State of Rajasthan*⁵ declared that corroboration is not the sine qua non for a conviction in a rape case. In the aforesaid case, Vivian Bose, J. speaking for the Court observed as follows :-

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, ... The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

The aforesaid proposition of law has been reiterated by this Court in numerous judgments subsequently. These observations leave no manner of doubt that a conviction can be recorded on the sole, uncorroborated testimony of a victim provided it does not suffer from any basic infirmities or improbabilities which render it unworthy of credence."

The Supreme Court in the case of *Mohd. Ali Vs. State of U.P.* Reported in (2015) 7 SCC 272 has held as under :-

"29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon."

The Supreme Court in the case of Lalliram and another Vs. State of Madhya Pradesh reported in (2008) 10 SCC 69 has held as under :-

"11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra v. State of Orissa where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar v. State of Haryana.)

12. As rightly contended by learned counsel for the appellants, a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar case it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial."

The Supreme Court in the case of Narender Kumar Vs. State (NCT of Delhi) reported in (2012) 7 SCC 171 has held as under :-

"29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide *Tukaram v. State of Maharashtra* and *Uday v. State of Karnataka*.)

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. The conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

31. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtues/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of."

(36) If the evidence of the prosecutrix (PW3), Jagdish Singh (DW1) and Mansingh Sharma (PDW2) is considered in the light of the spot map Ex.P7, it is clear that the room where the deity of Radha Krishna is installed, has a corridor on all sides. People visits the temple for doing rounding off (parikrama) and there is an open corridor in front of the temple. The prosecutrix (PW3) has stated that she had never gone out of temple for easing herself and she had discharged excreta in the temple itself. If this part of the evidence of the prosecutrix is considered in the light of the spot map Ex.17, then it is clear that there is no toilet in the temple and if somebody discharges excreta in the temple premises, then it would be easily noticed by the visitors. Even otherwise, as per the spot map Ex.P7, there is no room in the temple, in which the prosecutrix can be kept. From the spot map Ex.P7, it is clear that there is an open corridor in front of the temple and there is a room in which the deity has been installed and is surrounded by a corridor which is used for the purpose of rounding off (parikrama) by the visitors. If somebody stays in the temple, then he would be easily noticed by the visitors and somebody discharges excreta in the temple

premises then the same would be easily noticeable by the visitors. There is no tap or source of water inside the temple. There is no evidence to the effect that from where the prosecutrix managed her food for the period of 15 days when she was kept in the temple. The prosecutrix has also not clarified that at which place she was kept in the temple. If the spot map Ex.P7 is considered, then it is clear that except the room where the deity has been installed, there is no other room. If somebody is confined in the room where the deity has been installed, then it would be easily noticed by the Pujari or any other visitors. Thus, the manner in which the prosecutrix has stated that she was kept by seven persons in the temple premises and she was kept in the temple for 15 days and she had never gone out of the temple and she has always eased herself in the temple, then the same cannot be accepted to be trustworthy and reliable. Furthermore, the spot map Ex.P7 shows that the house of Kella Jatav is situated at a distance of 10 meters from the temple whereas the house of one Dhanpal is situated at a distance of 15 meters from the platform situated in front of the temple. The house of one Dhanpal is also situated at a distance of around 25 meters. Thus, it is clear that the temple was not situated at an isolated place but the temple is situated near the houses of the villagers and if a lady is kept in the temple and if she raises hue and cry, then her cries would be easily noticed by the residents of the locality. Even otherwise as pointed out that if the prosecutrix is kept in the temple for a period of 15 days and if she discharges her excreta in the temple itself and she is not offered any food by anybody, then it would be easily noticeable by any resident of the locality. Even if the prosecutrix had raised any alarm, then it would have been easily noticed by any body. Thus, it is clear that the allegations of rape by seven persons on the prosecutrix in the temple premises for a period of 15 days is false and cannot be accepted.

(37) Furthermore, according to the prosecution case, the prosecutrix was taken from one place to another, but she did not raise any alarm. She was taken on a motorcycle, but she did not raise any alarm. The allegation of administering some narcotic pill by the accused is missing in the case diary statement. The prosecutrix did not raise any alarm, when she was being taken to Sheopur by train. Furthermore, the prosecutrix had strong motive to falsely implicate the accused persons. Even the trial Court in paragraph 38 of the judgment has held that so far as the acquitted co-accused persons, namely, Mahendra, Raju, Ramdayal and Prem Narayan are concerned, the allegation made against them by the prosecutrix appears to be false and the evidence of prosecutrix in respect of acquitted co-accused persons was considered with a minutely in the light of the enmity between two families. The trial Court has lost sight of the fact that the appellant Kashiram is the son-in-law of the acquitted co-accused Prem Narayan and when in the opinion of the trial Court, the co-accused Prem Narayan has been falsely implicated, then same analogy would apply to the case of appellant Kashiram. Furthermore, this Court has already come to the conclusion that the evidence of the prosecutrix is completely unreliable and untrustworthy. The appellant Kashiram has been convicted on the ground that there does not

appear any enmity between the family of appellant Kashiram and the prosecutrix but the trial Court has lost sight of the fact that the appellant Kashiram is the son-in-law of the acquitted co-accused Prem Narayan and, therefore, the prosecutrix had a strong motive to falsely implicate the appellant Kashiram.

(38) The Supreme Court in the case of State of U.P. Vs. Moti ram reported in (1990) 4 SCC 389 has held as under :-

"21. So far as the motive is concerned,.....On a careful analysis of the evidence, we have no reservation in holding that there was bitter animosity between the prosecution and accused parties and as such there was sufficient motive on the part of the accused party to attack the prosecution party. But at the same time, one should not lose sight of the fact that the prosecution party which was also entertaining the same amount of animosity against the accused party had sufficient motive to implicate all the leading persons of the accused party with the offence in question. As repeatedly said, motive is a double-edged weapon and that it could be made use of by either party to wield that weapon of motive against each other. Therefore, the key question for consideration is whether the prosecution had convincingly and satisfactorily established guilt of all or any of the accused beyond all reasonable doubt by letting in reliable and cogent evidence."

(39) So far as the case of the appellant Devi Singh and appellant Yusuf Khan is concerned, it is true that there does not appear any enmity between the prosecutrix and appellant Yusuf Khan. However, the Supreme Court in the case of Narender Kumar (Supra) has held that even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case, the victim and other witnesses have falsely implicated the accused. The prosecution has to stand on its own legs and cannot take support from the weakness of the case of defence.

(40) Thus, when this court has already come to the conclusion that the evidence of Prosecutrix is not reliable in toto, then merely because the motive for falsely implicating the appellant Yusuf Khan and appellant Devi Singh could not be brought on record, would not mean that the evidence of the prosecutrix has to be accepted against the appellant Devi Singh and appellant Yusuf Khan.

(41) It is next contended by the Counsel for the State, that in view of Section 114-A of Evidence Act, once, the prosecutrix has stated that she was subjected to gang rape, then the burden shifts on to the accused. The Submission made by the Counsel for the State cannot be accepted.

"Section 114-A of Indian Evidence Act, reads as under :-

"114A. Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause

(e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent."

The Supreme Court in the case of Deepak Vs. State of Haryana reported in (2015) 4 SCC 762 has held as under :

"24. In order to enable the court to draw presumption as contained in Section 114-A against the accused, it is necessary to first prove the commission of sexual intercourse by the accused on the prosecutrix and second, it should be proved that it was done without the consent of the prosecutrix. Once the prosecutrix states in her evidence that she did not consent to act of sexual intercourse done by the accused on her which, as per her statement, was committed by the accused against her will and the accused failed to give any satisfactory explanation in his defence evidence on this issue, the court will be entitled to draw the presumption under Section 114-A of the Evidence Act against the accused holding that he committed the act of sexual intercourse on the prosecutrix against her will and without her consent. The question as to whether the sexual intercourse was done with or without consent being a question of fact has to be proved by the evidence in every case before invoking the rigour of Section 114-A of the Evidence Act."

(42) Thus, when this Court has already come to a conclusion that the prosecution has prima facie failed to prove the commission of offence of rape and abduction, then the question of drawing presumption against the appellants under Section 114-A of Evidence Act, would not arise.

(43) Under these circumstances, this Court is of the considered opinion that the prosecution has failed to prove that the prosecutrix was abducted and was raped by the appellants. The prosecution has failed to prove that the appellant Devi Singh had snatched the silver chain and an amount of Rs.150/- from the prosecutrix. Accordingly, they are acquitted of all the charges.

(44) Resultantly, the judgment and sentence dated 12th January, 2007 passed by Special Judge (MPDVPK Act), Gwalior in Special Sessions Trial No.13/2006 is hereby set aside.

(45) The appellants are on bail. their bail bonds and surety bonds are discharged.

(45) The appeals succeed and are hereby allowed.