ABC 2016 (II) 149 SC

ACQUITTAL & BAIL CASES

a

SUPREME COURT OF INDIA

(Pinaki Chandra Ghose & Amitava Roy, JJ.)

Criminal Appeal No. 1767 of 2011

(From Karnataka High Court)

b Decided On 4 October, 2016

RAJA AND OTHERS ***- Appellant(s).***

Versus

STATE OF KARNATAKA ***- Respondent(s).***

c

Law Covered:- ***(A) Indian Penal Code, 1860 — Section 376 — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Gang rape — Medical evidence — no sign of forcible intercourse — prosecutrix was accustomed to sexual intercourse — was living separately from her husband for 1 and ½ years — Held, the medical*** d ***evidence as such in the attendant facts and circumstances in a way belies the allegation of gang rape. (Para 20)***

(B) Indian Penal Code, 1860 — Section 376 — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Financial assistance — Evidence of witness — the prosecutrix used to take financial help e ***from the accused persons — & she used to indulge in dubious late night activities for which her husband had deserted her— Defence plea of false implication — as the accused persons had declined to oblige the prosecutrix qua her demand for financial help — cannot be lightly discarded. (Para 21)***

f ***(C) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Hostile witness — Testimony of — Evidentiary value — Plausible version — The testimony as a whole cannot be brushed aside. (Para 21)***

(D) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Hostile witness — Testimony of — Evidentiary value— Held, in all g ***eventualities ought not stand effaced altogether — & the same can be accepted to the extent found dependable on a careful scrutiny. (Para 22)***

(E) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Hostile witness — Testimony of — Admissibility of — Held, the evidence remains admissible and is open for a Court to rely on the h ***dependable part thereof — as found acceptable and duly corroborated by other reliable evidence. (Para 22)***

(F) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Seizure — Denial by prosecution witness — Version of defence — the alleged seized articles were purchased by the police — seizure found unreliable. (Para 23)

(G) Interpretation of Statute — Rape, Molestation & Other crimes against women — Statement of Victim — Construction of — Held, the evidence of the prosecutrix is to be construed to be that of an injured witness so much so that no corroboration is necessary — Indian Penal Code, 1860 — Section 376. (Para 24)

(H) Criminal Jurisprudence — Right of accused — Held, an accused must also be protected against the possibility of false implication. (Para 24)

(I) Interpretation of Statute — Rape, Molestation & Other crimes against women — Statement of Victim — Credibility of witness — Held, the testimony of the victim in such cases, though commands great weight — but the same, cannot necessarily be universally and mechanically accepted to be free in all circumstances from embellishment and exaggeration— Indian Penal Code, 1860 — Section 376. (Para 24)

(J) Interpretation of Statute — Rape, Molestation & Other crimes against women — Statement of Victim — Construction of — Held, the evidence of the prosecutrix must be examined as that of a injured witness whose presence at the spot is probable — but it can never be presumed that her statement should always, without exception, be taken as gospel truth. (Para 24)

(K) Code of Criminal Procedure, 1973 — Section 378 — Appeal against Acquittal — Reversal — Scope of — Possibility of two views — Duty of the appellate court — should not ordinarily interfere therewith though its view may appear to be the more probable one. (Para 25)

(L) Judgment of trial Court — Judicial essence of — Credibility of witness — Judging of — Held, the trial court has the benefit of watching the demeanour of the witnesses & is thus the best judge of their credibility. (Para 25)

(M) Code of Criminal Procedure, 1973 — Section 378 — Appeal against Acquittal — Reversal — Qualification of — Findings of trial Court — Deficiencies in — Held, if the findings have been arrived at by ignoring or excluding relevant materials or by taking into consideration irrelevant/inadmissible material — & are against the weight of evidence or are so outrageously in defiance of logic so

as to suffer from the vice of irrationality, that interference by the appellate court would be called for. (Para 25)

(N) Criminal Jurisprudence — Appellate Court — Obligation of — Held, the appellate court is under an obligation to consider & identify the error in the decision of the trial court — & then to decide whether the error is gross enough to warrant interference. (Para 26)

(O) Criminal Jurisprudence — Judgment of the trial Court — Reversal of —Appellate Court — Desecration of — Exercising of— Duty of Court — Held, the decoration is to be exercised very cautiously to correct an error of law or fact —if any & significant enough to warrant reversal of the verdict of the trial court. (Para 26)

Facts:- *The case was registered on an oral report by the prosecutrix, whereafter a case was registered under Sections 366, 376(g), 392 r/w 34 IPC. It was alleged by the prosecutrix that in the relevant evening, while she was coming back from work, she was pulled inside an auto rickshaw, blindfolded and was taken to an auto garage where there was no light. She further stated that the abductors lit a candle, spread 2 seats of the auto rickshaw on the ground, laid her forcibly thereon and in spite of her resistance and objections, forcibly undressed her and raped her by turn. She disclosed that 3 of the four persons ravished her. It was also alleged that miscreants also snatched her mangalsootra and gold ear-studs. They then made her to wear her clothes, brought her in the auto rickshaw to a vacant place and discarded her.*

The trial court acquitted the appellants of the charges levelled against them. However, the High Court by the impugned decision reversed the acquittal and the appellants were convicted under Sections 376(g) and 392 IPC r/w 34 IPC.

It was observed by the honourable Apex Court that the findings of the High Court were recorded in favour of the prosecution by overlooking many irreconcilable inconsistencies, anomalies and omissions rendering the prosecution case unworthy of credit. Acquittal recorded by the Trial Court was restored.

Law of relief:- It can never be presumed that the statement of the victim of Rape, Molestation & Other crimes against women should always, without exception, be taken as gospel truth.

Held:- PW8, who medically examined her, opined in clear terms that she was accustomed to sexual intercourse and that no sign of forcible intercourse was discernible. This assumes great

significance in view of the allegation of forcible rape by 3 to 4 adult persons more than once. The medical opinion that she was accustomed to sexual inter course when admittedly she was living separately from her husband for 1 and ½ years before the incident also has its own implication. The medical evidence as such in the attendant facts and circumstances in a way belies the allegation of gang rape. (Para 20)

The evidence of PW2 Geeta who admittedly had offered shelter to the prosecutrix and her minor daughter, though had been declared hostile, her testimony as a whole cannot be brushed aside. In her testimony, this witness indicated that the prosecutrix used to take financial help from the accused persons and that she used to indulge in dubious late night activities for which her husband had deserted her. The defence plea of false implication as the accused persons had declined to oblige the prosecutrix qua her demand for financial help therefore cannot be lightly discarded in the overall factual scenario. Her version therefore is a plausible one and thus fit in with the defence plea to demolish the prosecution case. (Para 21)

That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. (Para 22)

The seizures said to have been effected by the investigating agency also do not inspire confidence. Not only PW 4 Muthu denied that the seizure of ear studs had been made in his presence, DW1 on oath had stated that this item of jewellery had in fact been purchased by the police from a local shop which he could identify on the basis of the symbol 'MP' inscribed thereon. In any view of the matter, the seized articles per se in absence of any evidence of corroboration of charge would not, irrefutably prove the involvement of the appellants in the offence alleged. (Para 23)

This Court in Raju (supra), while reiterating that the evidence of the prosecutrix in cases of rape, molestation and other physical

outrages is to be construed to be that of an injured witness so much so that no corroboration is necessary, ruled that an accused must also be protected against the possibility of false implication. It was underlined that the testimony of the victim in such cases, though commands great weight but the same, cannot necessarily be universally and mechanically accepted to be free in all circumstances from embellishment and exaggeration. It was ruled that the presumption of absence of consent of the victim, where sexual intercourse by the accused is proved as contemplated in Section 114A of the Evidence Act, was extremely restricted in its application compared to the sweep and ambit of the presumption under Sections 113A and 113B of the Indian Evidence Act. It was exposited that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of a injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel truth. (Para 24)

Vis-a-vis the scope of interference with a judgment of acquittal, this Court in Sunil Kumar Shabukumar Gupta (Dr.) (supra) echoed the hallowed proposition that if two views are possible, the appellate court should not ordinarily interfere therewith though its view may appear to be the more probable one. While emphasizing that the trial court has the benefit of watching the demeanour of the witnesses and is thus the best judge of their credibility, it was held that every accused is presumed to be innocent unless his guilt is proved and that his presumption of innocence gets reinforced with his acquittal by the trial court's verdict. It was reiterated that only in exceptionable cases and under compelling circumstances, where the judgement of acquittal is found to be perverse i.e. if the findings have been arrived at by ignoring or excluding relevant materials or by taking into consideration irrelevant/inadmissible material and are against the weight of evidence or are so outrageously in defiance of logic so as to suffer from the vice of irrationality, that interference by the appellate court would be called for. (Para 25)

That the appellate court is under an obligation to consider and identify the error in the decision of the trial court and then to decide whether the error is gross enough to warrant interference was underlined by this Court in Shyamal Saha (supra). It was emphasized that the appellate court is not expected to merely substitute its opinion for that of the trial court and that it has to exercise its discretion very cautiously to correct an error of law or

fact, if any and significant enough to warrant reversal of the verdict of the trial court. (Para 26)

Counsel:- ***For Appellant(s):*** *Mr. Basava Prabhu S. Patil, learned senior counsel.*

For Respondent(s): *Mr. Joseph Aristotle S., learned counsel.*

Cases Referred:-

1. *Sunil Kumar Sambhudayal Gupta (Dr.) and others. Vs. State of Maharashtra (2010) 13 SCC 657. (Para 15)*
2. *Shyamal Saha Vs. State of West Bengal (2014) 12 SCC 321. (Para 15)*
3. *Himanshu alias Chintu Vs. State (NCT of Delhi) (2011) 2 SCC 36. (Para 15)*
4. *Raju and Others Vs. State of Madhya Pradesh (2008) 15 SCC 133. (Para 15)*
5. *Khujii vs. State of M.P. (1991) 3 SCC 627. (Para 22)*
6. *Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. (Para 22)*

JUDGMENT

AMITAVA ROY, J.: - 1 Distressed by the reversal of their acquittal from the charge under Sections 366/376(g)/392 read with Section 34 IPC, as recorded by the trial court, the appellants have impeached the impugned judgement and order of their conviction rendered by the High Court in the State appeal.

2. We have heard Mr. Basava Prabhu S. Patil, learned senior counsel for the appellants and Mr. Joseph Aristotle S, learned counsel for the respondent-State.

3. The prosecution was set rolling by an oral report by the prosecutrix with the Sampangiramanagara Police Station between 2.00 A.M. and 3.00 A.M. of 11.10.1997, which was in Tamil language and was translated and recorded by S. Shiva Lingaia, ASI, whereafter a case was registered under Sections 366, 376(g), 392 r/w 34 IPC.

4. The prosecutrix revealed that she was a resident of No.81, Jasari Kaleeli, Rustum ji Compound, Richmond Road, Bangalore and was earning her livelihood by rendering services as a maid in the house of Shilpa Shetty at Shanti Nagar, Bangalore. According to her, because of the ill-treatment of her husband, she shifted to Bangalore about 8 months prior to the incident by separating from him.

She alleged that at about 7.30 P.M. in the previous evening, while she was coming back from work and was at the Richmond

Park, an auto rickshaw ,with two persons in it including the driver stopped by her side and she was pulled inside. According to her, after travelling some distance, two other persons also got into the auto rickshaw. The miscreants then blindfolded her, by her chudidar cloth and took her to an auto garage where there was no light. The prosecutrix stated that the abductors lit a candle, spread 2 seats of the auto rickshaw on the ground, laid her forcibly thereon and in spite of her resistance and objections, forcibly undressed her and raped her by turn. She disclosed that 3 of the four persons ravished her. Out of them, two committed the act twice and the third only once.

The prosecutrix further stated that one of the persons brought dosa and idli and also offered the same to her, whereafter they tried to repeat the same act, to which she protested for which she was kicked and fisted and further they snatched her Tali (mangalsootre) gold ear-studs. They then made her to wear her clothes, brought her in the auto rickshaw to a vacant place and discarded her. According to her, these violators were addressing each other as Raju, Venu, Parkash and Francis and claimed that she could identify them, if produced. Investigation followed and in the course thereof, the appellants were apprehended. The fourth person Francis could not be nabbed as he absconded. As a matter of fact, after the submission of the charge-sheet against the appellants, the trial was conducted by segregating the absconding accused. They denied the charge under the above provisions of law.

5. At the trial, the prosecution examined 11 witnesses and also marked several documents and exhibited material objects seized during the investigation. The appellants rendered their statements under Section 313 Cr.P.C. reiterating their innocence and also examined one witness in defence. The trial court, to reiterate, acquitted the appellants of the charges levelled against them. The High Court by the impugned decision has reversed the acquittal and the appellants thus stand convicted under Sections 376(g) and 392 IPC r/w 34 IPC and have been sentenced to suffer rigorous imprisonment for 10 years.

6. The instant adjudication being one to examine the tenability of the conviction of the appellants on the reversal of their acquittal, an independent assessment of the evidence on record is indispensable in the interest of justice, two courts of facts having arrived at irreconcilable conclusions on the same materials on records. It would

thus be expedient, to analyse the evidence, oral and documentary before adverting to the rival arguments based thereon.

7. PW1, the prosecutrix on oath stated that she has a female child through her husband who lived separately with another lady and she and her daughter lived in the compound of PW2 Geeta. She deposed that she had been working in the house of Shilpa Shetty for the last three years and that even prior to the incident, the appellants used to tease her and pass remarks on the way. She stated that in the evening of the date of the incident along with the appellants, another person had boarded the auto and that the two persons sitting on her sides were appellants Venu Gopal and Parkash. She testified that she also did peep out of the auto thinking that someone would save her, for which the person with the beard in the auto slapped her and therefore she felt frightened and sat behind. She stated that the abductors then blindfolded her with her own dupatta, molested her inside the auto and ultimately took her to an auto garage and in spite of her objections, raped her one by one. According to her, she was raped by Venu Gopal, Parash and the bearded person in that order.

In her deposition, however she stated that appellant Raja also assaulted her and had forcible intercourse with her. She reiterated that the violators then brought dosa and idlis and also offered some to her which she on being assaulted, did eat. In a departure from her FIR, the prosecutrix deposed that thereafter all the four performed one more round of intercourse by turn. Thereafter according to her, the bearded person snatched her Tali (mangalsootre) and the other, her ear studs. They did assault her by kicks and thereafter by making her wear her clothes, took her in the same auto and left her near a bridge. She complained of having sustained injuries on her thighs.

She stated that thereafter she took water from a person near the garage road and ascertained from him the area where she was situated. According to her, from the location of the place, she could understand the site of the garage and on reaching there, she saw broken pieces of her glass bangles and also the litter and left overs of the food taken in the garage and could convincingly identify the place. She deposed further that at that time, a man came in a bicycle to whom she narrated the entire incident, who asked her to wait and went to the Hoysala Police Station to report, whereafter the police did come, inspect the place as shown by her and took her to the Sampangiramanagara P.S. past midnight where she made her verbal

complaint which was reduced into writing and she put her thumb impression thereon.

a

The prosecutrix proved the complaint/FIR as Ex. P1. According to her, in the next morning at 6 A.M., the appellants were brought to the police station. She admitted to have been taken to the Vanivilas Hospital where she was medically examined. She also b identified the ear studs, material Ex. 1 and also her inner-wear material Ex. 2 and broken pieces of glass bangles material Ex 3. She also stated to have identified the appellants in the test identification parade conducted in the central jail. She also identified the seats of the auto rickshaw as material Ex P4 and P5.

c In her cross-examination, the prosecutrix admitted that she was not married and that she had come to Bangalore with Saravana whom she had referred to in her examination-in-chief, as her husband. She stated that she lived with Saravana for three years in Bangalore and that they used to earn their living as labourers. She d stated that Saravana deserted her, following frequent quarrels with her, whereafter PW2 Geeta gave her and her daughter, shelter. She testified that she used to earn Rs. 700 p.m. by working in the house of Shilpa Shetty and that there was none in the family or in her village to support her financially. She admitted that from one week prior to the incident, the appellants used to tease her and that from then she knew e them. She admitted that the road from which she was abducted was a public thorough fare but asserted that she could not scream as she was gagged. She admitted that though the auto travelled for 10 minutes thereafter, she did not try to get down as she was scared of her abductors. She further disclosed that the appellants used to speak f to her from 2/3 days prior to the incident.

According to her, while she was near Fatima Bakery, which was opposite to Johnson market, she was taken inside the auto. She admitted to have known the accused Francis then. She claimed to have identified two persons in the auto rickshaw when she was first g picked up from the road as appellants Parkash and Francis. She admitted that none of the abductors did speak to her while in the auto rickshaw. She also conceded that she did not scream for help from the passers-by on the road. She was confronted with her disclosure in the FIR that only three persons had committed rape on her though four h had been named therein. She admitted that at the time when she was offered two idlis and a glass of water, she did not cry for help and

instead had made up her mind to teach the miscreants a lesson by informing the police. She also stated, by departing from the FIR that for the second time, three persons committed sexual intercourse with her. According to her, the ear studs had been given to her by her husband who got them made at Kaveripattinam in Tamil Nadu. She claimed that her FIR was written by one Anthony in the police station whom she came to know at that point of time.

In her cross-examination, she further deviated by stating that apart from the 4th person referred to by her, there was yet another person of short stature and that she had forgotten to refer to him in her FIR. She admitted that her mouth was never shut but her abductors did threaten and scold her. She admitted that after she was abandoned by the miscreants, she did alone return to the garage where the act was committed. She also stated to have narrated her incident to five more persons at different places before the police had intervened, who according to her, were watchmen. She stated that she wanted to see the place before informing the police and, therefore she went in search thereof. She deposed that she saw the jeep of the Hoysala police and called for help whereafter she was taken in the jeep. She took the jeep near the garage and from there, she was taken to two more police stations before lodging the FIR at Sampangirama-nagara Police Station.

She contradicted herself by stating that the complaint was not written by Anthony. She also stated that her report was typed, read out to her whereupon she put her left thumb impression. When Ex. P1, FIR was shown to her, she admitted that it was not typed. She admitted as well that while narrating the incident and lodging the complaint, she did not disclose the names of the accused persons. She conceded as well that when she was taken to the hospital, there were no wounds.

She admitted as well that PW 2 Geeta had advised her to take money and return to her native village and not to file a case as otherwise she would disclose that she was a prostitute. She denied the suggestion that she had requested for financial help from the appellants and when they expressed their inability, she lodged a false case against them to wreak vengeance. She also denied the suggestion that the material exhibits, more particularity ear studs and tali (mangalsootre) were not hers and that the police had procured the same from elsewhere, to frame the accused persons. In the context of

her identification of the appellants in the TIP, she admitted in her cross-examination that even prior to the incident, she had seen the accused persons and that not only they used to talk to her, she knew them as well.

8. PW2 Geeta, on oath stated that she also did earn her living as a labourer. She admitted that she knew the prosecutrix who was deserted by her husband and that she had accommodated her and her daughter and had provided shelter to them about 7 years prior to the incident. She stated that about four years back (coinciding approximately with the date of the incident), the prosecutrix had disclosed to her that on her way back home, she had been teased, on which she advised her to be careful. The witness stated that in the evening of the date of the incident, the prosecutirx did not return home and that at about mid-night, the police brought her back. She stated that she saw marks of assault on the body of prosecutrix and on being enquired, she stated that "they did not pay me any money but have snatched my ear studs. They have extracted all the work needed". The witness volunteered to explain "work" meant prostitution.

At this stage, the witness was declared hostile and was cross-examined. In her cross-examination, she admitted that when the prosecutrix returned that night, she had suffered wounds and was limping. She denied to have stated before the police that the appellants had snatched her gold ornaments and had committed rape on her. She also denied to have identified the ear studs, as those of the prosecutrix and instead asserted that the same were not hers. She denied the suggestion that her retraction from the statement made before the police was with a view to help the accused persons. She volunteered to state that the reason for her husband to desert the prosecutrix was her activities of prostitution which had come to his knowledge.

The witness further disclosed in her cross-examination by the defence that about a fortnight before the incident, the prosecutrix along with her had approached the accused persons for an amount of Rs. 10000 which she intended to invest for living in a separate house, which was however declined. PW2 testified that this was not to the liking of the prosecutrix, who was enraged by such refusal and left the place by intimidating them of adverse consequences. The witness on oath stated further that the prosecutrix after returning home in the

evenings and after completing the house hold work, used to go around in the night indulging in prostitution and when asked as to why she had lodged the complaint against the accused persons, she disclosed that this would compel them to part with the money that she wanted.

9. PW3 Dr. B.R.S. Kashyap had examined the appellants and opined that there was nothing to suggest that they were incapable of performing sexual intercourse. He also was of the view that the injury on the body of the appellant Raju could have been sustained also in the course of attending his auto rickshaw or could be self- inflicted as well.

10. PW4 Muthu produced as a seizure witness of the ear studs denied that same had been seized in his presence and instead testified that on the insistence of the police he put his signature on a paper. This witness was declared hostile but did not budge from his statement in his examination-in-chief.

11. PW5 M.K. Srirangaiah was the Tehsildar, Bangalore North Taluk at the relevant time and he proved the conduct of TIP, in which the prosecutrix identified the appellants.

12. PW8 K.M. Nandagopal was the Assistant Professor, OBG, Vanivilas Hospital on 11.10.1997 where at about 9 a.m. on that day, the prosecutrix was medically examined. He deposed that the prosecutrix was found to have sustained red colour injury on her left thigh. While stating that the vaginal swab of the prosecutrix was sealed and sent to the Forensic Science Laboratory, he was of the clear opinion that she was accustomed to the act of sexual intercourse. In his cross-examination, the doctor admitted that the prosecutrix did not reveal any evidence or sign of having sexual intercourse at the time of her examination. Vis-a-vis the injuries on her thigh, the witness stated that this could happen due to reasons other than sexual intercourse.

13. PW11 B.S. Mudumadeviah, the Investigating Officer affirmed that the FIR was lodged by the prosecutrix at 2 a.m. on 11.10.1997 at the police station. He deposed that after the medical examination of the prosecutrix, he accompanied her to the place of occurrence and seized therefrom a red colour drawer, one box of Nirodh (contraceptive), two auto rickshaw seats, two broken pieces of black bangles and three black bangles found strewn around. He identified the seized articles in court. He referred to the disclosure

statement of the appellant Parkash leading to the discovery of the ear studs of the prosecutrix from his house which he identified in the court as well. He also claimed to have seized the auto rickshaw identified by the same appellant used for abducting the prosecutrix. According to him, he had written down the complaint of the prosecutrix made verbally He conceded that the prosecutrix did not state that at that point of time, that she had been abducted by five persons and raped by four. She also did not disclose that there was another short person who had raped her as well. The witness admitted that she did not disclose that she was abducted while near the Fatima Bakery but referred to the spot as Richmond Park. He denied the suggestion that the prosecutrix at the time of lodging of the complaint did not name the miscreants. He denied the suggestion as well that the ear studs were bought from Man Pasand Jewellers, Shanti Nagar by taking Rakesh, a friend of accused No. 3- Parkash for the purpose. He denied the suggestion with regard to seizures from the spot and also the identification by the prosecutrix at the test identification parade.

14. The defence witness Rakesh deposed on oath that after the incident, while one day he was in the house of Parkash, the police visited the place and threatened the grand-father of the appellant Parkash alleging that he (Parkash) had snatched a pair of ear studs from the prosecutrix, to which his grand-father objected. The witness stated that then the police took him and the grand-father of the appellant Parkash to Man Pasand Jewellers, a local jewellery shop, where the police threatened the old man to pay the amount to purchase a pair of ear studs for Rs. 4000. The witness identified the ear studs through the emblem "M.P." thereon. He denied that the material Ex. 1, the ear studs belonged to the prosecutrix and that the same had been seized from the appellant Parkash.

15. Mr. Basava Prabhu S. Patil, learned senior counsel for the appellants has insistently argued that it being patent on a combined reading of the FIR and the testimony of the prosecutrix at the trial, that she is wholly untrustworthy and that the appellants have been falsely implicated, the impugned judgement and order is liable to be set aside lest it perpetuates gross injustice. The learned senior counsel has urged that not only the prosecutrix's version of the incident as a whole is inherently improbable, she has been wholly discredited as well by the medical evidence belying the accusation of forcible sexual intercourse by

the appellants in succession. Castigating the investigating agency for falsely foisting the articles claimed to have been seized on the appellants in its desperate attempt to establish their culpability, Mr. Patil has maintained that as the prosecutrix admittedly knew the appellants from before, their so called identification by her at the TIP is also of no consequence. The learned senior counsel asserted that PW2 Geeta, though having been declared hostile, her evidence at the trial otherwise consistent with the attendant facts and circumstances bearing on the conduct and activities of the prosecutrix ought not to have been discarded and this having vitiated the impugned decision as well, the conviction and sentence recorded against the appellants is liable to be interfered with. As the prosecution has failed to convincingly prove the charge levelled against the appellants, they are entitled to be acquitted, he urged. To buttress these pleas, reliance has been placed on the decisions of this Court in ***Sunil Kumar Sambhudayal Gupta (Dr.) and others. Vs. State of Maharashtra (2010) 13 SCC 657, Shyamal Saha Vs. State of West Bengal (2014) 12 SCC 321. Himanshu alias Chintu Vs. State (NCT of Delhi) (2011) 2 SCC 36 and Raju and Others Vs. State of Madhya Pradesh (2008) 15 SCC 133.***

16. As against this, the learned state counsel wholly endorsed the impugned decision contending that not only the testimony of the prosecutrix is true, cogent and convincing, having regard to the charge levelled by her, the same is deserving of full credence to base the conviction of the appellants thereon. According to the learned counsel, the minor inconsistencies in the FIR and the deposition of the prosecutrix, on a consideration of the totality of the circumstances, are acceptably reconcilable. As the identity of the appellants, as the perpetrators of the crime, is not in doubt, they having been identified by the prosecutrix in no uncertain terms, the prosecution case ought not to be jettisoned by relying on the evidence of PW2, a hostile witness, he urged. While contending that the medical evidence is not mutilative of the charge and that the seizures made in course of the investigation do undeniably establish the complicity of the appellants, their conviction is legally valid and does not merit any interference in the instant appeal, he maintained.

17. We have lent our anxious consideration to the materials on record as well as the competing arguments based thereon. Having regard to the charge levelled, the fulcrum of the prosecution case

logically is the testimony of the prosecutrix. Undeniably therefore the credibility and trustworthiness of the victim's version is the decisive factor to adjudge the culpability of the appellants.

18. Filtering the unnecessary factual details, suffice it is to recount that the incident allegedly had occurred at 7.30 p.m. on a public road while the prosecutrix was returning home after the day's work. Her version is that while she was on the way, an auto rickshaw with two persons therein pulled up by her side and she was dragged in forcibly. After moving for about 10 minutes, the abductors were joined by two more persons, whereafter she was taken to a garage and was molested against her will forcibly.

19. To start with, the prosecutrix has contradicted herself qua the place of alleged kidnapping. In the complaint, she mentioned the spot to be near Richmond park, whereas in her evidence she referred to the same as opposite Johnson market. It is more or less authenticated by the evidence on record that after her abduction and on the way to the garage as narrated by her, she did not scream or cry for help. This is of utmost significance as it is not alleged by her that the abductors had put her under fear on the point of any weapon threatening physical injury thereby. This is more so, as admittedly the prosecutrix at the relevant time was a major and could very well foresee the disastrous consequences to follow. She has admitted in her deposition as well that while she was ravished inside the garage and even during the intermittent breaks, she did not shout for any help. Her version in the complaint with regard to the offending act and the number of persons, who had committed the same, is inconsistent with her testimony on oath at the trial. Notably in the complaint she mentioned about four persons of whom three raped and out of them, two committed the act twice. She did not disclose in her complaint that the accused persons were known to her from before and disclosed that they during the time had been referring to themselves as Raju, Venu, Parkash and Francis. This, however has been denied by the investigation officer. On oath, she however introduced a fifth person as well. She accused all the four persons to have committed sexual intercourse with her for the second time. Though grudgingly, as admitted by her, she also consumed the food as offered to her by her molesters.

In cross-examination, she admitted that she was not married to Sarvana though she claimed him to be her husband in her

examination-in-chief. She disclosed more than once that the accused persons used to tease her for about 5-6 months prior to the incident and that she used to talk to them as well. In view of this admission of hers , the identification by the prosecutrix of the accused persons in the TIP pales into insignificance. She contradicted herself in the cross-examination by stating that three of the four did rape her for the second time. She was also inconsistent with regard to the writer of her complaint.

Her conduct during the alleged ordeal is also unlike a victim of forcible rape and betrays somewhat submissive and consensual disposition. From the nature of the exchanges between her and the accused persons as narrated by her, the same are not at all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct.

Her post incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and a devastated state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc. According to her, she wandered around the place and as disclosed by her in her evidence, to collect information so as to teach the accused persons a lesson. Her avengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised. Her confident movements alone past midnight, in that state are also out of the ordinary. Her testimony that she met a cyclist to whom she narrated her tale of woe and that on his information, the Hoysala police came to the spot and that thereafter she was taken to successive police stations before lodging the complaint at Sampangiramanagara police station as well has to be accepted with a grain of salt.

20. PW8, who medically examined her, opined in clear terms that she was accustomed to sexual intercourse and that no sign of forcible intercourse was discernible. This assumes great significance in view of the allegation of forcible rape by 3 to 4 adult persons more than once. The medical opinion that she was accustomed to sexual inter course when admittedly she was living separately from her husband for 1 and ½ years before the incident also has its own

implication. The medical evidence as such in the attendant facts and circumstances in a way belies the allegation of gang rape.

21. The evidence of PW2 Geeta who admittedly had offered shelter to the prosecutrix and her minor daughter, though had been declared hostile, her testimony as a whole cannot be brushed aside. In her testimony, this witness indicated that the prosecutrix used to take financial help from the accused persons and that she used to indulge in dubious late night activities for which her husband had deserted her. The defence plea of false implication as the accused persons had declined to oblige the prosecutrix qua her demand for financial help therefore cannot be lightly discarded in the overall factual scenario. Her version therefore is a plausible one and thus fit in with the defence plea to demolish the prosecution case.

22. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from ***Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624.*** It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record.

23. The seizures said to have been effected by the investigating agency also do not inspire confidence. Not only PW 4 Muthu denied that the seizure of ear studs had been made in his presence, DW1 on oath had stated that this item of jewellery had in fact been purchased by the police from a local shop which he could identify on the basis of the symbol 'MP' inscribed thereon. In any view of the matter, the seized articles per se in absence of any evidence of corroboration of charge would not, irrefutably prove the involvement of the appellants in the offence alleged.

24. This Court in Raju (supra), while reiterating that the evidence of the prosecutrix in cases of rape, molestation and other physical outrages is to be construed to be that of an injured witness so much so that no corroboration is necessary, ruled that an accused must also be protected against the possibility of false implication. It was underlined that the testimony of the victim in such cases, though commands great weight but the same, cannot necessarily be

universally and mechanically accepted to be free in all circumstances from embellishment and exaggeration. It was ruled that the presumption of absence of consent of the victim, where sexual intercourse by the accused is proved as contemplated in Section 114A of the Evidence Act, was extremely restricted in its application compared to the sweep and ambit of the presumption under Sections 113A and 113B of the Indian Evidence Act. It was exposited that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of a injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel truth.

The essence of this verdict which has stood the test of time proclaims that though generally the testimony of a victim of rape or non- consensual physical assault ought to be accepted as true and unblemished, it would still be subject to judicial scrutiny lest a casual, routine and automatic acceptance thereof results in unwarranted conviction of the person charged.

25. Vis-a-vis the scope of interference with a judgment of acquittal, this Court in Sunil Kumar Shabukumar Gupta (Dr.) (supra) echoed the hallowed proposition that if two views are possible, the appellate court should not ordinarily interfere therewith though its view may appear to be the more probable one. While emphasizing that the trial court has the benefit of watching the demeanour of the witnesses and is thus the best judge of their credibility, it was held that every accused is presumed to be innocent unless his guilt is proved and that his presumption of innocence gets reinforced with his acquittal by the trial court's verdict. It was reiterated that only in exceptionable cases and under compelling circumstances, where the judgement of acquittal is found to be perverse i.e. if the findings have been arrived at by ignoring or excluding relevant materials or by taking into consideration irrelevant/inadmissible material and are against the weight of evidence or are so outrageously in defiance of logic so as to suffer from the vice of irrationality, that interference by the appellate court would be called for.

26. That the appellate court is under an obligation to consider and identify the error in the decision of the trial court and then to decide whether the error is gross enough to warrant interference was underlined by this Court in Shyamal Saha (supra). It was emphasized that the appellate court is not expected to merely substitute its

opinion for that of the trial court and that it has to exercise its discretion very cautiously to correct an error of law or fact, if any and significant enough to warrant reversal of the verdict of the trial court.

27. The prosecution case, when judged on the touchstone of totality of the facts and circumstances, does not generate the unqualified and unreserved satisfaction indispensably required to enter a finding of guilt against the appellants. Having regard to the evidence on record as a whole, it is not possible for this Court to unhesitatingly hold that the charge levelled against the appellants has been proved beyond reasonable doubt. In our estimate, the view taken by the Trial Court is the overwhelmingly possible one. In contrast, the findings of the High Court are decipherably strained in favour of the prosecution by overlooking many irreconcilable inconsistencies, anomalies and omissions rendering the prosecution case unworthy of credit. Noticeably, the High Court has exonerated the appellants of the charge of abduction underSection 366 IPC, which is an inseverable component of the string of offences alleged against them. Judged by the known parameters of law, the view adopted by the High Court is not a plausible one when juxtaposed to that of the Trial Court. We are of the unhesitant opinion that the prosecution has failed to prove the charge against the appellants to the hilt as obligated in law and thus, they are entitled to the benefit of doubt. The appeal thus succeeds and is allowed. The impugned judgement and order is set-aside. The appellants are on bail. Their bail bonds are discharged.

***Result*:-** Appeal allowed.
