

IN THE COURT OF MS. NIVEDITA ANIL SHARMA,
ADDITIONAL SESSIONS JUDGE
(SPECIAL FAST TRACK COURT)-01,
WEST, TIS HAZARI COURTS, DELHI

Sessions Case Number : 148 of 2013.
Unique Case ID Number : 02401R0609662013.

State

Versus

Mr. Upender Dutt Sharma@ Goldi,
Son of Mr. Durga Dutt Sharma,
Resident of A-182, Gali No. 7, Ph.No.5, Peer Baba Road,
Om Vihar, Uttam Nagar, New Delhi.

First Information Report Number : 143/13.
Police Station Nihal Vihar.
Under section 376 of the Indian Penal Code.

Date of filing of the charge sheet before : 07.09.2013.
the Court of the Metropolitan Magistrate
Date of receipt of file after committal : 31.10.2013.
Arguments concluded on : 02.01.2016.
Date of judgment : 02.01.2016.

Appearances: Ms.Madhu Arora, Additional Public Prosecutor for the
State.
Accused on bail with counsel,Mr.Shri Parkash Sharma.
Ms.Vandana Chanchal, counsel for the Delhi Commission
for Women.

Sessions Case Number : 148 of 2013.
Unique Case ID Number : 02401R0452772013.
FIR No. 143/2013, Police Station Nihal Vihar,
Under sections 376 of the Indian Penal Code.
State vs Upender Dutt Sharma @ Goldi

JUDGMENT

“To call woman the weaker sex is a libel; it is man's injustice to woman. If by strength is meant brute strength, then, indeed, is woman less brute than man. If by strength is meant moral power, then woman is immeasurably man's superior. Has she not greater intuition, is she not more self-sacrificing, has she not greater powers of endurance, has she not greater courage? Without her, man could not be. If nonviolence is the law of our being, the future is with woman. Who can make a more effective appeal to the heart than woman?”----Mahatma Gandhi.

1. Rape is a dark reality in Indian society like in any other nation. This abnormal conduct is rooted in physical force as well as familiar and other power which the abuser uses to pressure his victim. Nor is abuse by known and unknown persons confined to a single political ideology or to one economic system. It transcends barriers of age, class, language, caste, community, sex and even family. The only commonality is power which triggers and feeds rape. Disbelief, denial and cover-up to “preserve the family reputation” are often then placed above the interests of the victim and her abuse. Rape is an abominable and ghastly and it worsens and becomes inhuman and barbaric when the victim who is allegedly subjected to unwanted physical contact by a perverted male, known to her.
2. *“Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions*

or insignificant discrepancies in the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more important because of lately crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasize that the courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in totality of the background of the entire case and not in isolation." The Supreme Court has made the above observations in the judgment reported as **State of Andhra Pradesh v. Gangula Satya Murthy, JT 1996 (10) SC 550.**

PROSECUTION CASE

3. Mr. Upender Dutt Sharma @ Goldi, the accused, has been charge sheeted by Police Station Nihal Vihal, Delhi for the offence under section 376 of the Indian Penal Code (hereinafter referred to as the IPC) on the allegations that from 2008 to February 2009 during the first incident on unknown date at WZ-779, Village Tihar, he offered the prosecutrix (name withheld to protect her identity) tea and biscuits mixed with intoxicated material and committed rape upon her; and thereafter the accused had raped her on the false pretext of marriage with her.

CHARGE SHEET AND COMMITTAL

4. After completion of the investigation, the charge sheet was filed

before the Court of the learned Metropolitan Magistrate on 07.09.2013 and after its committal, the case was assigned to this Court i.e. Additional Sessions Judge (Special Fast Track Court) -01, West, Tis Hazari Courts, Delhi for 31.10.2013.

CHARGE

5. After hearing arguments, charge for offence under sections 328, 376 and 420 of the IPC have been framed against accused Mr. Upender Dutt Sharma @ Goldi vide order dated 19.11.2013 to which he pleaded not guilty and claimed trial.

PROSECUTION EVIDENCE

6. In order to prove its case, the prosecution has examined as many as 10 witnesses i.e. the prosecutrix, as PW1; HC Ram Mahesh, MHCM as PW2; Ct. Seema Chahar, who had taken the prosecutrix to SGM Hospital for her medical examination, as PW3; HC Jai Bhagwan, Duty Officer, as PW4; Dr. Binay Kumar, who had medically examined the accused, as PW5; Dr. Aditi Aggarwal, who had medically examined the prosecutrix, as PW6; Dr. Gurdeep, who had medically examined the prosecutrix in casualty, as PW7; Ct M.R.Prasad, witness of investigation, as PW8; Ms. Ekta Gauba, learned Metropolitan Magistrate, who had recorded the statement of prosecutrix under section 164 of the Cr.P.C., as PW9; and SI Koyal, the Investigation Officer, as PW10.
7. The accused and his counsel have preferred not to cross examine

PWs 2, 3, 4, , 5, 6, 7 and 9 due to which their evidence remains uncontroverted and unrebutted and can be presumed to have been admitted as correct by all the accused persons.

8. Vide order dated 03.06.2014, the counsel for accused, on behalf of the accused, has admitted the evidence of Ms. Sunita Gupta, FSL Expert as well as FSL report.
9. The Additional Public Prosecutor made a statement on 07.08.2014 and has dropped the witness Ct. Chandra Shekhar from the list of prosecution witnesses as his evidence is not relevant.

STATEMENT OF THE ACCUSED UNDER SECTION 313 OF THE CR.P.C. AND DEFENCE EVIDENCE

10. In his statement under section 313 of the Cr.P.C., the accused has controverted and rebutted the entire evidence against him and submitted that he is innocent and he has not committed any offence. The prosecutrix was already married to some one else and she wanted to extort money from him for which she had lodged the present false case against him.

11. Accused has preferred to lead evidence in their defence. He is examined Mr. Phool Singh, as DW1; Ct. Dharamvir as DW2; and Mr. Dev Karan Singh as DW3.

ARGUMENTS

*Sessions Case Number : 148 of 2013.
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12. I have heard arguments at length. I have also given my conscious thought and prolonged consideration to the material on record, relevant provisions of law and the precedents on the point.

13. The Additional Public Prosecutor for the State has requested for convicting the accused for having committed the offences under sections 328, 376 and 420 of the IPC, submitting that the prosecution has been able to bring home the charge against the accused by examining its witnesses whose testimonies are corroborative and reliable.

14. The counsel for the accused, on the other hand, has requested for his acquittal submitting that there is nothing incriminating against the accused on the record. There is an unexplained delay in the lodging of FIR. The complaint made by the prosecutrix is concocted. The prosecutrix has given false evidence. The evidence of the prosecutrix as well as other prosecution witnesses is unreliable as it suffers from various contradictions and inconsistencies. The investigation has not been properly conducted. The prosecutrix was already married and could not have married the accused. She wanted to extort money from the accused.

DISCUSSION, ANALYSIS, OBSERVATIONS AND FINDINGS

15. The question is how to test the veracity of the prosecution story especially when it has some variations in the evidence. Mere variance of the prosecution story with the evidence, in all cases,

should not lead to the conclusion inevitably to reject the prosecution story. Efforts should be made to find the truth, this is the very object for which the courts are created. To search it out, the Courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the Courts, not to merely conclude and leave the case the moment suspicions are created. It is the onerous duty of the Court within permissible limit to find out the truth. It means, on the other hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot-free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be created to the accused. For this, one has to comprehend the totality of facts and the circumstances as spelled out through the evidence, depending on the facts of each case by testing the credibility of the witnesses, of course after excluding that part of the evidence which are vague and uncertain. There is no mathematical formula through which the truthfulness of the prosecution or a defence case could be concretized. It would depend upon the evidence of each case including the manner of deposition and his demeanors, clarity, corroboration of witnesses and overall, the conscience of a Judge evoked by the evidence on record. So the Courts have to proceed further and make genuine efforts within judicial sphere to search out the truth and not stop at the threshold of creation of doubt to

confer benefit of doubt.

16. Under this sphere, I now proceed to test the submissions of both the sides.

CASE OF THE PROSECUTION, ALLEGATIONS AND PROVED DOCUMENTS

17. The prosecution story unveils with the prosecutrix (**PW1**) going to Police Station Nihal Vihar on 26.04.2013 where she made a written complaint (**Ex.PW1/A**) against the accused. Since police did not take any action on her complaint dated 26.04.2013, the **prosecutrix** again visited PS Nihal Vihar on 30.04.2013 and enquired about the action taken on her complaint. The prosecutrix (**PW1**) was told that no action had been taken on her complaint and the police official on duty tried to avoid her. Thereafter, the prosecutrix (**PW1**) telephoned the Media persons of Sahara News Channel and narrated the entire incident to them stating that police was not taking any action on her complaint and she was present at Police Station Nihal Vihar. After some time, two media persons came to Police Station Nihal Vihar and they enquired from the police regarding the action taken on her complaint. Thereafter, the police recorded a statement without conducting any enquiries from her and asked her to sign on the same stating that the contents of her application dated 26.04.2013 have been reproduced in this statement and thereafter, she signed the said statement (**Ex.PW1/B**) and the FIR was registered in this case. On 01.05.2013, HC Jai

Bhagwan (PW4) Duty Officer lodged the FIR (Ex. PW4/A), made his endorsement on the rukka (Ex. PW4/B) and issued certificate under section 65 B Evidence Act (Ex. PW4/C) and handed over the same to IO/SI Koyal (PW10) for investigation. The prosecutrix (PW1) was taken on the instructions of the IO/SI Koyal (PW10) by Ct. Seema Chahar (PW3) to SGM Hospital, Mangol Puri for her medical examination where she was medically examined by Dr. Gurdeep (PW7) and was referred to the Gynecological department where she was medically examined by Dr. Aditi Aggarwal (PW6) vide MLC (Ex. PW6/A). Her internal examination was also conducted by the doctor and her blood sample as well as other samples and sealed exhibits were handed over to Ct. Seema Chahar (PW3) who handed the same to the Investigation Officer (PW10) who seized them vide seizure memo (Ex. PW1/C). Before the doctor, the prosecutrix (PW1) had stated the name of the accused as Goldy but after her examination, when copy of the MLC was provided to the prosecutrix, she came to know that doctor had written the name of the accused as Murli and she had informed W Ct. Seema (PW3) who had taken her for her medical examination that the name of Goldy has been wrongly mentioned as Murli in the MLC and the prosecutrix told her that she wanted to get the same corrected in the MLC. W Ct. Seema (PW3) did not do anything in this regard and took her back to Police Station Nihal Vihar and she told this fact to the Investigation Officer SI Koyal (PW10) but she stated that now nothing can be done in this regard. On 25.07.2013, the prosecutrix was produced

before Ms. Ekta Gauba, learned Metropolitan Magistrate (**PW9**) who recorded her statement under section 164 of the Cr.P.C. (**Ex.PW1/G**) on the application of the IO for recording the statement (**Ex.PW9/A**) and copy of the statement was given to the IO on her application for supply of copy of statement (**Ex.PW9/B**). The prosecutrix (**PW1**) was taken by the police to the place of occurrence i.e. H.No.779, Village Tihar, New Delhi where the offence of rape took place with her for the first time. IO/SI Koyal (**PW10**) prepared site plan (**Ex.PW1/D**) at her instance. The prosecutrix (**PW1**) had taken the police to the house of the accused in A-182, Gali no.7, Phase No-5, Pir Baba Road, Om Vihar, Uttam Nagar, where he was present. On the identification of the prosecutrix, the accused was arrested by the IO/SI Koyal (**PW10**) vide arrest memo (**Ex.PW1/E**) and the personal search memo (**Ex.PW1/F**). The accused confessed his crime vide his disclosure statement (**Ex.PW8/A**). The accused took the police to the place of occurrence and pointed out the same vide the pointing memo (**Ex.PW8/B**). On the directions of IO/SI Koyal (**PW10**), Ct. M.R.Prasad (**PW8**) took the accused to SGM Hospital for his medical examination and was examined by Dr. Binay Kumar (**PW5**) vide MLC (**Ex.PW5/A**) and the doctor had handed over MLC of the accused, the sealed exhibits of the accused to Ct. M.R.Prasad (**PW8**) who handed over the same to IO/SI Koyal (**PW10**) who seized the same vide seizure memo (**Ex.PW8/C**). On 01.05.2013, IO/SI Koyal (**PW10**) had deposited with HC Ram Mahesh, MHC (M) (**PW2**), three sealed pullandas along with one

sample seal of the hospital and HC Ram Mahesh (PW2) had made the entry of the same in register number 19 at serial no. 981 (Ex.PW2/A). On 14.05.2013, three sealed pullandas along with one sample seal were received by IO/SI Koyal (PW10) vide entry no. 70/21/13 in register no. 21 (Ex.PW2/B) by HC Ram Mahesh and IO/SI Koyal (PW10) deposited the same in the office of FSL vide acknowledgement (Ex. PW2/C). The exhibits of the case were examined by Ms. Sunita Gupta, Senior Scientific Officer (Biology) FSL vide FSL report (Ex.PX1). During the investigation IO/SI Koyal (PW10) had recorded the statements of the witnesses under section 161 Cr.P.C and after completion of the investigation, the charge sheet was prepared and put to the Court for trial.

18. The allegations against the accused are that from 2008 to February 2009 during the first incident on unknown date at WZ-779, Village Tihar, he offered the prosecutrix tea and biscuits mixed with intoxicated material and committed rape upon her; and thereafter, the accused had raped her on the false pretext of marriage with her.

IMPORTANT ISSUES

19. The important issues and the points in dispute are being discussed hereinafter.

IDENTITY OF THE ACCUSED

20. There is no dispute regarding the identity of the accused Mr. Upender Dutt Sharma @ Goldi who has been identified in the

Court by PW1, the prosecutrix and the police witnesses of investigation. It is also not in dispute that the accused and the prosecutrix were known to each other prior to the lodging of the FIR. Accused is also named in the complaint (**Ex.PW1/B**) and the FIR (**Ex.PW4/A**).

21. Therefore, the identity of the accused stands established.

AGE OF THE PROSECUTRIX

22. There is no dispute that the prosecutrix was above 18 years of age at the time of the incident. In her complaint (**Ex.PW1/A**), the prosecutrix has mentioned her age as 27 years and in her statement under section 164 of the Cr.P.C. (**Ex.PW1/C**), her MLC (**Ex.PW5/A**) and in her evidence before the Court, the prosecutrix has mentioned her age as 28 years. As per the prosecution, she was a major at the time of the alleged incident.

23. Therefore, it is clear that the prosecutrix was a major at the time of incident.

VIRILITY OF THE ACCUSED

24. Dr. M. Das (**PW5**) had medically examined the accused vide MLC (**Ex.PW5/A**). He has not been cross examined on behalf of the accused due to which his evidence remains uncontroverted and unrebutted and can be presumed to be admitted by the accused.

25. It is mentioned in the MLC of the accused (Ex.PW5/A) that ***“There is nothing to suggest that pt. is not capable of performing sexual intercourse”***.

26. Even on physical examination, the doctor has found that the private parts of the accused to be well developed. There is nothing on the record to show that the accused is impotent or medically incapable of committing the offence of rape.

27. Therefore, it is clear that the accused is virile and is capable of performing sexual act and is capable of committing the act of rape.

MLC OF THE PROSECUTRIX AND FORENSIC EVIDENCE

28. It has been argued on behalf of the accused that as there is no medical and forensic evidence against the accused, it indicates that he has been falsely implicated in this case as the prosecutrix does not have any injury and when her samples taken during her gynecological examination were compared with those of the accused, nothing incriminating was found in the FSL report (Ex.PW8/F).

29. The Additional Public Prosecutor has argued that the medical and forensic evidence is only for corroboration.

30. It can be seen from the MLC of the prosecutrix (Ex.PW6/A) which

is dated 30.04.2013 that she does not have any external injuries. She had told the doctor that last sexual relations were 10 days back, which would be 20.04.2013 (calculated).

31. The FSL report (Ex.PX-1) shows that blood was found on exhibits '1a', '1a-2' and '2' i.e. one gauze cloth piece having brownish stains, one dark brown foul smelling liquid and damp foul smelling blood stained gauze. Blood could not be detected on '1b1', '1b2' and '3' i.e. two cotton swabs on stick kept in test tubes described as vaginal swabs and underwear of accused. Human semen was detected on exhibit '3' i.e. underwear of accused. Semen could not be detected on '1b' and '1b2' i.e. two cotton swabs on stick kept in test tubes described as vaginal swabs.

32. Although there is nothing incriminating against the accused in the medical and forensic evidence produced by the prosecution, but per se, the ocular and oral evidence as such cannot be ignored, and lack of medical and forensic evidence does not indicate that the accused is innocent.

33. There is nothing incriminating against the accused in the medical and forensic evidence produced by the prosecution.

DELAY IN FIR

34. The contention of the counsel for the accused that there was a delay in lodging of the FIR which is fatal is now being taken into

consideration.

35. The counsel for the accused has argued that there is an unexplained delay in lodging the FIR which was lodged after due deliberation and consultation.

36. The contention of the prosecution that there is no delay in lodging the FIR as the prosecutrix lodged the complaint as early as possible. She was exploited by the accused for five years and then he refused to marry her saying that he cannot go against the wishes of his parents. She went to the Police Station and gave her complaint on which action was not taken and then when the media persons intervened, the FIR was lodged.

37. The delay in lodging the report raises a considerable doubt regarding the veracity of the evidence of the prosecution and points towards the infirmity in the evidence and renders it unsafe to base any conviction. Delay in lodging of the FIR quite often results in embellishment which is a creature of after thought. It is therefore that the delay in lodging the FIR be satisfactorily explained. The purpose and object of insisting upon prompt lodging of the FIR to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well the names of eye witnesses present at the scene of occurrence.

38. It is not that every delay in registration of the FIR would be fatal to the prosecution. Once the delay has been sufficiently explained, the prosecution case would not suffer. However, it is necessary for the Courts to exercise due caution particularly in the cases involving sexual offences because the only evidence in such cases is the version put forwarded by the prosecutrix.

39. In the case reported as **State of Rajasthan v. Om Prakash, (2002) 5 SCC 745**, the Hon'ble Supreme Court has held that in case where delay is explained by the prosecution in registering the case, the same could be condoned moreover when the evidence of the victim is reliable and trustworthy.

40. Similar view was taken in **Tulshidas Kanolkar v. The State of Goa, (2003) 8 SCC 590**, wherein it was held by the Supreme Court as follows:

“The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance s for the accused when accusation of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered , the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there s possibility of embellishment or exaggeration in the prosecution version on account of such delay , it is a relevant factor. On the other

hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so the mere delay in lodging of first information report does not in any way render prosecution version brittle.

41. In the judgment reported as Devanand v. State (NCT of Delhi), 2003 Cr.L.J. 242, the Hon'ble High Court of Delhi has observed as follows:

“The above said statement clearly show that at the earliest opportunity the prosecutrix had not made any complaint to her mother in this regard. Reading of the examination–in-chief reveals that first time she was raped as per her own version after about 30-36 days of coming of the appellant but in any case she admits that she has been raped many a times and she only complained to her mother few days after he had left. The appellant stayed in the house of the prosecutrix for more than year.”

42. Further, the Hon'ble High Court of Rajasthan in the judgment reported as Babu Lal and Anr v. State of Rajasthan, Cri.L.J. 2282, has held as under:

“No doubt delay in lodging the FIR in sexual assault cannot normally damage the version of the prosecutrix as held the Hon'ble Supreme Court in various judgements but husband of the prosecutrix is there and report is lodged after one and half months, such type of delay would certainly be regarded as fatal to the prosecution case”

43. The Hon'ble High Court of Madhya Pradesh in the judgment reported as Banti alias Balvinder Singh v. State of Madya

Pradesh, 1992 Cr.L.J. 715, has held as under:

“in conclusion, having regard to the conduct of the prosecutrix in not making any kind of complaint about the alleged incident to anybody for five days coupled with late recording of report by her after five days with false explanation for the delay, in the context also of the Lax Morals of the Prosecutrix, it is very unsafe to pin faith on her mere word that sexual intercourse was committed with her by five accused persons or any of them. It is also difficult to believe her version regarding the alleged abduction in jeep. In the circumstances it must be held that the prosecutrix story was not satisfactorily established”

44. It is claimed by the accused that as the FIR (Ex.PW4/A) has been lodged after a long delay on 01.05.2013 at 00:05 hours (12:05 a.m.) while the allegations made by the prosecutrix in her complaint (Ex.PW1/B) (which is dated 30.04.2013) are that the accused had raped her for the first time in February, 2009 and thereafter w.e.f. February, 2009 till 20.04.2013 (as per MLC-Ex.PW6/A). The delay in lodging of the FIR has been not explained by the prosecution.

45. The Additional Public Prosecutor, on the other hand, has submitted that there is no delay in the lodging of the FIR as the criminal action was swung into motion as soon as possible.

46. As per the complaint / statement of the prosecutrix to the police, (Ex.PW1/B), which is dated 30.04.2013, the physical relations were established (without her consent) in February, 2009 and thereafter w.e.f. February, 2009 to 20.04.2013 on a false pretext of

marriage.

47. In her statement under section 164 of the Cr.P.C. (Ex.PW1/G) which was recorded on 25.07.2013, the prosecutrix has stated similarly with some variations. She has not given any specific date when the physical relations were last established.

48. In her examination in chief, the prosecutrix as PW1, has deposed that ***“For about 4-5 years accused continued to have physical relations with me saying that he would marry me..... This continued up till April 2013.”***

49. The first alleged incident of rape was in February, 2009 when the prosecutrix was taken to the house of the accused, intoxicated and raped. The prosecutrix neither shouted for help nor raised any alarm nor tried to escape nor complained about the alleged offence to anyone.

50. It is clear that the prosecutrix preferred to remain silent and not complain to anyone prior to the lodging of the complaint on 30.04.2013.

51. Here, the judgment of the hon'ble High Court of Delhi reported as **Shashi Chaudhary v. Ram Kumar and anr, 2011 (1) JCC 520** would be relevant wherein it has been observed that there is no

explanation given by the prosecutrix for her not making hue and cry, when the alleged offence took place, nor is there any explanation for failure on her part to lodge the complaint with the police immediately or for that matter within a reasonable time of incident.

52.No explanation is coming forth from the prosecution regarding the delay. No reasonable or logical explanation is coming from the prosecution regarding the delay in lodging of the FIR on 30.04.2013 at 00:05 hours (**Ex.PW4/A**) when the alleged incident of rape occurred much earlier. The last incident was on 20.04.2013 (calculated) as per the MLC of the prosecutrix (**Ex.PW6/A**) and no explanation is coming forth from the prosecution regarding her waiting till 30.04.2013 for making the complaint. No media person has been examined by the prosecution to justify that the police was not taking the complaint (**Ex.PW1/A**) nor any action on the same.

53.The prosecutrix and the prosecution have not been able to justify the delay and why the prosecutrix did not report the matter immediately or earlier. No logical explanation has been furnished by the prosecution for the delay, as elaborated above.

54.These facts indicate that the possibility of the complaint being motivated or manipulated and the version of the prosecutrix being untrue cannot be completely ruled out. The possibility that the FIR was lodged after due deliberation and consultation cannot be ruled

out. The discrepancies in the evidence and the documents regarding the delay in lodging of the FIR indicate that the prosecutrix and the prosecution are unable to justify the delay in lodging of the FIR which is fatal to the prosecution version.

55. Therefore, it can be said that the FIR was lodged after a delay which is fatal to the prosecution story. The delay has not been satisfactorily explained by the prosecutrix and the prosecution.

EVIDENCE AND OTHER STATEMENTS OF THE PROSECUTRIX

56. It is very essential and important to discuss and analyse the different statements of the prosecutrix.

57. **PW1, the prosecutrix** has deposed that in the year 2008, she had gone with her friend Ms. Simran to PVR Cinema at Vikas Puri for a movie. After the movie had finished, they met one Mr. Ajay who was friend of Ms. Simran outside the movie hall. Accused Upender Dutt Sharma @ Goldi was accompanying Mr. Ajay at that time. She was introduced to him. She has identified accused Upender Dutt Sharma @ Goldi through the screen. While they were leaving, the accused asked her for her mobile number and offered friendship to her. She refused to give her mobile number to him and thereafter went to her residence. Next day, she got a call on her mobile phone from the accused and on her enquiry, he told her that he had taken her mobile number from Ms. Simran. He had again offered

friendship to her and she again declined. Thereafter, he called her repeatedly on her phone asking for friendship. She gradually developed friendship with and started talking to him. Accused started asking her to meet him at PVR Cinema which she used to refused. However, she did meet him once or twice at PVR Cinema along with Ms.Simran and Mr. Ajay but she never met him alone. After 5-6 months of her initial meeting, the accused asked her to marry him on which she told him that she would take permission from her parents before she gets married. Accused told her that he would meet her parents to take their permission but prior to that, he would make her meet his parents. Thereafter, she started meeting the accused frequently. She told the accused that as they were meeting frequently, they would be seen by her family and friends and he should talk to his parents about their marriage. She did not remember the exact date, but it was in February 2009 that accused phoned her and asked her to come to his house at WZ-779, Tihar Village, Near Tilak Nagar for meeting his parents. She went to meet him. From Tilak Nagar, the accused had picked her to take her to his residence. She met his father in his house. When she touched his feet, he had given her his blessings. Accused told him that he liked her and wanted to marry her to which his father replied that even he approved of her. However, he also said that as his wife, mother of the accused, was not at home, they should wait for her to return. His father enquired about her residence and then, the accused offered to show his house to her. He showed his house to her which comprise of two rooms, kitchen and wash room and a

courtyard. He told her to sit in the second room. The room where initially she was taken had a sofa and a single bed and the second room had a double bed. Accused told her to sit in the second room which had a double bed saying that she may be uncomfortable in the presence of his father. Then he left the room and returned with tea and biscuit. She saw that he had given one cup of tea to his father also in the other room. Accused had brought two cups of tea. They had tea and biscuit. After consuming tea, she started feeling heaviness in her head (sir bhaari ho gaya) on which the accused had told her that she was coming from outside, she must be tired and asked her to lie down on the bed till his mother returned. Thereafter, as she became sleepy, she slept. She did not know for how much she had slept. When she woke up, she found that she did not have any clothes on her body. Accused Upender also did not have any clothes on his body. He was lying besides her and was touching her private parts (private parts ke saath ched-chaad kar raha tha). When she asked him to stop, he told her that as his father has consented for their marriage, they could have physical relations. Accused forcibly had physical relations with her (mere saath jabardasti sharirik sambandh banai). She was crying and she asked the accused why he had forcibly had physical relations with her on which he told her that his father had approved their marriage and as they were to get married, they could have physical relationship as they would be having physical relationship after marriage also. Accused was not returning her clothes and it was only when she repeatedly requested him that he took out her

clothes from under the bed and gave them to her. She wore her clothes. Accused came up to Tilak Nagar with her and returned saying that his father was alone at home. From Tilak Nagar, she came to her residence herself. For about 4-5 years, the accused continued to have physical relations with her saying that he would marry her. Accused repeatedly promised to marry her after which he had physical relationship with her. If the accused had not promised to marry her, she would not have had physical relations with him. This continued up till April 2013. In between, she had met Ms.Uma, mother of the accused, several times and she had also approved of the marriage between her and the accused. On 21.04.2013, the mother of the accused telephoned her and told her that she had got the accused engaged to some other girl. She also told her that she should not telephone or contact the accused. She enquired from her whether anything was wrong. She told her that as her father had expired, they would not be able to give her anything in marriage and also that she was of a lower caste. She telephoned the accused several times but he did not take her calls. Accused sent her one SMS that he was busy. She has deposed her mobile number (number mentioned in file and withheld to protect the identity of the prosecutrix). The mobile number of the accused is 8800557997. He telephoned her in the evening and told her that he could not do anything but he would try to talk to his mother. Thereafter, despite her repeated attempts at contacting him on telephone, he did not take her calls and did not meet her. Thereafter, she went to Police Station Nihal Vihar on 26.04.2013 and made a

written complaint against the accused (**Ex.PW1/A**) which was in her handwriting. The police officer on duty, who was a lady and not in police uniform, had initially refused to accept her complaint but had later on taken it on record and had put receiving endorsement on her copy. The police officer on duty had given her one mobile number which is mentioned at point C telling her that the said number is of ASI Rekha and she could enquire from her regarding the status of her complaint. After two days of her filing the complaint, she telephoned ASI Rekha who expressed her ignorance regarding any such complaint in the Police Station. Since police did not take any action on her complaint dated 26.04.2013, she again visited Police Station Nihal Vihar on 30.04.2013 and enquired about the action taken on her complaint. She was told that no action had been taken on her complaint and the police official on duty try to avoid her. Thereafter, she telephoned the Media person of Sahara News Channel and narrated the entire incident to them stating that police was not taking any action on her complaint and she was present at Police Station Nihal Vihar. After some time, two media persons came to Police Station Nihal Vihar and they enquired from the police regarding the action taken on her complaint. Thereafter, the police recorded a statement without conducting any enquiries from her and asked her to sign on the same stating that the contents of her application dated 26.04.2013 have been reproduced in this statement and thereafter she signed the said statement (**Ex.PW1/B**). Thereafter, the FIR was registered in this case. She was taken to SGM Hospital, Mangol Puri for her medical examination. Her

internal examination was also conducted by the doctor and her blood sample as well as other samples were taken. The sealed exhibits were taken into possession by the IO vide seizure memo (Ex.PW1/C). Before the doctor, she had stated the name of the accused as Goldy but after her examination when copy of the MLC was provided to her, she came to know that doctor had written the name of the accused as Murli. She had informed W.Ct. Seema who had taken her for her medical examination that name of Goldy has been wrongly mentioned as Murli in the MLC and she told her that she wanted to get the same corrected in the MLC. W.Ct. Seema did not do anything in this regard and took her back to Police Station Nihal Vihar. She told this fact to the IO SI Koyal but she stated that now nothing can be done in this regard. She was taken by the police to the place of occurrence i.e H.No. 779, Village Tihar, New Delhi where the offence of rape took place with her for the first time. Investigation Officer prepared site plan (Ex.PW1/D) at her instance. She had taken the police to the house of accused in A-182, gali no.7, Phase No-5, Pir Baba Road, Om Vihar, Uttam Nagar, where accused was present and on her identification, he was arrested by the Investigation Officer vide arrested memo (Ex.PW1/E) and the personal search memo (Ex.PW1/F). Her statement was recorded by the learned Metropolitan Magistrate after about 4 months of registration of FIR. One day prior to her statement before the learned Metropolitan Magistrate, IO SI Koyal along with one Inspector came to her residence stating that she was to be produced before the learned Metropolitan Magistrate for her

statement. Next day, she came to Tis Hazari Courts where her statement (**Ex.PW1/G**) was recorded by Ms. Ekta Gauba, the learned Metropolitan Magistrate. She has prayed that accused should be punished for the offence he has committed against her.

58.In her complaint (**Ex.PW1/B**) made on 30.04.2013, the prosecutrix has stated that how she was introduced to the accused through her friend Ms.Simran @ Tashu and her friend Mr.Ajay who was friend of the accused. She has stated in February, 2009, when the prosecutrix was taken to the house of the accused, she was intoxicated and raped by him. Thereafter, as he promised to marry her, he had physical relations with her till about 15 days earlier (till 15.04.2013-calculated). His mother told her that they are marrying the accused to someone else and she should not interfere. She contacted the accused and he told her that he cannot go against the wishes of his parents.

59.In her statement under section 164 of the Cr.P.C. (**Ex.PW1/G**), the prosecutrix has stated similarly with some variations.

60.Before coming to the factual matrix, briefly the law regarding physical relations on a false pretext of marriage is required to be elaborated briefly.

61.In the case reported as **Uday v. State of Karnataka, AIR 2003 SC 1639**, the Hon'ble Supreme Court has held as under :-

“It therefore, appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

62. In the case reported as Sujit Ranjan v State, 2011 LawSuit (Del) 601, the Hon’ble Delhi High Court has held that:

“Legal position which can be culled out from the judicial pronouncements referred above is that the consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be considered as given under “misconception of fact”. Whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under “misconception of fact ” depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and

every ingredient of the offence Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to “misconception of fact” right from the inception.”

63. In the case reported as Deepak Gulati v State of Haryana, (2013) 7 SCC 675 : 2013 Law Suit (SC) 442 , the Hon'ble Supreme Court has held that:

“Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had malafide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at any early stage a false promise of marriage by the accused ; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so, such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was malafide, and that he had clandestine motives. Hence, it is evident that there must be

adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “ failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance.” Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.”

64. Thus, in Uday’s case (supra) and Deepak Gulati’s case (supra), the Hon’ble Supreme Court laid down the law that if the prosecutrix is matured to understand the significance and morality associated with the act, she was consenting to and that she was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor and also that if it is difficult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact, that had arisen from his promise to marry her and further that if there is any evidence to prove conclusively, that the appellant never intended to marry with the prosecutrix, the accused be given benefit of doubt.

65. In the case reported as **Kuldeep Tyagi v The State NCT of Delhi,**

2013(2) JCC 840, it was observed that it was never the case of the prosecutrix that she ever insisted the accused to marry her. Thus, it was not a case of refusal to marry, despite promise, hence, not relevant.

66. In the judgment reported as Nikhil Parashar v. State of Delhi, 2010 (1) JCC 615, it was observed as follows:

“If I take the view that sexual intercourse with a girl, in the facts and circumstances such as in the present case, does not amount to rape, it will result in unscrupulous and mischievous persons, taking undue advantage of innocent girls by promising marriage with them, without having any intention to do so, re-assuring the girl and her family by making the two families meet each other and formalize the matter by ceremonies, such as an engagement, persuading the girl to have sexual intercourse with him by making her believe that he was definitely going to marry her and then abandoning her, after robbing her of what is most dear to her. A case where the girl agrees to have sexual intercourse on account of her love and passion for the boy and not solely on account of the misrepresentation made to her by the boy or a case where a boy, on account of circumstances, which he could not have foreseen or which are beyond his control, does not marry her, despite having all good intentions to do so, has to be treated differently from a case, such as the present one, where the petitioner since the very inception had no intention of marrying the prosecutrix to whom he was a complete stranger before he met her to consider the proposal for marriage with her.”

67. In the case reported as Karthi @ Karthick v State of Tamil Nadu, Crl. Appeal No. 601 of 2008 decided on 01/07/2013, AIR 2013 SC 2645, the facts were that the accused used to tease the

prosecutrix and one day finding her alone in her house committed sexual intercourse forcibly and then promised to marry her and requested that she should not disclose this fact to anybody. Thereafter they both were engaged in consensual sex at different places and in all these meeting the accused swore that he would marry with the prosecutrix. However one day on 05.10.2003, both the prosecutrix and accused gone in a temple where she requested the accused to marry her but he refused and on his refusal, she divulged the entire facts to her family members. Panchayat was held in village and the accused was summoned there and persuade to marry with prosecutrix but he refused to marry the prosecutrix and then the prosecutrix lodged a report.

68. The Hon'ble Supreme Court after considering the case law laid down, held that the first sexual intercourse was forceful and thereafter the subsequent acts of sexual intercourse, were actions of actively cheating her, by giving her the impression that he would marry her. The occurrence at the Murugan temple, is of significant importance, where he left the prosecutrix when he was asked to marry her. Hence the court held that the sexual intercourse by the accused with the prosecutrix was not consensual as obtaining consent by exercising deceit, cannot be legitimate defence to exculpate an accused.

69. Thus, on analyzing the law laid down by the Hon'ble Superior Courts, it appears that the intention of the accused at the time of

entering into a relationship is to be seen by the Court as to if he really intended to marry the prosecutrix or he merely made the promise to get sexual favours from the prosecutrix. If the facts suggest that the accused genuinely wished to marry prosecutrix but it could not materialize due to reasons beyond his control, then in such an event no offence could be made out. However, on the contrary, if he had no intention to marry the prosecutrix since beginning then his case would be squarely covered within the ambit of offence under section 376 IPC. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to “misconception of fact” right from the inception.”

70. Turning to the present case, on carefully scrutiny of her different statements, it transpires that the prosecutrix has made several improvements, contradictions and inconsistencies in her evidence and her deposition is contrary to her earlier statements. Her cross examination shall be discussed later. Some of the improvements, contradictions and inconsistencies in the different statements of the prosecutrix are tabulated below:

Complaint- Ex.PW1/B	MLC of prosecutrix- Ex.PW6/A	Statement under section 164 Cr.P.C.- Ex.PW1/G	Examination in chief
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Sessions Case Number : 148 of 2013.
Unique Case ID Number : 02401R0452772013.
FIR No. 143/2013, Police Station Nihal Vihar,
Under sections 376 of the Indian Penal Code.
State vs Upender Dutt Sharma @ Goldi

Name of accused is Goldi	Name of accused is Murli	Name of accused is Goldi	Name of accused is Upender Dutt Sharma @ Goldi
In February 2009, accused phoned her and asked her to come to his house at WZ-779, Tihar Village, Near Tilak Nagar for meeting his parents.	Accused called her to meet his family	In February 2009, accused phoned her and asked her to come to his house at WZ-779, Tihar Village, Near Tilak Nagar for meeting his parents.
His father liked her. Accused asked to wait till his mother returns.	She reached his house. She met his father who had paralysis. His mother was not at home. Accused told him that he liked her and wanted to marry her. His father gave her his blessings.	From Tilak Nagar, the accused had picked her to take her to his residence. She met his father in his house. When she touched his feet, he had given her his blessings. Accused told him that he liked her and wanted to marry her to which his father replied that even he approved of her.

.....	.....	.....	However, he also said that as his wife, mother of the accused, was not at home, they should wait for her to return.
.....	.....	Accused offered to show his house to her and took her to the other room where they had tea and biscuits.	His father enquired about her residence and then, the accused offered to show his house to her.
.....	.....	.....	He told her to sit in the second room.
Accused brought tea and biscuits which they had.	.....	Accused went to make tea for her while she sat with his father.	Then he left the room and returned with tea and biscuit. They had tea and biscuit.
.....	.....	Accused brought tea and gave one cup of tea to his father.	She saw that he had given one cup of tea to his father also in the other room.

<p>After consuming tea, she started feeling heaviness in her head (sir bhaari ho gaya) on which the accused had told her that she was coming from outside, she must be tired and asked her to lie down on the bed till his mother returned. She slept there.</p>	<p align="center">.....</p>	<p>Accused brought another cup for himself. They had tea and biscuits. After consuming tea and biscuits, she felt heaviness in her head and felt sleepy. accused had told her that she was coming from outside, she must rest till his mother returned.</p>	<p>After consuming tea, she started feeling heaviness in her head (sir bhaari ho gaya) on which the accused had told her that she was coming from outside, she must be tired and asked her to lie down on the bed till his mother returned. Thereafter, as she became sleepy, she slept.</p>
<p>When she woke up, she found that she did not have any clothes on her body.</p>	<p align="center">.....</p>	<p>When she woke up, she found accused wearing only underwear and she was not wearing any clothes.</p>	<p>When she woke up, she found that she did not have any clothes on her body. Accused Upender also did not have any clothes on his body.</p>
<p>He was touching her private parts. Accused forcibly had physical relations with her assuring her of marriage.</p>	<p align="center">.....</p>	<p>Accused was touching her breast and private parts. She covered herself with a pillow. He removed it and raped her. She</p>	<p>He was lying besides her and was touching her private parts (private parts ke saath ched-chaad kar raha tha). When she asked him to</p>

		could not shout as his father was in the other room.	stop, he told her that as his father has consented for their marriage, they could have physical relations. Accused forcibly had physical relations with her (mere saath jabardasti sharirik sambandh banai).
.....	.....	Accused took out her clothes from under the bed and gave them to her.	Accused was not returning her clothes and it was only when she repeatedly requested him that he took out her clothes from under the bed and gave them to her. She wore her clothes. Accused came up to Tilak Nagar with her and returned saying that his father was alone at home.

		Accused assured her of marriage saying that his father had given his assent.	
.....	.....	Then she returned home. She was sad and did not go to her office for two days. On the third day, when she went to office, accused came there and met her. He again assured her of marriage. After few days, his mother met her and accused told his mother that he wanted to marry her. They started visiting each other's houses.	.....
They had physical relations till 15 days prior to the complaint i.e. till 15.04.2013	Alleged history of sexual intercourse with the consent of the victim since five years.	They had physical relations till first week of April, 2013 on the assurance of marriage	For about 4-5 years, the accused continued to have physical relations with her saying that he would

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(calculated).		given by accused.	marry her. Accused repeatedly promised to marry her after which he had physical relationship with her.
.....	Last episode of sexual intercourse 10 days back.	.....	This continued up till April 2013.
.....	.....	.....	In between, she had met Ms.Uma, mother of the accused, several times and she had also approved of the marriage between her and the accused.
.....	.....	In February, 2012 accused took her to a temple in Vikas Puri and filled the parting of her hair.	.....
On 21.04.2014, mother of accused phoned her saying that they were getting the accused married else where and she should not	On 21.04.2014, accused phoned her saying that his mother wanted to talk to her. In evening, his mother phoned her and told her	On 21.04.2013, the mother of the accused telephoned her and told her that she had got the accused engaged to some other girl. She also

*Sessions Case Number : 148 of 2013.
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<p>interfere.</p>		<p>that they were getting the accused married else where and she should stop phoning him. The other girl's family is giving dowry which her family cannot give. The accused had given his acceptance for that marriage and he did not want to marry the prosecutrix. She was also threatened to be defamed or killed.</p>	<p>told her that she should not telephone or contact the accused. She enquired from her whether anything was wrong. She told her that as her father had expired, they would not be able to give her anything in marriage and also that she was of a lower caste.</p>
<p>She talked to accused and he told her that he cannot go against the wishes of his parents.</p>	<p>.....</p>	<p>.....</p>	<p>She telephoned the accused several times but he did not take her calls. Accused sent her one SMS that he was busy. She has deposed her mobile number (number mentioned in file and withheld to protect the identity of the prosecutrix).</p>

			<p>The mobile number of the accused is 8800557997. He telephoned her in the evening and told her that he could not do anything but he would try to talk to his mother. Thereafter, despite her repeated attempts at contacting him on telephone, he did not take her calls and did not meet her.</p>
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71. It can be seen from the above discussion and the above detailed table that the prosecutrix has given different and contradictory versions about practically every aspect of the case.

72. One of the catastrophic contradictions is regarding the name of the accused. In the MLC (Ex.PW6/A), the prosecutrix has given the name of the culprit as Murli while everywhere else she has said Goldi. She has tried to justify the same by deposing in her examination in chief that ***“Before the doctor I had stated the name of the accused as Goldy but after my examination when copy of the MLC was provided to me I came to know that doctor had written the name of the accused as Murli. I had informed WCT***

Seema who had taken me for my medical examination that name of Goldy has been wrongly mentioned as Murlu in the MLC and I told her I wanted to get the same corrected in the MLC. WCT Seema did not do anything in this regard and took back to PS Nihal Vihar. I told this fact to the IO SI Koyal but she stated that now nothing can be done in this regard.” However, no such deposition has been made by IO SI Koyal (PW10). The prosecutrix has not made any complaint to any authority that the doctor has written the name of the accused wrongly. The MLC was prepared on 30.04.2013 and the prosecutrix gave her statement under section 164 of the Cr.P.C. (Ex.PW1/G) on 25.07.2013 but she did not say anything or make a complaint before the learned Metropolitan Magistrate regarding the name of the accused being wrong in the MLC. No explanation is coming forth from the prosecution regarding this contradiction due to which the prosecution version appears doubtful.

73. The prosecutrix has deposed that *“I went to PS Nihal Vihar on 26.04.2013 and made a written complaint against the accused which was in my handwriting. Copy of the same is Ex.PW1/A.....I telephoned the Media person of Sahara News Channel and narrated the entire incident to them stating that police was not taking any action on my complaint and I was present at PS Nihal Vihar. After some time two media persons came to PS Nihal Vihar and they enquired from the police regarding the action taken on my complaint. Thereafter, police*

recorded a statement without conducting any enquiries from me and asked me to sign on the same stating that the contents of my application dt. 26.04.2013 have been reproduced in this statement and thereafter I signed the said statement which is Ex.PW1/B, which bears my signature at point A. Thereafter, the FIR was registered in this case.” However, the original of Ex.PW1/A was not produced by the prosecution nor the IO SI Koyal (PW10) has deposed regarding the same. The media persons on whose intervention the FIR was registered have also not been cited as witnesses nor produced and examined by the prosecution. The same shatters the veracity of the testimony of the prosecutrix.

74. The prosecutrix has stated in her statement under section 164 of the Cr.P.C. (Ex.PW1/G) that *“In February, 2012 accused took her to a temple in Vikas Puri and filled the parting of her hair.”* But this fact is not mentioned in her any other statement. No explanation regarding the same is coming forth from the prosecution which makes her version doubtful.

75. The prosecutrix has deposed in her cross examination that *“I did not make any complaint to anyone on way back from the house of the accused to my residence in February, 2009 after the incident nor I had raised any alarm nor sought help from any one. I had myself returned to my house.”* No explanation is coming forth from the prosecution regarding this deposition as why the prosecutrix did not complain to the father of the accused, her

own family, anyone she may have met on way back to her house or the police, if she was aggrieved due to the conduct of the accused. The same makes the prosecution version appears doubtful.

76. The prosecutrix has deposed in her examination in chief that ***“I saw that he had given one cup of tea to his father also in the other room. Accused had brought two cups of tea. We had tea and biscuit.”*** Apparently, the tea was also given by the accused to his father and tea and biscuits were consumed by them-accused and prosecutrix. Then how only she was intoxicated has not been explained by the prosecution. He had heaviness in her head and slept but neither the accused nor his father who had consumed the same tea and biscuits were not affected has not been explained by the prosecution.

77. The prosecutrix has deposed in her cross examination that ***“I was working in February, 2009 in a company in the name of Vipes which was in Meera Bagh. It was neither a Sunday nor any festive occasion on the day when I had gone to the house of accused in February, 2009. I have not taken any leave from my office between January and March 2009.”*** The fact that the prosecutrix after the alleged incident of February, 2009 continued to work normally indicates that she was comfortable with the arrangement between the accused and herself. She has also not taken leave from her office shows that she herself was keen to go to the house of the accused.

78. A startling fact is revealed in the cross examination of the prosecutrix. She has deposed that ***“In December, 2009 I had gone with the accused to Shimla and had stayed in a hotel for a day. I had not told this fact to the police in my statement. Ms. Simran had also accompanied me to Shimla with her friend Mr. Ajay. I had not told to the police or to any family member that accused had taken me forcibly to Shimla where he had forcibly established physical relations with me. Again said there were no physical relations between me and accused at Shimla.”*** She has concealed this fact from the police, learned Metropolitan Magistrate and this Court and only revealed about the same when she was cross examined. It appears that she had willingly gone with the accused to Shimla. She has also not mentioned about her trip to Shimla with the accused in her complaint, statement under section 164 of the Cr.P.C. and examination in chief and no explanation regarding the same is coming forth from the prosecution. It appears that the prosecutrix has made a conscious attempt to conceal this fact which makes her version doubtful.

79. According to the prosecutrix, she had talked frequently to the accused on phone and also to his mother who had told her on phone about the accused marrying another girl. However, neither the phone was seized nor the CDRs of the mobile phones of the accused and the prosecutrix were obtained during investigation. The prosecutrix has deposed that ***“My phone was not seized by the***

police Vol. The IO had told me that she would keep my phone under surveillance.” This fact also makes the prosecution version doubtful.

80. In her cross examination, the prosecutrix has deposed that ***“In the month of March, 2009 when I had talked to the mother of the accused and had later met her, I had told her on both the occasion that the accused had physical relations with me in February, 2009.”*** No explanation is coming forth from the prosecution regarding not disclosing this fact in her earlier statements and it appears that the prosecutrix has made a conscious attempt to conceal this fact which makes her version doubtful.

81. In her cross examination, the prosecutrix has deposed that ***“The number of the mother of the accused was fed in my mobile and my mother also used to talk to her.”*** However, neither the CDRs of the mobile phone of the prosecutrix have been produced nor the mother of the prosecutrix has been associated in this case.

82. In her cross examination, the prosecutrix has deposed that ***“I did not make any complaint to anyone on way back from the house of the accused to my residence in February, 2009 after the incident nor I had raised any alarm nor sought help from any one. I had myself returned to my house.”*** When such a shocking incident of rape has occurred with the prosecutrix and she does not make any complaint to any authority, the same makes her version

doubtful.

83. In her cross examination, the prosecutrix has deposed that ***“I did not make any complaint to any authority against the accused between the year 2009 and 2013 prior to the lodging of the present case.”*** The prosecutrix has been continuously raped on a false promise of marriage since February, 2009 till April, 2013 but she preferred to remain silent about it and not make any complaint to any authority. No explanation is coming forth from the prosecution regarding the same which makes her version doubtful.

84. In her cross examination, the prosecutrix has deposed that ***“I do not remember the exact date and time but it was summer season of the year 2009 when I had told my mother and my friends that the accused and I were going to get married and it was after the accused had proposed marriage to me. In February, 2009 I had told the father of the accused that accused and I were going to get married.”*** It is an admitted fact that the families of the prosecutrix and the accused had not met to discuss their marriage. She has stated that her mother had talked to the mother of the accused on phone which is not proved. For more than four years i.e. w.e.f. February, 2009 to April, 2013, if there was a promise to marry by the accused to the prosecutrix, then apparently no action was taken on the same nor the families had met nor any date of the marriage was fixed. All these facts throw a shadow of doubt on the prosecution version.

85. The prosecutrix has deposed that ***“On the day of Holi in 2014 I had telephoned the accused.”*** Giving explanation that ***“I was receiving the calls from the friends of the accused including one Mr. Ajay number of times for finishing this case so I had called the accused.”*** The prosecutrix calling the accused during the trial of this case shows her inclination towards him even then. It can be seen that due to her love for the accused, the prosecutrix wants to marry the accused and her desperation is evident when she has contacted him during trial of this case. Apparently, it is a case of one sided love of the prosecutrix which has not been reciprocated.

86. The prosecutrix was fully aware that she had taken of risk of having physical relations with the accused without his marrying her. She was fully aware of the pros and cons of the act being educated and mature.

87. The above mentioned overwhelming contradictions and glaring inconsistencies in the evidence of the prosecutrix and the other statements of the prosecutrix cannot be ignored. The veracity of the testimony of the prosecutrix stands shattered.

88. Prosecutrix a consenting party and enjoyed the company of the accused on her own. If a full grown girl consents to act of sexual intercourse on promise to marry and continues to indulge in such activity, it is act of promiscuity on her part and not an act induced

by misconception of fact.

89.It appears that the prosecutrix despite knowing about all the pros and cons that the accused has not married her after the acquittal in the first case, she still had physical relations with him. She apparently took this step at her own risk and peril. It may be as she was in love with him and was desperate to marry him that such a major step was taken by her. This fact clearly indicates that the prosecutrix was a consenting party. It also transpires from the evidence of the prosecutrix that she was phoning him, having physical relations with him, and this indicates that she herself was interested in the physical relations with the accused. It appears that the prosecutrix was aware of the acts she was indulging in and she being a major surely knew about the morality and complications attached to the act and hence the accused cannot be held liable.

90.It can be seen from the above table that the prosecutrix has made several contradictions in her different statements and the prosecution has not been able to explain or justify them.

91.Here, it may be mentioned that it is important to understand what consent implies and what is consent on misconception of facts or misrepresentation.

92.An argument has been raised by the Additional Public Prosecutor that the accused on the pretext of love and promise to marry

established a physical relationship with the prosecutrix which amounts to rape as this is obtaining the consent of the prosecutrix by fraud and incitement which neither voluntary nor free. Had the prosecutrix known that the accused would not marry her and he is already married, she would not established physical relations with him. There has to be unequivocal consent but the consent of the prosecutrix was taken by misrepresentation amounting to breach of trust.

93. On the other hand, it had argued by the counsel for the accused that the accused and the prosecutrix did not have any physical relations and assuming that the prosecutrix had physical relationship with the accused, it was with her free consent and will despite knowing that he will not marry her.

94. The crucial expression in section 375 of the IPC which defines rape as against her will. It seems to connote that the offending act was despite resistance and opposition of the woman. IPC does not define consent in positive terms. But what cannot be regarded as consent is explained in Section 90 which reads as follows:

“Consent given firstly under fear of injury and secondly under a misconception of fact is not consent at all.”

95. **Jowitts Dictionary on English Law, Words and Phrases,**

Permanent Edn. explains “consent” as follows:

“Consent supposes three things a physical power, a mental power and a free and serious use of them. Hence it is that if

consent is obtained by intimidation, force, meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of mind.”

96. In Words and Phrases, Permanent Edn., Vol.8-A, the following passages culled out from certain old decisions of the American Courts are found:

“.....adult females understanding of nature and consequences of sexual act must be intelligent understanding to constitute consent.”

97. Here, it would be necessary to mention that in the case reported as Jayanti Rani Panda v. State of West Bengal and anr., 2002 SCC (Cri) 1448, it has been observed that:

“The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to an act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case unless the Court can be assured that from the very inception the accused never really intended to marry her.”

98. Similar observations have also been made in the judgments

reported as Pradeep Kumar Verma v. State of Bihar & anr., AIR 2007 SC 3059; Jyotsana Kora v. The State of West Bengal and anr., Manu/WB/0364/2010; Deelip Singh alias Dilip Kuamr v. State of Bihar, (2005) 1 SCC 88; Uday v. State of Karnataka, (2003) 4 SCC 46 and Naresh Kumar v. State (Govt. of NCT) Delhi, 2012 (7) LRC 156 (Del).

99. When a girl, a major, willfully has physical relations with the accused on the promise to marry on an uncertain date, it cannot be said that it is a misconception of fact or that her consent has been obtained by fraud. It is clear that the prosecutrix accepted whatever physical relationship was there with her free consent.

100. In the present case, it is clear that that the consent of the prosecutrix on the promise to marry cannot be said to be under a misconception of fact as she was a major at the time of the alleged incident and intelligent enough to understand the consequences of establishing physical relationship with the accused. Mere promise to marry on an uncertain date does not indicate that the accused has obtained her consent for the physical relationship by fraud or misrepresentation. Consent given by the prosecutrix to have physical relationship with whom she is in love, on a promise that he would marry her on a later date, cannot be considered as given under misconception of fact.

101. Thus, sexual intercourse by a man with a woman without her
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consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix 'against her consent'. How is 'consent' defined? Section 90 of the IPC defines consent known to be given under 'fear or misconception' which reads as under:-

"Consent known to be given under fear or misconception -
A consent is not such consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."

102. Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated. It cannot be said that the alleged consent said to have obtained by the accused was not voluntary consent and the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is not borne out from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix.

103. This kind of consent taken by the accused with clear intention not to fulfill the promise and persuaded the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.

104. Section 114-A of the Indian Evidence Act, 1872 provides, that

if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, alongwith the provisions of Section 90 of the Act 1872. Section 90 of the Act 1872 provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.

105. The judgments reported as [Uday v. State of Karnataka, AIR 2003 SC 1639](#); [Deelip Singh @ Dilip Kumar v. State of Bihar, AIR 2005 SC 203](#); [Yedla Srinivasa Rao v. State of A.P., \(2006\) 11 SCC 615](#); and [Pradeep Kumar Verma v. State of Bihar & Anr., AIR 2007 SC 3059](#), observe that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act (s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

106. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

107. Turning back to the case in hand, it may be mentioned here that the prosecution has not produced any proof of the prosecutrix

being administered any intoxicant at the time of the alleged first incident. Except for a bare assertion, there is nothing to substantiate this allegation.

108. It is also clear that the prosecutrix was not confined by the accused and was willingly with him in February, 2009 in his house where his father was in another room, as she had neither not shouted for help nor raised any alarm nor tried to escape nor complained to his father immediately after the alleged incident or even later. She had not called the police nor made any complaint to the neighbours.

109. Where the evidence of the prosecutrix is found suffering from serious infirmities, contradictions and inconsistencies with other material and there being no forensic or medical evidence, then no reliance can be placed upon her evidence. Onus is always on the prosecution to prove and accused is entitled to the benefit of reasonable doubt. Case of the prosecution is to be proved beyond reasonable doubt and cannot take support from weakness of case of defence. In case the evidence is read in totality and story projected by the prosecutrix is found to be improbable, prosecution case becomes liable to be rejected. If evidence of prosecutrix is read and considered in totality of circumstances along with other evidence on record, in which offence is alleged to have been committed, her deposition does not inspire confidence. Prosecution has not disclosed true genesis of crime. (Reliance can be placed upon the

judgment of the hon'ble Supreme Court reported as **Narender Kumar v. State (NCT of Delhi), 2012 (5) LRC 137 (SC)**.

110. If one integral part of the story put forth by a witness-prosecutrix was not believable, then entire case fails. Where a witness makes two inconsistent statements in evidence either at one stage or both stages, testimony of such witness becomes unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on such evidence. (Reliance can be placed upon the judgment of the hon'ble Delhi High Court reported as **Ashok Narang v. State, 2012 (2) LRC 287 (Del)**).

111. The fact that the prosecutix did not make any complaint immediately after the alleged incident of February, 2009 and thereafter. The same also points towards the prosecution case not being true.

112. The Hon'ble Supreme Court had observed in the case of **Deelip Singh Alias Dilip Kumar vs. State of Bihar, AIR 2005 SC 203** that where sexual intercourse took place between parties on promise of marriage by accused and the statement of the prosecutrix revealing that she was fully aware of moral quality of act and inherent risk involved, she had considered pros and cons of act and the prospect of marriage proposal not materializing had also entered her mind. The participation of prosecutrix in sexual act

could be said to be voluntary and deliberate.

These statements do indicate 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. The prospect of the marriage proposal not materializing had also entered her mind. Thus her own evidence reveals that she took a conscious decision after active application of mind to the things that were happening. Incidentally, we may point out that the awareness of the prosecutrix that the marriage may not take place at all in view of the caste barrier was an important factor that weighed with the learned Judges in Uday's case in holding that her participation in the sexual act was voluntary and deliberate."

113. It is clear from the record that the prosecutrix is now 29 years old and working as a beautician (as mentioned in her particulars during evidence). She is a mature woman. The prosecutrix was fully aware that she had taken of risk of having physical relations with the accused without his marrying her. She was fully aware of the pros and cons of the act being working and mature.

114. The above mentioned overwhelming contradictions and glaring inconsistencies in the evidence of the prosecutrix and the other statements of the prosecutrix cannot be ignored. The veracity of the testimony of the prosecutrix stands shattered. Consequently, no inference can be drawn that the accused is guilty of the charged offences as the prosecutrix has made different inconsistent statements due to which her testimony becomes unreliable and unworthy of credence.

115. Prosecutrix a consenting party and enjoyed the company of the accused on her own for four years w.e.f. February, 2009 to April, 2013. If a full grown girl consents to act of sexual intercourse on promise to marry and continues to indulge in such activity, it is act of promiscuity on her part and not an act induced by misconception of fact.

116. It appears that the prosecutrix despite knowing about all the pros and cons that the accused has not married her, she still had physical relations with him. She apparently took this step at her own risk and peril. It may be as she was in love with him and was desperate to marry him that such a major step was taken by her.

117. Despite knowing everything, the prosecutrix still preferred to be with the accused and did not raise any objection or resistance. This fact clearly indicates that the prosecutrix was a consenting party. It also transpires from the evidence of the prosecutrix that she went to Shimla with him and this indicates that she herself was interested in the physical relations with the accused. It appears that the prosecutrix was aware of the acts she was indulging in and she being a major surely knew about the morality and complications attached to the act and hence the accused cannot be held liable.

118. The prosecution has failed to furnish any explanation in respect of the contradictions in the statements of the prosecutrix.

The inherent contradictions strike at the very root of the

prosecution story making it unbelievable and improbable. In the instant case, the evidence and different statements of the victim/prosecutrix suffers from such infirmities and the probabilities due to which the prosecution has come out with a story, which is highly improbable. The overwhelming contradictions are too major to be ignored and they strike a fatal blow to the prosecution version.

119. Where the evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material points with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, then no reliance can be placed upon her evidence. Onus is always on the prosecution to prove and accused is entitled to the benefit of reasonable doubt. Case of the prosecution is to be proved beyond reasonable doubt and cannot take support from weakness of case of defence. In case the evidence is read in totality and story projected by the prosecutrix is found to be improbable, prosecution case becomes liable to be rejected. Prosecutrix knew the accused prior to the incident. If evidence of prosecutrix is read and considered in totality of circumstances along with other evidence on record, in which offence is alleged to have been committed, her deposition does not inspire confidence. Prosecution has not disclosed true genesis of crime.

120. It is a case of heinous crime of rape, which carries grave implication for the accused, if convicted. Therefore, for convicting any person for the said offence, the degree of proof has to be that of a high standard and not mere possibility of committing the said offence. In a criminal case, the prosecution has to prove its case beyond reasonable doubt against the accused and not merely dwell upon the shortcoming of defence.

121. Consequently, no inference can be drawn that the accused is guilty of the charged offence under section 328, 376 read with section 417 of the IPC as the prosecutrix has made inconsistent statements due to which her testimony becomes unreliable and unworthy of credence. There is no material on record that the prosecutrix was forced into having physical relations by the accused by intoxicating her and later on a false promise of marriage.

122. It appears that the prosecutrix had willfully remained with the accused and had physical relationship, if any, with him being a consenting party and that the accused does not appear to have committed any offence.

123. The prosecutrix is an adult. She is sufficiently intelligent to understand the significance and moral quality of the act she was consenting to, having friendship with the accused and having no grievance about her conduct and behaviour at any time and having

established physical relationship number of times with her consent and without any resistance. She never informed her family about her relationship with the accused or his offer to marry her. Her versions are inconsistent and contradictory. All the surrounding circumstances reveal that the prosecutrix established physical relationship with the accused with her free consent and in such a situation, there is nothing on the judicial record to show that the accused has ever committed any offence, as alleged.

124. Therefore, there is no force is the contention of the Additional Public Prosecutor that the prosecutrix was raped by the accused after intoxicating her and raped on a false promise of marriage as her consent is not free.

125. The hon'ble Supreme Court had an opportunity to discuss as to why discrepancies arise in the statements of witnesses. In the judgment reported as **Bharwada Boginbhai Hijri Bhai v. State of Gujarat, 1983 (CRI) GJX 0252 SC**, the Supreme Court pointed out the following reasons as to why the discrepancies, contradictions and improvements occur in the testimonies of the witnesses.

- a. *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
- b. *Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The*

mental faculties therefore cannot be expected to be attuned to absorb the details.

- c. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.*
- d. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*
- e. In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of individuals which varies from person to person.*
- f. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.*
- g. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, of fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved through the witness is giving a truthful and honest account of the occurrence witnessed by him perhaps it is a sort of psychological defence mechanism activated on the moment.*

126. The prosecution has failed to furnish any explanation in respect of the contradictions in the statements of the prosecutrix. The inherent contradictions strike at the very root of the

prosecution story making it unbelievable and improbable. In the instant case, the evidence and different statements of the victim/prosecutrix suffers from such infirmities and the probabilities due to which the prosecution has come out with a story, which is highly improbable. The overwhelming contradictions are too major to be ignored and they strike a fatal blow to the prosecution version. In fact what emerges from the evidence of the prosecutrix is she has leveled false allegations of rape against the accused.

127. In the light of the aforesaid nature of deposition of the prosecutrix, PW1, who happens to be the material witnesses, I am of the considered view that her deposition cannot be treated as trustworthy and reliable. Reliance can also be placed upon the judgment reported as **Suraj Mal versus The State (Delhi Admn.), AIR 1979 S.C. 1408**, wherein it has been observed by the Supreme Court as:

“Where witness make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witness.”

128. Similar view was also taken in the judgment reported as **Madari @ Dhiraj & Ors. v. State of Chhattisgarh, 2004(1) C.C. Cases 487.**

129. Consequently, no inference can be drawn that the accused is guilty of the charged offences as the prosecutrix has made different inconsistent statements due to which her testimony becomes unreliable and unworthy of credence.

130. Consequently, no inference can be drawn that the accused is guilty of the charged offences as the prosecutrix has made inconsistent statements due to which her testimony becomes unreliable and unworthy of credence. There is no material on record that the prosecutrix was forced by the accused.

131. This brings me to the final question as to whether it was she was raped by the accused, raped on a false promise of marriage and made to undergo a semblance of ceremony of marriage. In this regard it is no doubt true that in her statement before this Court she has stated that she had physical relations with the accused on a false pretext of marriage but there are several contradictions in her statements which remain unexplained and indicate that no such offence was ever committed by the accused.

132. In the judgment reported as **Namdeo Daulata Dhayagude and others v. State of Maharashtra, AIR 1977 SC 381**, it was held that where the story narrated by the witness in his evidence before the Court differs substantially from that set out in his statement before the police and there are large number of contradictions in his evidence not on mere matters of detail, but on

vital points, it would not be safe to rely on his evidence and it may be excluded from consideration in determining the guilt of accused.

133. In the judgment reported as **Suraj Mal v. The State (Delhi Administration) AIR 1979, SC 1408**, it was held that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses.

134. In such a situation, the assertions made by the prosecutrix that the accused had physical relations with the prosecutrix forcibly, the prosecutrix had physical relations with the accused, on the assurance that he shall marry her, or undergoing a semblance of ceremony of marriage are per se false and as such, unacceptable and unbelievable. It is apparently clear that the prosecutrix had herself got involved physically with the accused. It can be seen from the evidence of the prosecutrix that the allegations leveled by her of rape by the accused are false and unbelievable. It seems that she has not been raped at any point of time but she was a consenting party to the physical relationship with the accused.

135. It is also saddening to note that when the prosecutrix, an unmarried illiterate woman, gets involved with a man, in order to save her respect in society or in her desperation to marry the

accused as she may have one sided love for him, she is projecting herself to be a victim and the accused to be a culprit and guilty of raping her on a false promise of marriage when she herself is fully aware that the accused has not committed any offence. A case where the girl agrees to have sexual intercourse on account of her love and passion for the boy and not solely on account of the misrepresentation made to her by the boy or a case where a boy, on account of circumstances, which he could not have foreseen or which are beyond his control, does not marry her, despite having all good intentions to do so, has to be treated as innocent.

136. In the light of the aforesaid nature of deposition of the prosecutrix, PW1, who happen to be the material witnesses, I am of the considered view that her deposition cannot be treated as trustworthy and reliable.

137. **All the above facts and the ratio of the above referred judgments indicate that there is no veracity in the prosecution case in respect of the offences of intoxication and rape, rape on promise to marry the prosecutrix by accused Mr.Upender Dutt Sharma @ Goldi and the accused merits to be acquitted for the offence under section 328, 376 read with section 420 of the IPC.**

MENS REA / MOTIVE

138. Regarding the motive of crime, it may be observed that in a case based on evidence, the existence of motive assumed significance though the absence of motive does not necessarily discredit the prosecution case, if the case stands otherwise established by other conclusive circumstances and the chain of evidence is so complete and is consistent only with the hypothesis of the guilt of the accused and inconsistent with the hypothesis of his innocence.

139. The motive has to be gathered from the surrounding circumstances and such evidence should form one of the links to the chain of evidence. The proof of motive would only strengthen the prosecution case and fortify the Court in its ultimate conclusion but in the absence of any connecting evidence or link which would be sufficient in itself from the face of it, the accused cannot be convicted. Motives of men are often subjective, submerged and unnameable to easy proof that courts have to go without clear evidence thereon if other clinching evidence exists. A motive is indicated to heighten the probability that the offence was committed by the person who was impelled by the motive but if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in which the alleged motive.

140. In the present case, a story has been projected that the accused has raped the prosecutrix after intoxicating her and then continued to rape her since February, 2009 till April, 2013 on a false promise of marriage. This version appears to be untrue as there is no reason why he would do so. No reason is shown as to why the accused would jeopardize his future. He has claimed that the prosecutrix was already married to someone else and she wanted to extort money from him. In such a situation, when according to the accused, the prosecutrix is already married, there can be no reason why an unmarried man would want to marry a married woman.

141. There is nothing on the record to show that the accused has committed the offence, as alleged by the prosecution. He is a mature man aged about 27 years (as per his MLC-Ex.Pw5/A) and capable of understanding the implications of his acts. He has completely denied having physical relations with the prosecutrix at any point of time.

142. In the present case there is sufficient evidence on record to show that the accused did not have a motive to commit the offence. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. However, there can be no sweeping generalization. Each case must be judged on its own

facts. These observations are only made to combat what is so often put forward in cases as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.

143. There does not appear to be any criminal intention and mens rea on the part of the accused.

DEFENCE OF THE ACCUSED

144. In his statement under section 313 of the Cr.P.C., the accused has stated that he is innocent and has been falsely implicated in this case. He has denied all the evidence of the prosecution. This case has been falsely lodged against him by the prosecutrix. The prosecutrix was already to someone else and she wanted to extort money from me for which she has lodged the present false case against me.

145. Accused has preferred to examine three witnesses in his defence.

146. DW-1- Mr. Phool Singh, Assistant in Diwan Kedar Nath Charitable Trust, 2, Barat Ghar Marg, Feroze Gandhi Road, Lajpat Nagar-III, New Delhi-24 has brought the receipt no. 9360 dated 26.04.2005. As per the, list the marriage hall was booked by Mr. Amit Kumar R/o 185/4 Lukur Ganj, Allahabad and advance amount of Rs. 7300/- were given by the Mr. Amit Kumar for

booking of marriage hall. A marriage invitation card (Mark A) shows that the address of the marriage hall in the invitation card is mentioned as 2, Barat Ghar Marg, Feroze Gandhi Road, Lajpat Nagar-III, New Delhi-24. He has brought the office record regarding the bookings vide receipts. The photocopy of booking receipt no. 9360 dated 26.04.2005 of the amount paid by Mr. Amit Kumar i.e Rs.7300/- is Ex.DW1/A. He did not know the names of the bride and the groom whose marriage was solemnized in the marriage hall on 11.05.2005 against which receipt Ex.DW1/A was issued to Mr. Amit Kumar. In his cross examination, he has deposed that he has been authorized to attend the Court by Secretary for Diwan Kedarnath Charitable Trust. He has been working as an Assistant in Diwan Kedarnath Charitable Trust, 2 Barat Ghar Marg, Firoze Gandhi Road, Lajpat Nagar-III New Delhi, for the last one year. The document Ex.DW1/A is not in his handwriting. He has admitted to be correct that he does not know who had prepared the receipt Ex.DW1/A as he was not working there in the year 2005. He can not tell that the hall booked for 11.05.2005 was for the purpose of solemnization of marriage or for any other small function. He has admitted to be correct that the said hall is being booked for all the purposes like some get together or some religious function or any birthday, occasion, etc.

147. DW-2-Ct. Dharamvir had brought the summoned record i.e DD entry no. 34 registered in the Roznamcha register at serial no. 34 dated 16.03.2008 (Ex.DW2/A). In his cross examination, he has

deposed that he can tell the name of the writer of DD No. 34 only by referring to the record brought by him. He does not have any personal knowledge about the content and writer of DD No. 34.

148. DW-3- Mr.Dev Karan Singh, FSO in Food & Supply Department, Mundka, Delhi has deposed that he is posted as Food and Supply Officer at Mundka. Record relating to the ration of Mr. Sehdev Barvi, the ration card no. 151605 issued for the address of 74, Nilothi Viaster, New Hari Kishen Nagar, Delhi-41 is not available in his office. However, same is available with the FSO of Nangloi and directions may be issued to the concerned office to produce the relevant records. He has not been cross examined.

149. The accused has claimed that the prosecutrix is an already married woman who married Mr.Sehdev on 11.05.2005. Her father had made a complaint against Mr.Sehdev, his son in law vide DD entry, Ex.DW2/A.

150. DW1 has only produced the record regarding the booking of hall by Mr.Amit but the same does not prove in any manner that it was for the marriage of the prosecutrix with Mr.Sehdev. DW2 has produced the DD entry-Ex.DW2/A but the same also does not prove in any manner that the prosecutrix is married with Mr.Sehdev as the complainant and the victim are not examined by the prosecution. The evidence of DW3 is of no help to the accused as he has not deposed anything in his favour.

151. The defence of the accused has also not been put to the prosecutrix that she was already married with someone else. No such suggestion has been given to her by the accused in her cross examination.

152. It is clear from the MLC of the prosecutrix (**Ex.PW6/A**) and the FSL report (**Ex.PX-1**) that the prosecutrix does not have any injury and there is nothing found in the exhibits of the prosecutrix and the accused to connect the accused with the offence. There is no medical and forensic evidence against the accused.

153. It is also clear while discussing the different statements of the prosecutrix, that her version is neither reliable nor believable.

154. Therefore, the defence of the accused although is not proved but considering the unreliable evidence of the prosecutrix which suffers from overwhelming contradictions and glaring inconsistencies, the prosecution version is not believable and reliable.

155. The case of the prosecution has to stand of its own legs and is required to prove all its allegations against the accused and all the ingredients of the offence alleged to have been committed by the accused.

156. **Therefore, as the prosecution version is unreliable and unbelievable that the accused had raped the prosecutrix after intoxicating her and continued to rape her on a false pretext of marriage, the defence of the accused appears to be plausible that he has not committed any offence.**

PUBLIC WITNESSES NEITHER CITED NOR EXAMINED

157. The prosecution has failed to examine some very material witnesses and this lapse gives a severe blow to the prosecution case.

158. The Investigation Officer has failed to associate in the investigation **Ms.Simran, Mr.Ajay, the media persons, mother of the prosecutrix** who were very material for this case. The prosecutrix had met the accused through Ms.Simran and Mr.Ajay, gone with the accused as well as Ms.Simran and Mr.Ajay to Shimla, phoned the accused on the day of Holi in year 2014 as Mr.Ajay and other friends of the accused were phoning her to finish this case, the media persons with whose intervention the police acted on her complaint, her mother who was talking to the mother of the accused on phone. These very material witnesses have neither been cited as witnesses nor produced nor examined by the prosecution. Their evidence could have facilitated the Court in adjudicating the matter.

159. **By not citing, producing and examining the above named**

persons, the prosecution has left out some very material evidence which may have been of some help to the prosecution in this case against the accused.

INVESTIGATION

160. The investigation conducted in the present case has been deposed by police witnesses (**PWs 3, 8 and 10**). The FIR and FSL report have been admitted by the accused. The FIR has been proved by PW4. The MLCs of the prosecutrix and the accused have been proved by the doctors (**PWs 5, 6 and 7**). The registers of the malkhana have been proved by MHC (M) (**PW2**). The statement under section 164 of the Cr.P.C. of the prosecutrix has been proved by the prosecutrix (PW1) as well as PW9. There is nothing on the record which could show that the investigation has not been conducted properly, fairly and impartially.

161. The investigation conducted including the documents prepared in the present case has been substantially proved by the police witnesses including the IO. There is nothing on the record to show that their testimonies are false or not reliable.

162. However, it must be mentioned here again that the Investigation Officer has failed to associate Ms.Simran, Mr.Ajay, the media persons, mother of the prosecutrix who were very material for this case.

163. It is the actual crime which is important than the investigation. Where the actual crime is being elaborated and proved in the evidence of the prosecutrix and other material witnesses, then the investigation becomes less important as prosecutrix has not only deposed regarding the manner of commission of the crime but has also elaborated all the details and has assigned a clear and specific role to the accused.

164. There are two stages in the criminal prosecution. The first obviously is the commission of the crime and the second is the investigation conducted regarding the same. In case the investigation is faulty or it has not been proved in evidence at trial, does it absolve the liability of the culprit who has committed the offence? The answer is logically in the negative as any lapse on the part of the investigation does not negate the offence.

165. **Therefore, the investigation is not being taken into consideration although it is material but not very relevant as the evidence of the prosecutrix itself is not reliable and believable.**

FINAL CONCLUSION

166. The prosecution has failed to furnish any explanation in respect of the numerous contradictions and inconsistencies in the statements of the prosecutrix. The inherent contradictions strike at the very root of the prosecution story making it unbelievable and

improbable. In the instant case, the evidence and different statements of the victim/prosecutrix suffers from such infirmities and the probabilities due to which the prosecution has come out with a story, which is highly improbable. The overwhelming contradictions are too major to be ignored and they strike a fatal blow to the prosecution version. In fact what emerges from the evidence of the prosecutrix is that there appears to be an element of consent of the prosecutrix in having physical relations with the accused as she has subsequently deposed that she had physical relations with the accused with her consent and she was in love with him. It is also clear from the evidence of the prosecutrix that she had accepted the proposal of the accused. It appears that the present rape case was lodged by the prosecutrix as she was in love with the accused and wanted to pressurize him to marry her. She was also aware that he is getting married elsewhere to another girl of his parents' choice.

167. It may be observed here that consent is an act of reason coupled with deliberation, after the mind has weighed the good and evil on each side in a balanced manner. Consent denotes an active will in the mind of a person to permit the doing of an act complained off. Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge of the significance and the moral quality of the act, but after having freely exercised a choice between resistance and assent.

168. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to “misconception of fact” right from the inception.”

169. The prosecutrix is an adult who is responsible for her actions. She is sufficiently intelligent to understand the significance and moral quality of the act she was consenting to, having physical relations with the accused knowing that he will not marry her. Her versions are inconsistent and contradictory. All the surrounding circumstances reveal that the prosecutrix established physical relationship with the accused with her free consent and in such a situation, there is nothing on the judicial record to show that the accused has ever committed any offence, as alleged.

170. Since the evidence of the prosecutrix, PW1, is neither reliable nor believable as there are overwhelming contradictions in her different statements as well as in totality with the other evidence on record, the conscience of this Court is completely satisfied that the prosecution has not been able to bring home the charge against the accused. The prosecution story does not inspire confidence and is not worthy of credence.

171. In the case of Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622, the Apex Court has laid down the tests which are prerequisites before conviction should be recorded, which are as under:

- i. *The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;*
- ii. *The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- iii. *The circumstances should be of conclusive nature and tendency;*
- iv. *They should exclude every possible hypothesis except the one to be proved; and*
- v. *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

172. Applying the above principles of law to the facts of present case, it stands established that the accused had not raped the prosecutrix nor raped her on a false promise of marriage. There is no incriminating evidence against the accused. The gaps in the prosecution evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such incidents ever took place.

173. Consequently, no inference can be drawn that the accused is guilty of the charged offences as the testimony of the prosecution witnesses is unreliable and unworthy of credence.

174. Onus is always on the prosecution to prove and accused is entitled to the benefit of reasonable doubt. Case of the prosecution is to be proved beyond reasonable doubt and cannot take support from weakness of case of defence. In case the evidence is read in totality and story projected by the prosecution is found to be improbable, prosecution case becomes liable to be rejected.

175. If the prosecution evidence is read and considered in totality of circumstances along with other material on record, in which offence is alleged to have been committed, the deposition does not inspire confidence and is unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on such evidence. Prosecution has not disclosed true genesis of crime.

176. It is a case of heinous crime of rape which carries grave implication for the accused, if convicted. Therefore, for convicting any person for the said offence, the degree of proof has to be that of a high standard and not mere possibility of committing the said offence. In a criminal case, the prosecution has to prove its case beyond reasonable doubt against the accused. The prosecution story does not inspire confidence and is not worthy of credence.

The gaps in the prosecution evidence, the several discrepancies in

the evidence and other circumstances make it highly improbable that such incidents ever took place. Here in the present case, is a prosecutrix who is not truthful. She has given different statements and made numerous contradictions and inconsistencies which remain unexplained.

177. The prosecution has miserably failed to prove that from 2008 to February 2009 during the first incident on unknown date at WZ-779, Village Tihar, he offered the prosecutrix tea and biscuits mixed with intoxicated material and committed rape upon her; and thereafter the accused had raped her on the false pretext of marriage with her.

178. **All the above facts indicate that there is no veracity in the prosecution case in respect of the offences of rape and rape on promise to marry the prosecutrix by accused Mr.Upender Dutt Sharma @ Goldi and the accused merits to be acquitted for the offence under section 376 of the IPC, section 376 read with section 420 of the IPC.**

179. Therefore, in view of above discussion, the conscience of this Court is completely satisfied that the prosecution has failed to bring home the charge against the accused **Mr.Upender Dutt Sharma @ Goldi.**

180. Accordingly, Mr.Upender Dutt Sharma @ Goldi, the accused, is hereby acquitted of the charges for the offences of intoxication and rape, rape on promise to marry the prosecutrix under sections 328, 376 read with section 420 of the IPC.

COMPLAINEE OF SECTION 437-A OF THE CR.P.C. AND OTHER FORMALITIES

181. Compliance of section 437-A Cr.P.C. is made in the order sheet of even date.

182. Case property be confiscated and be destroyed after expiry of period of limitation of appeal.

183. It would not be out of place to mention here that today there is a public outrage and a hue and cry is being raised everywhere that Courts are not convicting the rape accused. However, no man, accused of rape, can be convicted if the witnesses do not support the prosecution case or give quality evidence, as in the present case where the evidence of the prosecutrix is neither reliable nor believable, as already discussed above. It should not be ignored that the Court has to confine itself to the ambit of law and the contents of the file as well as the testimonies of the witnesses and is not to be swayed by emotions or reporting in the media.

184. Here, I would also like to mention, once again as already
*Sessions Case Number : 148 of 2013.
Unique Case ID Number : 02401R0452772013.
FIR No. 143/2013, Police Station Nihal Vihar,
Under sections 376 of the Indian Penal Code.
State vs Upender Dutt Sharma @ Goldi*

observed in several other similar cases, that in recent times a new expression is being used for a rape victim i.e. **a rape survivor**. The prosecutrix, a woman or a girl who is alive, who has levelled allegations of rape by a man is now called a rape survivor. In the present case, the accused has been acquitted of the charge of rape, after trial, as evidence of the prosecutrix is not reliable. In the circumstances, such a person, an acquitted accused, who has remained in custody for a considerable period during inquiry, investigation and trial and who has been acquitted honourably, should he now be addressed as **a rape case survivor**? This leaves us with much to ponder about the present day situation of the veracity of the rape cases.

185. It cannot be ignored that the accused due to this case which has ultimately ended in his acquittal, has suffered humiliation, distress and misery besides the expenses of the litigation. His plight may also continue after his acquittal as his implication may have caused an uproar in society but his acquittal may not even be noticed. He would continue to suffer the stigma of being a rape case accused. He has remained in custody for a considerable period.

186. It may not be possible to restore the dignity and honour of the accused nor compensate him for the humiliation, misery, distress and monetary loss. However, his acquittal may give him some solace. He may also file any case for damages against

the prosecutrix, if advised. **No one discusses about the dignity and honour of a man as all are only fighting for the rights, honour and dignity of women. Laws for protection of women are being made which may be misused by a woman but where is the law to protect a man from such a woman where he is being persecuted and implicated in false cases, as in the present case. Perhaps, now it is the time to take a stand for a man.**

187. One copy of the judgment be given to the Additional Public Prosecutor, as requested.

188. After the expiry of the period of limitation for appeal and completion of all the formalities, the file be consigned to record room.

Announced in the open Court on
this 02nd day of January, 2016.

(NIVEDITA ANIL SHARMA)
Additional Sessions Judge,
(Special Fast Track Court)-01,
West, Tis Hazari Courts, Delhi.
