

Brijesh Vs. State

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Court : Delhi

Decided On : Sep-02-2013

Judge : V.P.Vaish

Appellant : Brijesh

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

24. h July, 2013 Date of Decision:

2. d September, 2013 % + CRIMINAL APPEAL NO.1198/2012 BRIJESH Through:
..... Appellant Mr.Sudhir Nandrajog, Sr. Adv. with Ms.Jagriti Ahuja, Mr.Virender Rawat & Mr.Y.S. Chauhan, Advocates. Versus STATE Through: Respondent Mr.Sanjay Lao, APP for State. CORAM: HON'BLE MR. JUSTICE P.K. BHASIN HON'BLE MR. JUSTICE VED PRAKASH VAISH VED PRAKASH VAISH, J:

1. The appellant Brijesh has assailed the judgment dated 03.09.2012 passed by learned Additional Sessions Judge (Outer) in FIR No.1341/07, P.S. Sultan Puri whereby the appellant was convicted under Section 376 and 506 of Indian Penal Code (IPC for short) and the order on sentence dated 03.09.2013 whereby the appellant was sentenced to undergo life imprisonment for the offence under Section 376 IPC along with a fine of Rs.1 lakh and in default of payment of fine, S.I. for a period of two years and rigorous imprisonment for a period of five years

and a fine of Rs.10,000/- and in default of payment of fine, he was to undergo S.I. for a period of one month under Section 506 IPC. Out of the said amount of Rs.1 lakh, a sum of Rs.75,000/- was ordered to be paid to the prosecutrix towards the compensation, after the expiry of period of appeal, revision etc.

2. Briefly stated, the case of the prosecution is that on 22nd August, 2007, complainant/prosecutrix P (assumed name) in the presence of her husband got a complaint registered and upon the said statement, a rukka was prepared and FIR No.1341/2007 under Sections 341/354 IPC was consequently registered. As per the statement, the prosecutrix stated that she had been living at the present address along with her three children and husband. The landlord Brijesh used to come to the said premises on one pretext or another and kept a bad eye on her and she had asked him not to come to her room behind her husband's back. On 22nd August, 2007, said landlord came to her room at about 11.15 a.m. on the pretext of checking the electric metre. He caught hold of her and blocked her way and started rubbing her breasts on which she raised an alarm as a result of which he ran away. Thereafter she told about the incident to her husband and the information to the police was given. On that day, the prosecutrix was sent for medical examination, however, she refused to undergo internal medical examination which she later on explained was due to the threat given to her husband that if she did go for medical examination, it would lead to dire consequences for her son. On that day, an FIR under Sections 341/354 IPC was registered through Constable Mahesh. The investigation was entrusted to ASI Rakesh (Retired) (PW-12) who prepared the site plan, recorded the statement of witnesses and on pointing out of the prosecutrix, the accused/appellant was arrested in this case and was later on released on bail. On 23rd August, 2007, the prosecutrix along with her husband again went to Police Post Budh Vihar and informed that the appellant had committed rape upon her and also due to threat extended to her, she had not reported regarding the same earlier but since the appellant was again threatening her, she had come to report of the incident now. On that day, the prosecutrix alleged that the appellant had committed rape on her after having come to her house. The appellant after entering the tenanted premises, closed the door, caught hold of her from behind, shut her mouth and thereafter raped her against her will. While leaving, the appellant threatened the

prosecutrix that he would kill her, her husband and the children. Initially under the influence of threat, the prosecutrix did not report about the incident of rape, however, on an encouragement by her husband, she got her second statement recorded wherein charges under Sections 376, 506 IPC were added to the initial FIR. On this day, the prosecutrix was again got medically examined and her statement under Section 164 Cr.P.C. was recorded by learned Metropolitan Magistrate, Delhi. The exhibits were sent to FSL and after completion of the investigation, chargesheet was filed. The trial was conducted, statement of witnesses were recorded. Leading finally to the passing of the impugned judgment and order on sentence.

3. Learned Senior counsel for the appellant contended that the prosecutrix did not make any allegation of rape in the first statement made by her on 22nd August, 2007 and even as per medical examination conducted on that day, no external injury was observed. However, prosecutrix later on changed her stand completely and in the statement dated 23rd August, 2007, alleged that the appellant had committed rape on her. The statement of prosecutrix under Section 164 Cr.P.C. is full of contradictions and inconsistent with her earlier two statements recorded on 22nd August, 2007 and 23rd August, 2007. Initially, when she was produced for her medical examination, she refused to undergo internal medical examination which was subsequently got done on the next day. Further, the prosecutrix had stated that on the date of incident, her three children aged between 7-10 years were present in her house. She also stated that she asked her son to call for help, however, none of the children were produced as witness before the trial Court. The prosecutrix also claimed that she raised an alarm. The house in which she was residing is a small house and located in a crowded area. In such a situation, it is highly improbable that no one in the neighbourhood had seen the occurrence or had come for her help. Learned senior counsel for the appellant also urged that there are contradictions in the testimonies of prosecutrix (PW-4) and Shailender Singh (PW-9) with regard to the time of incident, alleged offence, telephonic communication between them, the alleged time and call made to the police for reporting the incident and even thereafter.

4. Learned senior counsel for the appellant lastly contended that the complainant/prosecutrix is a habitual complainant and she and her husband were involved in various other criminal cases.

5. Per contra, learned APP for the State contended that the conviction in rape cases can be based on the sole testimony of the prosecutrix without any corroboration if it inspires confidence. Although the prosecutrix had initially got the FIR registered under Sections 341, 354 IPC and she had refused to get her internal medical examination done on the first day when she was taken to the hospital, however, she and her husband have explained the reason for the same being the fear of constant threat from the appellant and his brother. Both in her testimonies before the trial Court and in her statement under Section 164 Cr.P.C., she had mentioned about the appellant committing rape on her. Merely, the factum of absence of injury or any injuries on the private parts of the victim would not by itself falsify the case of rape nor be construed as evidence of consent. Even otherwise also, in the case of a grown up family and especially when she is married having kids, the absence of symptoms and features on the private part of the body would not be itself sufficient to rule out the occurrence of rape. He further contended that the prosecutrix had come to the locality only 10 to 12 days prior to the incident and did not know anyone there. In such a situation, it is quite likely that her call for help was left unheard and unattended. She also stated in her testimony that the appellant had gagged her. The discrepancies in the statements of the prosecutrix (PW-4) and Shailender Singh (PW-9) are not material in nature so as to vitiate the case of the prosecutrix.

6. Learned APP for the State also contended that the absence of examination of independent witness in the present case would not be sufficient to rule out the occurrence of offence even when the testimony of the prosecutrix is cogent and sufficient.

7. We have heard learned senior counsel for the appellant and learned APP for the State and perused the material on record.

8. At this stage, it would be relevant to produce the testimonies of the prosecutrix P (PW-4) and her husband Shailender Singh (PW-9) respectively before the trial

Court. The prosecutrix (PW-4) in her statement before the trial Court deposed that about three years back, she along with her husband and children were residing at Budh Vihar, Phase-II, as tenant in the house of the appellant which house was taken on rent eight days prior to the date of incident i.e. on 22nd August, 2007. On the said date at about 11.30 a.m. when she was cooking food in the kitchen and her children were playing in the room and her husband had gone to his duty, the appellant came in the house on the pretext of taking tap lying in the room of other tenant. Two days prior also, he had come to her room on the pretext of fixing the electricity metre and on that day, he had enquired from her the duty hours of her husband. Immediately after coming in the house, the appellant closed the main gate of the room where her children were playing, her son called her as to why the appellant was closing the room. When she turned, she saw that the appellant was closing the main gate of the house as well. On inquiry, the appellant replied that he was closing the main gate as he wanted to fix the gate of latrine upstairs. She asked him to open the main gate. The appellant pretended to go upstairs and she went inside the kitchen. However, the appellant followed her in the kitchen and hugged her. She cried for help and asked her son to call someone from the window for help. When she tried to raise an alarm, he put his handkerchief on her mouth and made her lie on the floor near the kitchen. She tried to give a kick from her leg to the appellant, but he overpowered her in such a manner as she could not escape. Thereafter, the appellant committed rape on her, forcibly and without her consent. The appellant threatened her that he would kill her husband and children in case she disclosed this fact to anyone. Thereafter, he went away and she did not tell this fact to anyone. She made a call to her husband after one or one and a half hour later from the STD booth who came to the house after 10-15 minutes and she narrated the incident to him asking him to shift to the native village from there. Her husband called the police and the police officials of Police Station Sultan Puri came at her residence and recorded her statement on 22nd August, 2007 which is exhibited as Ex.PW4/A. She had narrated the incident of rape to the police official of Budh Vihar in P.S. Sultan Puri on that day but the brother of the appellant was a local political leader and under his influence the true facts as narrated by her with regards to rape by the appellant were not recorded by the police in her said statement.

9. Thereafter on 23rd August, 2007, she had gone to P.S. Sultan Puri along with the media persons and then only her statement was recorded truly by the police which is Ex.PW4/B. The police took her for medical examination to the hospital. Her statement was recorded before the Magistrate which is Ex.PW4/C. She further stated that the wife and other family members of the appellant came to her room and gave her beating with chappals when she lodged the complaint against the appellant.

10. In her first cross-examination conducted on 29th March, 2011, she stated that she does not know the exact date of her marriage however, it was performed about 13 or 14 years back. She stated that the age of her eldest child to be 10 years and second child as 9 years and the third child as 7 years. At the time of incident, none of her children were studying in any school. Before coming to Delhi, all of them were residing in the village and had come to Delhi for the first time when the incident took place. She also stated that her husband used to go for work at 9.00 a.m. and return at 7.00 p.m. and he used to come back to home for lunch and used to leave and come back as per availability of the work. At the time of incident, she was the only tenant in the said house as the other tenant had gone to his native village. She denied the suggestion that the house was surrounded by many other houses and stated that on one side of her house, there was a vacant land and on the side of the tenanted premises, there is one other house where people were residing. She admitted that in front of her tenanted premises across the gali there were residential houses however, she does not know that people were residing in those houses or not. She further stated that the said gali was frequented by the public persons and in the tenanted room, there was only one window which opened towards the said gali. The door of the kitchen opened towards the main gate of the said house towards gali and the door used to be closed by her when her husband was away for work, but sometimes it remained open when her children used to play outside. At the back side of the tenanted premises, there was no window and it was a closed wall. She further stated that her husband never asked the appellant to get a door fixed at the toilet and also that neither her family and nor the appellant ever came and went to each others house. She admitted of having informed the police that on the date of incident her children were playing inside the tenanted room and also that the appellant had

come and closed the door of this room and the main gate of the premises. She denied the suggestion that she told to the police that her son asked her as to why the appellant had closed the door. She also admitted of having told the police that she asked the appellant as to why he had closed the main door and asked him to open it, the appellant entered in the kitchen, she having cried for help and asking her son to call someone for help. In reply to a question put to her on behalf of the appellant as to whether the appellant had some equipment/implement at the time when he came inside the said premises, she replied that the appellant was having a knife in his hand. She also stated that the appellant had come to her house to check the electric metre and lastly, stated that her saree and blouse were in the same position which she was wearing till the time the appellant had stayed and the appellant, wearing pant and shirt intact, went away after checking the metre.

11. In her further cross-examination recorded on 26th April, 2011, the prosecutrix stated that she did not meet any neighbour after the appellant had left the house nor did she disclose about the incident to anyone in the neighbourhood. She called her husband from a PCO on the main road near her house after about 10/15 minutes of the incident. However, she did not know the name of the PCO booth owner nor did she discuss the incident with him. She admitted that she did not inform the police and only after she narrated the incident to her husband, he informed the police and discussed the incident with some neighbourer of whose names, she was not aware. She denied the suggestion that she knew that all the relatives of the appellant were residing in the same locality in the neighbourhood and that her husband did not talk with any of the relatives of the appellant before calling the police. She has stated that the police made inquiries from her after reaching at the spot, recorded her statement and that she was taken in a separate vehicle than one in which her husband and children were taken to the police station. Statement of her husband was not recorded in her presence at her home and was recorded at the police station although the inquiry was made from her elder son, his statement was not recorded. She was not got medically examined initially and was got examined later on. After returning from police station, she, her husband and children did not stay in the rented premises at night and stayed at a house in a gali nearby called Malik Wali Gali and on the next day, she was taken by the members of Women Commission to the police Station and was, thereafter,

got medically examined. Her statement was also recorded by the Magistrate. She lastly has stated that the tenanted premises was on rent of Rs.1,000/- per month and denied that at the time of negotiation for taking the premises, it was agreed that the security of Rs.20,000/- would be paid after the supply of electricity to the tenanted premises and also that they did not pay the security and rent or that the appellant had asked them to vacate the premises.

12. In her statement under Section 164 Cr.P.C. before the Magistrate, the prosecutrix P reiterated the factum of appellant having come to her home on the date of incident and committing rape on her and also that he threatened her of dire consequences if so revealed about it to anyone. She further stated that initially she refused to tell about the incident to her husband also, however, later on, on his insisting, she revealed about the occurrence to him who informed the police and the brother of the appellant, that the appellant had committed rape on her. When she was taken to the police station and asked for medical examination, she was refused, however, when she insisted, she was taken to the hospital. When she reached there, her husband and children were made to wait there in the police van along with gundas who threatened her husband that she should not get herself examined, otherwise they will kill him and their children, on which she refused to undergo her examination that day. Thereafter she was taken to the police station where she was forced to write that nothing had happened with her and was further threatened that if she took any further proceedings, she would not be spared. However, on the next day, on her informing, some women from Womens Commission were accompanied by her to the police station who got further proceedings done. She lastly stated that she was beaten up by gundas, her husband was kept in jail and she was under constant threat to her life.

13. Shailender Singh (PW-9) has stated that he was working as a plumber. The prosecutrix P is his wife and he has three children. He leaves for work at about 8.30 or 9.00 a.m. On 22 nd August, 2007, he had gone for his work at about 9.00 a.m. when he received a call from his wife at about 11/11.30 a.m. who called him immediately at home as the appellant had misbehaved with her. He came back to his wife where his wife narrated the entire incident on which he called the police at number 100. Thereafter the police took them to the police post and they were

made to sit in Kothari type room. At the police post, brother of the appellant who was a BJP leader of the area had reached along with many other persons and started talking with the police. He refused to accept the offer given by them for closing the case and not to take his wife for medical examination. When he insisted, the police took his wife to the hospital in a separate vehicle and he and his three children were taken to the hospital by the brother of the appellant along with other persons. On the way to the hospital, he was threatened by those people that they would kill his only son in case he insisted on getting the medical examination of his wife and getting the case registered. Thereupon he asked his wife not to go to the hospital as his son was made to sit by those persons in the same vehicle. Resultantly, they came back without her medical got done. He insisted the police officials and the people who were threatening him that he would leave Budh Vihar forever and go to his village. Next day, he decided to go to higher authorities for getting the case registered with the intervention of DCP and Womens Commission on which the police recorded the statement of his wife and medical examination of his wife was got conducted. Police went to the appellants house which was found locked but he was apprehended later on from his house and arrested vide arrest memo Ex.PW9/A and his statement was recorded by the police. In his cross-examination, he has stated that the premises were taken on rent 12 days prior to the date of incident i.e. 23rd August, 2007 and the rent of the house was Rs.600/- per month. He denied that the rent was Rs.1,000/- per month besides the security amount of Rs.20,000/- and further stated that he had met with the appellant for the first time on the day of incident as earlier he used to go to work in the morning and come late in the night. He denied that it was agreed at the time of creation of tenancy that the rent would be paid when the electric metre would be installed besides the said security amount deposited and admitted that there was another tenant in the said premises who was relative of the appellant. The premises consisted of one room and kitchen at the ground floor and there was no window or door at the back side of the said premises. There was only one window in the room which opened towards the gali. He denied that he and his wife insisted the appellant for getting the door fixed at the latrine and also that there were houses in front of and by the left side of the tenanted premises. He further stated that he did not know any neighbour during his 10/12 days stay in the

premises and also that the appellant never visited his house prior to the date of incident and he did not know him during the said period. The gali in front of the premises was hardly frequented by the people. At the time of incident, only 10 or 12 houses were situated in the entire gali. On the date of incident, he was working at a house near the bus terminal when he got a call from his wife. On reaching, he was advised by the neighbours who had gathered near the house to make a call at phone No.100 to the police regarding the incident. He gave a call to the police at about 12.30 p.m., within 15 minutes of his reaching the house. Police arrived at the spot within five minutes of his call. The neighbours were present in the gali when the police had come. No inquiry was made by the police at that time as the wife of the appellant and his other relatives had come there to attack and beat her. Subsequently, they were taken to police post and thereafter their statements were recorded at the said tenanted premises also, inquiries were made from his wife and they went to the hospital from the police post. On the intervening night of 22/23 August, 2007, they remained at the tenanted premises and on 23rd August, 2007, they met with lady officials of Women Commission to whom they orally explained the incident. The said lady officials reported the matter to DCP and regarding the threat extended, he sent a fax /registry to the authorities. He denied the suggestion of having not made any complaint to the DCP or to the other authorities and affirmed that his statement was recorded and one neighbour was put behind the bars for threatening him. His wife was taken to the hospital where her medical was got done. He denied that his wife had gone with him to make purchases in the market from the time of incident till 23 rd August, 2007. He also denied the suggestion that he has falsely implicated the appellant to build a pressure for not to get the tenanted premises vacated.

14. Now we shall deal with the incriminating circumstances one by one: Conviction on the sole testimony of the prosecutrix 15. The Supreme Court in State of Punjab vs. Gurmit Singh and Ors., (1996) 2 SCC 38. has held that 8. ..The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as

a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

9. We are in respectful agreement with the above exposition of law. In the instant case our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness. Her testimony suffers from no infirmity or blemish whatsoever. We have no hesitation in acting upon her testimony alone without looking for any corroboration. However, in this case there is ample corroboration available on the record to lend further credence to the testimony of the prosecutrix.

16. Also in *Narender Kumar vs. State (NCT of Delhi)*, (2012) 7 SCC 171, the Supreme Court has observed as under:²⁰ It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (sic circumstantial), which may lend assurance to her testimony. (*Vide Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and Vishnu v. State of Maharashtra.*)¹⁷ The law on conviction in cases of rape on the basis of sole testimony of prosecutrix is no longer *res integra*. It is a well settled law that the conviction can be based on the sole testimony of the prosecutrix if it inspires confidence and corroboration is to be looked at only if the Court finds that it is difficult to accept her testimony on its face value. The Court is to act with utmost sensitivity and the prosecutrix version is to be rejected only if in the circumstances of a case Court finds it impossible and devoid of merit. There is a balance need to be drawn so that none of the sides in a prosecution is prejudiced and the Court has to scrutinize facts of each and every case in its own terms. Same view was taken by Supreme Court in *Gurmit Singhs case* (*supra*) and *Narender Kumars case* (*supra*).

18. In the instant case, on the complaint of the prosecutrix initially the FIR was lodged under Sections 354/341 IPC and later on Section 376/506 IPC were added. The prosecutrix and her husband both stated the reason for this was a threat given to them by the appellant and his relatives. Initially on 22nd August, 2007 she also

refused to undergo medical examination which was confirmed by Dr.Renu Gupta (PW-6) in her statement, the reason for the same was again stated by the prosecutrix to be the threat given by the appellant. Even that being so, neither has she or her husband produced any evidence to show that they took steps against the said threat or made any representation about the same to the higher authorities. In such a case, where the prosecutrix has changed her stand, in the absence of corroboration, placing reliance solely upon her testimony would not be proper. II Absence of Medical examination 19. Initially when the prosecutrix P was examined on the date of incident i.e. 22nd August, 2007, she refused to undergo internal medical examination. Hence the MLC (Ex.PW5/A) recorded on that day mentions that there were no marks of any external injury on her body and also that she was not willing for internal examination. On the subsequent date i.e. 23rd August, 2007, the prosecutrix P got herself internally medically examined and as per the MLC, no injuries were found, hymen ruptured was described as old and her uterus size could not be assessed. On that day, the doctor seized her petticoat, vaginal swab, pubic hair which were sealed and handed over to WHC Nirmala (PW-1).

20. As per the FSL report of the said sealed pullanda, human semen were detected on exhibits 1, 2a, 2b and 4 which are petticoat having few whitish stains, small cotton wool swab on a wooden stick kept in a plastic tube, small cotton swab on a wooden stick kept in a plastic tube and one underwear respectively. Further as per the said FSL report (Ex.PY), blood group O was found on Ex.1 whereas Ex.2a and 2b showed no reaction and inconclusive result was found on Ex.4. However, no further examination was conducted in this regard. There is no indication in the said report so as to link the semen found on the said samples to the appellant. Even with regard to Ex.1 showing O blood group, no indication was given as to link the same to the appellant in the present case. III Non-examination of son of the prosecutrix and neighbours 21. The prosecutrix had, both in her statement under Section 164 Cr.P.C. and the testimony before the trial Court stated that the appellant on entering the premises closed the main gate of the room where her children were playing and her son asked her as to why the appellant had closed the door. She has further stated that when the appellant entered the kitchen, hugged her, she cried for help and asked her son to call

someone for help from the window. The prosecutrix P has further admitted in her cross-examination that her eldest child is 10 years of age, second child is 9 years of age and third child is 7 years old and all her children were not studying in school at the time of incident. However, none of the said children were produced as witnesses before the trial Court. Nor has the veracity of her statement that she asked her son to call out for help has been so made out in the absence of such an examination.

22. Shailender Singh (PW-9), the husband of the prosecutrix has stated that when he came back to his house, neighbours had collected outside the house but, he was advised by his neighbours who had gathered there to make a call at phone No.100 regarding the incident. But statement of none of the neighbours was recorded by the Investigating Officer nor any neighbourer has been produced in the Court. IV Conduct of the prosecutrix 23. As we have already observed that the prosecutrix P in the testimony before the Court had stated that on 22 nd August, 2007, she had informed the police about the factum of rape, however, under the influence of appellants brother, true facts were not recorded on that day which were done subsequently on 23rd August, 2007 when she had gone to the police station with media persons. In her statement under Section 164 Cr.P.C. before the Magistrate, she has also stated that initially on the date of incident she, under the threat refused to undergo her medical examination which was subsequently done on 23 rd August, 2007, when she went with the women of Womens Commission. Shailender Singh (PW-9) has reiterated the stand in his testimony that under the threat to life, he asked his wife to refuse to undergo medical examination on 22nd August, 2007 which was done only on the next day.

24. It is pertinent to note that the prosecutrix P has although alleged the existence of threat, however, no complaint regarding this was made to the higher authorities. Also Shailender Singh (PW-9) in his cross-examination stated that he sent fax/registry to the authorities about the threat extended to his child and to them however, he has not produced the said documents before the Court. PW-4 and PW-9 have also stated that they were accompanied to the police by some women from Womens Commission however, the said witnesses were neither produced before the Court nor they were ever examined. V History of past complaints filed

by and against the prosecutrix and her husband 25. Learned senior counsel for the appellant pointed out that an application bearing CrI.M.A. No.17978/2012 for taking on record additional evidence was filed by the appellant and the said application was allowed on 11th February 2013 by this court and the matter was remanded back to the trial Court for taking additional evidence of the prosecutrix P (PW-4) and her husband, Shailender Singh (PW-9). Learned senior counsel for the appellant also pointed out that certified copies of previous FIRs lodged by the prosecutrix were tendered by the counsel for the appellant before the trial Court on 27 th April, 2013 which were exhibited as Ex.DZ-1 to Ex.DZ-9. When the prosecutrix P (PW-4) and Shailender Singh (PW-9) were recalled for further examination before the trial Court, their statements were recorded on 10.4.2013 and 15.4.2013 respectively and they admitted various FIRs, the details of which are reproduced as under:

List of FIRs other than the present Prosecutrix (PW4) and Husband (PW9)	FIR NO.	(in year)	P.S.	(under section)	Complainant	Accused	Status
FIR No.178/07	Case No.277/07	registered on 27.3.2007	pg No.20	Kotwali Nagar, Bulendsehehar, UP,	u/s 452/376/506 IPC	Shailender Singh (husband of prosecutrix)	Gulbir Singh + one other name & address unknown Person is acquitted
FIR No.623/2011		dated 14.8.2011	(status report)	Kotwali, P	Guddu Pandit	Bulendshehar, UP,	u/s 420/506/406 IPC (Prosecutrix) Pending trial
CS No.445	FIR No.50/08,	dated 2.2.2008	pg 98	Katghar, Muradabad	u/s 376/506 IPC	Shailender Singh (Husband of prosecutrix)	Yashpal Singh Sharma Pending, cancellation report vide no.28/08 dt. 27.2.08 forwarded
Case Crime No.753/2008	(FIR No.535/2008	Kotwali Nagar under Section 452/376/323/506 IPC	P Deepak Chaudhary	Acquitted	Complaint on 13.10.2006	Kotwali Nagar, UP	u/s 376/506 IPC
P Naresh Raghav	Settled (Prosecutrix)	(Prosecutrix)	Pg. No.80-81	Complaint in year 2006	Ram Ghat, UP	u/s 376/506 IPC	P Vipin (Prosecutrix)
FIRs against Prosecutrix (PW4) and Husband (PW9)	FIR No.701/2012	u/s 366/376/120-B IPC,	PS Ramghat, Bulendshehar, UP	Against husband & Prosecutrix, Both on bail	FIR No.184/2000	u/s 110G Cr. P.C., PS Ramghat, Bulendshehar, UP	Against husband

26. As per the aforesaid table and the statement of prosecutrix (PW-4) and Shailender Singh (PW-9) recorded by the trial Court as per the order of this Court in CrI. M.A. No.17978/2012 dated 11th February 2013, it can be seen that the prosecutrix had admitted of having got two FIRs registered i.e. FIR No.178/07

against one Gulbir Singh and FIR No.623/2011 against Guddu Pandit. She had admitted of compromising the matter with Gulbir Singh whereas her husband had admitted the factum of registration of four FIRs i.e. FIR Nos.178/07, 623/2011, 50/08 and Case Crime No.753/2008, out of which he admitted of having settled three matters i.e., FIR 178/07, FIR 50/08 and Case Crime No.753/2008. Further proceedings under Sections 366, 376, 120B IPC and under Section 110G Cr.P.C. are pending against both of them.

27. Learned APP for the State has filed status report dated 5th February, 2013 in which the verification report with regard to the various FIRs have been recorded.

28. We are conscious of the fact that in case of additional evidence, the matter should be remanded back to the trial court for considering the same but since the matter is pending since 2007, remanding the matter back to the trial court would cause nothing but delay, therefore, in the interest of justice, we are considering the factum of previous litigation by and against the prosecutrix 'P' in light of her admission recorded by the Trial Court as per the order of this court, at this appellate stage.

29. Rape is a sensitive issue which should be dealt with utmost care, caution and sensitivity. As we have observed above, the conviction can be based on the sole testimony of the prosecutrix. However, this can be done only in the cases where her statement inspires confidence. No doubt some judgments had indicated that in charges of rape etc. the Court should avoid embarking on detailed consideration of probative value of materials. However, in our opinion, these do not detract from the basic time tested norm that the Court has to form a reasonable doubt about the existence of grave suspicion regarding the commission of offence. Equally if two views are possible, the one supporting the accused/appellant has to be preferred. Strict laws such as that dealing with rape have inherent in themselves a tendency of being misused as well. The duty of the Court, thus, becomes important to separate the grain from the chaff. In the present case, besides the informant, there is no one speaking about the incident as alleged by her. It becomes important in the present, in contradiction to the judgment of the Supreme Court in Gurmit Singhs case (supra) and Narender Kumars case (supra) to look for

the corroboration as the history of past numerous complaints filed by the prosecutrix and her husband raise suspicion in the mind of the Court and makes it impossible for us to rely solely on her testimony. In these circumstances, after careful consideration, we are of the opinion that there is a reasonable version which supports the appellant. The material on record also does not point towards a grave suspicion to warrant the conviction of the appellant for the offence under Section 376 IPC. As per the above discussion, in the absence of complaint or any concrete evidence to prove the allegation under Section 506 IPC, the offence under the said Section is also not made out.

30. Even though, in the present case, as we have observed above, in the absence of corroboration the case of the prosecutrix cannot be beyond reasonable doubt covered under Section 376 IPC. However, the fact of the matter remains to be that the prosecutrix had initially stated in her testimony before the police that the appellant had forcefully entered her house and caught hold of her and rubbed her breast. Thereafter he had run away. In such a case while dismissing her statement in the absence of corroboration looking at the history of complaints made by her and her husband, one cannot dismiss the case completely so as to bring it out of the ambit of Section 354 IPC also. Thus, it is important to discuss the elements of Section 354 IPC at this stage.

31. In order to constitute the offence under Section 354 IPC mere knowledge that modesty of a woman is likely to be outraged is sufficient without any deliberate intention to commit the said offence. There is no abstract conception of modesty that can apply to all cases. A careful approach has to be adopted by the Court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under: i) That the person assaulted must be a woman; ii) That the accused must have used criminal force on her; iii) That the criminal force must have been used on the woman intending thereby to outrage her modesty.

32. Intention is not the still criteria of the offence under Section 354 IPC and it can be committed by a person assaulting or using criminal force to any woman if he knows that by such act the modesty of the woman is likely to be affected.

Knowledge and intention are essential things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offences alleged to have been committed. The factum of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weightage.

33. In the instant case, therefore, we alter the conviction of the appellant from Section 376 IPC to Section 354 IPC. The appellant is sentenced to undergo rigorous imprisonment of one year and to pay fine of Rs.25,000/- (Rupees Twenty Five Thousand Only), out of which a sum of Rs.20,000/- be paid to the victim. In default of payment of fine, he is further sentenced to undergo simple imprisonment for a period of one month. Benefit of Section 428 Cr.P.C. be given.

34. The appeal stands disposed of in above terms. (VED PRAKASH VAISH)
JUDGE (P.K. BHASIN) JUDGE September 02, 2013 gm

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