

**Pardeep @ Sonu Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/912323](http://sooperkanoon.com/912323)

**Court :** Delhi

**Decided On :** Mar-25-2011

**Judge :** Anil Kumar; S.L.Bhayana, Jj.

**Acts :** Indian Penal Code (IPC) - Sections 376, 506; Code of Criminal Procedure (CrPC) - Sections 313, 161, 164, 391

**Appeal No. :** Cri.A. No.928/2008

**Appellant :** Pardeep @ Sonu

**Respondent :** State

**Advocate for Def. :** Mr. Lovkesh Sawhney, Adv.

**Advocate for Pet/Ap. :** Mr.Ravi Gupta; Ms.Priyanka Gupta, Adv.

**Judgement :**

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

1. The appellant has challenged his conviction in Sessions Case No.123 of 2006, titled as State v. Pradeep @ Sonu, arising from the FIR No.737 of 2005, under Sections 376/506 Indian Penal Code, PS Okhla Industrial Area convicting the

appellant under Section 376 of the Indian Penal Code and Section 506 of the Indian Penal Code and sentencing the appellant to undergo rigorous life imprisonment under Section 376 (2)(f) of the Indian Penal Code and a fine of Rs.5,000/- and in default to undergo simple imprisonment for two months and simple imprisonment for two years for offence under Section 506 of the Indian Penal Code.

2. The brief facts to comprehend the case are that on 16th August, 2005 an FIR was registered on the basis of statement made by a minor girl aged about 8 years, namely Khushbu @ Diksha. She had disclosed that she lives along with her parents and other siblings in one room in a rented house bearing No. RZ 57 K, 1st Floor, Gali No.7, Tuglaqabad Extension.

3. Khusbu @ Diksha was a student of 3rd Class. About 20-22 days prior to 16th August, 2005 her mother had gone to the village and she was living along with her father and brother. It was disclosed that she was sleeping in her room along with her brother on an iron cot measuring about 4 Ft. x 6 Ft.. Her father was sleeping on the roof. In the night she felt pain in her private part and she found that the appellant was lying next to her, between her and her brother, and he had inserted his figure inside her vagina. When she tried to cry, she was gagged by the accused by putting his palm on her mouth and thereafter the accused raped her. When she raised noise, her brother who was sleeping next to her woke up and switched on the light. When the brother of Khushbu @ Diksha, namely Pankaj, got up and switched on the light, the accused asked him to switch off the light and also threatened them that if they will disclose anything to anyone, he would kill their father and thereafter, he ran away from there. According to Khushbu @ Diksha, when her mother came back from the village 20-22 days after the incident , she disclosed the incident to her mother. The mother of Khushbu @ Diksha disclosed it to father of Khushbu @ Diksha and they went to the Police Station and an FIR No.737 of 2005 dated 16th August, 2005 under Sections 376/506 of the Indian Penal Code was registered. The appellant was arrested on 16th August, 2005 in presence of the mother and father, namely Smt.Sridevi & Sh.Om Prakash of the prosecutrix Khushbu @ Diksha. The complainant, Khushbu @ Diksha was medically examined and slide samples were also taken and undergarment of the

prosecutrix was also taken and the seizure memo was proved as Ex. PW-1/D during trial after the accused had not pleaded guilty and the charge was framed against him on 30th January, 2006.

4. The charge framed against the accused/appellant is as under:- "That 20-22 days prior to 16th August, 2005 in the night time (time unknown) on the second floor of house No.57 K, Gali No.7, Tuglaqabad Extension, New Delhi you committed rape upon the person baby Khusbu aged about 8 years a minor and thereby you are guilty of an offence punishable under Sections 376 of the Indian Penal Code and within my cognizance.

Secondly that on the above said date, time and place you had criminally intimidated baby Khushbu @ Diksha threatening to kill her father and thereby you are guilty of offence punishable under Section 506 of the Indian Penal Code and within my cognizance."

5. During the trial, prosecution examined 15 witnesses including the mother of the prosecutrix, Smt.Sridevi PW-1, brother Sh.Pankaj PW-3, father Sh.Om Prakash PW-4 and other witnesses. The statement of the appellant was also recorded under Section 313 of the Criminal Procedure Code.

6. According to the trial court, the testimony of Khushbu @ Diksha, PW-2 was corroborated by her mother Smt.Sridevi PW-1 and the statement of Khushbu @ Diksha was also corroborated by her father Sh.Om Prakash PW-3 and brother Sh.Pankaj PW-4, and by the statement of Dr.Anupama Bahadur PW-6. The medico legal report revealed that hymen of the prosecutrix was ruptured and the doctor opined that it could be a case of sexual assault as the hymen was found ruptured and uterus was mobile.

7. According to the learned Sessions Judge, the case of rape and intimidation was conclusively made out against the appellant and therefore, he convicted the appellant under Sections 376 and 506 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life for offence under Section 376 and simple imprisonment for 2 years for offence under Section 506 of the Indian Penal Code.

8. Learned counsel for the appellant, Mr.Ravi Gupta, Senior Counsel has very emphatically contended that perusal of the statement of the prosecutrix recorded under Section 161 of the Criminal Procedure Code, Ex. PW-2/A recorded on 16th August, 2005; statement recorded under Section 164 of the Criminal Procedure Code on 18th August, 2005, Ex. PW2/B and the statement recorded before the court as PW-2 unequivocally reflected that the evidence of the prosecutrix is full of discrepancies and does not inspire confidence. The evidence of the mother Smt.Sridevi as PW-1 and the father Sh.Om Prakash PW-4 also did not corroborate the statement of the prosecutrix as their testimonies are based on whatsoever was allegedly disclosed by the prosecutrix first to her mother, Smt.Sridevi who had disclosed the same facts to her husband, Sh.Om Prakash, father of the prosecutrix and therefore, on the basis of their testimonies, it is rather established that her testimony is unreliable and discrepancies of the prosecutrixs testimony are further highlighted rather than corroborated. The learned counsel has also asserted that the testimony of the brother Sh.Pankaj PW-3 is also unreliable and cannot be believed. The learned counsel has pointed out various discrepancies in the statement of the prosecutrix and her brother Sh.Pankaj which according to him in the present facts and circumstances cannot be termed minor or inconsequential and thus make their testimonies unreliable.

9. On behalf of the appellant, it is contended that he has been falsely implicated by the prosecutrix and her brother who were tutored by their father on account of their fathers disputes with his father regarding demand of increase of rent of the room and about the payment of electricity charges. Learned counsel has pointed out that in his statement under Section 313 of the Criminal Procedure Code, the appellant had categorically deposed that prosecutrix and her parents were tenant of his father for last 10-11 years and the allegation of rape has been concocted, as there is a dispute between his father and parents of the prosecutrix in respect of increase of rent of the room and about the payment of electricity charges. The appellant had deposed that he never committed any of the acts alleged against him and the incident as alleged had never happened and is concocted. The appellant had also disclosed that he had gone out of Delhi on the alleged date to take 'Kanwar from Neelkanth Haridwar' along with the priest Sh. Komal Pandit of a local mandir of his area and his friends, namely Raj Kamal Gautam and Sanjay

Giri. He deposed that he started from Haridwar on 25th July, 2005 and reached Delhi on 1st August, 2005 and came home on 3rd August, 2005 after pouring holy water in Mandir on 2nd August, 2005. Learned counsel also relied on an application on behalf of the appellant under Section 391 of the Criminal Procedure Code for recording additional evidence being Criminal M.P. No.12605 of 2009 where it was alleged on behalf of the appellant that though he had gone to Haridwar along with priest Sh. Komal Pandit and his friends, namely Raj Kamal Gautam and Sanjay Giri, however, those persons could not be examined as defence witnesses. In the circumstances, it was contended to permit the appellant to lead the defence evidence of these persons.

10. Learned counsel for the appellant refuted the CFSL report, Ex. PW-15/E revealing that underwear of the prosecutrix and cover of Dari though had spots of semen but group test was inconclusive. It was contended that the semen sample of the appellant was taken by Ex. 10/A, however, it has not been compared with the semen which was detected on the underwear of the prosecutrix and on the Dari. Learned counsel also emphasized that the underwear which was seized from the accused did not have the semen and even the glass slides of the vaginal swab of the prosecutrix did not reveal any semen. According to CFSL report Ex. PW-15/E, test on stained gauze piece remained inconclusive and in the circumstances, it is contended that it could not be established conclusively that the semen on the underwear of the prosecutrix and Dari was of the appellant.

11. On behalf of the appellant, it is also asserted that according to the testimony of the prosecutrix, she had two underwears which were used by her alternatively and she used to wash them. According to her testimony, she had also bled on account of alleged rape. In the circumstances, it is unbelievable that underwear of the prosecutrix did not get the blood stain and the alleged semen stain survived even after about 10-12 wash as she was washing the underwear alternatively and the alleged incident had taken place 20-22 days prior to the seizure. It was also pleaded that it is unbelievable that if the prosecutrix had bled to such an extent that there was blood even in the toilet which was noticed by an aunty, yet there was no blood either on bed sheet or on the Dari where allegedly semen was detected. In the circumstances, it is contended that testimonies of the prosecutrix

and her brother are full of glaring contradictions and the whole incident has been concocted by parents of the prosecutrix to implicate the appellant who is son of the landlord with whom they have disputes regarding rent and payment of electricity charges.

12. Mr.Gupta, learned Senior Counsel for the appellant emphasized that false charges of rape are not uncommon and the present case is an instance where the parents of the prosecutrix who is a young girl of 8 years and who is gullible and obedient have made a false charge of rape in order to get rid of their financial liability.

13. Learned Senior Counsel has also emphasized that even if the application of the appellant for additional evidence is not allowed and the defence to prove the motive for false implication is not established it will be inconsequential, since the prosecution has failed measurably to prove the charges and in the circumstances, the appellant shall be entitled for acquittal.

14. On behalf of the appellant, it is also asserted that on an iron bed which was of the dimension 4 Ft. x 6 Ft., it was not possible for the appellant to lie between the prosecutrix and her brother without waking up the brother and even the prosecutrix. Even if, it is believed that he had inserted his figure in the vagina of the prosecutrix on a bed where the brother was lying, it was impossible to insert his penis by the appellant in the vagina of the prosecutrix so as to commit rape on her without disturbing the brother and waking him. On the basis of the medical evidence, it is contended that though it reveals that the hymen was ruptured but there was no bleeding on 16th August, 2005 when the prosecutrix was medically examined. The learned counsel has contended that there is no evidence as to when the hymen was ruptured as the alleged incident is of 20-22 days before 16th August, 2005. In the circumstances, it is contended that the fact that hymen of prosecutrix was found ruptured, does not establish in any manner that this must be on account of inserting the finger or finger and penis both by the accused as other evidence is unreliable and the testimony of the prosecutrix is unreliable and full of contradictions.

15. The emphasis is also led on the fact that the prosecutrix had other sibling namely Priyanka, however, all the witnesses are quiet as to where she was on the said date as the prosecutrix and her family has only one room in their possession. Since Priyanka is the sister, it is unbelievable that the prosecutrix would not reveal the alleged incident to her. From the plan Ex. PW-15/B, it is contended that it does not reveal the terrace where PW-4 father was sleeping and the passage/staircase through which the accused had allegedly come from the ground floor to the room of prosecutrix. According to the learned counsel, the plan Ex. PW-15/B does not tally with the statement of the prosecutrix and her brother Sh.Pankaj PW-3.

16. The appellant has also challenged the CFSL report Ex. PW-15/E on the ground that author of the report has not been produced. In the circumstances, the appellant has been deprived of effective cross- examination of the author of the report and to impeach the report conclusively.

17. Learned counsel for the appellant, Mr.Gupta, Senior Counsel has also relied on (2007) 12 SCC 57, Radhu v. State of Madhya Pradesh to contend that if the evidence of the prosecutrix is full of discrepancies and does not inspire confidence and if the person who had been informed about the incident had not been examined and therefore, there was no corroboration, in such circumstances on the basis of the uncorroborated evidence, the finding of the guilt cannot be arrived at though finding of guilt in some cases of rape can be based on the uncorroborated evidence of the prosecutrix.

18. The pleas and contentions raised on behalf of the appellant are refuted by the learned Additional Public Prosecutor, Mr.Lovkesh Sawhney contending inter-alia that the variation in the statement of the prosecutrix PW-2 under Section 161 of the Criminal Procedure Code Ex. PW-2/A dated 16th August, 2005, Ex. PW-2/B dated 18th August, 2005 recorded under Section 164 of the Criminal Procedure Code and the statement recorded in the Court and in the statement of her brother are minor discrepancies on the basis of which it cannot be held that her testimony is unreliable. The learned Additional Public Prosecutor contends that the CFSL report conclusively established semen on the underwear and Dari in terms of Ex.

PW-15/E. He emphasized that no suggestion was given to the parents of the prosecutrix that he has been falsely implicated on account of the dispute regarding increase of rent and non-payment of electricity charges and consequently, the version given by the appellant cannot be relied on.

19. Mr. Sawhney, learned Additional Public Prosecutor has also contended that from the testimony of the father, Sh. Om Prakash, it is apparent that 3rd child Priyanka was not at home and therefore, the plea on behalf of the appellant that whereabouts of the third child will cast doubt about the prosecutrix version cannot be accepted. Learned counsel has relied on (2000) 5 SCC 30 State of Rajasthan v. N.K.- The Accused, to contend that conviction in case of rape can be based solely on the testimony of the prosecutrix. It is further contended that if the Court finds it difficult to accept the testimony of the prosecutrix, it may seek assurance of her testimony, which may be in the form of corroboration from other evidence. Reliance was also placed on this case to contend that the witnesses to whom the incident was narrated if not produced will not be fatal.

20. Learned Additional Public Prosecutor has also relied on (2002) 5 SCC 745 State of Rajasthan v. Om Prakash holding that if the testimony of prosecutrix and her relatives and the doctor who had examined her are found to be trust worthy, convincing and reliable, non-examination of other witnesses cannot be a ground to reject the prosecution case. Reliance has also been placed by the prosecution on AIR 2006 SC 2568 State of Tamil Nadu v. Ravi @ Nehru holding that even slight penetration is sufficient to constitute rape and emission is not necessary. It was urged that intercourse means slightest degree of penetration of the vulva by the penis with or without emission of semen and it is possible to commit offence of rape without any external injury to the genital or leave any seminal stains.

21. This Court has heard the learned counsel for the parties in detail and have also perused the entire trial court record including the evidence on record. On account of an application of the appellant for additional defence evidence, this Court has to first decide whether the appellant is entitled and can be allowed to lead additional defence evidence of priest Komal Pandit and his friends, namely Raj Kamal Gautam and Sanjay Giri. Under Section 391 of the Criminal Procedure

Code discretion is vested with the appellate court to take further evidence in an appeal is an exception to the general rule that an appeal must be decided on the evidence which was before the trial court. Therefore, the discretion conferred must always be exercised with circumspection and for meeting the ends of justice. Additional evidence should be permitted only when it is the requirement of the Court to elucidate truth or when interest of justice demands such a course. The discretion vested in shape of exception, therefore, has to be exercised in the rarest of rare cases and such exercise must avoid arbitrariness and must be according to recognized canons of criminal justice system. The additional evidence can be permitted at the instance of the prosecution as well as the defence. It is a known celebrated principle of law that discretion under this section should not be exercised for the purpose of filling a gap in the prosecution case when the necessary evidence was available to the prosecution at the hearing and ought to have been produced then. Likewise, defence should not also be permitted to tender such evidence when the evidence in defence was available to the defence at the hearing of trial and ought to have been produced then.

22. The word 'necessary' employed in the section does not import that it is impossible to pronounce judgment without the additional evidence (AIR 1965 SC 1987). Broadly, the principle to allow fresh evidence in Appeal can be summarized as under:

- i. The evidence sought to be called must be evidence which was not available at the trial;
- ii. the evidence must be relevant to the issues;
- iii. it must be credible evidence in the sense of being well capable of belief;
- iv. the Court will after considering that the evidence to go on to consider whether there might have been reasonable doubt as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

The Supreme Court has observed that the provisions of Section 391 of Criminal Procedure Code are akin to provisions contained in Order 41, Rule 27 of Civil

Procedure Code. Rule 27 in fact starts with the words "no party shall be entitled to produce additional evidence". Ordinarily, therefore, there is a clear bar for admitting additional evidence in appeal. Rule, however, in certain cases allows such party to produce the evidence on the grounds:

- i. The first ground is when the trial Court has refused to admit that evidence and
- ii. Second is in spite of exercise of due diligence, it was not within knowledge and could not be within the knowledge and could not be produced. The case at hand does not fall in either of the above two categories.
- iii. The third ground is when the Court itself finds such evidence and document necessary to pronounce the judgment. However, if the purpose of the prosecution or the accused is only to adduce evidence at the appeal stage for the purpose of filling in lacunae, then such an application must be rejected. This view has been upheld and followed in these decisions enumerated hereinafter: 2003(2) ALD (Cri)21, Yogendra Bhagatram Sachdev v. The State of Maharashtra and Shri Shambu Prasad Mishra; 2008 Cri.L.J 970, Mamatadevi W/o Prafullakumar Bhansli v. Vijaykumar Mamraj Agrawal; (2008) 3 GLR 2566, State of Gujarat v. Maheshbhai Ranchodbhai and Ors., in these cases the accused persons had made applications under Section 391, requiring the Courts to take additional evidence by way of examining certain witness or producing documents, which was not done at the trial stage. The Courts however, rejected their applications as it was felt that the application was solely with the intention of improving on the defence. Since the accused did not prefer to lead the evidence sought to be produced at appellate stage, during trial though it was available and could be produced, the accused were not permitted to lead the same by way of additional evidence under Section 391 of the Code of Criminal Procedure.

23. In the application for additional defence evidence, being M.P.No.12605/2009, the only ground disclosed is that the appellant was unable to defend himself before the trial court and it will be in the interest of justice to permit the appellant to lead the additional evidence. Perusal of the trial court record reveals that the appellant was duly represented by a counsel. If a counsel had represented the appellant, it has not been explained satisfactorily as to how he was unable to

defend himself before the trial court. This is also not the case of the appellant that though he had a counsel but counsel had not appeared or had conducted the trial contrary to his instructions. It is also not being divulged by the appellant that despite his insistence or opinion that priest Komal Pandit and his friends, namely Raj Kamal Gautam and Sanjay Giri be examined, the counsel did not examine them or made any effort to examine them. The application for additional evidence is also silent about the availability of these witnesses. No case has been made out during the trial after conclusion of the statement of the appellant under Section 313 of the Criminal Procedure Code that these witnesses which the appellant now seeks to examine, were not available or not agreeable to come and depose in favour of the appellant.

24. As considered hereinbefore, section 391 of the Criminal Procedure Code contemplates that while dealing with an appeal, the Court may take additional evidence if it thinks the additional evidence is necessary either by recording itself or directing the Magistrate or Court of Session to record the additional evidence. In the present facts and circumstances, this Court is of the opinion that the appellant has not been able to make out a sufficient cause to allow the appellant to lead additional evidence. No cogent reasons have been disclosed as to why these witnesses who are sought to be examined now could not be examined earlier. In some cases in the interest of justice, the Court on the basis of the relevancy of the evidence may allow the additional evidence however, in the present facts and circumstances, this Court is not inclined to allow the appellant to examine priest Komal Pandit and his friends, namely Raj Kamal Gautam and Sanjay Giri to depose that the appellant was not present on the date of incident and had gone with them to Haridwar to bring holy water as Kanwanria. The application is therefore, declined.

25. The statement of the prosecutrix recorded under Section 161 of the Criminal Procedure Code on 16th August, 2005 could be used for confronting her with the statement made before the Court. Before the Court the prosecutrix namely Khushbu @ Diksha had deposed that in 2005 one day she was sleeping in the room along with her brother namely Pankaj and her father was sleeping on the roof. She got up due to pain at her private part and found that the appellant was

lying there and had entered his finger inside her vagina. When she tried to cry, the appellant gagged her mouth with his palm and thereafter committed rape upon her. She also deposed that when she tried to raise noise her brother woke up and switched on the light. After her brother woke up, the appellant threatened them that if they will tell anything to anyone he would kill their father. The relevant examination of the prosecutrix recorded on 19th July, 2006 is as under:-

"I got up due to pain at my private part and I found that accused Sonu @ Pradeep present in the court today was lying there and he had entered his finger inside my vagina when I tried to cry, accused gagged my mouth from his palm and thereafter he committed rape upon me. I tried to raise noise. My brother Pankaj woke up and switch on the light. The accused threatened us in case we will tell this fact to anyone he would kill my father and run away."

26. During her cross-examination, she denied the suggestion that on the bed since her brother was also there, there was no space for anyone else. She also admitted that there is no door in the staircase which goes from the ground floor to first floor. She categorically stated that she had two underwears and she used to change her underwear daily and she had given one of the underwear after about 20 to 22 days of the incident, as was demanded by the police official. She also admitted that switch of the light was towards her side of the bed. She also categorically deposed that the appellant was lying straight between her and her brother when she woke up. She also admitted that the appellant was wearing a knicker and baniyan at that time. She also deposed that the accused had penetrated her vagina when her brother woke up and had switched on the light.

27. The prosecutrix in her statement under Section 164 of the Criminal Procedure Code before the Magistrate, being Ex. PW-2/B deposed, the English Translation of which is as under:- "I am 8 years old. I study in 3rd Class. 20-22 days before at night I and my brother Sh.Pankaj were sleeping in the room. Because of pain my eyes opened. Lota son of our landlord was lying next to me. My underwear had been pulled down. That boy Lota had also pulled down his underwear. He put his finger at my place of urination. When I cried , he muffled my mouth with his palm and put his penis in place of my urination. Because of noise my brother switched

on the light. Thereafter, Lota asked to switch off the light. Thereafter, he wore his underwear and paint and went away and while going, he said that if either I or my brother will tell anything to anyone, he will kill my father. I did not tell anything to anyone on account of fear, nor my brother told anything. Later on, the aunty who lives across our room asked me whether I had gone to bathroom. I admitted to her having gone to bathroom. In latrine with my urine I have passed the blood which has been seen by the aunty. The aunty had told my father. My father had told it to my mother. When my mother asked I told her everything. My statement is correct and I have heard it."

28. This is no more *res integra* that conviction for offence under Section 376 of IPC can be based on the sole testimony of a victim as was held in *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384; and in *State of Maharashtra v. Chandraprakash Kewal Chand Jain*, (1990) 1 SCC 550. However, the testimony of the victim in such cases is very vital and should be without inconsistencies and should not be improbable, unless there are compelling reasons which necessitate looking for corroboration of her statement and the Court finds it difficult to act on the sole testimony of victim of sexual assault to convict an accused. In the *State of Himachal Pradesh v. Gian Chand* (2001) 6 SCC 71, it was held that if the Court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could have been examined but were not examined.

29. In *Om Prakash* (*supra*) relied on by the learned additional public prosecutor, the prosecutrix aged eight years had gone to the house of one S to take buttermilk. When she did not return for a long time, her mother went to the house and when she opened the door, which was closed, she found the accused aged 18 years committing rape on her daughter, who was totally unconscious. On seeing the mother of the prosecutrix, the accused ran away and the mother lifted her daughter and brought her back home. As the husband and brother-in-law had gone to another village, next day a report was lodged with the Police. The deposition of the prosecutrix was supported by the deposition of her mother, who had seen the accused raping her daughter. The doctor who had been examined, however, had found no injury on her body but on the inner parts of both thighs and

at the outer part of the left foot he had found signs of blood. He had opined that the intercourse was done with the girl. The doctor had also deposed that according to the opinion of the lady doctor and the opinion of pathologist and his opinion based on his own examination of the victim, something had penetrated in her vagina. In the cross-examination the only thing put to him was that main examination report of the lady doctor and the other pathologist was not before him and that the seminal stains were not present on the clothes and that after the sexual contact, the vagina remained intact. The High Court had reversed the conviction on the ground of non- examination of other independent witnesses and had rejected medical evidence on the ground that since the incident had taken place in the environment of village, where there were other residential houses, it was unnatural that the prosecutrix and her mother would not have shouted and others might not have gathered at the place of incident and that except the family members, no other witness had come forward to support the case of the prosecution. The Supreme Court had, however, set aside the acquittal by the High Court holding that the explanation for the delay that the father of the prosecutrix and brother-in-law were not in the village was not unnatural and also the fact that the girl/prosecutrix was unconscious during the day and the police station was at a distance of 15 km. In the circumstances, it was held that the delay in reporting the matter to the police had been fully explained. The testimony of the doctor was also found to be clear and specific as he was the author of the report and no grounds were found to discard the report of the doctor. The Supreme Court also held that conviction of the offence under Section 376 of IPC can be based on the sole testimony of a raped victim. However, the sole testimony has to be seen and scrutinized with the evidence of the parents of the prosecutrix, her brother and if it is found to be reliable, can be acted upon. In these circumstances, it was held that there was nothing unnatural for other villagers not to visit the house of the prosecutrix and conviction could be sustained on the basis of testimonies of relatives.

30. The Supreme Court, however, cautioned that the evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy prey to tutoring. Wisdom requires that the evidence of a child witness must find adequate corroboration before it is relied

upon and placed reliance on State of UP v. Ashok Dixit & Anr.(2000) 3 SCC 70. The Supreme Court in this case had set aside the acquittal by the High Court as the High Court had not even noticed the testimony of the prosecutrix in the judgment under appeal.

31. The learned additional public prosecutor has also relied on Ravi @ Nehru (supra) in which case the prosecutrix aged about 5 years while going to her aunts house along with other children was taken by the accused to his bed room where prosecutrixs underwear was removed and the accused also removed his pants and placed the prosecutrix on his lap and pressed his male organ on her female organ. The prosecutrix cried in pain and on hearing her cry, two persons who were watching television in the front room of the house, came there and scolded the accused. When the mother of the victim girl came, she removed all the clothes, which according to her had contained blood stains. She also washed her clothes and gave bath to her daughter. In this case, the High Court had acquitted the accused holding that the statement of the prosecutrix was not corroborated by the evidence of the doctor, who examined her as there were no external injuries and there were no blood stains on her dress nor there was any injury on her female organ though hymen was ruptured and there was no fresh bleeding from the private parts. In these circumstances, it was held that non presence of blood stains on the victims vaginal part and on her wearing apparel will not make much difference as there was categorical testimony of her mother and two other witnesses that the prosecutrix was given bath and her vagina and wearing apparel were washed before taking her to the doctor. In this case, High Court had also overlooked the testimony of the doctor who examined the accused and found a cut/wound at the bottom portion of penis of accused and who had further opined that such cut/wound was possible only when the penis was forced into the vagina. The Supreme Court had set aside the acquittal also on the ground that such stark testimony had not been considered by the High Court and in the circumstances, evidence of the prosecutrix was found to be un- impeached and well corroborated by evidence of other prosecution witnesses. In this case, there was not even an iota of evidence or even a suggestion that the accused has been falsely implicated because of animosity or for some other reason.

32. It must be remembered that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. Considering the present facts and circumstances, it may not be necessary to deal with precedents in detail relied on by the parties in the facts and circumstances of the present case as the present case is apparently distinguishable from the fact situation of most of the precedents relied on by the parties. In *Ambica Quarry Works v. State of Gujarat and Ors.* and *Ambalal Manibhai Patel & Ors. v State of Gujarat & Ors* MANU/SC/0049/1986 the Supreme Court observed:-

"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

Similarly in *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59), the Supreme had observed:- "It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

The Supreme Court in *Bharat Petroleum Corporation Ltd. and Anr. v. N.R.Vairamani and Anr.*(2004) 8 SCC 579 had also held that a decision cannot be relied on without considering the factual situation. In the same judgment the Supreme Court also observed:- "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for

judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

In *Padmasundara.Rao Vs State of Tamil Nadu & Ors*, JT 2002 (3) SC 1, the Supreme Court had held as under:

"There is always a peril in treating the words of judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases."

In *Rafiq Vs State of U.P*, 1980 4 SCC 262 it was observed as under:

"The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases and disposing of a case by blindly placing reliance on a decision is not proper.

33. In contradiction to the cases relied on by the learned APP, in the present case, the testimony of the prosecutrix before Court has major contradictions and is unreliable and improbable. In her statement before the Magistrate under Section 164 of Criminal Procedure Code she was categorical that she had bled to such an extent that when she went to toilet later on, she had passed blood which was found in the toilet even by another woman who had been referred to as aunty who was, however, not examined. If the prosecutrix had bled so profusely, how there were no blood stains either on her underwear or on the bed sheet as the alleged act was done on an iron cot of 4ft. x 6ft. where her brother was also lying and the accused had allegedly also come and lied in between the prosecutrix and her brother, has not been explained. If the prosecutrix had only two underwears and she was using them alternatively and washing them and the underwear was seized by the police after 20-22 days of the incident, it must have been washed a

number of times before it was given to the police. If there were blood stains, they must have been washed, if that be so, it is unimaginable as to how semen stains on the underwear of the victim will remain intact so as to be detected in the examination by CFSL but no stains of blood would be found. If the bleeding was so profuse then no stains on the underwear of the accused, on dori or on the bed sheet creates doubt about the version of the prosecutrix. The facts of the present case are quite distinguishable from the facts and circumstances of the cases relied on by the respondent. In the facts and circumstances and on the basis of the ratio of Ravi @ Nehru (supra), it cannot be held that the testimony of the prosecutrix is reliable. In the case relied on by the respondent, a cut was found on the bottom portion of the penis of the accused and the hymen of the victim was also found to be ruptured, though, there was no fresh bleeding from the private parts. In this case, there was cogent evidence that the accused had taken the victim to his house and had removed her undergarments and his own undergarments and had placed the victim in his lap. However, in the present case, the testimony of the victim is that she was lying on the bed which was four ft. wide with her brother and it was dark. In a bed which is four ft. wide where the prosecutrix was lying with her brother, there would hardly be any space in between the prosecutrix and her brother for another adult to come and lie down, who is 22 years old, without disturbing the brother and even prosecutrix, as the testimony of the prosecutrix is that she woke up, not when the appellant came and lied in between them but when she felt pain in her private part. On a bed which is only four feet wide if the accused was lying in between the victim and her brother and the legs of the victim were closed and not stretched, it would be difficult for the appellant even to insert his finger without making such commotion which will wake up not only the victim but her brother also, who was alleged to be on the same cot. According to the testimony of the victim the appellant raped her after inserting his finger and during this time, the brother remained asleep, cannot be believed in the facts and circumstances. The other factor which impels us to disbelieve the statement of the victim about her rape is that on a cot which was 4 feet wide, it would not be possible for the accused to penetrate her unless the legs of the victims were stretched. Had the legs of the victim been stretched, there was no way that the legs of the girl will not hit her brother sleeping on the same cot. The accused

would not have had so much time to stretch her legs and to mount her and to penetrate her without waking her brother. The version of the prosecutrix is highly improbable and is full of contradictions.

34. There are contradictions in the testimony of the brother PW-3 Pankaj and the prosecutrix PW-2 as to what was worn by the appellant at the time he allegedly inserted the finger in the vagina of the prosecutrix and thereafter raped her with his male organ. The prosecutrix, in her statement before the Court had stated that the appellant was wearing a underwear and a baniyan, when he was lying down between them. He had already removed his underwear and had also pulled down the underwear of the victim. After her brother switched on the light, which light switch was towards the victim, the appellant wore his knicker and after threatening them left the place. The brother, however, in his testimony as PW-3, deposed that the appellant was wearing trousers and he was standing in the room with his trousers pulled down. He categorically deposed later on that when he switched on the light, the appellant asked him to switch off the light and at that time he was standing and he had worn his trousers where after he threatened them. The Police had rather seized the underwear of the appellant as Ex. 1 and as per CFSL report, neither any semen nor any blood was detected on the same. In her statement under Section 161 of Criminal Procedure Code, Ex. PW 2/A, the fact that she had bled and one aunty had seen some blood in the toilet were not disclosed. The victim was confronted with the said statement without any plausible explanation.

35. Even in the site plan, which was exhibited as Ex. PW-15/B, placement of the room where the alleged incident had taken place and in the room the position of the iron cot and the switch has not been shown nor it has been shown as to how the appellant could have come from the ground floor to the room without opening the door of the room. This is not disputed that the room where the alleged incident took place is under tenancy of the family of the victim.

36. The MLC of the victim Ex. PW-6/A also reveals only about the ruptured hymen and that there was no bleeding. This MLC was done on 16th August, 2005, almost after 20-22 days and consequently, there could not be bleeding at that time. In that context, the testimony of the aunty, who had seen the blood which was passed by

the victim as per her testimony, becomes very material, however who was that aunty has neither been explained by the victim and her family nor by the prosecution. Non-examination of that aunty breaks the essential link in the chain of events as the version of the victim is that on account of the threat by the appellant to her and her brother that he will kill their father, they did not disclose anything till the mother of the victim came back after 20-22 days and then the victim had revealed the incident to her. The other version is that the victim had told about bleeding to the aunty after it was observed by her in toilet and the aunty had disclosed this to her father. If the aunty who had not been examined and whose particulars have also not been disclosed had divulged it to the father, why did he not immediately take any action to find out as to how his younger daughter had bled or tried rendering some medical assistance to her, makes the entire version of the prosecution extremely doubtful.

37. The father Om Prakash, PW-4, rather in his testimony, admitted that the lady had told him about the blood in the latrine but he did not pay any heed to this on the premise that the blood in the latrine may be of any person who had come to the latrine. Meaning thereby that he was not told by the lady that the blood was of his daughter but that there was blood in the latrine, which is contrary to the testimony of the victim who categorically stated in her statement under Section 164, Criminal Procedure Code that on seeing the blood in the latrine, aunty had asked the victim about her bleeding and she had told it to Om Prakash, father of the victim. According to PW-1 Smt. Sridevi, the incident was told by the daughter to her, whereas according to the victim after the aunty had disclosed about the bleeding of the victim to the father Om Prakash, he had told to his wife PW-1 Sridevi when she came back from her mothers house where after the mother asked the details from the victim, PW 2 Diksha. This inherent contradiction makes the version of the prosecution unreliable and does not prove the guilt of the appellant conclusively.

38. Though the learned counsel for the state, Mr. Sawhney, has contended that the third sibling, sister of the prosecutrix Diksha, namely, Priyanka, was out according to the statement of PW-4, however, no such fact had been deposed by Sh. Om Prakash in his statement recorded on 10th April, 2007 or in his cross-

examination. This is not the case of the prosecution that the sister Priyanka of the victim had gone with the mother to her grandmothers house nor it is a case of the father that she was sleeping with him on the roof. In the facts and circumstances, no explanation as to where Priyanka was sleeping or where she was at that time, as the family of the victim has only one room under their tenancy, also casts doubt about the version of prosecution.

39. Though, the learned counsel for the State has relied on N.K.- The Accused (supra), in support of the contention that failure of the prosecution to produce the witness to whom the victim had narrated her story after rape is not fatal, however, the facts and circumstances of that case are completely distinguishable. In the case relied on by the learned public prosecutor, the victim after the rape, when blood was oozing from her private part and accused having left her alone, the victim while weeping had narrated the incident to a woman and to her father in quick succession. The statement of the father to whom the facts were narrated in succession along with other lady, was recorded which had corroborated the version of the prosecutrix and the other person to whom the incident was narrated in quick succession, the another lady was not examined and it was held that non-examination of the another lady is not fatal. However, in the case of the present appellant, the prosecution version is not that the fact of bleeding was either disclosed by the victim to her father PW-4 or the father had been told about it by the victim. Rather there are two versions that on the date of incident, an aunty had told it to father who had told about it to his wife, mother of the victim when she came back from the village and the other version is that the victim had told her mother about the incident when she came back after 20-22 days from her mothers house.

40. The version of the mother PW-1 Smt.Sridevi is that when she came back after 20-22 days, the prosecutrix Khushbu @ Diksha disclosed to her and she disclosed to the father of the prosecutrix whereas the prosecutrix version in her statement before the Magistrate under Section 164 of Criminal Procedure Code is that the aunty who had not been examined, had noticed the blood in the toilet and had confronted the victim with it and she had admitted and disclosed to the aunty that in latrine with urine she had passed the blood which fact was disclosed and told by

the aunty to the father and thereafter, the father told this to his wife, mother of the victim who after 20-22 days found out further details on returning back from her mothers house. Though, the father had tried to say that he thought that the blood would be of some other person, however, his statement cannot be believed in view of the categorical statement of the victim that the aunty, who had not been examined, had told her father that it was the victim, who bled, which blood was found by her in the toilet. If the father had been told about bleeding of his daughter, why did he not take steps or any action or found out from the victim or his son the reason for it, makes the version of the prosecution improbable and not reliable. Why the father Om Prakash, PW 4 waited for 20-22 days for his wife to return has not been satisfactorily explained. Had Sh. Om Prakash talked to his daughter and son and had they not divulged anything to him on account of threat given to them by the accused, it would have been different. But the prosecution version that he did not even talk to his daughter and son, makes the whole version highly suspicious. In the circumstances, it will not be safe to convict the appellant on the basis of the testimonies of the victim and her father which have major contradictions. Though, the sole testimony of the victim can be sufficient in some cases, for inculcating an accused, however, if there are inherent contradictions in the testimony of the victim and her parents and a very relevant witness is not examined, sole testimony cannot be made the basis for establishing the case of the prosecution beyond reasonable doubt.

41. In the case of Radhu(supra), the Supreme Court had held that the false charges of rape are not uncommon and in some cases parents do persuade gullible or obedient daughter to make false charge of rape either to take revenge or extort money or to get rid of financial liability. The Supreme Court had cautioned against false cases. In this case the evidence of the prosecutrix is full of discrepancies and improbabilities and does not inspire confidence. There are clear discrepancies in the evidence of mother and the father and the brother of the victim. The aunty who has disclosed about bleeding by the victim on account of the incident had not been examined. In the facts and circumstances the sole testimony of the victim is not sufficient to convict the appellant. Taking the statement of the victim PW-2 Diksha, her mother, her brother and her father, it is apparent that there are major discrepancies and in the opinion of this Court, their

testimonies do not inspire confidence. The aunty who had noticed the blood in the toilet had confronted the victim PW-2 Diksha and had come to know that it was she, who had bled leading to blood in the bathroom, she had even intimated the father Sh. Om Prakash, yet the father has given an entirely different version. An iron cot of 4ft. x 6ft., on which the alleged incident of inserting the finger in the vagina of the minor girl and thereafter raping her on the same cot was highly improbable without the brother even getting disturbed. In the facts and circumstances on the basis of testimony adduced by the prosecution the appellant cannot be inculpated. Since the version of the victim is disbelieved, it also cannot be believed that the appellant had threatened the victim and her brother so as to commit the offence under section 506 of Indian Penal Code.

42. Though, the appellant had stated in his statement under Section- 313 of the Criminal Procedure Code about the motive for false implication, i.e., to dissuade his father from claiming enhancement of rent and also to avoid the liability for electricity charges, it has not been established. However, failure of defence to prove motive for false implication will be inconsequential as the prosecution has failed to prove the charges as was also held by the Supreme Court in the case of Radhu (supra).

43. The inevitable conclusion in the facts and circumstances is that the respondent has failed to make out charges against the appellant beyond reasonable doubt. On the basis of evidence on record the appellant cannot be convicted under Section 376 and 506 of the Indian Penal Code. In the circumstances the appeal is allowed and conviction and sentence imposed upon the appellant by the session Court in Sessions Case No.123 of 2006, titled as State v. Pradeep @ Sonu, arising from the FIR No.737 of 2005, under Sections 376/506 Indian Penal Code, P.S. Okhla Industrial Area convicting the appellant under Section 376 of the Indian Penal Code and Section 506 of the Indian Penal Code and sentencing the appellant to undergo rigorous life imprisonment under Section 376 (2)(f) of the Indian Penal Code and a fine of Rs.5,000/- and in default to undergo simple imprisonment for two months and simple imprisonment for two years for offence under Section 506 of the Indian Penal Code are set aside. The appellant shall be set free forthwith if not required in any other case. Copy of this order be also sent to the concerned

detaining authorities forthwith.

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