

Ashok Narang Vs. State

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Court : Delhi

Decided On : Jan-12-2012

Appellant : Ashok Narang

Respondent : State

Advocate for Pet/Ap. : Mr. Kalra

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL. APPEAL No. 932/2009 % Judgment reserved on: 20th September, 2011 Judgment delivered on: 12th January, 2012 ASHOK NARANG Appellant Through: Mr.Rajender Kumar, Adv. versus STATE Respondent Through: Ms.Ritu Gauba, APP. CORAM: HON'BLE MR. JUSTICE SURESH KAIT SURESH KAIT, J..

1. Vide the instant appeal, the appellant has challenged the judgment dated 06.10.2009 whereby he was held guilty and convicted and by order on sentence dated 09.10.2009, he was sentenced to undergo RI for a period of 07 years for the offence under Section 363 Indian Penal Code, 1860 read with Section 34 Indian Penal Code, 1860 of which he stands convicted with payment of fine of ` 5,000/- for the said offence..

2. He also sentenced to undergo RI for a period of 10 years for the offence punishable under Section 376 IPC read with Section 34 Indian Penal Code, 1860 with payment of `5,000/-. Crl. Appeal No.932/2009 Page 1 of 70.

3. He further sentenced to undergo RI for a period of 01 year for the offence punishable under Section 342 Indian Penal Code, 1860 read with Section 34 Indian Penal Code, 1860..

4. Benefit of 428 Cr.P.C. has been given to the appellant..

5. The facts of the case, in brief, are that appellant along with co- accused Balwan Singh @ Bobby (since declared PO in the instant case) on 29.09.1998 at 12:00 Noon at Road Jamrudpur Village, Delhi in furtherance of common intention, kidnapped Satnam Kaur from lawful guardianship of Mahender Kaur and Paramjit Singh. Secondly, on the above said date at 12:00 Noon to 07:00 PM on 30.09.1998, they both in furtherance of common intention wrongly confined Satnam Kaur at Shop Narang Property Dealer, Jamrudpur, Delhi. Thirdly, during the period on 29.09.1998 and 30.09.1998 at Shop Narang Property Dealer at Jamrudpur, Delhi they both in furtherance of their common intention committed rape with Satnam Kaur against her will..

6. Vide order dated 07.08.2000, charges were framed against the appellant for the offence punishable under Section 363/342/376 read with Section 34 Indian Penal Code, 1860, to which he pleaded not guilty and claimed trial..

7. The prosecution has led evidence of as many as 28 witnesses in its PE in the instant case, on record, out of the 31 witnesses cited by it in its list of witnesses..

8. Thereafter statement of appellant under Section 313 Cr.P.C. was Crl. Appeal No.932/2009 *Page 2 of 70* recorded wherein he denied the case of the prosecution and stated that he has been falsely implicated at the instance and behest of his alleged inimical uncles family and tenant Mohan Singh. He has further alleged that his blood group is O +ve; that the IO with the connivance of interested witnesses has fabricated a false case and evidence by not sending his blood for comparison and sending blood of some other person to implicate him falsely. He has filed his blood examination report showing his blood group as O +ve which are mark D1 to D4..

9. The appellant led defence evidence DW1 Dr. Poonam Kaushik, DW-2 Sh. Jagannath Sahoo, DW3 Sh. J.K. Parshar, DW4 Sh. Rajbir Singh, Record Clerk, AIIMS, New Delhi, DW5 ASI Shiv Kumar, DW6 Ct. Hari Ram, again DW5 Sh. Pradeep Srivastava, again DW6 Dr. Usha Gupta and DW7 Sh. V.D. Narang in his defence evidence as also evidence of court witness namely CW1 Dr. Sunil Dewani, Sr. Resident, RML Hospital, New Delhi has also been recorded..

10. After going through the evidence on record, Id. Trial Judge has recorded in the impugned judgment that no cogent reason has come on record to disbelieve PW1 Prosecutrix as a PE in the instant case or in answer to the question as to why the prosecutrix is not be believed in respect of her allegations against the appellant constituting ingredients of the offences for which he is charged with in the instant case. The prosecutrix has stood the test of cross-examination and has not shaken from her testimony in her examination-in-chief in respect of material particulars of her allegations against the appellant. CrI. Appeal No.932/2009 Page 3 of 70.

11. Ld. Judge found no material discrepancies, inconsistencies or contradictions in the various statements recorded of the prosecutrix. Her testimony viz. her testimony recorded in PE as PW, her statement Ex.PW1/A on the basis of which the instant case was registered as also her statement recorded under Section 164 Cr.P.C. Ex.PW24/B..

12. Ld. Judge has also recorded that the case against the appellant have been corroborated vide FSL reports dated 24.03.1999 and 29.07.1999 Ex.PW5/A, B, C and D respectively in respect of the case property viz. Salwar, Ex.P1; Kurta, Ex.P2 being allegedly worn by PW1 prosecutrix at the time of alleged incident and seized vide seizure memo Ex.PW18/E as also report of the FSL Ex.PW5/A in respect of three microslides having whitish smears which are the three vaginal slides of the PW1 prosecutrix made at the time of her medical examination by PW16 Dr. Jyoti Nath vide MLC dated 02.10.1998 at 11: 45 PM Ex.PW16/A and seized vide seizure memo Ex.PW18/C on which human semen has been certified to have been detected apart from the exhibits P1 (Salwar) and P2 (Kurta) of the PW1 prosecutrix being allegedly worn by her at the time of alleged incident seized vide Ex.PW18/E, vide the relevant FSL report dated 24.03.1999 in their respect and in

this regard Ex.PW5/A as above said, on record..

13. Ld. Judge has also recorded that the case against the appellant have been corroborated vide seizure memo Ex.PW11/A in respect of the case property i.e. three seater Sofa having large flower print of light blue and pink flowers, navy blue base again Ex.P1 allegedly seized Crl. Appeal No.932/2009 *Page 4 of 70* from the office premises of the appellant in the name of Narang property situated main road, Jamrudpur opposite Lady Sri Ram College, New Delhi along with above said case property as also vide seizure memo Ex.PW7/A in respect of the Car No. DL-3CC-1746 Maruti 800, metallic blue again Ex.P1 seized from in front of the residential premises bearing No. I-56, Lajpat Nagar-II, New Delhi of the appellant along with the above said case property..

14. Ld. Trial Judge has also recorded that no personal enmity has been lodged on the part of the appellant against the star material public witnesses of the prosecution viz. PW1 prosecutrix and PW4 her father Sardar Paramjeet Singh..

15. It is also recorded that the statements Mark PW23/A to PW23/D dated 30.09.1998 of the alleged witnesses recorded by PW19 IO/SI Ved Singh during his investigation are not relevant/admissible in evidence by virtue of they being signed statements of the said alleged witnesses and there being no provision of recording of such signed statements on the part of the IO concerned during his investigation..

16. Ld. Trial Judge was of the opinion that it hit by provision of Section 162 of Code of Criminal Procedure, 1973 (as amended up-to- date) which expressly bars the recording / use of such statements in evidence. Accordingly, he has relied upon the statement of PW-4 Sardar Paramjit Singh, father of the prosecutrix, in his cross- examination on the part of the accused in PE inter alia that, "the version giving in Ex.PW4/DD is not his but written under the pressure Crl. Appeal No.932/2009 *Page 5 of 70* of Chowki Incharge who was posted at 30.09.1998 known as Mr.Kaushik. The Ex.PW4/DB is not in his hand writing and he was forced to sign the same. Ex.PW4/DB might have been written by Ashish Kapoor on the dictation of the police. He did not say if Ashish Kapoor also signed the said sheet. He has denied the document Ex.PW4/DB was written by Ashish Kapoor at

his instance as he voluntarily signed the same. He has admitted that Ex.PW4/DC bears the signature of his daughter Satnam Kaur. He did not know, who had written Ex.PW4/DC"..

17. Ld. Trial Judge has also recorded that no evidence has been led on the part of appellant about the alleged nexus / connivance on the part of the PW1 Prosecutrix and her father with the alleged inimical uncle of appellant namely L.D. Narang and his tenant, namely, Mohan Singh in order to false implication of the appellant in the instant case. As alleged by him the motive/consideration on their part for the same, either in his cross-examination of the said star material witnesses of the prosecution or in his defence evidence, in order to prove / establish his plea / defence of false implication on the part of the said PWs allegedly in connivance / at the behest of the said alleged persons. Learned Trial Judge find it a sin-qua-non for proving/establishing the same on record, except making only bald suggestion to the said star material public witnesses of the prosecution viz. PW1 Prosecutrix of his alleged false implication in the instant case on her part at the behest of her father and Mohan Singh. And to her father PW4 of his alleged false implication in the instant case on his part at the behest of L.D. Narang Crl. Appeal No.932/2009 *Page 6 of 70* and Mohan Singh, thereby leaving is said defence in the realms of conjectures and surmises..

18. Ld. Trial Judge has also recorded that though PW19 IO/SI Ved Singh was declared hostile to the case of the prosecution, however, the other prosecution witnesses i.e. PW-1 Prosecutrix, PW-4 Sardar Paramjit Singh, PW-7, Nizam, Public witnesses, PW-8 Smt. Mahender Kaur, PW-11 Sh. Bhag Singh and PW-12 Sh. Sanjay Kohli apart from the testimonies of medical witnesses PW-2 Dr. R.K. Sharma, PW-3 Dr. Joginder Singh, PW-15 Dr.Prasant Kulshrestha as also PW16 Dr. Jyoti Nath and PW6 Sh. A.K. Srivastava along with other witnesses has proved the case of the prosecution..

19. Mr. Rajender Kumar, Adv. appearing on behalf of the appellant has submitted that the impugned judgement is perverse as the same is based on conjectures and surmises as the same is neither supported by the evidence / material on record nor in accordance with the statutory provisions of law..

20. He further submitted that the conviction of the appellant is solely based on the uncorroborated / uninspiring testimony of the PW1 prosecutrix Ms. Satnam Kaur, which is most untrustworthy witness as she had made materially contradicted statements at various stages which cannot be relied upon due to the reasons as under:- (a) PW1 Prosecutrix has made statements on 30.09.1998 Ex.PW4/DC, on 02.10.1998 Ex.PW1/A, on 10.12.1998 under Section 164 Cr.P.C. Ex.PW24/A and at trial on 07.09.2000 and Crl. Appeal No.932/2009 *Page 7 of 70* 08.09.2000 are materially at variance with each other as she has given different versions at various stages. Ld. Counsel for the appellant has pointed out some of the material contradictions / omissions in the statement of the prosecutrix as under:- (i) Time of incident:- i) As per the Complaint (Mark PW8/A filed by Ms. Mahender Kaur (PW8) on the basis of which FIR NO. 887/98 Under Section 363 Indian Penal Code, 1860 was registered at PS-Lajpat Nagar, New Delhi wherein it is stated that her grand-daughter on 29.09.1998 at about 12.30 PM went to Amar Colony Market but has not returned. She suspected that some unknown person has taken her grand-daughter to some pretext. ii) As per the statement of the prosecutrix Ex.PW1/A, on the basis of which FIR no. 381/98 under Section 376/342/34 Indian Penal Code, 1860 was registered on 03.10.1998 at PS-Greater Kailash, it is alleged therein that on 29.09.1998 at about 12 noon she went to Jamrudpur Village for Crl. Appeal No.932/2009 *Page 8 of 70* buying some household items. When she was on the way to Jamrudpur, one car had stopped in front of her from where one man got down and caught hold her and get her smeared with some hanky to which, she became unconscious. Thereafter he took her to nearby shop. She was put on sofa. When she came in the senses, two persons were there, one of whom, administered injection to her. Thereafter, when she regained consciousness, that shop was closed, the light was on and both the persons were sitting near her. Her clothes were found removed. Thereafter both the persons gave beatings to her. She tried to raise an alarm. They threatened her to kill her and both of them committed rape upon her one after another. They both were talking to each other by name one was Ashok Narang and another was Bobby. Ashok Narang put hanky on her mouth and administered injection. On 30.09.1998 at about 7:00 PM she was taken out from the shop. Thereafter, she saw one board in the name of Narang Property Dealer. Both the above said persons left her at Amar Crl. Appeal

No.932/2009 *Page 9 of 70* Colony in the same car. Thereafter, she went to her Nani's house. On that day, because of shame, she did not disclose the incident to anyone. On 01.10.1998, she went to her fathers house at Buddha Vihar. Thereafter on 02.10.1998 around 8:00 PM, she felt pain in her stomach. She thought that this pain is because of the rape committed on the earlier date. Her father admitted her at AIIMS Hospital, where she disclosed that both the above said persons committed rape one after another. On this statement, present case was registered against the appellant. iii. Statement Ex.PW16/A given by PW1 Prosecutrix to the Doctor during medical examination on 2/3.10.1998, wherein it is recorded that she had come to stay with her maternal grandmother. On 29.09.1998 around 12:30 PM she was forcibly taken away in a car by two men allegedly named Ashok Narang and Bobby, who were property dealers and businessmen dealing in stones respectively. She recognized them by Crl. Appeal No.932/2009 *Page 10 of 70* face. She had gone to market to fetch bread when this happened and she was allegedly taken away in a car to a nearby shop belonging to one of them. She shouted and resisted but apparently no one noted and came for help. She was made unconscious by putting a cloth with a medicine to her nose. She woke up next morning and found herself completely naked. Her clothes were lying nereby. None of the two men were around when she woke up. They had also beaten her on the back while brining her into the shop. She put on her clothes and noticed some blood on her Salwar. Her clothes worn at that time were lying at home at the time of examination. She was found by police on 01.10.1998 around 12:00 PM. She had taken bath day before examination. She had no more episode of bleeding per vagina. She had pain in her vulva region when she woke up on first morning. There was no pain in her vulva region at the time of examination. According to patient she had been raped by these two men. The patient was studying in Class VII and left school because of financial Crl. Appeal No.932/2009 *Page 11 of 70* crisis. She was youngest of 6 sisters of which 3 were married. Menstrual history: unmarried girl attain menarche 2 years ago (13 years). Her cycles were regular (3 day / 30). Her last menses was less than a week ago. On examination: conscious, ambulatory a febrile, vitals stable. Systemic examination: Appeared with normal limits. Local examination: On local examination of external generalia slight matting of public hair present. Dried

secretions present on labiaminoria whitish. Small superficial tear in posterior fourchette. No obvious hymenal tear. No active bleeding or blood stain. Vital slides made (3). Pubic hair sample taken and sealed. Possibility of rape cannot be ruled out. In cross-examination the said Doctor has admitted that normally the hymen is ruptured by first intercourse. *Crl. Appeal No.932/2009 Page 12 of 70* iv) Statement of Ex.PW14/B of PW1 Prosecutrix under Section 164 Cr.P.C. before Id. MM, wherein she has stated that on 29.09.1998 at about 6:00 PM she went to bazaar for fetching some household item. When she was crossing the road towards Jamrudpur, one Maruti Car (Maroon shed) stopped near her. Thereafter one boy came out of the car and put cloth on her mouth and took her in the car. She tried to get free from their clutches. She made alarm. Because of Tuesday, Shops were closed. There was no one on the road. The glasses of the car were closed. The prosecutrix in her statement before the Court during trial stated that the time at about 3:15 PM on 29.09.1998 of the alleged incident. (b) Time at which, the prosecutrix had come out of the Shop: i) As per the statement of Ex.PW1/A, is at about 7:00PM on 30.09.1998. ii) As per the statement of the prosecutrix under *Crl. Appeal No.932/2009 Page 13 of 70* Section 164 Cr.P.C. Ex.PW24/B before Id. MM, the time is stated to be in the afternoon on 30.09.1998. iii) At the time of trial, the time is stated to be at about 7:00 PM on 30.09.1998. (c) Place of incident: i) As per the Complaint Mark PW-8/A, Amar Colony Market. ii) As per the Statement of Prosecutrix Ex.PW1/A, the place of incident is Jamrudpur Village. iii) As per the statement of prosecutrix Ex.PW16/A given to the Doctor she went to nearby market to buy bread. iv) As per statement of the Prosecutrix under Section 164 Cr.P.C. PW24/B before the Id. MM dated 10.12.1998 stated the place of incident while crossing the road towards Jamrudpur Village. v) As per statement of the Prosecutrix at trial the place of incident is six steps from her house in Lajpat Nagar. *Ld. Counsel for the appellant submitted that the prosecutrix had neither led the police to the place of alleged incident nor to the shop where the alleged offence was stated to be committed..*

21. *Ld. Counsel for the appellant has submitted that as per the Crl. Appeal No.932/2009 Page 14 of 70* statement of the prosecutrix Ex.PW24/B, she stated the day of incident as Tuesday. However, in her statement at trial, she stated that day of incident to be Monday..

22. On seizure of Car as per the testimony of the prosecutrix at trial, the Maruti Car allegedly used in this incident was Maroon colour while the Maruti Car seized by the Police was Blue Car. Id. Counsel has pointed that neither any TIP was conducted nor the car produced / identified by the prosecutrix during trial..

23. Id. Counsel for the appellant has pointed out that as per the Statement Ex.PW4/DC given to the Police by the father of the prosecutrix on 39.09.1998, no untoward incident had occurred with her..

24. He further submitted that the sofa seized was not sent to FSL to ascertain presence of any semen stain on the same. Neither any TIP was conducted nor Sofa was identified by the prosecutrix at the trial..

25. On education of the Prosecutrix, she has stated at the trial that she studied at home upto 5th Class. However, before the Doctor during MLC she stated upto 7th Class. Whereas in the Statement under Section 164 Cr.P.C. she stated upto to 5th Class..

26. On medical examination of the prosecutrix, Id. Counsel for the appellant has submitted that she was medically examined twice firstly on 02.10.1998 at AIIMS and Second time she was examined on 14.11.1998. *Page 15 of 70* CrI. Appeal No.932/2009 Learned counsel has pointed out that in MLC dated 02.10.1998 Doctor found no obvious hymenal tear. No active bleeding or blood stain. Dried Secretions present on labia minoria whitish. Small superficial tear in posterior fourchette. Whereas, in MLC dated 14.11.1998 Ex.PW2/A it is recorded that no poor perineal-hygiene. Dried Secretions on labia minoria and near clitoris was present. On hymen old tears were present at 2 OClock position and 10 OClock position. Vagina could admit 2 fingers tight..

27. On the issue of two FIRs for the same offence at different police Stations, Id. Counsel has submitted that first FIR No.887/1998 under Section 363 Indian Penal Code, 1860 was registered on 30.09.1998 at PS-Lajpat Nagar, New Delhi. Thereafter, PW-4 Sardar Paramjit Singh, father of the PW1 Prosecutrix in connivance with Sh. L.D. Narang, uncle of the appellant got second FIR No.381/1998 under Section 363/376/34 Indian Penal Code registered at PS-

Greater Kailash, I, New Delhi on 02.10.1998..

28. Ld. Counsel further submitted that there can be no second FIR and no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or same occurrence giving rise to one or more cognizable offences. Only information about commission of cognizable offence which first entered in Station House Diary by Officer Incharge Police can be recorded as FIR under Section 154 Cr.P.C. All subsequent information will be covered by Section 162 Cr.P.C. Thus it is not permissible under the law to have two FIRs Crl. Appeal No.932/2009 *Page 16 of 70* for the same offence..

29. Ld. Counsel has also pointed out that there is a fabrication / manipulation of medical evidence in respect of the appellant that the clothes of prosecutrix (Salwar, Kurta and Chunni) were sent to CFSL, Malviya Nagar, New Delhi for analysis. CFSL report Ex.PW5/A and 5/B were received by the police on 24.03.1999. As per the report, the semen stains on her clothes were of A Group. Thereafter, the investigation of the case was transferred to CAW Cell, Nanak Pura, New Delhi and W/ Inspr. Omwati Malik was detailed as the IO of the case..

30. On 21.5.1999, the appellant was sent to Hospital for medical examination. Besides medical examination of the appellant, his blood sample and sample of pubic hair were obtained. W/Inspr. Omwati Malik (PW23) clandestinely got the blood sample of the appellant challenged so that CFSL would be corroborated with CFSL report of the samples found on the clothes of the PW1 Prosecutrix Ex.PW5/B. As per the report received from CFSL, the group of the appellant was shown as A Group whereas the appellant is having blood group of O +ve..

31. It is pertinent to mention here that there is overwhelming evidence on record to prove that blood group of the appellant is O +ve, whereas, as per CFSL report Ex.PW5/A and Ex.PW5/B, which were received on 24.03.1999, the blood group of the appellant is of A Group. Crl. Appeal No.932/2009 *Page 17 of 70*.

32. Ld. Counsel for the appellant has also raised the issue on the age of the prosecutrix that for an offence under Section 363 Indian Penal Code against the appellant it is mandatory on the part of the prosecution to produce sustainable

evidence during trial to prove that prosecutrix was minor at the time of incident..

33. Ld. Counsel has mentioned that Ossification test to determine the age of prosecutrix was carried out on 03.10.1998 and the result of Ossification test report is on record, wherein the age of the prosecutrix at the relevant time was 15.8 to 16.4 Years..

34. Ld. counsel has relied upon decisions of Supreme Court, Delhi High Court and various courts, wherein it has become a settled law that there can be a variation of 2-3 years in the age determined by Ossification test and the accused can claim to choose the age whichever is on the higher side. Thus, the age of the prosecutrix at the time of alleged incident was 18-19 years and thereafter, the Charge under Section 363 Indian Penal Code is not sustainable against the appellant..

35. Ld. Counsel has argued that although the Ossification Test report was available at the trial court record, yet the prosecution deliberately with malafide intention did not produce the said document at the time of trial with the sole intention to conceal the most important evidence in favour of the appellant..

36. Ld. counsel for the appellant has also raised the issue on Crl. Appeal No.932/2009 *Page 18 of 70* identification of the appellant. He has argued that admittedly, the appellant was not known to the prosecutrix prior to the alleged incident. No test identification parade was conducted by the prosecution. The identification of the appellant by the prosecutrix and other witnesses first time in Court after a lapse of time, is value less and cannot be relied upon..

37. Ld. Counsel has also raised the issue on the investigation and submitted that in the instant case there was unfair investigation and the documents were fabricated against the appellant. In the instant case, the investigation was carried out by Police Station Lajpat Nagar, Police Station - Greater Kailash-I and CAW Cell, Nanak Pura, New Delhi. From 29.09.1998 to February, 1999, the investigation was carried out by PW19, ASI Ved Singh, PW22 SI Atul Kumar and PW28 W/Inspr. Sunderjeet Kaur. DW5 Sh. Pradeep Srivastava, IPS, DCP South had been closely monitoring the investigation of the case and he submitted the report Ex.DW5/A to the Additional Commissioner of Police and also to the Press,

wherein it is reported that the Grandmother suspected that one Bobby a Stone Cutter working nearby, who was friendly with the prosecutrix might have taken her away. The said Bobby was worked as stone-cutter and a peon at J.C.R. Marble Shop situated nearby and owned by one Ashok Bihani, who was questioned. He reported to the Police on 30.09.1998 that a girl was continuously ringing up his shop whereabouts of Bobby. On the advice of the Police, when the phone came next time in the afternoon, she was told to meet Bobby at Lady Sriram College around 5:00 PM on the same *Crl. Appeal No.932/2009 Page 19 of 70* evening. In the meanwhile, Bobby who came to the shop was also handed over to the Police. At 6:00 PM to policemen in plain clothes went to Lady Sriram College with Bobby where the girl also came and both of them were brought to the police post. Father of the Prosecutrix Paramjit Singh and Mama of the Prosecutrix also came to the police post. On way to Police post, the girl had initially stated that she had a quarrel with her grandmother Smt.Mohinder Kaur and had gone to his fathers place in Buddh Vihar. This statement has also been signed by the relative of the girl. Similar statement was given to the police in his own hand by father of the girl Paramjit Singh. However, for their satisfaction they further questioned the girl, who later told them that she had gone out of her own will with Bobby to one room tenement in Jamrudpur and stayed with him there. Bobby also agreed to take the prosecutrix to his tenement, but insisted that she was not at his flat during the night, but was dropped back in the locality. Bobby agreed to having love affairs with this girl for nearly a year. It is also recorded in the said report that on 02.10.1998 around 11:00 PM, the prosecutrix was admitted at AIIMS by her father with the complaint of abdominal pain. There, the girl narrated another incident. She alleged that she was kidnapped by two boys in a Maruti Car with tainted Glass on 29.09.1998. She did not know the boys, but overheard their names as Bobby and Ashok Narang. She alleged rape by these boys in a private office. Since, neither the father nor the girl disclosed the fact that Lajpat Nagar Police was already seized of the matter, the Greater Kailash - I Police registered case of rape and started investigation. It is *Crl. Appeal No.932/2009 Page 20 of 70* also being found during investigation that Bobby and Ashok Narang, appellant herein did not know each other before this incident. It has also been alleged that someone was trying to implicate Ashok Narang in this case because of property

and money dispute..

38. Learned counsel for the appellant has further submitted that during the investigation, the statement of Sh.Ashok Bihani (Ex.PW- 26/DA-1) employer of accused Balwinder @ Bobby, Shri J. K. Parasher, (Ex.PW-26/DA-2), Sh.Virender Sehlot (Ex.PW-26/DA-3), Shri Rajender Prasad (Ex.PW-26/DA-4), Mrs.Jaswinder Kaur (Mark PW23/E) and Shri Vinay Kapoor (owner of telephone booth) were recorded by the police and concluded that no case was made out against the appellant..

39. It is further submitted that PW23 W/Inspector Omwati Malik, carried out the investigation of this case from 24.02.1999 to 09.06.1999. She carried out the investigation in the most perfunctory manner and fabricated the medical evidence i.e. blood sample of the appellant. Also, she deliberately, ignored the statements of the material witnesses named above in the preceding para, who had completely negated prosecution case..

40. Learned counsel further submitted that she had also fabricated the disclosure statement of the appellant not leading to any recovery, pointing out memos and various seizure memos without the signature of the appellant. CrI. Appeal No.932/2009 Page 21 of 70.

41. He has submitted that the duty of the investigating officer is not merely to bolster up the prosecution case with such evidence as may enable to the Court to recover a conviction and to bring out real unvarnished truth. Also it is the duty of the investigating officer to bring out the unvarnished truth on record and to segregate the evidence which is favourable to the accused..

42. Learned counsel for the appellant has argued that deliberately material witnesses have not been examined. The sole aim of the prosecuting agency was to conceal the most material facts and the appellant let to conviction in a most false and fabricated case..

43. Learned counsel for the appellant has further argued that Sh.Ashok Kapoor, who had accompanied the complainant (Mrs.Mahonder Kaur) to police post Lajpat

Nagar, New Delhi to lodge the complaint, has not been examined. He also witnessed to the statement of the prosecutrix (Ex.PW4/DC) and statement of Sardar Parmajeet Singh (Ex.PW4/B) ..

44. He has further pointed out that another most important witness Smt.Jaswinder Kaur (Mark PW23/E) is Mausi of the prosecutrix. The visiting card Mark DX was recovered from the clothes of the prosecutrix wherein the contact number of Balwinder @ Bobby was mentioned. Also, as per the statement, the prosecutrix was having love affair with Balwinder @ Bobby..

45. Learned counsel for appellant has further submitted that the Crl. Appeal No.932/2009 *Page 22 of 70* doctor who conducted the ossification test was not examined at the trial..

46. It is pertinent to mention that although, X-Ray plates and ossification test reports were available on the record, yet the prosecution did not examine the doctor who carried the tests and submitted the reports..

47. Learned counsel has also submitted that in spite of the best efforts made by PW19 ASI Ved Singh, PW26 SI Atul Kumar and PW28 W/Inspector Sunderjeet Kaur, the witnesses namely PW1 Smt. Satnam Kaur, PW4 Sardar Paramjeet Singh and PW8 Smt.Mohinder Kaur did not make their statements under Section 161 Cr. P.C..

48. Learned counsel has also argued on the late recording of the statement of the prosecutrix PW1 Ms.Satnam Kaur under Section 164 Cr. P. C. Since the prosecutrix had been making contradictory statements at various stages, W/Inspector Sunderjeet Kuar filed an application dated 10.12.1998 in the concerned court for recoding the statement under Section 164 Cr. P.C. Thus, the statement of the prosuectrix was recorded on 10.12.1998 i.e. after lapse of 2 months..

49. He has also raised an issue that a woman cannot be anaesthetized against her will while she was awake. Even a skilled anaesthetist requires the help of one or two assistants to hold a patient forcibly on the operating table during first stage

of anaesthesia although the patient voluntarily inhales it. CrI. Appeal No.932/2009
Page 23 of 70.

50. To buttress this argument, learned counsel has referred to Modi's Medical Jurisprudence and Toxicology 22nd Edition Page Nos.511 and 512 wherein under the heading 'Can a Woman be raped during unconsciousness?' which reads as under:- "There is no doubt that rape can be committed on a woman without her being aware of the fact during catalepsy, syncope, epileptic coma or mesmeric or hypnotic trance, or during unconsciousness produced by the administration of narcotic and intoxicating or anaesthetic drugs. However, soon after recovery of consciousness, a nubile virgin would feel pain, tenderness and dampness about her private parts, and would probably find her underwear soiled with blood or semen or with both. She is therefore bound to complain about her condition to her relative or friend, but her story would be looked upon with suspicion if she complained after the lapse of some time that she was violated during the period of her unconsciousness. Xxx xx Xxx xx Concerning the administration of an anaesthetic drug, such as chloroform, it must be remembered that it is impossible to anaesthetize a woman against her will while she is awake. Even a skilled anaesthetist requires the help of one or two assistants to hold a patient forcibly on the operating table during the first stage of anaesthesia, although, the patient voluntarily inhales it for an operation." CrI. Appeal No.932/2009 Page 24 of 70.

51. Learned counsel has further submitted that due to material contradictions vide gaps, abrasions, incurable legal infirmities in the testimonies of prosecution witnesses; no reliance can be placed on the same to connect the appellant with the alleged offence. There is absolutely no evidence/ material on record to connect the appellant with the alleged offence..

52. The motive behind the appellant being implicated in the present case is that there is a family feud due to the property. The present case has been planted upon the appellant by the complainant in connivance with his uncle Shri L. D. Narang and his family. The appellants family has been having property dispute for the last 32 years, Shri L. D. Narang (uncle of the appellant) some of the

criminal/civil cases have been sorted by this Court. He submitted that three children of Sh.L. D. Narang viz one son namely Shri Rajinder Narang and two daughters namely Ms.Pinki Chopra and Ms.Rekha Narang are advocates practising in Delhi. These advocates in connivance with PW4 Shri Paramjeet Singh and Shri Mohan Singh had filed number of pseudo- anonymous complaints with the sole aim to mislead various trial Courts and got the present case transferred 7 or 8 times from one Trial Court to another. Also during the pendency of the instant appeal, these persons continue to file such baseless complaints addressed to various Judges and authorities with ulterior motives to mislead and poison their mind against the appellant. *Crl. Appeal No.932/2009 Page 25 of 70.*

53. Learned counsel for appellant has relied upon *Jamuna Chaudhary and Ors v. State of Bihar AIR 1974 SC 1822* wherein it has been held in para No.11 as under:- "11. The duty of the Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth".

54. Learned counsel for appellant has relied upon *Jaspal Singh v. The State (Delhi Administration) 1994 JCC 80* wherein it has been held by a division bench of this Court as under:- "22. Some other witnesses were also given up as unnecessary and not on the ground that the said witnesses had been won over by the defense. We may notice that the prosecution is not required to keep back witnesses only because they are likely to go against the prosecution. It is not the duty of the prosecution to secure the conviction by adopting all means, fair or foul. The duty of the prosecution is to act fairly so that truth may come out..

32. The finding of the trial court that accused persons used to maltreat Harbans Kaur and demand dowry and on account of non fulfillment of the demands the six accused persons joined hands and in furtherance of common intention of all of them intentionally caused the death of Harbans Kaur by setting her on fire after pouring kerosene oil is contrary to the weight of evidence on record. The sole testimony of Public Witness -7 on the demand for dowry and its non fulfillment does not inspire any confidence particularly in view of various improvements made by him. *The learned Crl. Appeal No.932/2009 Page 26 of 70 Additional Sessions*

Judge rightly records that the witness had improved upon his statement made earlier with the Police but still goes on to record the finding of demand of dowry which is unsustainable for want of reliable and trustworthy evidence which was not produced by the prosecution."

55. Learned counsel for appellant has relied upon Babu Bhai v. State of Gujarat and Ors (2011) 1 SCC (Cri) 336 wherein it has been held as under:- "20. Thus, in view of the above, the law on the subject emerges to the effect that an FIR under Section 154 Cr.P.C. is a very important document. It is the first information of a cognizable offence recorded by the Officer In-Charge of the Police Station. It sets the machinery of criminal law in motion and marks the commencement of the investigation which ends with the formation of an opinion under Section 169 or 170 Cr.P.C., as the case may be, and forwarding of a police report under Section 173 Cr.P.C. Thus, it is quite possible that more than one piece of information be given to the Police Officer In-charge of the Police Station in respect of the same incident involving one or more than one cognizable offences. In such a case, he need not enter each piece of information in the Diary. All other information given orally or in writing after the commencement of the investigation into the facts mentioned in the First Information Report will be statements falling under Section 162 Cr.P.C." Cri. Appeal No.932/2009 Page 27 of 70.

56. Learned counsel for appellant has relied upon T.T.Antony v. State of Kerala and Ors 2001 SCC (Cri.) 1048 wherein it has been held as under:- "18. An information given under sub-section (1) of Section 154 of Cr.P.C. is commonly known as First Information Report (F.I.R.) though this term is not used in the Code. It is a very important document. And as its nick name suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law into motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forwarding of a police report under Section 173 of Cr.P.C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the

station house diary and this is implied in Section 154 of Cr.P.C. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the First Information Report - F.I.R. postulated by Section 154 of Cr.P.C. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be CrI. Appeal No.932/2009 *Page 28 of 70* statements falling under Section 162 of Cr.P.C. No such information/statement can properly be treated as an F.I.R. and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of the Cr.P.C. Take a case where an FIR mentions cognizable offence under Section 307 or 326 I.P.C. and the investigating agency learns during the investigation or receives a fresh information that the victim died, no fresh FIR under Section 302 I.P.C. need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H - the real offender-who can be arraigned in the report under Section 173(2) or 173(8) of Cr.P.C., as the case may be. It is of course permissible for the investigating officer to send up a report to the concerned Magistrate even earlier that investigation is being directed against the person suspected to be the accused. The scheme of the Cr.P.C. is that an officer in charge of a Police Station has to commence investigation as provided in Section 156 or 157 of Cr.P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forward his report to the concerned Magistrate under Section 173(2) of Cr.P.C. However, even after filing such a report if he CrI. Appeal No.932/2009 *Page 29 of 70* comes into possession of further information or material, he need not register a fresh FIR, he

is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 Cr.P.C."

57. Learned counsel for appellant has relied upon *Thulia Kali v. State of Tamil Nadu* 1972 CrL.J. 1296 wherein it has been held as under:- " First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused: The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story As a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case, Kopia, daughter-in-law of Madhandi deceased, according to the CrL. Appeal No.932/2009 *Page 30 of 70* prosecution case, was present when the accused made murderous assault on the deceased. Valanjiaraju, stepson of the deceased, is also alleged to have arrived near the scene of occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjiaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it."

58. Learned counsel for appellant has relied upon *Sunil v. State of Haryana* 2010 CrL.J.839 wherein it has been held as under:- "15. According to the appellant, the prosecution has failed to prove that Pinki was minor at the time of the incident. The prosecution did not produce any Admission Form of the School. The School Leaving Certificate was obtained from the school after the incident. As per the prosecution, the prosecutrix was admitted in the school few months before, i.e., on 12.4.1996 and remained in school upto 12.9.1996 (inclusive of summer vacation). As per prosecution version, she joined in the middle of the session and left in the middle of the session. The attendance in the school of 100 days in ex- facie false. There is no reason why she was removed from the school and was forced to do household work in other houses. The appellant urged that all these facts create some suspicion regarding genuineness of the School Leaving Certificate particularly when the same was admittedly procured after several days of filing of the first information report..

16. The prosecution examined Chandra Prakash Sharma, PW3 with regard to the School Leaving Certificate. The prosecutrix was admitted in the school by Ashok Kumar, her brother. The said Ashok Kumar was not examined by the prosecution. According to the prosecution, this is again a serious lapse in the prosecution version."

59. He further relied upon *State of Karnataka v Mapilla P. P. Soopi* AIR 2004 SC 83 wherein it has been held as under:- "Undue delay in lodging the complaint without acceptable evidence has also contributed to the doubt in the prosecution case. Hence, the High Court was justified in allowing the appeal."

60. Learned counsel for appellant has relied upon *Chidda Ram v State* 1992 JCC 376 wherein it has been held in para No.11 as under:- "7. Mr. Kalra counsel for the petitioner contended that no reliance can be placed on the testimony of these witnesses regarding the age of the prosecutrix because by an oral statement the admission form was filled up. There is not an iota of proof regarding the date of birth of the prosecutrix. The prosecution in fact failed to produce the date of birth certificate of the prosecutrix. Smt. Surjeet Kaur mother of the prosecutrix appearing as P.W.

2. has categorically stated in her cross examination that her eldest daughter Savitri was born in Lady Harding Hospital after five years of 1947 riots. After three years a son was born and then two daughters were born within a gap of three years and then the prosecutrix was born. Nowhere it is stated that in which hospital she was born. If what Surjeet Kaur has stated is taken to be correct then the age of the prosecutrix would be between 16 to 17 years. On the basis of the gap between the birth of her first child and the prosecutrix, the prosecutrix, the prosecutrix would have born somewhere in 1958 or 1959. In this view of the matter it cannot be said that the prosecutrix was minor in May, 1975. The school certificate or the admission form is not a conclusive evidence of the age because it is based on no evidence at all. This in fact remained unproved and therefore cannot be treated as conclusive evidence. The birth certificate has not been produced therefore the conviction based on the age on the basis of doctor's opinion cannot be sustainable. In fact there is a conflict regarding the date of birth of the prosecutrix as given by her parents and that opined by the doctor. As per the mother's version the prosecutrix cannot be said to be below the age of 16 years whereas the ossification test shows that she was below the age of 16 years. If the two years margin is taken then it cannot be said that she was below the age of 16 years at the date of the incident. In view of the two ages of the prosecutrix having come on record the Crl. Appeal No.932/2009 *Page 33 of 70* accused can claim to choose one which shows the age of the prosecutrix above 16 years. Therefore, to my mind the learned Additional Sessions Judge was not justified in coming to the conclusion that the prosecutrix was below age of 16 years at the time the offence was committed. In fact he completely ignored the aspect that there was no evidence worth the name placed on record to establish the age of the prosecutrix. The entry in the municipal record or the date of birth certificate, to my mind, had been intentionally kept back by the prosecution. If it had been produced it would have established the correct age of the prosecutrix. As already observed, the ossification test is not a sure test regarding the age. It gives only an approximation which may vary by two years on either side. If the variation and margin is taken into account then it cannot be said that the prosecutrix was below the age of 16 years. Hence the observation of the learned Additional Sessions Judge that the prosecutrix was minor at the time of offence cannot be accepted. Having held that

the prosecutrix could not be below 16 years at the time of the offence, the rest of the reasoning given by the learned Additional Sessions Judge naturally falls to the ground and cannot be sustained. The learned Addl. Sessions Judge's basis for conviction was the age of the prosecutrix. On the basis of the evidence adduced before him he came to the conclusion that the prosecutrix was a consenting party in eloping from her house but convicted the petitioner on the account because prosecutrix being minor her consent had no meaning. But since I have held that she was not minor her CrI. Appeal No.932/2009 *Page 34 of 70* consent assumes importance. If she was a consenting party in eloping from her house with the petitioner then it cannot be called a case of kidnapping. Therefore this offence against the petitioner, to my mind, is not established. Similarly as regards the rape, there is not an iota of evidence to establish that the petitioner committed rape on her on the night of 28th May and 29th May, 1975. On the contrary from the testimony of Dr. N. Trigunayat, P.W.

6. it has come on record that the prosecutrix was used to sexual intercourse. In the absence of the medical report of vaginal and cervical swabs it cannot be said that the petitioner committed sexual intercourse with the prosecutrix on the night of 28th May, 1975. Even otherwise the story given by the prosecutrix after being handed over by the police to her mother does not inspire confidence nor any credence can be attached to the same. Her version vary from stage to stage and from point to point. Therefore, no much reliance can be placed on the testimony of the prosecutrix particularly when there is no corroboration for the same."

61. Learned counsel for appellant has relied upon Pradeep @ Sonu v. State (Govt of NCT of Delhi) 2011 (2) JCC 1031 wherein it has been held as under:- "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, CrI. Appeal No.932/2009 *Page 35 of 70* (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 vs. 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."

62. He further relied upon Virender Ahmed v. State of Delhi 2010 III AD (Delhi) 342 wherein it has been held as under:- "9. In the deposition in court as PW1, the prosecutrix stated that she knows the appellant very well for the reason that he was residing at the same place for 3-4 years. She made a statement similar to the one given by her under section 161 of the Cr PC so far as the place of occurrence was concerned. In her statement, at one place she stated that the appellant had misbehaved with her and that he did 'galat kaam' with her. The witness explained galat kaam to mean as to what 'a husband does with his wife in the night'. Certain additions in this statement so far as what happened there after are pointed out. For the first time the prosecutrix states that when she had shouted for help, one aunty (who she now named as Neelam) asked another lady who was passing by to ascertain as to where the cries were coming from on which that lady, whose name she did not know, opened the door on which the appellant left the house while she then put on her clothes and CrI. Appeal No.932/2009 *Page 36 of 70* returned to her house. In the evening, when her father returned, she narrated the incident to him. She was taken by her father to the police station and her statement was recorded thereupon. She identified the underwear which had been seized by the police as the one worn by her at the time of incident. The statement given by her to the police and the one under section 164 of the Cr PC before the Metropolitan Magistrate were proved on record as Exh PW 1/A and Exh PW 1/B respectively."

63. He further relied upon Ganesh Bhuwan Patil and Anr v. State of Maharashtra AIR 1979 SC 135 wherein it has been held as under:- "18. In this connection, the second circumstance, which enhances the potentiality of this delay as a factor undermining the prosecution case, is the order of priority or sequence in which the investigating officer recorded the statements of witnesses. Normally, in a case

where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence, over the evidence of other witnesses. Here, the natural order of priorities seems to have been reversed. The investigating officer first recorded the statement of Ravji, in all probability, between 12.45 and 3 a.m. On the 30th, of Constable Shinde, at 4 a.m., and thereafter of Walji, Kanjibhai (P.W. 7), Santukbai (P.W. 6), Pramila, and Kuvarbai, between 8 a.m. and 1 p.m. The investigating officers made a futile attempt to explain away their conduct in not promptly recording the statements of the alleged CrI. Appeal No.932/2009 *Page 37 of 70* eyewitnesses. Inspector Tipnis and Sub-Inspector Pathak stated that after the completion of the panchnamas at the spot, they made efforts to contact the material witnesses, including Pramila, Santukbai and Kuvarbai. Santukbai was actually questioned by the investigating officers, but they did not then record her statement, because she was in an anguished state of mind and was wailing."

64. Learned counsel has also relied upon *Suraj Mal v. The State (Delhi Administration)* 1979 CrI.L.J. 1087 wherein it has been held as under:- "2. The defence of the appellant was that he was falsely implicated and nothing was recovered from him nor did he make any demand for bribe. The Special Judge on the basis of the evidence led before the Court held that the evidence was extremely shaky and unconvincing and was not sufficient to convict Ram Narain but nevertheless the trial court convicted the appellant on that very evidence. In upholding the conviction of the appellant the High Court completely overlooked the fact that the very evidence on which the conviction of the appellant was based had been rejected with respect to the same transaction and thus if one integral part of the story given by witnesses was not believable, then the entire case failed. In other words, the Position was that while P.Ws. 6,8 and 9 were disbelieved both in regard to the factum of payment of the bribe and the recovery of the money. Regarding Ram Narain, the very same witnesses were believed so far as the CrI. Appeal No.932/2009 *Page 38 of 70* appellant was concerned. It is well-settled that where witnesses make two inconsistent statements in their evidence either at one state or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses. For these reasons, therefore,

when the Special Judge disbelieved the evidence of P Ws.

6. 8 and 9 in regard to the complicity of Ram Narain, It was not open to him to have convicted the appellant on the same evidence with respect to the appellant, which suffered from same infirmities for which the said evidence was disbelieved regarding the complicity of Ram Narain. If the witnesses drew no distinction in the examination in chief regarding acceptance of bribe by Ram Narain and by the appellant and the witnesses were to be disbelieved with respect to one, they could not be believed with respect to the other. In other words, the evidence of witnesses against Ram Narain and the appellant was inseparable and indivisible. Moreover, there is an additional circumstance which throws a serious doubt on the complicity of the appellant Suraj Mai, Although, in his statement of page 71 of the paper-book, the complainant has clearly stated that all the three accused including the appellant had met him and demanded bribe of Rs. 2000/-, the appellant having demanded Rs. 100/-, yet in the report which he lodged before Mr. Katoch, there is no mention of the fact that the appellant at any time demanded any bribe at all. Even the presence of the appellant at the time when the demand was made by Devender Singh has not been mentioned, *Crl. Appeal No.932/2009 Page 39 of 70* in this document. This report, undoubtedly contains reference to a demand having been made by the Section H.O. Devender Singh on behalf of the appellant, but there is no statement in this report that any demand was made by Suraj Mal directly from the complainant. If, in fact, the appellant would have demanded bribe from the complainant just on the previous evening, it is not understandable why this fact was not mentioned in the report which the complainant submitted to the D.S P. Katoch and which is the F.I R. constituting the evidence. We have perused the statements of P.W. 6, 8 and 9 and we find that while in the examination in chief they have tried to implicate all the three accused persons equally without any distinction in their cross examination, they have tried to save Ram Narain and made out a different story so far as Ram Narain is concerned and have even gone to the extent of stating that he did not demand any money and that he refused to accept the money which was offered to him. In this state of the evidence, we feel that the High Court was not right in convicting the appellant. Mr. Lalit appearing for the State vehemently submitted that whatever be the nature of the evidence in the case, it is an established fact that money had been recovered from the bushirt of

the appellant and that by itself is sufficient for the conviction of the accused. In our opinion, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. Moreover, the appellant in his statement under Section 342 has denied the recovery of the money. *Crl. Appeal No.932/2009 Page 40 of 70* and has stated that he had been falsely implicated. The High Court was wrong in holding that the appellant had admitted either the payment of money or recovery of the same as this fact is specifically denied by the appellant in his statement Under Section 342 Cr. PC Thus mere recovery by itself cannot prove the charge of the prosecution against the appellant, in the absence of any evidence to prove payment of bribe or to show that the appellant voluntarily accepted the money. For these reasons, therefore, we are satisfied that the prosecution has not been able to prove the case against the appellant beyond reasonable doubt.".

65. Learned counsel for appellant has relied upon *Arjun Singh v. State of H. P. 2009 Crl. L. J. 4721* wherein it has been held as under:- "7. It is not disputed by learned counsel for the State that unlike some others the appellant was not caught at the place of occurrence. The Trial Court had itself held that there was no test identification parade in the eye of law. Therefore, identification of the appellant for the first time in court was really of no consequence. Added to that, the only evidence pressed into service by the prosecution so far as the appellant is concerned, was that his name was similar to one of the names which the accused persons were addressing each other, as stated by the prosecutrix. That cannot be by any stretch of imagination an incriminating material..

8. No evidence was led to show the presence of the appellant at the spot of occurrence or to have *Crl. Appeal No.932/2009 Page 41 of 70* participated in the crime. That being so, the prosecution has miserably failed to prove the accusations so far as the appellant is concerned. He is acquitted of the charges. He shall be released forthwith from custody unless required to be in custody in connection with any other case."

65. He has also relied upon *Jackran Singh v. State of Punjab 1995 Crl.L. J. 3992* wherein it has been held as under:- "8. So far as the conscious possession of the

weapon Ex.M/O/4 is concerned, the disclosure statement, Ex.P-9 inspires no confidence. Firstly because none of the two panch witnesses, Yash Pal and Sukhdev Singh, ASI, have been examined at the trial and secondly because the disclosure statement does not bear the signatures or the thumb impression of the appellant. Even, the recovery memo of the revolver and the cartridges, Ex. P-9/A, which is also attested by Yash Pal and Sukhdev Singh, ASI does not bear either the signatures or the thumb impression of the accused. The absence of the signatures or the thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act detracts materially from the authenticity and the reliability of the disclosure statement. According to the defence version the appellant had been arrested during the night intervening 15-16 June, 1984 and not on 23rd June, 1984, as alleged by the prosecution. The statement of PW-4, Surinder Kumar to the effect that "I had seen the accused in the police station *Crl. Appeal No.932/2009 Page 42 of 70* for the first time after about 13-14 days of the occurrence" probably the defence version. The prosecution case, that the appellant was arrested on 23-6-1984 and led to the recovery of the revolver and the cartridges pursuant to the disclosure statement, therefore, becomes suspect. We are unable to place any reliance upon the alleged disclosure statement and the recovery of the revolver and consequently the opinion of the Ballistic Expert connecting the empties with Ex. M/O/4 becomes irrelevant. The appellant has denied ownership of the crime revolver and the prosecution has led no evidence to show that the crime weapon belonged to the appellant. There is no other circumstance pressed into aid by the prosecution to connect the appellant with the crime. The prosecution has thus not been able to establish the case against the appellant beyond a reasonable doubt.".

67. He has further relied upon *Varkey Joseph v. State of Kerala AIR 1993 SC 1892* wherein it has been held as under:- "11. Leading question to be one which indicates to the witnesses the real or supposed fact which the prosecutor (plaintiff) expects and desires to have confirmed by the answer. Leading question may be used to prepare him to give the answer to the questions about to be put to him for the purpose of identification or to lead him to the main evidence or fact in dispute. The attention of the witness cannot be directed in Chief examination to the subject of the enquiry/trial. The Court may permit leading question to draw the attention of

the witness which cannot otherwise be called to the Crl. Appeal No.932/2009 *Page 43 of 70* matter under enquiry, trial or investigation. The discretion of the court must only be controlled towards that end but a question which suggest to the witness, the answer the prosecutor expects must not be allowed unless the witness, with the permission of the Court, is declared hostile and cross-examination is directed thereafter in that behalf. Therefore, as soon as the witness has been conducted to the material portion of his examination, it is generally the duty of the prosecutor to ask the witness to state the facts or to give, his own account of the matter making him to speak as to what he had seen. The prosecutor will not be allowed to frame his questions in such a manner that the witness by answering merely "yes" or "no" will give the evidence which the prosecutor wishes to elicit. The witness must account for what he himself had seen. Sections 145 and 154 of the Evidence Act is intended to provide for cases to contradict the previous statement of the witnesses called by the prosecution. Sections 143 and 154 provides the right to cross- examination of the witnesses by the adverse party even by leading questions to contradict answers given by the witnesses or to test the veracity or to drag the truth of the statement made by him. Therein the adverse party is entitled to put leading questions but Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness by answer merely "yes" or "no" but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into Crl. Appeal No.932/2009 *Page 44 of 70* witness's mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give. The counsel must leave the witness to tell unvarnished tale of his own account. Sample leading questions extracted hereinbefore clearly show the fact that the prosecutor led the witnesses what he intended that they should say the material part of the prosecution case to prove against the appellant which is illegal and, obviously unfair to the appellant offending his right to fair trial enshrined under Art.

21. of the Constitution. It is not a curable irregularity..

12. Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. We have already seen that the prosecution not only has not proved its case but palpably produced false evidence and the prosecution has miserably failed to prove its case against the appellant let alone beyond all reasonable doubt that the appellant and he alone committed the offence.".

68. Learned counsel has relied upon *Murari Lal v. State (Delhi Administration)* 23 (1983) DLT 410 wherein this Court has held as under:- "5. Several infirmities and discrepancies in the prosecution story were pointed out by Mrs. Usha Kumar, the learned counsel for the appellant (legal aid) : (1) Three Police Reports : *Crl. Appeal No.932/2009 Page 45 of 70* It was urged by her that the whole situation was quite confusing inasmuch as three reports in the police were lodged one (Ex. PW 19/A) at 3.20 p.m. at Darya Ganj Police Station, another (Ex PW10/A) at Jama Masjid at 7.30 p.m. on 20-8- 1979 and the third (Ex. PW 9/A) at Chanakya Puri Police Station at 8.40 pm. either on 20-8-1979 or 21-8-1979. There is no reason why the report Ex. PW 19/A be not treated as FIR. And the subsequent reports are inadmissible under Section 162 Gr. P.G. Yet, they can be used for showing the conduct of the prosecution witnesses Jagdish and Rakesh under Section 8 of the Indian Evidence Act. The versions contained in the three reports do not tally. (2) Employment of Rakesh : It was the case of Rakesh Kumar (PW 9) that Nipil Kumar Goel (PW 1) had brought him to the house of Mamchand, brother of Jagdish at about 19.15 a.m. on 20-8-1979 by train from their village in U.P. Jagdish Prasad immediately offered him a job but Rakesh Kumar wanted time as he was not prepared for this sudden offer but Jagdish Prasad did not listen to his protestation and immediately kept him and carried him in the manner aforesaid, vide Ex. PW 9/A. In his deposition in the court he said that he had not been employed by Jagdish Prasad before he was taken to Darya Ganj. Jagdish Prasad (PW 4) did not say in the examination-in-chief that Rakesh was employed by him. It was in cross-examination that he said that Rakesh had come for employment but the terms of *Crl. Appeal No.932/2009 Page 46 of 70* salary had not yet settled. Thus the very story of service of Rakesh is suspicious. (3) Was Rakesh new to Delhi : It was pointed out that the case of the prosecution is that Rakesh Kumar

was new to Delhi, but the same was not stated in the daily diary (Ex. PW 4/A, because he was not. He came in the Baraat of his brother to Delhi and his subsequent journeys from Satya Marg to Pahari Dhiraj, Darya Ganj, Connaught Place and Greater Kailash belie that he was new to Delhi. It was pointed out that he was Science Graduate aged about 20 years. Thus, the air of innocence projected by or for him is without basis. (4) Relationship : In Ex. PW 19/A it is mentioned that Rakesh Kumar was the son of the maternal uncle of Jagdish Prasad. This relationship was omitted from the FIR lodged at Jama Masjid. As per the Chanakya Puri report he was introduced by Nipil Kumar to Jagdish Prasad but no relationship was mentioned by him. Later on in his examination in the court Jagdish Prasad (PW 4) stated that he knew Rakesh because he was like a son of his maternal uncle. There being no relationship and no previous acquaintance, it is not possible to believe that he will be employed immediately and also taken along on an important mission. (5) Car and driver : Crl. Appeal No.932/2009 *Page 47 of 70* Though the impression created is that the car belonged to the complainant yet in cross-examination he said that the car was not registered in his name. It is in the name of Jethanand of Janak Manufacturing Co. He has not said how he got it, but Jethanand (PW 8) said that he had given his car for use to Jagdish in 1979. According to Ex. PW 9/A, the driver was Kishan. However, according to Jagdish Prasad, his name was Inder Singh. He was a tempo driver and was employed only a month before the occurrence. He was not his registered employee but was paid out of business funds. (6) Rs. 50,000/-: In Ex. PW 4/A, Jagdish Prasad has stated that he had come to Darya Ganj from Sadar Bazar to take payment. In his deposition, he said that he realised a sum of Rs. 50,000/-. No man of Bhanwar Lal and Bros, was produced, but two persons of Choudhri Metal Industries Ltd. a sister concern, both owned by S.M. Choudhri came, Chander Mohan (PW 11) prepared the ledger Ex. PW 5/c, Cash Register Ex. PW 5/B and the voucher Ex. PW 5/A were prepared by R.K. Varma (PW 5) of Bhanwar Lal and Bros. They show the amount as loan but the ledger Ex. PW 5/C does not. No agreement or promissory note was executed and Jagdish Prasad has not said that the money was borrowed by him, nor was the receipt proved by him. The receipt which is said to have, been signed by Jagdish Prasad does not contain the amount. A bare look of the ledger reveals that from January to August, 1979 two Crl. Appeal No.932/2009

Page 48 of 70 purchases of some goods were made by Jagdish Prasad from Bhanwar Lal and Bros. He made payments against them. The last is the debit entry of Rs. 50,000/- in question. This does not at all indicate that there had been very many transactions between the parties so as to generate so much of confidence as a huge amount would be advanced without any instrument capable of enforceable in a court of law. The learned counsel for the accused, therefore, urged that the manner of giving and taking shows that the whole theory of collecting the amount from Darya Ganj is nothing but false and has been subsequently invented. (7) Handing over of money to Rakesh : Jagdish Prasad (PW 4) deposed that he handed over the amount to Rakesh and told Inder that he be safely conveyed to house. He has been given Rs. 50,000/- in the paper bags. He and driver left at 1.45p.m. but In the Darya Ganj report, it was stated that they left at 12.45 p.m. and he checked from his house at 1.45p.m. Rakesh (PW 9) deposed that he did not know what was contained in the bundles. Jagdish Prasad did not tell him that the bundles had currency notes. It is not in the natural course of conduct that such a huge sum could be entrusted to a driver who was engaged only a month before and to a person who was not known earlier and was not even employed and without telling him what he was carrying. The initial doubts which the Chanakya Puri Police Officer entertained do still persist. (8) Where to carry : Crl. Appeal No.932/2009 Page 49 of 70 In Darya Ganj report it was said that Rakesh Kumar was directed to carry the cash to office, while in the Jama Masjid report and the depositions it was stated that Rakesh Kumar was sent to the house. The office and the house are not in the same premises and are a distance apart. Why could the complainant be not certain even on this small but an important detail, questioned the learned counsel for the appellant. Obviously, the details are being changed to suit the situation and conceal something which is true. (9) Recovery of car : The learned counsel for the accused then stated that the prosecution commenced with the case that the car was recovered from outside the house of Shanti Lal but he was with held and there is no one to corroborate that the car was found in front of his house locked with keys inside. The memo of recovery of Ex. PW 3/A does not mention that the car was recovered from in front of the house of Shanti Lal, but instead it says that it was found parked on the open main road in Anand Lok. It was taken in possession along with a bunch of four

keys kept in a purse like thing. It is not stated how the car was opened. Why these contradictions It cannot be just by chance that the car should be parked near the house of the man who had provided money. The story of recovery of car is as mysterious as its ownership. (10) Place of occurrence and conduct of Rakesh : Crl. Appeal No.932/2009 *Page 50 of 70* The charge mentions Filmistan as the place of occurrence but Rakesh stop short of it and only said that the accused joined them on the Rani Jhansi Road. The conduct of Rakesh Kumar is assailed as quite unnatural because he did not care to shout when he was being taken in the car at the point of knife--noting that it was almost noon time in a busy area of Filmistan and he failed to raise an alarm when dropped at the place where even rikshaws are available. He had been to Darya Ganj once by himself and later along with R.K. Garg and instead of lodging the report at Darya Ganj Police Station, the report is managed to be lodged by him next day at Chanakya Puri Police Station. (11) Identification of Murari Lal : The police knew before hand that Murari Lal was involved in the occurrence. They arrested him at the pointing of Rakesh. But his evidence of pointing is inadmissible being hit by Section 162 Cr.P.C. In the absence of identification in a test parade, the identification in the court made by him is of little value. (12) Disclosure statement and recovery : The disclosure statement of Murari Lal Ex. PW 4/G is inadmissible unless it led to discovery. Rakesh says that prior to the arrest of the accused, he was taken to Govindpuri by the Police. Why? It seems that the police already knew where the money was lying and a fact already discovered cannot be discovered again. The statement, Crl. Appeal No.932/2009 *Page 51 of 70* therefore cannot be read against the accused. There is a difference also amongst the witnesses. Some say Thakurdas was there at his house when the police went there with Murari Lal while other say that he was called from neighborhood. (13) Identification of the crime property : Moreover, no identification of the notes was made. Kirpal Singh (PW 12) did state that he initialled the notes he gave to Jagdish Prasad. In the court he identified his initials on five bundles of Rs. 10/- each and two bundles of Rs. 20/- each, Ex. PW 12/6 and Ex. PW 12/7. There is no no evidence that these bundles contained the same notes which were recovered from the house of Thakurdas. (14) Knife : The knife has not been recovered in this case and the evidence of Rakesh Kumar is not satisfactory with regard to the use of knife. There is only a

suggestion of use of knife. No one knows the size of its blade and unless the size is known a knife cannot ordinarily be classified as a deadly weapon within the meaning of Section 397 I.P.C. (15) Withholding of witnesses : The prosecution has withheld the material witnesses namely Shanti Lal and R.K. Garg. Inference should be drawn that if produced they would not have supported the prosecution version. Reliance was placed upon *Ram Ranjau Roy v. Emperor*." *Crl. Appeal No.932/2009 Page 52 of 70*.

69. Learned counsel for appellant has relied upon *State of Haryana v. Ram Singh* 2002 (1) *Crl. Court Cases* 571 (SC) wherein it has been held as under:- "19. Significantly all disclosures, discoveries and even arrests have been made in the presence of three specific persons, namely, Budh Ram, Dholu Ram and Atma Ram -- no independent witness could be found in the aforesaid context -- is it deliberate or is it sheer coincidence -- this is where the relevance of the passage from Sarkar on Evidence comes on. The ingenuity devised by the prosecutor knew no bounds -- Can it be attributed to be sheer coincidence? Without any further consideration of the matter, one thing can be more or less with certain amount of conclusiveness be stated that these at least create a doubt or suspicion as to whether the same has been tailor- made or not and in the event of there being such a doubt, the benefit must and ought to be transposed to the accused persons. The trial Court addressed itself on scrutiny of evidence and came to a conclusion that the evidence available on record is trustworthy but the High Court acquitted one of the accused persons on the basis of some discrepancy between the oral testimony and the documentary evidence as noticed fully herein before. The oral testimony thus stands tainted with suspicion. If that be the case, then there is no other evidence apart from the omni present Budh Ram and Dholu Ram, who however are totally interested witnesses. While it is true that legitimacy of interested witnesses cannot be discredited in any way nor termed to be a suspect *Crl. Appeal No.932/2009 Page 53 of 70* witness but the evidence before being ascribed to be trustworthy or being capable of creating confidence, the Court has to be consider the same upon proper scrutiny. In our view, the High Court was wholly in error in not considering the evidence available on record in its proper perspective. The other aspect of the matter is in regard to the defence contention that Manphool was missing from village for about 2/3 days and is murdered on

21.1.1992 itself. There is defence evidence on record by DW-3 Raja Ram that Manphool was murdered on 21.1.1992. The High Court rejected the defence contention by reason of the fact that it was not suggested to Budh Ram or Dholu Ram that the murder had taken place on 21.1.1992 itself and DW-3 Raja Ram had even come to attend the condolence and it is by reason therefore Raja Ram's evidence was not accepted. Incidentally be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one -- the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by defence witness has been effected rather casually by the High Court. Suggestion was there to the prosecution's witnesses in particular PW-10 Dholu Ram that his father Manphool was missing for about 2/3 days prior to the day of the occurrence itself -- what more is expected of the defence case : a doubt or a certainty -- jurisprudentially a doubt would be *Crl. Appeal No.932/2009 Page 54 of 70* enough : when such a suggestion has been made prosecution has to bring on record the availability of the deceased during those 2/3 days with some independent evidence. Rejection of the defence case only by reason thereof is far too strict and rigid a requirement for the defence to meet -- it is prosecutor's duty to prove beyond all reasonable doubts and not the defence to prove its innocence - - this itself is a circumstance, which cannot but be termed to be suspicious in nature."

70. Learned counsel for appellant has relied upon *Karupanna Thevar and Ors v. State of Tamil Nadu 1975 SCC (Crl) 753* wherein it has been held as under:- "12. According to Alagiri Chettiar he and the deceased took their food on the 06th evening and thereafter they went to their fields at about the time when one normally goes to sleep. They took around of their respective fields and the case of Alagiri Chettari is that he and the deceased kept talking behind a thatti near well adjoining the field of the deceased. This claim is also highly unnatural. The offence took place at about 01:00AM on 07th and it is highly improbable that at that hour Alagiri and the deceased would be just chatting idly near the well. Villagers do chat idly but our attempt in this appeal is to find whether the view taken by the Sessions Court can be characterised as unreasonable or perverse. Unnatural events also

do take place in life but when a serious of unnatural incidents are alleged to have taken place in quick succession, the case acquires an air of unreality." *Crl. Appeal No.932/2009 Page 55 of 70.*

71. Learned counsel for appellant has relied upon *State of Rajasthan v. Netrapal and Ors* 2007 (2) SCC (Crl) 187 wherein it has been held as under:- "11. Again, some of the witnesses stated that they heard that the accused were arrested after few days. But the evidence of investigating officer was that the accused were arrested on 21.12.1987 or 22.12.1987. The Court, in the light of above facts, may not rely on such evidence but to hold that the accused were arrested and were detained but such detention was not shown, was not at all justified."

72. He has relied upon *Bhimapa Chandrappa Hosamani and Ors v. State of Karnataka* 2006(11) SCC 323 wherein it has been held as under:- "24. We have undertaken a very close and critical scrutiny of the evidence of PW1 and the other evidence on record only with a view to assess whether the evidence of PW1 is of such quality that a conviction for the offence of murder can be safely rested on her sole testimony. This Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also cautioned that while doing so the court must be satisfied that the testimony of the solitary eyewitness is of such sterling quality that the court finds it safe to base a conviction solely on the testimony of that witness. In doing so the court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the court as wholly truthful, must appear to be natural and so convincing that the court has no hesitation in *Crl. Appeal No.932/2009 Page 56 of 70* recording a conviction solely on the basis of the testimony of a single witness."

73. Ms.Ritu Gauba, learned APP has argued that the delay in lodging the present FIR / case, on the part of the prosecutrix has been explained by her vide her testimony recorded in prosecution evidence as PW1 and also vide her statement Ex.PW1/A on the basis of the statement, the instant case FIR has been registered and also vide the conduct of PW19 SI Ved Singh, the initial investigating officer of the case, who has been examined by the learned APP during trial on material

aspect of the investigation on the dates immediately succeeding the recovery of the prosecutrix PW1, pursuant to her admitted disappearance on the relevant date, time and place alleged vide mark PW8/A and rukka Ex.PW19/A on the same as no question had been put to dispute the same on the part of the appellant that atleast in cross-examination of either PW1 or PW19 and also it is not the case of the appellant that the prosecutrix had gone with her own consent and had not been abducted or confined by the appellant on the date, time and place alleged..

74. Learned APP has further argued that no material discrepancy, inconsistency or contradiction in the various statements of prosecutrix viz her testimony recorded in the Court as PW1; and her statement Ex.PW1/A on the basis of which, instant case FIR has been registered as well as her statement recorded under Section 164 Cr. P.C. Ex.PW24/B, which can prove to be fatal to the case of the prosecution Crl. Appeal No.932/2009 *Page 57 of 70* in favour of the appellant for the offences of which he stood charge- sheeted, charged, tried and convicted..

75. In the instant case, there are corroborative evidence such as FSL report dated 24.03.1999 and 29.07.1999 Ex.PW5/A, Ex.PW5/B, Ex.PW5/C and Ex.PW5/D respectively in respect of the case property viz salwaar Ex.P1 and Kurta Ex.P2 worn by prosecutrix at the time of alleged incident and seized by seizure memo Ex.PW18/E and also the FSL report Ex.PW5/A in respect of three micro slides having whitish smears which are the three vaginal slides of the prosecutrix prepared at the time of her medical examination by PW16 Dr. Jyoti Nath vide MLC dated 02.10.1998 at 11:45PM..

76. Learned APP further submits that there is no discrepancy in the judgment passed by learned Trial Judge and convicting the appellant. The allegations of the prosecutrix have been corroborated vide seizure memo Ex.PW11/A in respect of the case property i.e. three seater sofa Ex.P1, alleged seized from the office premises of the appellant in the name and style of Narang Properties situate on main road, Jamrudpur, Opposite LSR College, New Delhi alongwith the abovesaid case property, as also seized vide seizure memo Ex.PW7/A in respect of Maruti 800 Car, Metallic blue colour bearing registration No.DL-3C-C-1746..

77. She further submitted that the statement recorded by IO, Ved Singh during investigation are not relevant and inadmissible in evidence by the fact that they are the signed statement of the witnesses *Crl. Appeal No.932/2009 Page 58 of 70* and there being no provision under which the statements had been signed from the witnesses by the investigating officer during the investigation in a particular case under provision of Section 161 Cr. P.C..

78. Learned APP further submitted that PW4 Shri Parmajit Singh, father of the prosecutrix, PW1 prosecutrix, PW7 Nizam, PW8 Smt.Mohinder Kaur, PW11 Sh.Bhag Singh and PW12 Shri Sanjy Kohli apartfrom the medical witnesses viz. PW2 Dr. R. K. Sharma, PW3 Dr.Joginder Kumar, PW15 Dr.Prashant Kulshrestha as also PW16 Dr.Jyoti Nath and PW6 Shri A. K. Srivastava alongwith other prosecution witnesses have fully proved the case against the appellant, therefore, learned Trial Judge has rightly convicted the appellant..

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

80. I have heard learned counsel for parties and perused the record..

81. I note in the seizure memo Ex.PW18/C on which human semen certified to have been detected, however the semen does not connect with the appellant. Accordingly, the blood group found in the semen by FSL report of Group A; whereas blood group of appellant is *Crl. Appeal No.932/2009 Page 59 of 70* O+ve. It is pertinent to mention here that the blood group of the appellant was taken through W/Inspector Omwati Malik and sent to FSL. The FSL report connects the appellant with the blood group detected in the traces of semen of the prosecutrix. However, the issue raised before learned Trial Court, the blood sample of the appellant obtained and found that the blood group of the appellant was not of Group A, but O +ve..

82. The first IO, SI Ved Singh recorded the statements Mark PW23/A to Mark PW23/D, dated 30.09.1998, however the same were not taken into consideration by the subsequent IO, as the statements recorded by the aforementioned IO were the signed statements, therefore, no taken into consideration..

83. PW-19, SI Ved Singh did not support the prosecution case, however he was declared hostile..

84. I note, learned Trial Judge has convicted the appellant solely based on the uncorroborated/inconsisted testimony of PW1, prosecutrix, which is most untrustworthy witness as she has materially contradicted statements at various stages, which cannot be relied upon due to the reasons that on 30.09.1998 she made statement Ex.PW4/DC, on 02.10.1998 Ex.PW1/A, on 10.12.198 she made statement under Section 164 Cr. P.C. Ex.PW24/A; and during trial on 07.09.2000 and 08.09.2000 had deviated at every stage..

85. In complaint Mark PW8/A, PW8 Ms.Mohinder Kaur stated that her granddaughter on 29.09.1998 at 12:30PM went to Amar Colony Crl. Appeal No.932/2009 *Page 60 of 70* Market but did not return. As per statement of prosecutrix, Ex.PW1/A on the basis of FIR No.381/1998 under Section 376/342/34 Indian Penal Code, 1860 was registered on 03.10.1998 at police station Greater Kailash Part-I, New Delhi, it is alleged therein that on 29.09.1998 at about 12:00 Noon, she went to Jamrudpur village for buying some household articles. When she was on the way to Jamrudpur, one car had stopped in front of her from when one man got down and caught hold of her and held her mouth with some hanky to which, she became unconscious. Thereafter, he took her to nearby shop, and put on sofa. When she came into her senses, two persons were there, one of whom, administered an injection to her. Thereafter, when she regained her consciousness, the light was on and both the persons were sitting near her, however the shop was closed. Her clothes were found to be removed. They were talking to each other by the names i.e. Ashok Narang i.e. appellant, herein and another was Bobby..

86. On 30.09.1998 at about 7:00 PM she was taken out from the shop. Both the above said persons left her at Amar Colony in the same car. Thereafter, she went

to her Nani's house. On 01.10.1998, she went to her fathers house at Budh Vihar. Thereafter, on 02.10.1998 around 08:00 PM, she felt pain in her stomach. Her father admitted her at AIIMS Hospital, where she disclosed that both the above mentioned persons committed rape on her, one after another..

87. I note, in the statement Ex.PW16/A given by PW1 prosecutrix to the Doctor during medical examination on 2/3.10.1998, wherein it is *Crl. Appeal No.932/2009 Page 61 of 70* recorded that she had come to stay with her maternal grandmother. On 29.09.1998 around 12:30 PM she was forcibly taken away in a car by two men allegedly named Ashok Narang and Bobby, who were property dealers and businessmen dealing in stones respectively. She was made unconscious by putting a cloth with some medicine on her nose. She woke up next morning and found herself completely naked in a shop. None of the two men were around when she woke up..

88. I further note that the statement Ex.PW14/B of PW1 prosecutrix under Section 164 Cr. P.C., before learned Magistrate wherein she had stated that on 29.09.1998 at about 06:00 PM she went to bazaar for fetching some household item. When she was crossing the road towards Jamrudpur, one Maruti Car (Maroon shed) stopped near her. Thereafter one boy came out of the car and put cloth on her mouth and took her in the car. She tried to get free from their clutches by raising an alarm. Being a weekly off, there were few a people on the road. The windows of the car were rolled up. However, during in her deposition she deposed that the time of incident at about 03:15PM on 29.09.1998..

89. Keeping in view the decision rendered in Murari Lal (*supra*), I note the prosecutrix on the place of incident has given different versions viz:- i) As per complaint Mark PW-8/A, Amar Colony Market. ii) As per statement of prosecutrix Ex.PW1/A, the *Crl. Appeal No.932/2009 Page 62 of 70* place of incident is Jamrudpur Village. iii) As per the statement of prosecutrix Ex.PW16/A given to the Doctor she went to nearby market to buy bread. iv) As per statement of the prosecutrix under Section 164 Cr.P.C. Ex.PW24/B before the Magistrate recorded on 10.12.1998 stated the place of incident while crossing the road towards Jamrudpur Village. v) As per statement of the Prosecutrix at trial the place of

incident is six steps from her house in Lajpat Nagar, itself..

90. I also note that as per the testimony of prosecutrix during trial, the Maruti car allegedly used in the incident was maroon colour while the Maruti car seized by police is metallic blue colour..

91. Admittedly, in the statement of the father of prosecutrix Ex.PW4/DC given on 30.09.1998, no untoward incident has happened with her..

92. The prosecution has not lifted the chance print from the sofa, nor sent to FSL to ascertaining the presence of any semen stain thereon. Nor any TIP of the sofa was got conducted by the prosecutrix, during investigation..

93. As per MLC dated 02.10.1998 the doctor concerned had observed that no obvious hymenal tear. No active bleeding or blood stain. Dried Secretions present on labia minoria whitish. Small Crl. Appeal No.932/2009 *Page 63 of 70* superficial tear in posterior fourchette. Whereas, in MLC dated 14.11.1998 Ex.PW2/A it is recorded that no poor perineal-hygiene. Dried Secretions on labia minoria and near clitoris was present. On hymen old tears were present at 2 OClock position and 10 OClock position. Vagina could admit two fingers tight..

94. In the instant case, admittedly, two FIRs were registered at different police stations. The first FIR No.887/1998 under Section 363 Indian Penal Code, 1860 was registered on 30.09.1998 at police station Lajpat Nagar, New Delhi; whereas another FIR No.381/1998 under Section 363/376/34 Indian Penal Code registered at police station Greater Kailash Part-I, New Delhi on 02.10.1998. The prosecutrix or her father PW4 Sardar Parmjeet Singh did not disclose the fact that to the same incident, FIR had already been registered at police station Lajpat Nagar, New Delhi, which brought the case of the prosecution under shadow of doubt..

95. Admittedly, the appellant was not known to the prosecutrix prior to the alleged incident. No test identification parade was got conducted by prosecution..

96. In the instant case, investigation was initially carried out by police station Lajpat Nagar, and police station Greater Kailash Part-I, CAW Nankpura, New Delhi from 29.09.1998 to February 1999 and investigation was carried out by PW-

97. DW5 Sh. Pradeep Srivastava, IPS, DCP South had been closely monitoring the investigation of the case and he submitted the report Ex.DW5/A to the Additional Commissioner of Police and also to the Press, wherein it is reported that the Grandmother suspected that one Bobby - a stone cutter worker, was friendly with the prosecutrix might have taken her away. The said Bobby was worked as stone-cutter and a peon at J.C.R. Marble Shop situated nearby and owned by one Ashok Bihani. On asking aforesaid person, he reported to the police on 30.09.1998 that a girl was continuously ringing up his shop inquiring whereabouts of Bobby. On the advice of the police, when the phone came next time in the afternoon, she was told to meet Bobby at Lady Sriram College around 05:00 PM on the same evening. In the meanwhile, Bobby who came to the shop was also handed over to the Police. At 06:00 PM two policemen in plain clothes went to Lady Sriram College with Bobby where the girl also came and both of them were brought to the police post. On way to police post, the girl had initially stated that she had a quarrel with her grandmother Smt.Mohinder Kaur and had gone to his fathers place in Buddh Vihar. This statement has also been signed by the relative of the girl. Similar statement was given to the police in his own hand by father of the girl Sardar Paramjit Singh. However, for their satisfaction they further questioned the girl, who later told them that she had gone out of her own will with Bobby to one room tenement in Jamrudpur and stayed with him there. Bobby also agreed to take the prosecutrix to his tenement, but insisted that she was not at his flat during the night, but Crl. Appeal No.932/2009 Page 65 of 70 was dropped back in the locality. Bobby agreed to have a love affair with the prosecutrix for nearly a year..

98. It is to be noted that said Bobby is absconding and declared proclaimed offender and could not be tried..

99. It also creates the doubt that the second FIR which got registered clandestinely. The appellant has deposed in his statement under Section 313 Cr. P.C that the motive behind the appellant being implicated in the present case was

that there was a family feud due to the property. The present case has been planted upon the appellant by the complainant in connivance with his uncle Shri L. D. Narang and his family. The appellants family had been having property dispute for the last 32 years, Shri L. D. Narang (uncle of the appellant) some of the criminal/civil cases have been sorted by this Court. He submitted that three children of Sh.L. D. Narang viz one son namely Shri Rajinder Narang and two daughters namely Ms.Pinki Chopra and Ms.Rekha Narang are advocates practising in Delhi. These advocates in connivance with PW4 Shri Paramjeet Singh and Shri Mohan Singh had filed number of pseudo-anonymous complaints with the sole aim to mislead various trial Courts and got the present case transferred 7 or 8 times from one Trial Court to another..

100. Subsequent IO, W/Inspector Omwati Malik, did not consider the statements recorded by the previous IO. It is not the duty of the prosecution to secure the conviction by adopting all means, fair or foul. *Crl. Appeal No.932/2009 Page 66 of 70* The duty of the prosecution is to act fairly so that truth may come out as has been observed in Jaspal Singh (supra)..

101. In any case where the FIR pertains to cognizable offence and the investigating agency learns during the investigation or receives a fresh information that the offender had committed another offence, no fresh FIR need be registered, which will be irregular. In such a case, alteration of the provisions of law in the initial FIR is the proper course to adopt by the investigating agency, as has been observed in T.T. Antony (supra)..

102. In the facts and circumstances of the case, as are in the present case would raise considerable doubt regarding the veracity of evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of appellant, as has been observed in Thulia Kali (supra)..

103. The instant case being serious nature; however the testimony of the victim in such a case is very vital and should be without inconsistency and should not be improbable unless there are compelling circumstances, which necessitated corroboration of her statement and the Court finds it difficult to act on the sole testimony of victim of sexual assault to convict the accused..

104. If one integral part of the story put forth by witness was not believable, then the entire case failed. It is settled law that where witness makes two inconsistent statements in their evidence either at one stage or both stages, the testimony of said witness becomes CrI. Appeal No.932/2009 *Page 67 of 70* unreliable and unworthy of credence and in the absence of special circumstances; no conviction can be based on the evidence of said witnesses. For these reasons, therefore, when learned Trial Judge disbelieved the evidence of prosecutrix and her father in regard to her father, it was not open to him to have convicted the appellant on the same evidence with respect to which suffered from some infirmity for which the said evidence was disbelieved..

105. In the instant case, the first statement of prosecutrix which was recorded at the police station Lajpat Nagar, New Delhi was not believed and her subsequent statement was believed which is full of contradictions and cannot be relied upon to convict the appellant..

106. Admittedly, initially, the prosecutrix admitted love affairs with Bobby. The said Bobby was called at police station Lajpat Nagar, who also admitted the same. Therefore, on subsequent statement wherein appellant was named, creates suspicion and suspicion is not the substitute for prove. There is a long distance between the phrase "may be true" and "must be true" and the prosecution has to travel all the way to prove its case beyond all reasonable doubts. As has been held by the Apex Court in Varkey Joseph(supra)..

107. In the instant case, the prosecution not only proved its case palpably relying upon unreliable evidence and the prosecution must be able to prove its case against the appellant..

108. As already noted above, learned Trial Judge has ignored the statements recorded by the first IO. The law has been settled by the CrI. Appeal No.932/2009 *Page 68 of 70* Apex Court in Ram Singh (supra) that the evidence tendered by defence witness cannot always be termed to be tainted one. The defence witness is entitled to equal term and equal respect as with of the prosecution. The issue of credibility and trustworthiness will also to be attributed to the defence witness at par with that of the prosecution..

109. In the instant case, the conviction has been based on the sole testimony of prosecutrix. As has been held by Apex Court in Bhimapa Chandrappa Hosamani (supra) that the Supreme Court has repeatedly observed that on the basis of the testimony of a single eye witness a conviction may be recorded, but it has also cautioned that while doing so the court must be satisfied that the testimony of the solitary eyewitness is of such sterling quality that the court finds it safe to base a conviction solely on the testimony of that witness. In doing so the court must test the credibility of the witness by reference to the quality of his evidence. The evidence must be free of any blemish or suspicion, must impress the court as wholly truthful, and must appear to be natural and so convincing that the court has no hesitation in recording a conviction solely on the basis of the testimony of a single witness..

110. Keeping the circumstances discussed above and the case law, I am of the view that learned Trial Court has gone wrong in convicting the appellant, therefore, the impugned judgment dated 06.10.2009 and sentence order dated 09.10.2009 are hereby set aside qua the appellant. Crl. Appeal No.932/2009 Page 69 of 70.

111. As per the nominal roll dated 22.07.2011, the appellant already undergone 01 year 10 months, and 01 days in custody. The jail authorities are directed to release the appellant forthwith, if not required in any other case..

112. Copy of order be sent to the Jail Superintendent, for compliance..

113. Accordingly, Criminal Appeal No.932/2009 is allowed and stands disposed of. SURESH KAIT, J JANUARY 12, 2012 Jg/Mk Crl. Appeal No.932/2009 Page 70 of 70

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