

A.F.R.

RESERVED

Court No. - 43

**Case :-** CRIMINAL APPEAL No. - 7478 of 2018

**Appellant :-** Ajeet Singh Constable

**Respondent :-** State Of U.P. And Anr.

**Counsel for Appellant :-** Rajesh Kumar Singh, Rajiv Lochan Shukla, Sr. Advocate, Tarun Kumar Srivastava

**Counsel for Respondent :-** G.A., Pavan Kumar Srivastava, R.B. Sahai, Sanjay Srivastava, Shailendra Kumar Dwivedi

**Hon'ble Ashwani Kumar Mishra, J.**

**Hon'ble Shiv Shanker Prasad, J.**

**(Delivered by Hon. Shiv Shanker Prasad, J.)**

1. This criminal appeal is directed against the judgment and order dated 12.11.2018, passed by the Additional Sessions Judge-VIII, Fatehpur in Special Trial No. 110 of 2015 (State vs. Ajeet Singh Constable); whereby the accused-appellant has been convicted under sections 376 IPC read with Section 3 (ii) (v)/ 3 (i) (xii) SC/ST Act and Section 5/6 POCSO Act and consequently sentenced to rigorous life imprisonment along with fine of Rs.20,000/- for the offence under Section 6 of POCSO Act and in default thereof, he has to further undergo 6 months additional simple imprisonment; rigorous life imprisonment along with fine of Rs.20,000/- for the offence under Section 3 (ii) (v) SC/ST Act and in default thereof he has to further undergo 6 months additional simple imprisonment; and 5 years rigorous imprisonment along with fine of Rs.5000/- for the offence under Section 3 (i) (xii) SC/ST Act and in default thereof, he has to further undergo two months additional simple imprisonment with an observation that all the sentences are to run concurrently.

2. As per the prosecution case, on 9<sup>th</sup> September, 2015 a written report (Ext. Ka-8) was given to the Police Station Malva, District Fatehpur by the first informant, namely, Kallu Kori (PW-2) stating that on 9th September, 2015, at about 4:30 a.m. in the morning, the informant's daughter aged about 16 years had gone behind the house to ease

herself then accused Ajit Singh, Constable posted in Police Station-Kalyanpur, who was sitting in an ambush, dragged his daughter to the field by gagging her mouth and raped her. When the gagging eased, the victim raised an alarm. After hearing her shrieks, informant's wife rushed to the spot and the accused-appellant ran away to the G.T. Road through the paddy field. At the same time, the first informant/complainant/P.W.-2 was also easing himself on the side of the road in front of Malva Police Station and when he asked the accused, he started running and the first informant/complainant/P.W.-2 chased him. The accused-appellant was not able to run as his feet were covered with mud and the first informant held the neck of the accused-appellant at Itraura Mod, G.T. Road. The accused-appellant however escaped from the grip of the first informant/complainant by sliding off his T-shirt and vest.

3. On the basis of the aforesaid written report a first information report (Ex.Ka.9) was lodged on 9<sup>th</sup> September, 2015 at 08.15 a.m., which was registered as Case Crime No. 0235 of 2015, under Section 376 IPC, Section 3 (ii) (v)/ 3 (i) (xii) of SC/ST Act and Section 3/4 POCSO Act. The chik first information report has been prepared by Constable-828 Satya Prakash Mishra (P.W.-8). After registration of the aforesaid first information the Investigating Officer i.e. Bandana Singh, Deputy Superintendent of Police (P.W.-10) has recorded the statements of first informant (P.W.-2), and his wife under Section 161 Cr.P.C. and on the disclosure of the victim, he has also prepared the site plan. Thereafter P.W.-10 has taken possession of T-shirt, black lower pant, black Sameej and white underwear, which were worn by the victim. Thereafter P.W.-10 has sent the victim to the Women District Hospital for her medical examination along with Constable Vandana Dwivedi (P.W.-3).

4. Dr. Rani Bala Sharma (P.W.-4) examined the victim and performed the medical examination on 09.09.15. P.W.-4 has opined that after external and internal examination of the victim, she found no injury on the body of the victim. Hymen was found to be intact and that according

to her, no opinion related to sexual assault could be given. To ascertain the correct age of the victim, she was sent to radiologist Dr. Manu Gopal (P.W.-5) who opined the victim to be of age 16-18 years. On the constitution of Medical Board, the victim was sent to Dr. Rekha Rani (P.W.-7) for re-examination on 23.09.15, where she found no internal and external injury on the body of the victim. P.W.-7 did not find any injury of pinching on the body of the victim and no injury or blood was found on the vagina of the victim. Hymen was found to be intact. In her opinion considering the Forensic Science Laboratory's report, physical violence cannot be ruled out. Dr. Vinay Kumar Pandey, Chief Medical Officer, Fatehpur (P.W.-6) who was the Chief Medical Officer opined that on the basis of medical report submitted by the board, age of victim is found to be 16 years.

5. The investigation proceeded thereafter and statement was recorded of the victim under Section 161 Cr.P.C. and after completing necessary formalities as provided under Chapter-XII C.P.C., charge-sheet came to be submitted on 7<sup>th</sup> November, 2015 (Exhibit-Ka-15) before the court concerned against the accused appellant under Section 376 IPC, Section 3 (ii) (v)/ 3 (i) (xii) of SC/ST Act and Section 3/4 POCSO Act on which the Magistrate concerned took cognizance and committed the case to Court of Sessions.

6. On 18<sup>th</sup> February, 2016, following charges were framed by the Court of Special Judge (POCSO Act)/Additional Sessions Judge/Fast Track Court, Fatehpur:

*“मै आदिल आफताब अहमद, विशेष न्यायाधीश (लैंगिक अपराधों से बालकों का संरक्षण अधिनियम)/अपर सत्र न्यायाधीश/फास्ट ट्रैक कोर्ट, फतेहपुर आप अभियुक्त*

**अजीत सिंह**

*को निम्न आरोप से आरोपित करता हूँ—*

**प्रथम—** यह कि दिनांक 09.09.2015 को प्रातः 4.30 बजे स्थान बमुकाम वादी के घर के पीछे के खेत वहद ग्राम मलवाँ थाना मलवाँ जिला फतेहपुर में आप जो लोक सेवक है, ने वादी मुकदमा कल्लू कोरी की अवयस्क 16

वर्षीय पुत्री दिव्या देवी, जो अनुसूचित जाति कोरी है, के साथ लैंगिक हमला/बलात्संग किया। इस प्रकार आपने भारतीय दण्ड संहिता की धारा 376 सपठित धारा 3(2)(5)/3(1)(12)अनुजाति/जनजातिअत्याचार निवारण अधिनियम के अन्तर्गत दण्डनीय अपराध कारित किया है, जो इस न्यायालय के प्रसंज्ञान में है।

**द्वितीय-** यह कि उक्त दिनांक समय व स्थान पर आप जो लोक सेवक (पुलिस कर्मचारी) है, ने वादी मुकदमा कल्लू कोरी की अवयस्क 16 वर्षीय पुत्री दिव्या देवी के साथ गुरुतर प्रवेशक लैंगिक हमला किया। इस प्रकार आपने धारा 5/6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 के अन्तर्गत दण्डनीय अपराध कारित किया, जो इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्वारा निर्देश देता हूँ कि उपरोक्त आरोपों में आपका विचारण इस न्यायालय द्वारा किया जायेगा।”

7. The prosecution in order to establish the charge levelled against the accused-appellants, has relied upon following documentary evidences, which were duly proved and consequently marked as Exhibits:

“Written report dated 9.9.2015 has been marked as Exhibit-Ka-8; F.I.R dated 9.9.2015 has been marked as Exhibit-Ka-9; Site plan with index dated 9.9.2015 has been marked as Exhibit-Ka-13; Statement of the victim has been marked as Exhibit-Ka-1; Medicolegal Examination Report dated 9.9.2015 has been marked as Exhibit-Ka-2; X-Ray Report dated 16.09.2015 has been marked as Exhibit-Ka-4, X-Ray Report dated 23.09.2015 has been marked as Exhibit-Ka-3, Medicolegal Examination Report dated 23.9.2015 has been marked as Exhibit-Ka-7, Report of the Medical Board dated 24.09.2015 has been marked as Exhibit-Ka-6 and charge-sheet (original) dated 7.11.2015 has been marked as Exhibit-Ka-15.”

8. The prosecution has also adduced oral testimony of following witnesses:-

“P.W.-1/ Victim, namely, Divya Devi; P.W.-2/ Informant, namely Kallu Kori, P.W.-3, Women Constable, namely, Vandana Dwivedi, recorded the statement of the victim under Section 161 Cr.P.C. of which videography has been done and she has also recorded the majid bayan of the victim and also taken her to the hospital for medical examination, P.W.-4, namely Dr. Rani Bala Sharma, who has medically examined the victim; P.W.-5, namely, Dr. Manu Gopal, Radiologist; P.W.-6, namely, Dr. Vinay Kumar Pandey, Chief Medical Officer from whose order the medical board was constituted; P.W.-7, namely, Dr. Rekha Rani, a member of the Medical Board; P.W.-8, namely, Satya Prakash Misra, constable, who had typed the chik F.I.R.; P.W.-9, namely Dr. Rekha Misra, In-charge Principal, Government Girls Inter College, Malva, Fatehpur, who has certified the date of birth of the victim and P.W.-10 Vandana Singh, Deputy Superintendent of Police, the Investigating Officer.”

9. After recording of the prosecution evidence, the incriminating evidence were put to the accused-appellant for confronting him with the same under Section 313 Cr.P.C. In his statement recorded U/s 313 Cr.P.C. the accused appellant denied his involvement in the commissioning of the offence under Section 376 I.P.C. Sections 3 (ii) (v)/ 3 (i) (xii) S.C./S.T. Act and also Sections 5/6 POCSO Act and also the charges levelled against him. In the said statement, the accused-appellant has specifically stated before the trial court that since he always reprimanded the first informant/ P.W.-2 and that is why he has been implicated in this case to teach a lesson to him, and he is otherwise innocent.

10. From the materials placed on record it appears that the statement of the victim (P.W.-1) was recorded under Section 161 Cr.P.C. wherein she did not allege the commissioning of rape upon her by the accused-appellant but in the statement recorded under Section 164 Cr.P.C., which was recorded before the Magistrate concerned, she disclosed about commissioning of offence of rape upon her by the accused-appellant.

11. The trial court after relying upon the evidence adduced by the prosecution and recording its finding that the incident happened around 4:30 a.m. in the morning and after the incident, a quick first information report was registered within about quarter to four hours in the morning of the incident as evident from the evidence of the first informant/P.W.-2 and PW-8. The fact of rape by the accused-appellant has been conclusively proved by the evidence of the victim and admittedly the accused-appellant was working in Police Station-Malwan before the incident. The accused-appellant was known to the people of Malwan area. In the statement of the accused-appellant recorded under Section 313 Cr.P.C. it was said by him that he was entrapped in rivalry, but no rivalry was explained by the defence side, so that the presumption under section 29 of POCSO Act could not be dislodged. After perusal of all the above evidences, the offence punishable under Section 376 I.P.C. and Section 6 of POCSO Act has been found proved against the accused-appellant. On the basis of aforesaid finding, the trial court has come to the conclusion that against the accused-appellant Ajit Singh Sipahi for the offence punishable under section 376 of Indian Penal Code read with section 3 (ii) (v)/ 3 (i) (xii) of S.C./S.T. Act. And Section 5/6 POCSO Act, the prosecution has been successful in proving the allegation beyond reasonable doubt. Accordingly, the accused-appellant has been convicted under Section 376 of the Indian Penal Code read with section 3 (ii) (v)/ 3 (i) (xii) of the S.C./S.T. Act and also Section 5/6 PCOSO Act and sentenced him to life imprisonment along with fine as referred to above.

12. Sri Rajiv Lochan Shukla, learned counsel for the accused-appellant submits that as per the prosecution version, the incident took place on 9.9.2015 at 4:30 A.M., whereas statement of the victim under Section 161 Cr.P.C. has been recorded by the Police in which she has stated that she went to ease herself behind her house and someone caught hold of her from behind and gagged her mouth. When the victim raised alarm her parents came there. Due to darkness, the victim was unable to recognise the accused. She has also stated that no wrongful

act had been committed upon her. She has further stated that she did not see the person who gagged her mouth due to darkness.

13. Learned counsel for the appellant has argued that since the statement of the victim under Section 161 Cr.P.C. was recorded soon after the incident and has been exhibited and accepted by the witness in Court, the same is liable to be treated as a natural statement.

14. Learned counsel for the appellant has also argued that in the medical examination, which was conducted on 9.9.2015 at 6:15 P.M. she did not disclose the name of the person as to who had committed the alleged offence upon her. The Doctor opined that hymen of the victim was intact and no definite opinion regarding sexual assault could be given. In the report of the Medical Board which conducted the re-medical examination of the victim, the hymen of the victim was found to be intact. This examination was conducted on 23.09.2015 at 2:00 P.M. The Board has opined that there are no sign of use of force, however, final opinion is reserved pending availability of F.S.L. report but the Board has also opined that the sexual violence cannot be ruled out.

15. Learned counsel for the accused-appellant has also submitted that the statement of victim under Section 164 Cr.P.C. was recorded after long interval of the incident and the victim was living with her mother and father in their house. Statement under Section 164 Cr.P.C. and statement given before the court below by the victim were under the pressure and duress of the parents of the victim. There is material improvement in the aforesaid statements of the victim. He has further argued that when the accused-appellant was posted in Police Station Malva sometimes ago, he always reprimanded the first informant/P.W.-2 and annoyed of this the informant/P.W.-2 has implicated him in this forged and frivolous case. Accused-appellant is innocent and he has not committed any crime against the victim.

16. It is also argued that no F.S.L. report and D.N.A. test report is on record. The place where the accused-appellant was caught by the informant/P.W.-2 is also not shown in the site plan. The torch by which the accused-appellant was recognised by the victim, has not been

recovered and produced before the trial court so that the same may be proved. According to the medical examination report no offence of rape as alleged by the prosecution has been committed by the accused-appellant upon the victim. Subsequent change of the stand by the victim does not find any corroboration from the materials available on record and, therefore, the trial court has grossly erred in relying upon the statement of the victim as P.W.-1 while her statement ought to have been subjected to greater scrutiny. It is also argued that in such circumstances the conviction of the accused-appellant under Sections 376 IPC read with Section 3 (ii) (v)/ 3 (i) (xii) SC/ST Act and Section 5/6 POCSO Act cannot be legally sustained on the cumulative strength of aforesaid and the same is liable to be quashed.

17. Learned A.G.A. on the other hand has supported the prosecution version and submits that the statement of the victim is credible in the facts and circumstances of the case and since she has clearly disclosed about the commissioning of the offence of rape by the accused-appellant upon her, therefore, the trial court has not committed any error in holding the conviction of the accused-appellant under Sections 376 IPC read with Section 3 (ii) (v)/ 3 (i) (xii) SC/ST Act and Section 5/6 POCSO Act.

18. It is in the context of the above facts that the present appeal has come up before us for hearing.

19. We have considered the submissions made by learned counsel for the parties and have gone through the records of the present appeal especially the judgment and order of conviction and the evidence adduced before the trial court.

20. The only question to be addressed and determined in this appeal is whether the accusation of guilt arrived at by the Trial Court and the sentence awarded is legal and sustainable and suffers from no infirmity and perversity.

21. The facts as have been noticed above would clearly go to show that a first information report was lodged on 9.9.2015 on the written report of the first-informant/P.W.-2 wherein he has alleged that in the



early morning the victim in order to go to her school went to ease herself behind her house and when she was easing herself, the accused-appellant caught hold of her from behind and gagged her mouth and dragged her to the field and committed rape upon her. On the fateful day of the incident, her statement under Section 161 Cr.P.C. has been recorded by Police Constable Vandana Dwivedi (P.W.-3) on the instruction of Investigating Officer i.e. P.W.-10 wherein the victim has stated that on the fateful day she went to ease herself behind her house and someone caught hold of her from behind and gagged her mouth. It has been further alleged that when the victim raised alarm, her parents i.e. the informant/P.W.-2 and his wife (mother of the victim) came on the spot. The victim did not see the face of that unknown person due to darkness and after that it was her father, who said that he was Ajit Singh Sipahi/Constable. She did not recognise the accused due to darkness. She has further admitted that the said statement has been given by her without any pressure or duress.

22. After long interval, the statement of the victim was recorded under Section 164 Cr.P.C. which has been exhibited as Exhibit-Kha-2, wherein she has made improvement and stated that when she went to ease herself behind her house, she had a torch and in the light of the same, she recognised the accused-appellant Ajit Singh Sipahi, who caught hold of her from behind and gagged her mouth and dragged her to the paddy field and committed rape upon her. Somehow or other when the victim could speak, she raised an alarm on which her mother came there and seeing them the accused left the victim and ran away. When the accused was running away, the father of the victim also came there and he tried to chase him but he could not apprehend him.

23. The victim has been examined as P.W.-1 before the trial court and she has admitted in her cross-examination that her statement under Section 164 Cr.P.C. was recorded after one month from the date of alleged incident and during this period she was living with her parents. She has also stated that in the statement under Section 164 Cr.P.C. she has not disclosed before the Magistrate concerned that the accused

inserted his penis in her vagina. She has further stated that her father (Informant/P.W.-2) called accused Ajit Singh Sipahi but he ran away and did not stop. Victim herself has admitted that when her statement under Section 161 Cr.P.C. was recorded, videography of the same was also done. The victim has reaffirmed the contents disclosed in her statement under Section 161 Cr.P.C.

24. From overall evaluation of the statement of the victim recorded under Section 161 and 164 Cr.P.C. and the statement given before the court below, we find that this is not a case where there are minor inconsistencies in the statements of the victim about commissioning of the offence of rape by the accused-appellant upon her, but it is a case where the victim has developed a new story for the first time when her statement was recorded under Section 164 Cr.P.C., i.e. after a month or more about the commissioning of rape upon her by the accused-appellant. In the statement recorded under Section 161 Cr.P.C. on the date of incident, she did not allege commissioning of the offence of rape upon her by the accused-appellant, meaning thereby that after some interval, she developed the story about the commissioning of rape against her by the accused-appellant, which is not trustworthy and creates doubt. The medical report otherwise does not support the commissioning of rape against the victim as the Doctor opined that her hymen was intact and no sign of external injury has been found. No definite opinion regarding sexual assault has been given by the doctor. The torch in the light of which the accused-appellant was recognised by the victim has not been recovered and produced before the court below. It is also noteworthy that victim (P.W.-1) has stated in her cross-examination that at the time of incident there was water and slurry in the paddy field where the offence was alleged to have been committed. The victim has stated that the place where she went to ease herself was dry, there was no slurry and water. It is improbable to conceive that when it was dark at about 4:30 A.M. in the morning, there was any need for the accused-appellant to maintain secrecy and drag her to the paddy field where there was water and slurry to commit the offence of rape upon the victim. This assertion also adds doubt to the prosecution story.

25. It is also alleged by the prosecution that the accused-appellant caught hold of the informant on the road but this place is not shown in the site plan by the Investigating Officer i.e. P.W.-10, which also creates doubt in prosecution version. Mud stained clothes and slippers of accused which are alleged to have been recovered from the place where the accused-appellant was caught by the informant are also not produced before the court below and proved.

26. P.W.-2 Kallu Kori (informant) has also been examined by the prosecution. He has admitted in his cross-examination that it is true that he had not seen the accused-appellant Ajit Singh Sipahi commissioning the rape upon his daughter (victim). Therefore, he is not the eye witness. His statement is simple hear-say evidence. He has admitted in his cross-examination that he has not handed over the clothes of victim to the police. No FSL report with regard to clothes has been submitted by the prosecution either.

27. P.W.-3 Women Constable Vandana Dwivedi has been examined. She has stated in her cross-examination that Exh. Kha-1 (statement of the victim recorded under Section 161 Cr.P.C.) has been recorded by her on the dictation of the victim, of which videography was being done. The victim has also signed on said statement and the same has also been read to her. The statement of the victim recorded under Section 161 Cr.P.C. has been exhibited and she has verified it.

28. She has further stated that in the open court when the C.J.M. asked the victim with regard to rape, she has stated that no offence of rape was committed upon her and she did not disclose anyone's name. Victim's statement under Section 164 Cr.P.C. was not recorded on that date. After some interval victim was again called for recording of her statement under Section 164 Cr.P.C. in which she alleged that the accused-appellant has committed the offence of rape upon her. This is clearly an improvement in the story of prosecution side.

29. P.W.-4 Dr. Rani Bala Sharma is the Doctor who has examined the injuries of the victim. She found that the hymen of the victim was intact and there was no injury either externally or internally on the body of the

victim. There was also no injury on the private part of the body of the victim. Doctor has opined that the offence of rape was not committed upon the victim. No supplementary report was prepared nor any cloth of the victim was taken in possession.

30. P.W.-5 Dr. Manu Gopal, Radiologist, District Hospital, Fatehpur has also been examined and he has opined that the age of the victim at the time of incident was between 16 to 18 years. Though in the examination-in-chief P.W.-5 has stated that on 23<sup>rd</sup> September, 2015 the X-ray of the victim has been done by him and he has also stated that before 23<sup>rd</sup> September, 2015 i.e. on 10<sup>th</sup> September, 2015 he has done the X-ray of the victim but in the cross-examination he has stated that he has done the X-ray of victim only on 23<sup>rd</sup> September, 2015 and has not done the same on 10<sup>th</sup> September, 2015.

31. P.W.-6 Dr. Vinay Kumar Pandey, who was the Chairman of the Medical Board has opined the age of the victim at the time of incident was about 16 years. It may be 17 to 18 years. He has alleged that this board was constituted by the order of the District Magistrate dated 15.9.2015.

32. P.W.-7 Dr. Rekha Rani was also the member of the Board. She opined that the hymen of the victim was intact at the time of medical examination. She further opined that there are no sign of use of intercourse, however, final opinion was reserved, pending availability of FSL report. From perusal of the original records and other documents, which are available at the stage of the appeal there is no FSL report or DNA report with regard to victim, hence the offence of commissioning of rape could not be ascertained. P.W.-7 has also stated that there was no pinching injury on the body of the victim and there was no injury and bleeding on the private parts of the body of the victim.

33. P.W.-8 Constable Satya Prakash Misra has also been examined by the prosecution. He has stated in his cross-examination that the informant Kallu Kori has not provided him any clothes of accused or victim which were wore by them at the time of the incident, during writing of the F.I.R.

34. P.W.-9 Dr. Rekha Misra, Acting Principal of Government Girls Inter College has also been examined. She has proved the date of birth of the victim, which is 6.5.2000.

35 P.W.-10 Bandana Singh, Deputy Superintendent of Police, who was Investigating Officer of the case has also been examined. She has stated that she took the clothes of the victim but with regard to the clothes of the victim or accused there is no FSL report on record. She has also corroborated in her cross-examination that in the medical report of the victim dated 9.9.2015 victim has not stated the name of the accused Ajit Singh Sipahi with regard to commissioning of offence of rape. Victim has also not disclosed the name of any one who has gagged her mouth from behind. She has also admitted that in both the medical reports there is no definite opinion about sexual assault upon the victim. She has also admitted that she has not prepared the memo of clothes which has been taken by her from the victim.

36, Apart from that statement of accused Ajit Singh Sipahi has been recorded under Section 313 Cr.P.C. by the court in which he has alleged that he is innocent and has not committed any crime upon the victim. He has reprimanded the complainant and that is why he has been falsely implicated in the present case by the complainant to teach a lesson. This statement of the accused-appellant finds support from the perusal of the evidence on record. Complainant Kallu Kori is vexatious litigant.

37. This fact has been admitted by the informant himself in his statement before the court that there is case crime no. 447 of 2013, under Section 302 I.P.C., P.S. Kotwali registered against him and there are four other litigations pending before the Court with regard to him and he has also admitted that he has filed complaint against one Dharendra Kumar Jha before Mahila Ayog,

38. From perusal of admission with regard to implication of P.W.-2 in various cases, the possibility of the accused being falsely implicated cannot be ruled out. The accused-appellant was otherwise posted in the Police Station, till recently, where P.W.-2 had his shop and lived.

39. The law laid down by the Apex Court in the case of **Sham Singh Vs. State of Haryana** reported in 2018 SCC OnLine SC 1042 can be summarized as under :

*"An accused can be convicted under section 376 IPC on the basis of sole testimony of the prosecutrix, if such testimony is worthy of credence and inspires confidence and is of sterling quality then corroboration from other evidence is not required. But where the statement of prosecutrix suffers from material inconsistency, contradiction and does not inspire confidence, then some other material may be even short of corroboration from other evidence collected during investigation is necessary."*

40. In the facts of the present case the solitary testimony from the prosecution side is of the victim herself but upon a deeper evaluation of the statement of the victim recorded under Section 161 and 164 Cr.P.C. and the statement given before the court below, we find that there is improvement in the statements of the victim after her statement was recorded under Section 161 Cr.P.C. on the same day i.e. date of incident and such development or improvement in the statement of the victim amounts to major improvement, which renders the testimony of P.W.1/victim unreliable.

41. It is settled law that where the previous statement and the evidence before the court below are so inconsistent and irreconcilable with each other than both cannot co-exist, therefore, it can be said that the previous statement contradicts the witness with the evidence given by him/her before the Court.

42. In the case of **State v. Saravanan** reported in (2008) 17 SCC 587 the Apex Court has opined as follows:

*"The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt."*

43. The aforesaid judgment has been followed by the Apex Court in the case of **Mahendra Pratap Singh Vs. State of U.P.** reported in (2009) 11 SCC 334.

44. Again the Apex Court in the case of **Sunil Kumar Sambhudayal Gupta & Others vs State Of Maharashtra** reported in (2010) 13 SCC 657 in paragraph nos. 30 to 32 has held as follows:

*“30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons.*

*31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence.*

*32. The discrepancies in the evidence of eye-witnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already.”*

45. From the aforesaid, we are of the view that the evidence of victim is not reliable in the facts of the present case.

46. From the medical examination reports and the statements of the Doctors i.e. P.W.-4, P.W.-5, P.W.-6 and P.W.-7, it is apparent that the medical evidence does not support the prosecution case of rape upon the victim.

47. The issue of contradictions in the statement of the victim as well as the issue that medical evidence does not support the prosecution case have been well discussed by the Apex Court in the case of **Dola @ Dolagobinda Pradhan & Another Vs. State of Odisha** reported in (2018) 8 SCC 695. In paragraph-

***“36. In our considered opinion, the Trial Court as well as the High Court have convicted the appellants without considering the aforementioned factors in their proper perspective. The testimony of the victim is full of inconsistencies and does not find support from any other evidence whatsoever. Moreover, the evidence of the informant/victim is inconsistent and self-destructive at different places. It is noticeable that the medical record and the Doctor’s evidence do not specify whether there were any signs of forcible sexual intercourse. It seems that the First Information Report was lodged with false allegations to extract revenge from the appellants, who had uncovered the theft of forest produce by the informant and her husband. The High Court has, in our considered opinion, brushed aside the various inconsistencies pointed out by us only on the ground that the victim could not have deposed falsely before the Court. The High Court has proceeded on the basis of assumptions, conjectures and surmises, inasmuch as such assumptions are not corroborated by any reliable evidence. The medical evidence does not support the case of the prosecution relating to the offence of rape.”***

***(Emphasis added)***

48. In view of the above discussions we find that the trial court was not justified in returning the finding of guilt against the accused-appellant on the basis of evidence led by the prosecution. Finding of the court below that the guilt of the accused-appellant has been proved beyond reasonable doubt is thus rendered unsustainable. We hold that the prosecution has failed to prove the guilt of the accused-appellant beyond reasonable doubt.

49. Consequently in the view of the deliberation held above this appeal succeeds and is allowed.

50. The judgment and order of conviction against the accused-appellant Ajeet Singh Sipahi dated 12.11.2018, passed by the Additional Sessions Judge-VIII, Fatehpur in Special Trial No. 110 of 2015 (State vs. Ajeet Singh Constable) is hereby set aside.

51. The accused appellant- Ajeet Singh Sipahi/Constable is clearly entitled to benefit of doubt . He is in jail since 5<sup>th</sup> November, 2018 and has already undergone four years and two months of incarceration, he is entitled to be released forthwith subject to compliance of Section 437-A Cr.P.C. unless he is wanted in any other case.



52. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Fatehpur henceforth, who shall transmit the same to the Jail Superintendent concerned in terms of this judgment.

(Shiv Shanker Prasad, J.)

(Ashwani Kumar Mishra, J.)

**Order Date:** 22<sup>nd</sup> December, 2022  
Abhishek Singh/Sushil