

PARKASH CHAND

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v.

STATE OF HIMACHAL PRADESH

(Criminal Appeal No. 2393 of 2010)

FEBRUARY 12, 2019

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**[RANJAN GOGOI, CJI, SANJAY KISHAN KAUL AND
K. M. JOSEPH, JJ.]**

Penal Code, 1860 – ss. 376 and 506 – Rape – PW.2-prosecutrix alleged that appellant caught hold of her on a common path of villages and dragged her in the bushes – She raised hue and cry but nobody was there at the place of occurrence – Appellant committed rape on her – Consequent to which, prosecutrix got pregnant – After 7 months of alleged commission of offence, FIR was lodged – Trial Court convicted appellant u/ss. 376 and 506 IPC – Conviction affirmed by the High Court – On appeal, held: High Court proceeded on the basis of testimony of prosecutrix and extra-judicial confession made before PW.4 and PW.5 – There were different versions of PW.3 and PW.4 about the disclosure of the incident to them by the prosecutrix – PW.4 evidence was based on prosecutrix going to him and revealing him about the incident whereas, PW.3 stated that after prosecutrix told her about the alleged rape, PW.3 disclosed the factum of alleged rape to PW.4 – And, prosecutrix stated that incident was disclosed by PW.3 to PW.4 – This falsified the version of PW.4 – In such circumstances, not safe to draw support from alleged extra-judicial confession made by appellant to PW.4 – PW.5 too gave contradictory version of facts regarding appellant coming to him and requesting compromise with prosecutrix – Insofar as prosecutrix is concerned, if she had raised hue and cry, it was very unlikely that the labourers who used the common path did not hear it – Thus, unsafe to convict appellant on testimony of the prosecutrix – Appellant entitled to the benefit of doubt.

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Evidence – Critical examination of evidence in an appeal by special leave – Held: This Court has indulged in a closer look at the evidence in these proceedings having regard to the need to do so in view of the fact that the complaint itself is lodged after 7 months – If the evidence adduced by the prosecution falls short of H

- A *the test of reliability and acceptability and as such it is highly unreliable to act upon it even in an appeal by special leave, such a critical examination may not be unwarranted.*

- B *Delay/ Laches – Offence of Rape – Delay of 7 months in lodging the FIR – Held: There is admittedly a delay of 7 months in lodging the FIR in the case of alleged rape – If the case is reported immediately apart from the inherent strength of the case flowing from genuineness attributable to such promptitude, the perceptible advantage would be the medical examination to which the prosecutrix can be subjected and the result of such examination in a case where there is a resistance – It is the case of the prosecution that she raised hue and cry and therefore apparently she would have resisted – Possibly, a medical examination may have revealed signs of any resistance or injuries.*

Allowing the appeal, the Court

- D **HELD:** 1. *There is admittedly a delay of 7 months in lodging the FIR in the case of alleged rape. If the case is reported immediately apart from the inherent strength of the case flowing from genuineness attributable to such promptitude, the perceptible advantage would be the medical examination to which the prosecutrix can be subjected and the result of such examination in a case where there is a resistance. It is the case of the prosecution that she raised hue and cry and therefore apparently she would have resisted. Possibly, a medical examination may have revealed signs of any resistance or injuries. In this case the High Court has proceeded on the basis of testimony of the prosecutrix and sought to fortify it by the extra judicial confession made before PW4 and PW5. [Para 14][964-B-D]*

- G *2. As far as PW 4 is concerned, his evidence is based on the prosecutrix going to him on 05/07/2000 and revealing to him about the incident whereas PW3, the maternal aunt of the prosecutrix clearly says that after prosecutrix told her about the alleged rape and when PW4 came to visit the same village where his in-laws also resides at that juncture on 07/07/2000, the factum of the alleged rape was disclosed to him and he came to know on the said basis. This is a completely different version from what PW4 has spoken. If PW3 is to be believed, then knowledge about*

the alleged incident was gained by P.W.4 only on 07/07/2000 and that too from PW3 instead he sets up the case that on 05/07/2000 the prosecutrix went to his house and told him about the same. In fact, even the prosecutrix in her version has no such case. Rather, the prosecutrix would say that the incident was disclosed by P.W.3 to P.W.4. This completely falsifies the version of P.W.4 that on 5.7.2000 the prosecutrix went and told him about the incident including about the threat of using the knife. P.W.4 as noted in further cross examination would state that he did not tell the police on the basis that she had not told him about it. This would again show that version of P.W.4 that prosecutrix had went and told him about the incident, cannot be believed. No doubt, P.W. 4 seeks to state that he did not tell the Police about what the prosecutrix told him thinking that prosecutrix would have told the police about it. It does not appear to be safe. In such circumstances, it may not be safe to draw support from the alleged extra judicial confession alleged to have been made by the appellant to him. [Para 15][964-D-H; 965-A]

3. As far as P.W.5 who again has been believed by the courts, it was noticed that in the cross examination he categorically states that the appellant and also co-accused did not ask him for compromise. This is contrary to his version that on the way back to his home on 09/07/2000 he met him and he sought for a compromise. It is also to be noted that PW 4 has stated in his cross examination that PW5 had met him on 05/07/2000 along with the appellant. This is not considered by the courts below. This Court has indulged in a closer look at the evidence in these proceedings having regard to the need to do so in view of the fact that the complaint itself is lodged after 7 months. If the evidence adduced by the prosecution falls short of the test of reliability and acceptability and as such it is highly unreliable to act upon it even in an appeal by special leave, such a critical examination may not be unwarranted. [Para 16][955-E-F]

4. If this Court does not place confidence in the deposition of PW4 and PW5 then the case would depend upon the credibility of PW2, the prosecutrix. The incident is alleged to have taken place near a path which has been admitted by the prosecutrix and her aunt PW3 as common path. If indeed the prosecutrix

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- A has raised hue and cry as in the case reported in 2013 (9) SCC 113, it is very unlikely that the labourers who are supposed to haunt the common path could not hear it. There is a case of the appellant that the evidence would make out a case of consensual sex. It is true that in the High Court, it is recorded that there is no case of consensual sexual intercourse as such argued but the case is to be decided on the basis of evidence. In the circumstances of this case that the appellant cannot be convicted for the offence under Section 376. It would indeed be unsafe to convict him based on the testimony of the prosecutrix. He would certainly be entitled to the benefit of doubt.
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- C [Para 17][965-G, H; 966-A-B]

Vijayan v. State of Kerala (2008) 14 SCC 763 ; Kaini Rajan v. State of Kerala (2013) 9 SCC 113 : [2013] 10 SCR 196 – relied on.

- D *State of Himachal Pradesh v. Shree Kant Shekari AIR 2004 SC 4404 : [2004] 4 Suppl. SCR 380 ; Tulshidas Kanolkar v. State of Goa (2003) 8 SCC 590 : [2003] 4 Suppl. SCR 978 ; Ganga Kumr Srivastava v. State of Bihar (2005) 6 SCC 211 – referred to.*

Case Law Reference

E	(2008) 14 SCC 763	relied on	Para 5
	[2004] 4 Suppl. SCR 380	referred to	Para 5
	[2003] 4 Suppl. SCR 978	referred to	Para 5
F	[2013] 10 SCR 196	relied on	Para 7
	(2005) 6 SCC 211	referred to	Para 16

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2393 of 2010.

- G From the Judgment and Order dated 11.05.2010 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 615 of 2002.

Rana Ranjit Singh, Vivek Kumar Singh, Ravish Singh, Advs. for the Appellant.

- H Abhinav Mukerji, AAG, Siddharth Garg, Ms. Bihu Sharma, Advs. for the Respondent.

The Judgment of the Court was delivered by A

K. M. JOSEPH, J.

1. This is a criminal appeal by special leave challenging the order dated 11.5.2010 passed by the High Court of Himachal Pradesh at Shimla in Criminal Appeal No.615 of 2002 affirming the conviction of the appellant under Sections 376 and 506 of the Indian Penal Code. In short, the case of the prosecution is as follows:

In December, 1999, the appellant committed rape upon P.W.2. It is also the further case that P.W.2 was intimidated by the appellant and another co-accused. The appellant was charged under Sections 376 and 506 IPC read with Section 34 of the Indian Penal Code and co-accused was charged under Section 506 read with Section 34 of the IPC. The trial Court found the case in favour of the prosecution and after convicting the appellant and co-accused sentenced the appellant to simple imprisonment for 7 years and a fine of Rs.10,000/- with default sentence for the offence punishable under Section 376 of the IPC. He was also sentenced for 2 years for the offence punishable under Section 506 IPC. Both the sentences were to run concurrently. The co-accused stands acquitted by the High court whereas the appeal filed by the appellant was unsuccessful.

2. We heard learned counsel for the parties. The learned counsel for the appellant would point out that PW2, the prosecutrix was above the age of 16 years. Learned counsel for the appellant would seek to extricate the appellant from culpability on the score that the case of the prosecutrix is based on the FIR which is lodged 7 months after the alleged commission of the rape. There is delay of 7 months in lodging the FIR just as in the case of *Vijayan v. State of Kerala* 2008 (14)SCC 763. In this case also the prosecutrix was pregnant at the time of filing the complaint. The FIR was filed on 17.7.2000. whereas the incident is alleged to have taken place in December, 1999. He points out that it is allegedly filed after the prosecutrix told PW1 who accompanied her to Deputy Commissioner Office, Chamba. It is pointed out that according to the prosecution on 17.7.2000 when she came to Chamba to get medicines, she allegedly disclosed the incident to PW1 and appellant has been implicated thereafter. It is the case of the appellant that P.W.1 is a resident of the same village and that P.W.1 has spoken about having met the prosecutrix even earlier but nothing about the alleged rape was disclosed.

- A 3. Per contra, the learned counsel for the respondent-State would point out that there was ample evidence in the form of testimony of the prosecutrix. Besides that learned counsel also drew our attention to the evidence of PW4 before whom the appellant himself made an extra judicial confession. So also attention was drawn to the evidence of PW5.
- B 4. PW5 has also deposed that the appellant requested him with folded hands for compromise as he has committed wrong with PW2, the prosecutrix and he wanted to keep her and her child as his own.
- C 5. The first question we have to consider is the impact of delay of nearly 7 months in lodging the complaint with the police. The appellant seeks support mainly from the judgment of this Court in the case of *Vijayan v. State of Kerala* 2008 (14)SCC 763. The High court in the impugned judgment has on the other hand relied upon the judgment of this Court reported in *State of Himachal Pradesh v. Shree Kant Shekari* AIR 2004 SC 4404. Therein, this Court has essentially relied upon the principles about the impact of delay as noticed by it in the judgment of this Court in *Tulshidas Kanolkar v. State of Goa* reported in 2003 (8) SCC 590 wherein rape was committed on a girl whose mental ability was undeveloped. This is what the court had to say about the fact of delay.
- E “.....In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay.
- F Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of the first information report does not in any way render prosecution version brittle.”
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6. In *Vijayan case* (supra) the prosecutrix who was aged about 17 years was the neighbor of the accused. In her testimony the prosecutrix set up the case that accused has raped her when no one else was there in the house and she was raped in the house. The accused-appellant was alleged to have been told that she need not worry as he will marry her. She did not give any complaint either to her parents and police in view of the promise. She became pregnant and while she was carrying a child of 7 months, she requested the accused to marry her. The accused declined. Thereafter a complaint was filed after 7 months. On these facts this court noted that no complaint or grievance was made either to the police or the parents thereto. The explanation for delay in lodging the FIR was noted namely that the accused promised to marry her and therefore the FIR was not filed. The Court held as follows:

“.....In cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR it will be very hazardous to convict on such sole oral testimony. Moreover, no DNA test was conducted to find out whether the child was born out of the said incident of rape and that the appellant-accused was responsible for the said child. In the face of lack of any other evidence, it is unsafe to convict the accused.”

7. In the case of *Kaini Rajan v. State of Kerala* reported in 2013 (9) SCC 113, on 17.9.1997 at about 8.30 a.m. it was alleged the prosecutrix was raped at a site which was by the side of a public road. It was the case of the prosecutrix that she tried to make hue and cry but was silenced by the accused by stating that he would marry her. Even after this incident he had sexual intercourse on more than one occasion. The prosecutrix became pregnant, gave birth to a child and accused did not keep his promise to marry her. It is thereafter that on 26.7.1998 nearly 10 months after the alleged rape that a case was registered. This Court referred the *Vijayan's case* (supra), took note of the place being on the

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- A side of a public road, the aspect of delayed filing of the report and also the behavior of the parents of the prosecutrix in not approaching the family members of the accused for marrying the prosecutrix and instead lodging the report. The Court also found that having regard to the site, if the prosecutrix has made any resistance or made hue and cry it would have attracted large number of people from the locality. The appeal filed by the accused was allowed.
8. It is in the background of the aforesaid principle that we must examine the question. P.W. 2 prosecutrix has undoubtedly stated that her parents had died and she was left without any brother and sister.
- C She was brought up by her uncle and aunt. She studied upto 9th class.
- C On 5.12.1999 while she was coming back at about 5-6 p.m. the appellant who is also the resident of the same village and who is related to her as brother in village relation caught hold of her and started dragging her towards the lonely place in the bushes and committed rape. She raised hue and cry but nobody was there at the place of occurrence. The
- D appellant showed her knife and threatened her to do away with her life in case she disclose the incident to anybody. She stated that she was so frightened and ashamed due to which she did not disclose the incident to anyone. After staying with her maternal grandmother when she came back she knew about becoming pregnant. Her aunt enquired about her womb looking bigger and she told her about the incident. Aunt sent her to the home of her maternal grandmother. The incident came to be disclosed by her aunt to P.W.4 who is also maternal uncle of the prosecutrix. A ‘baradari’ was called. She was also present. The appellant though called, did not appear. On 9.7.2000, persons including P.W.4 and appellant came there and the latter told her that he is prepared
- F to take her and child to accompany him and that he would get her and her child recorded as his wife and child. She accompanied the appellant by making to understand by matrimonial uncle P.W.4. She stayed there for one day and two nights. It is thereafter the accused refused to keep her at his house and the co-accused also threatened that they will not keep her in the house and nor would get the child recorded. In short, she
- G was turned out. She stated that she requested the accused not to turn her out as she was pregnant. On 17.7.2000 when she came to Chamba for getting the medicines, she met P.W.1 the person whom she described as brother and she told him the whole incident. She also asked to get the matter reported at the police. It is thereafter that the complaint was lodged. She states in her cross examination that it is correct that the

path is a common village path and people used to pass through the said path. She stated there was none at that time. She would say that it is correct that the labourers used to go their house after finishing their labour work. She made cries at the time when the accused caught hold of her by showing a knife. She stated that she had gone to the house of appellant of her own free will. She volunteered to say that the accused-appellant had giving assurance that she is his wife and was carrying his child in her womb. She disclosed that she told her grandmother about the rape and that she was turned out by the uncle. The grandmother (Nani) told her to go to the house of the accused-appellant. It was out of fear that she did not disclose to anyone. She states that P.W.1 met her for the first time at Chamba and the incident was also disclosed to him for the first time. She admits knowing the accused since her childhood but denied having either played with him or studied with him. She states that when she went to the house of the appellant, she slept with him during the night. She stated that she had told the petition writer that the appellant took her forcibly at the point of knife and threatened to kill her with the same. She was confronted with the petition wherein it was not so recorded. In the petition to the police also it is her statement she has stated so but it was found not recorded.

9. We may also notice also the deposition of P.W.1 to whom according to her, she disclosed for the first time in July, 2000 and with whom she lodged a complaint. He stated that it was disclosed by her to him that the appellant committed rape when she was coming back to her house after purchasing medicines. He admits that the uncle of the prosecutrix is alive and he has not lodged any complaint. He admits that village Dugli to which place prosecutrix had gone in December, 1999 to purchase article is scattered within a radius of one kilometer. He would say that he got drafted in Exhibit P.A. that prosecutrix had disclosed to him that the appellant had threatened her with knife/dagger in case she disclosed the incident to anyone. He stated that this fact was not got drafted in Exhibit P.A.

10. P.W.3 is not only married to uncle of the prosecutrix but is also the elder sister of her own mother. She has *inter alia* stated that when PW.2 after staying at her maternal grandmother's house for 3 months and thereafter after coming back after 21/22 days, on noticing that her womb was getting bigger and on her being questioned about it, she disclosed what happened in December, 1999 namely, the rape

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- A committed by the appellant. She also stated that out of fear as well as feeling ashamed this was not disclosed to anyone. Again, PW 2 was sent back to her maternal grandmother's house who is none other than the mother of PW 3. At that time PW 2 was six months pregnant. PW 3 would further state that Rattan Chand (who was in fact examined as PW 4) who is maternal uncle of the prosecutrix and who is having in laws in her village visited her house. She claims to have thereupon disclosed about the rape to him. The prosecutrix was thereupon called back from her maternal grandmother's house. A baradari was called. The appellant did not attend. Thereafter she speaks about her coming to know that prosecutrix went with the appellant and stayed with him
- B laws in her village visited her house. She claims to have thereupon disclosed about the rape to him. The prosecutrix was thereupon called back from her maternal grandmother's house. A baradari was called. The appellant did not attend. Thereafter she speaks about her coming to know that prosecutrix went with the appellant and stayed with him
- C and was turned out later on. In Cross Examination she would state that the prosecutrix was carrying pregnancy of 6 months when the baradari meeting was called. She disclaims knowledge of the outcome in the meeting. She admits that the stomach would start bulging out in 4 months pregnancy. In further cross she would state that prosecutrix continued for 15 days at her house after the disclosure about carrying the child of the appellant and thereafter she went to maternal grandmother's house. She admits that she and her husband (namely, uncle of prosecutrix) did not lodge any report either with the Pradhan or the Police. The prosecutrix was brought up by them from the age of about 2 ½ years. In regard to the path she denied that there is only path in between Bhogi
- D and Dugli village. She states there are two to three other paths. She, however, admits that this path is a common path.

11. PW 4 Rattan Chand however, has a different version about how he came to know about the matter. He would state that prosecutrix is related to him. On 5.7.2000 she came to his house at village Panjah.
- F On inquiry about her womb being bigger than normal she told him about the forcible sexual intercourse committed by the appellant in December, 1999 and about her being threatened with the help of a knife not to disclose it to anyone. He further states two days thereafter, namely on, 7.7.2000 he came to the house of his in-laws in village Bhoga and this fact was disclosed to the Panchayat member Bhola Ram who suggested a 'Baradari' meeting. In the said baradari meeting Loki Nand, Kishan Chand, Balo Ram and the prosecutrix was also there. As the appellant and his family members did not attend the meeting, the meeting could not take place. He further states that it was subsequently decided to report to the matter to the Police. Two days thereafter, namely, on H 9.7.2000 at about 9/10 p.m., appellant and, PW 5 came to his father-in-

law. They wanted to have special talk with him. It is thereupon that he says that the appellant requested him with folded hands that since he was the maternal uncle of the prosecutrix that he has committed wrong with her by committing forcible sexual intercourse due to which she became pregnant and the foetus in her womb belongs to him. He wanted to take the prosecutrix to his house and wanted to keep her as his wife and also unborn child and to get them recorded in the Panchayat Register if they were ready to send her as his wife. Under compelling circumstances and having no other way it was decided to send the prosecutrix as his wife. The prosecutrix was not ready to go as his wife but she was made to understand and then she went to the house of the accused-appellant. She was taken on the same night. She stayed for one day and two nights. Then she was turned out. In cross examination he states that he did not report the matter to any authority when the prosecutrix disclosed the incident to him. After 'baradari' meeting the prosecutrix started living with her Nani. He further states that the accused-appellant visited his house on 5.7.2000 and at that time Sahib Singh (PW 5), Khelku Devi and the prosecutrix was also present. The appellant was accompanied by PW 5.

12. He admits that his statement was recorded by the police. He states that he did not state to the police that the prosecutrix told him that the appellant had met her on the way and that he had committed forcible sexual intercourse with her.

He further states as follows:

"It is correct that I have not stated the aforesaid facts to the Police as it was not disclosed to me by the prosecutrix".

No doubt, thereafter it is found that he states as follows:

"I have not stated to the Police that the Prosecutrix told me that the appellant took her to the bushes on the point of knife on the pretext that the prosecutrix had already stated the said fact to the police".

13. In his deposition P.W.5 would state that on 9.7.2000 at about 8.00 p.m. while he was coming back, the appellant and the co-accused met him. The appellant requested him with folded hands by taking him into a side and told him that compromise be got effected with the prosecutrix because he has committed wrong with her and the child in her womb is his offspring. However, in cross examination he would state as follows:

- A "Witness Rattan Chand told me that the accused person want to effect compromise with the prosecutrix. Accused Prakash Chand had no talk with me regarding the aforesaid fact. Similarly, no talk took place with me and accused Chakknu on the said fact. It is correct that Rattan Chand told me about the compromise by the accused person with the prosecutrix."
- B 14. There is admittedly a delay of 7 months in lodging the FIR in the case of alleged rape. If the case is reported immediately apart from the inherent strength of the case flowing from genuineness attributable to such promptitude, the perceptible advantage would be the medical examination to which the prosecutrix can be subjected and the result of
- C such examination in a case where there is a resistance. It is the case of the prosecution that she raised hue and cry and therefore apparently she would have resisted. Possibly, a medical examination may have revealed signs of any resistance or injuries. In this case the High Court has proceeded on the basis of testimony of the prosecutrix and sought to
- D fortify it by the extra judicial confession made before PW4 and PW5.
- E 15. As far as PW 4 is concerned, his evidence is based on the prosecutrix going to him on 05/07/2000 and revealing to him what had happened allegedly in December 1999 whereas PW3, the maternal aunt of the prosecutrix clearly says that after prosecutrix told her about the
- F alleged rape and when PW4 came to visit the same village where his in-laws also resides at that juncture on 07/07/2000, the factum of the alleged rape was disclosed to him and he came to know on the said basis. This is a completely different version from what PW4 has spoken. If PW3 is to be believed, then knowledge about the alleged incident was gained by P.W.4 only on 07/07/2000 and that too from PW3 instead he sets up the
- G case that on 05/07/2000 the prosecutrix went to his house and told him about the same. In fact, even the prosecutrix in her version has no such case. Rather, the prosecutrix would say that the incident was disclosed by P.W.3 to P.W.4. This completely falsifies the version of P.W.4 that on 5.7.2000 the prosecutrix went and told him about the incident including
- H about the threat of using the knife. P.W.4 as we have noted in further cross examination would state that he did not tell the police on the basis that she had not told him about it. This would again show that version of P.W.4 that prosecutrix had went and told him about the incident, cannot be believed. No doubt, P.W. 4 seeks to state that he did not tell the Police about what the prosecutrix told him thinking that prosecutrix would

have told the police about it. It does not appear to be safe. In such circumstances, it may not be safe to draw support from the alleged extra judicial confession alleged to have been made by the appellant to him. A

16. As far as P.W.5 who again has been believed by the courts, we would notice that in the cross examination he categorically states that the appellant and also co-accused did not ask him for compromise. This is contrary to his version that on the way back to his home on 09/07/2000 he met him and he sought for a compromise. It is also to be noted that PW 4 has stated in his cross examination that PW5 had met him on 05/07/2000 along with the appellant. This is not considered by the courts below. We have indulged in a closer look at the evidence in these proceedings having regard to the need to do so in view of the fact that the complaint itself is lodged after 7 months. If the evidence adduced by the prosecution falls short of the test of reliability and acceptability and as such it is highly unreliable to act upon it even in an appeal by special leave, such a critical examination may not be unwarranted. See D decision of this Court in *Ganga Kumr Srivastava v. State of Bihar* 2005 (6) SCC 211. Also when vital evidence is not appreciated, this Court can interfere. Furthermore, we notice that the trial court, in fact, proceeded on the basis that the prosecutrix was not a minor. The High Court finds on evidence that the prosecutrix was not a minor. Moreover, we notice that the High court has found as follows: E

“16.On 18-8-2000, the prosecutrix was again brought and was examined by him and the pregnancy of approximately 36 weeks was detected. There is nothing in the MLC that the prosecutrix was habitual of sexual intercourse.....”. F

However, we find in Exhibit PE which is the MLC dated 18/08/2000, it is clearly stated under the head ‘opinion’ as follows:

“The pt. is used to habitual sexual intercourse”

17. If we do not place confidence in the deposition of PW4 and PW5 then the case would depend upon the credibility of PW2, the prosecutrix. The incident is alleged to have taken place near a path which has been admitted by the prosecutrix and her aunt PW3 as common path. If indeed the prosecutrix has raised hue and cry as in the case reported in 2013 (9) SCC 113, it is very unlikely that the labourers who are supposed to haunt the common path could not hear it. There is a G H

- A case of the appellant that the evidence would make out a case of consensual sex. It is true that in the High Court, it is recorded that there is no case of consensual sexual intercourse as such argued but we have to decide the case on the basis of evidence. We would think in the circumstances of this case that the appellant cannot be convicted for the offence under Section 376. It would indeed be unsafe to convict him based on the testimony of the prosecutrix. He would certainly be entitled to the benefit of doubt which is created by the very circumstances which we have referred.

18. As far as the charge against the appellant under Section 376 IPC is concerned, it reads as follows:

- C "That in the month of December 1999 at about 5/6 PM at village Bhoga, you committed rape upon Kumariat a place one kilometer away from Dugli towards Bhoga and thereby committed an offence punishable under Section 376 IPC and within my cognizance;
- D And I hereby direct you accused be tried on the said charge by this court."

As far as the charge under Section 506 read with 34 IPC is concerned, it reads as follows:

- E "That on 10.7.2000 at village Bhoga, you alongwith your co-accused in furtherance of common intention, criminally intimidated Kumarito do away with her life and thereby committed an offence punishable under Section 506 IPC read with Section 34 IPC and within my cognizance;
- F And I hereby direct you accused be tried on the said charge by this Court."

19. The trial Court, in fact, has proceeded to rely upon the testimony of prosecutrix about the appellant threatening her that in case she discloses the incident to anyone she will be killed by the accused. This apparently is related to the incident in December, 1999. In fact, the appellant was specifically charged with criminal intimidation allegedly done on 10/07/ 2000. The appellant was so charged in alleged furtherance of common intention along with co-accused. The trial Court has also proceeded to convict the co-accused relying on the evidence of the prosecutrix. The High Court has acquitted the co-accused of the charge of criminal

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intimidation. We have noted that there is no specific charge even framed against the appellant under Section 506 in regard to the alleged incident which took place in December, 1999 and the charge in fact relates only to the acts alleged to have been committed on 10/07/2000. Apart from the fact that there is no specific charge against the appellant in regard to what happened in December, 1999, we are inclined to think that the appellant could not be convicted under Section 506 having regard to the circumstances which we have already discussed hereinbefore.

20. In such circumstances, the appeal is allowed. We set aside the order of conviction and sentence of the appellant by the courts below. As the appellant is on bail, the bail bonds of the appellant stands discharged.

Ankit Gyan

Appeal allowed.

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