Jai Bhagwan vs State (Govt. Of N.C.T. Delhi) on 30 October, 2018

Author: R. Banumathi

Bench: Indira Banerjee, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2299 OF 2009

STATE (GOVT. OF NCT OF DELHI) ….Appellan

VERSUS

PANKAJ CHAUDHARY AND ORS. ….Respondents

With

CRIMINAL APPEAL NO.2298 OF 2009

JUDGMENT

R. BANUMATHI, J.

These appeals arise out of the judgment dated 05.05.2009 passed by the High Court of Delhi in Criminal Appeal No.384 of 2000 in and by which the High Court allowed the appeal filed by the respondents/accused thereby setting aside their conviction under Section 376(2)(g) IPC passed by the trial court and the sentence of imprisonment imposed upon them. By the impugned judgment, the High Court also issued direction to lodge a complaint against the appellants-police officials (CA No.2298/2009) for prosecuting them under Sections 193 and 195 IPC.

2. Case of prosecution is that the accused/respondents who were living in the neighbourhood of the prosecutrix (PW-1) at Shaheed Bhagat Singh Jhuggi Camp, Katwaria Sarai, entered her jhuggi at about 09.00 PM on 28.07.1997 and demanded a bidi from her. She refused to give them any bidi. Thereafter, they demanded water which she again refused. The prosecutrix has alleged that thereafter respondents/accused switched off the electricity and accused/respondent No.2 Gunjesh Chaudhary caught hold of her hands and the other three accused had torn her clothes and committed rape on her in turn. The prosecutrix has alleged that she raised an alarm and fell unconscious thereafter. On hearing the alarm, Bashira Khatoon, mother of the prosecutrix (PW-3) came there and saw the four accused/respondents coming out of the jhuggi. Bashira Khatoon (PW-3) found the prosecutrix lying unconscious inside the jhuggi. Police Control Room (PCR) van

took the prosecutrix to All India Institute of Medical Sciences (AIIMS) hospital. At about 11.45 PM, the prosecutrix was medically examined by Dr. Monika and it was noted in MLC (Ex.-PW6/A) that there were "bruises of 4 x 4 cm on medial aspects of both thighs of the prosecutrix". The blouse of the prosecutrix was found torn in the back side along the left sleeve.

3. At about 09.30 PM, information was received in the Police Station, Hauz Khaz PCR/South District regarding some quarrel at Shaheed Bhagat Singh Jhuggi. SI Jai Bhagwan (PW-7) along with Constable Khushi Ram (PW-4) reached the spot and learnt that the prosecutrix was taken to the hospital by a PCR Van. SI Jai Bhagawan (PW-7) along with the constable went to the AIIMS and found PW-1 Phoola (Prosecutrix) there. Doctor declared PW-1 fit to make statement and SI Jai Bhagwan recorded her statement concerning allegations of rape by the accused/respondents. The statement of the prosecutrix was recorded at 02.30 AM on 29.07.1997 and ruqqa for registration of the case under Section 376 IPC was sent at 02.50 AM. A case under FIR No.559/97 under Section 376 IPC read with Section 34 IPC was registered at 03.15 AM on 29.07.1997.

4. On the date of incident i.e. 28.07.1997 at about 11.45 PM, the prosecutrix was medically examined by Dr. Monika. It was noted in the MLC (Ex.-PW6/A) that there were bruises of 4 cm x 4 cm on the medial aspects of both the thighs of the prosecutrix. The blouse was torn along the back of the left sleeve and at the time of preparing the MLC (Ex.-PW6/A); the clothes of prosecutrix could not be sealed since she did not have spare clothes. Later her petticoat was collected and sent for chemical examination. Upon completion of investigation, charge sheet was filed against the accused/respondents.

5. Charges were framed against the accused/respondents under Section 376(2)(g) IPC to which they pleaded not guilty. To bring home the guilt of the accused, the prosecution examined seven witnesses and exhibited number of documents. The accused/respondents in their statement under Section 313 Cr.P.C. stated that PW-1-Prosecutrix was of bad character and she was indulging in prostitution and they have lodged complaint against her and therefore, they have been falsely implicated in the rape case.

6. Upon consideration of evidence of PW-1-Prosecutrix and medical report, forensic report and other evidence, the trial court convicted accused/respondents under Section 376(2)(g) IPC and sentenced each of them to undergo rigorous imprisonment for ten years. Being aggrieved, the accused/respondents filed appeal before the High Court. In the High Court, the accused/respondents filed petition under Section 391 Cr.P.C. for taking additional evidence which was allowed by the High Court. The High Court by the impugned judgment allowed the appeal by setting aside the conviction of the accused/respondents under Section 376(2)(g) IPC. The High Court held that regarding the ladies quarrel at 07.30 p.m. on 28.07.1997 involving sex workers including the prosecutrix at Shaheed Bhagat Singh Jhuggi, FIR No.558/97 was registered and in connection with the said FIR No.558/97, the prosecutrix and other ladies were arrested and that they were in custody with the police till at least 09.30 PM. The High Court therefore doubted the prosecution case in FIR No.559/97 and held that when the prosecutrix and other ladies were in custody with the police between 08.50 PM till 10.00 PM on 28.07.1997, it is quite impossible that the occurrence of rape would have taken place at 09.00 PM on 28.07.1997 as alleged by the

prosecutrix.

7. Based upon the Report of Joint Commissioner (Ex.-DW6/A) and the Report of DCP, the High court directed the Registrar General of the High Court to make a complaint against SI Jai Bhagwan (PW-7), SI Prem Chand (DW-3) and Head Constable Sagar Chand (DW-5) before the concerned court for prosecution for the offences under Sections 193 and 195 IPC. Being aggrieved by the remarks made against them and also the direction to lodge a complaint to initiate prosecution against them, SI Jai Bhagwan (PW-

7), SI Prem Chand (DW-3) and Head Constable Sagar Chand (DW-

5) have preferred Criminal Appeal No.2298 of 2009.

8. The learned Additional Solicitor General Mr. Vikaramjit Banerjee appearing on behalf of appellant Govt. of NCT of Delhi has submitted that the High Court has failed to appreciate the evidence of PW-1-Prosecutrix which is corroborated by the medical evidence and the High Court erred in relying upon the events in FIR No.558/97 and erred in acquitting the respondents/accused. The learned Additional Solicitor General further submitted that the High Court erred in relying upon the report of the Joint Commissioner (Ex.-DW6/A) and other materials produced at the time of arguments and the High Court ought not to have proceeded on presumption and conjectures and erred in not appreciating the evidence and materials placed on record.

9. The learned senior counsel Mr. Mukul Gupta and Mr. Sanjay R. Hegde appearing for the appellants-police have taken us through the evidence and other materials and submitted that the police officials have correctly investigated the case and without giving an opportunity of hearing, the High Court was not right in passing disparaging remarks against the police officials and issuing directions to lodge a complaint against the appellants-police officials to initiate the prosecution under Sections 193 and 195 IPC which have very serious consequences and impact on their official career.

10. Though the accused initially engaged a lawyer, in later hearings of the appeal, they were not represented. Mr. Praveen Chatruvedi was nominated as the counsel for the respondents through Supreme Court Legal Services Committee who made meticulous submissions. Contention of the respondents/accused is that PW-1-Prosecutrix was in custody of police between 08.50 PM to 10.00 PM on 28.07.1997 in connection with FIR No.558/97 under Section 160 IPC and therefore, the alleged offence of gang rape (FIR No.559/97) could not have been committed by the respondents/accused in the manner alleged. It is the contention of the respondents/accused that the police and prosecutrix have conspired a plot of false rape case implicating the respondents and the High Court rightly acquitted the accused/respondents and directed to initiate action against the police.

11. We have carefully considered the submissions of the respondents/accused and also the appellant/police officials and perused the impugned judgment and materials on record.

12. PW-1-Prosecutrix has spoken about the occurrence of rape committed on her that accused/respondent No.2-Gunjesh Chaudhary caught hold of her hands and that other three accused namely Pankaj Chaudhary, Qasim and Jai Lal Yadav had torn her blouse and committed rape on her and that she raised alarm and then her mother came there and the accused persons ran away. Upon consideration of evidence of the prosecutrix, the trial court held that there is no reason to disbelieve the statement of prosecutrix where it is sufficiently corroborated by the statement of Bashira Khatoon, mother of prosecutrix (PW-3) who saw the accused leaving the jhuggi and identified two of them in the court.

13. Evidence of the prosecutrix is corroborated by the MLC (Ex.-PW6/A). Dr. Monika who examined the prosecutrix noted in MLC (Ex-PW6/A) that "the blouse of the prosecutrix was found to be torn along the back of the left sleeve and bruises measuring 4 × 4 cm were found on her both thighs".

14. Contention of the respondents is that when the prosecutrix was forcibly held by the accused and gang raped, in all probability, the prosecutrix must have sustained external injuries and absence of external injuries raises serious doubts about the prosecution version. The submission of the accused/respondents that the prosecutrix was not injured, was belied by the presence of bruises measuring 4 × 4 cm on the medial aspects of both the thighs. The blouse was torn along the back of left sleeve and such injuries were possible by use of force. Further, the version of the prosecutrix is corroborated by MLC(Ex.-PW6/A) and that the injuries found could be possible by use of force. In any event, absence of external injuries does not tantamount to consent nor does it discredit the version of prosecutrix.

15. The evidence of the prosecutrix is also corroborated by FSL Report (Ex.-PW7/G) which shows presence of human semen (Ex.-

1) on the petticoat of the prosecutrix. As per the FSL Report (Ex.- PW7/G), blood was detected on Exhibits 3S1 (gauze cloth piece having brown stains labelled 'Pankaj'); 3S2 (gauze cloth piece having brown stains labelled 'Qasim'); and 3S3 (gauze cloth piece having brown stains labelled 'Jai Lal'). The result of the biological report reads as under:-

Exhibits	Species of Origin	ABO Group Remarks
3S1 (gauze cloth piece having stains labelled 'Pankaj')	brown	Inconclusive
3S2 (gauze cloth piece having stains labelled 'Qasim')	brown	Inconclusive
3S3 (gauze cloth piece having stains labelled 'Jai Lal')	brown	'B' Group
Semen Status (Ex.-1-petticoat prosecutrix)	of the	'B' Group

The presence of semen status of 'B' group on the petticoat of the prosecutrix which matches with the blood 'B' group of accused Jai Lal (3S3) corroborates the version of the prosecutrix. Of course, the Serology Report on Exhibits 3S1 (gauze cloth piece having brown stains labelled 'Pankaj'); 3S2

(gauze cloth piece having brown stains labelled 'Qasim') remained inconclusive; probably due to disintegration of the sample. Such disintegration of the sample does not dilute the version of the prosecutrix.

16. The FSL Report (Ex.-PW7/G) was discarded by the High Court primarily on the ground that in MLC (Ex.-PW6/A), it is stated that "the clothes could not be sealed as patient does not have extra clothes" which according to the High Court was inconsistent with the statement of SI Jai Bhagwan (PW-7) that "Duty Constable of the hospital produced before me two sealed parcels containing petticoat and slides which was sent to the FSL". It is pertinent to note that the prosecutrix was examined by the doctor at 11.45 PM on 28.07.1997; whereas SI Jai Bhagwan (PW-7) after getting statement from the doctor as to the fit mental state of prosecutrix has recorded the statement of the prosecutrix at 02.30 AM on 29.07.1997. In her evidence during cross-examination, the prosecutrix has stated that the petticoat that she was wearing at the time of incident was seized by the police. Having regard to the evidence of the prosecutrix, we find no inconsistency between MLC (Ex.-PW6/A) and the statement of SI Jai Bhagwan (PW-7).

17. Drawing our attention to the evidence of prosecutrix who submitted that the prosecutrix regained consciousness only at 10.00 AM on 29.07.1997 and while so SI Jai Bhagwan could not have recorded her statement at around 02.30 AM on 29.07.1997 as stated by him and this again throws serious doubt about the prosecution case. The prosecutrix (PW-1) was examined in the court on 05.11.1999 nearly two years after the occurrence and she might not have been able to recollect the happenings as it is. It is also pertinent to note that SI Jai Bhagwan (PW-7) has enquired the Doctor and the Doctor has declared that prosecutrix was fit to make the statement and only thereafter the statement of prosecutrix (PW-

1) was recorded (Ex.-PW1/A). In the light of the evidence of SI Jai Bhagwan that the Doctor declared the prosecutrix fit to make the statement, there is no merit in the contention of the accused raising doubts about the recording of statement of the prosecutrix at 02.30 AM on 29.07.1997.

18. On the next day i.e., on 29-07-1997 all the accused/respondents were arrested by SI Jai Bhagwan (PW-7) and they were medically examined in the hospital between 11.36 AM to 11.38 AM and the doctor opined that "on clinical examination, there is nothing to suggest that the said accused persons are incapable of performing sexual intercourse". The blood samples and the slide of smear of the accused were also seized and the case property was deposited in the malkhana from where it was sent to FSL. As pointed out earlier, the FSL Report (Ex.-PW7/G) showed that the semen stains were found on the petticoat of the prosecutrix (B group) which matched with the blood group of the accused/respondent No.4-Jai Lal Yadav.

19. It is also relevant to refer to the false explanation of the accused in their statement under Section 313 Cr.P.C. Though the accused have admitted about their medical examination, in their statement under Section 313 Cr.P.C. all the accused have given a false version regarding the manner and time of arrest as after 04.00 PM on 29.07.1997. The statement of the accused that they were arrested only after 04.00 PM on 29.07.1997 is not consistent with the materials placed on record that they were medically examined between 11.36 AM to 11.38 AM on 29.07.1997. The false explanation by the

accused is yet another militating circumstance against them.

20. Further, as pointed out by the trial court, the prosecutrix had no motive to falsely implicate the accused. In their statement under Section 313 Cr.P.C., the respondents/accused have stated that the prosecutrix was of bad character and she was indulging in prostitution regarding which they have lodged complaint against her and they have been falsely implicated in the case. As pointed out by the trial court, nothing was brought on record by the accused to show that they have lodged complaint against the prosecutrix. Mahanand Jha (DW-1) stated that he is the President of the jhuggi area. He further stated that about 7-8 women including the prosecutrix have been indulging in prostitution regarding which he has lodged the complaint. There is nothing on record to suggest that the accused were in any way involved in making such complaints against the prosecutrix and other women. The version that they lodged complaint against the prosecutrix and therefore, they have been falsely implicated in the case, is not substantiated by any record.

21. The High Court observed that the trial court erred in saying that the accused failed to prove the making of previous complaints against the prosecutrix. While saying so, the High Court referred to certain complaints made against the prosecutrix including the one allegedly given on 21.07.1997 which were produced by the Bar at the time of arguments. The power conferred under Section 391 Cr.P.C. is to be exercised with great care and caution. In dealing with any appeal, the appellate court can refer to the additional evidence only if the same has been recorded as provided under Section 391 Cr.P.C. Any material produced before the appellate court to fill-up the gaps by either side cannot be considered by the appellate court; more so, to reverse the judgment of the trial court. As rightly contended by the learned Additional Solicitor General, the High Court has taken into consideration the materials produced by the Bar, namely, complaints allegedly made against the prosecutrix and other women including the one allegedly given on 21.07.1997 just one week prior to the incident. The High Court was not right in taking into consideration those complaints produced at the time of arguments in the appeal.

22. As rightly held by the trial court that even if the allegations of the accused that the prosecutrix is of immoral character are taken to be correct, the same does not give any right to the accused persons to commit rape on her against her consent. In State of Maharashtra and Another v. Madhurkar Narayan Mardikar (1991) 1 SCC 57, it was held that even a woman of easy virtue is entitled to privacy and it is not open to any person to violate her and she is equally entitled to protection of law. Further, the evidence of such a woman cannot be thrown overboard merely because she is a woman of easy virtue.

23. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference like the victim being a woman of 'loose moral character" is permissible to be drawn from that circumstance alone. A woman of easy virtue also could not be raped by a person for that reason. In State of Punjab v. Gurmeet Singh and Others (1996) 2 SCC 384, it was held as under:-

> "16. .....Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to

anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone……"(Emphasis supplied) [Underlining added].

While so, the High Court erred in placing reliance upon the complaints allegedly made against the prosecutrix to doubt her version and to hold that a false case has been foisted against the accused.

24. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu alias Undrya v. State of Maharashtra (2006) 1 SCC 283]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [State v. N.K. The accused (2000) 5 SCC 30]

25. The trial court which had the opportunity of seeing and observing the prosecutrix, found the testimony of the prosecutrix reliable being corroborated by her mother's evidence, medical evidence, FSL report and other circumstances viz. absence of motive for any false implication etc. While so, the High Court ought not to have heavily interfered with the verdict of conviction based on the alleged time gap in the registration of two FIRs and other aspects of investigation in connection with FIR No.558/97 to reverse the verdict of conviction.

26. The High Court reversed the verdict of conviction mainly on the ground of difference of timing in the registration of FIR No.558/97 and other aspects of investigation. At about 08.05 PM, a telephonic information was received vide DD No.67-B at Police Station Hauz Khas regarding a quarrel at Shaheed Bhagat Singh Jhuggi. The specific case of the defence is that the prosecutrix was in police custody in FIR No.558/97 under Section 160 IPC till about 10.00 PM. As per the deposition of SI Prem Chand (DW-3), he reached the spot with one lady constable Ms. Sarla Toppo and Constable Sagar Chandra (DW-5) at around 08:18 PM and found the ladies including prosecutrix quarrelling at public place in their jhuggis and immediately arrested the ladies and conducted investigation and sent the ruqqa with a constable to register the FIR under Section 160 IPC. On receipt of information, FIR No.558/97 at Police Station Hauz Khas was registered at 09.20 PM on 28.07.1997. SI Prem Chand (DW-3) stated about the arrest and search of four women and then released them on bail bonds and he was on the spot up to 08:50 PM.

27. The High Court relied on the statement of Head Constable Ratan Lal (DW-4) that SI Prem Chand (DW-3) has made a telephonic call at 08:52 PM to know the serial number of the case and because the FIR was registered at 09:20 PM, the High Court came to the conclusion that the women involved in the FIR No.558/97 could not have been released before 09:20 PM because one of the bail bonds contain the said FIR number and also held that it is highly unlikely for the police to have completed all the steps referred to above in respect of each of the four women and released them by 08:52 PM and as per the site plan drawn in FIR No.559/97, the distance between the road and

jhuggi is such that it was impossible for the prosecutrix to come back alone and be in her jhuggi at 09.00 PM.

28. The occurrence of rape (FIR No.559/97) was at about 09.00 PM regarding which information was received by the same Police Station Hauz Khas at about 09.30 PM. SI Jai Bhagwan (PW-7) along with constable Khushi Ram (PW-4) reached the spot and learnt that the prosecutrix was taken to hospital by PCR Van. Thereafter, SI Jai Bhagwan (PW-7) along with constable Khushi Ram (PW-4) went to AIIMS and found the prosecutrix there and he recorded her statement at 02.30 AM on 29.07.1997 after getting the certificate from the doctor. Ruqqa for registration of the case under Section 376 IPC was sent at 02.50 AM and case under FIR No.559/97 under Section 376 IPC read with Section 34 IPC was registered at 03.15 AM on 29.07.1997.

29. After referring to the timings of FIR No.558/97, the High Court held that the quarrelling ladies including the prosecutrix were in custody of the police at least till 08.50 PM and it was highly improbable that the prosecutrix could have come back and was alone in her jhuggi at 09.00 PM on 28.07.1997 and that the respondents/accused entered her jhuggi and committed rape as alleged by her and that even before 09.30 PM, she was picked up from there by PCR Van. The High Court therefore concluded that SI Jai Bhagwan, constable Khushi Ram (PW-4) and the prosecutrix (PW-1) have fabricated false case against the accused. In this regard, the High Court relied upon the Report of Joint Commissioner dated 07.11.2000 (Ex.-DW6/A) and the Report of S.K. Gautam, DCP.

30. The reasoning of the High Court that the ladies were arrested in connection with FIR No.558/97 under Section 160 IPC and that the ladies must have remained with the custody of police till 09.20 PM proceeds on presumptive footing and surmises. In his evidence, Mahanand Jha (DW-1) has stated that "the said ladies came back to the area at 08.30 PM and started abusing the neighbourers". Likewise, Sharabuddin (DW-2) has stated that "the police released the said ladies including Phoola (PW-1) and after coming back to her jhuggi, she started abusing the neighbours. Then, I informed PCR Van on telephone and PCR Van came and took Phoola.....". The High Court failed to appreciate the testimonies of DWs 1 and 2 who have categorically stated that the prosecutrix had come back and was abusing neighbours. The evidence of DWs 1 and 2 clearly shows that the prosecutrix was let out by the police at or about 08.20 PM on 28.07.1997. Mere fact that FIR No.558/97 under Section 160 IPC was registered at 09.20 PM does not indicate that the prosecutrix and other quarrelling ladies were in the police custody till 09.30 PM on 28.07.1997 (with respect to the offence in FIR No.558/97).

31. There were two sets of persons and two sets of officers are involved in FIR No.558/97 and FIR No.559/97. The aspect regarding FIR No.558/97 was not put to the witnesses even before the trial court. Everything was brought about in appeal as additional evidence in exercise of the power of the appellate court under Section 391 Cr. P.C. Placing of heavy reliance by the High Court upon the contents in FIR No.558/97 was not a correct approach.

32. Unfortunately, the High Court was swayed by the Departmental Enquiry Report (Ext.-DW6/A) prepared by Joint Commissioner of Police that was brought on record by Constable Dharamvir Singh (DW-6). Going through the entire report, we observe that the departmental enquiry was

primarily based on the diary entries and the statements of one complainant Amod Shastri and statement of ASI Kamal Dev. In the report, Joint Commissioner of Police, inter-alia concluded that the rape incident could not have happened at 09.00 PM while SI Prem Chand (DW-3) indicated that quarrelling ladies including the prosecutrix were released at 08.50 PM. It is pertinent to note that neither S.K. Gautam, Deputy Commissioner of Police was examined nor the said complainant Amod Shastri and ASI Kamal Dev were examined. Yet the High Court relied on it to come to a conclusion that the rape incident could not have happened at the alleged time and manner.

33. ASI Kamal Dev who took the prosecutrix to the hospital in PCR Van is said to have made the statement before the Deputy Commissioner of Police stating that when he questioned the prosecutrix, she was conscious and that she told him that she had been beaten up and has not stated anything about the alleged incident of rape. In our view, the High Court was not right in placing heavy reliance upon the report of the Joint Commissioner and the report of Deputy Commissioner who were not examined before the court.

34. Based upon the report of Joint Commissioner of Police (Ex.- DW6/A) and the report of S.K. Gautam, DCP, the High Court made disparaging remarks against the police officials and directed prosecution against the police under Sections 193 and 195 IPC. The police officials were neither party nor summoned by the High Court before making such disparaging remarks and giving directions against them in the appeal against the conviction. On behalf of the police officials, it is submitted that the conclusions drawn by the High Court are based on mere surmises and presumptions. The High Court further relied on the Departmental Enquiry Report (Ex.- DW6/A) which was not put to test and the maker of the report was not examined which therefore has no evidentiary value in the eyes of law.

35. While passing disparaging remarks against the police officials and directing prosecution against them, in our considered view, the High Court has failed to bear in mind the well settled principles of law that should govern the courts before making disparaging remarks. Any disparaging remarks and direction to initiate departmental action/prosecution against the persons whose conduct comes into consideration before the court would have serious impact on their official career. In S.K. Viswambaran v. E. Koyakunju and Others (1987) 2 SCC 109, this Court held as under:-

> "9. Stung by the remarks made against him without even a hearing.....".
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> 13. We have also to point out a grievous procedural error committed by the High Court. Even assuming for argument's sake that for expunging the remarks against Respondents 2 and 3 the conduct of the appellant required scrutiny and merited adverse comment, the principles of natural justice required the High Court to have issued notice to the appellant and heard him before passing adverse remarks against him if it was considered necessary. By its failure the High Court has failed to render elementary justice to the appellant.
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> 14. .....In State of U.P. v. Mohd. Naim AIR 1964 SC 703, it was held as follows:

"If there is one principle of cardinal importance in the administration of justice, it is this: the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this Court. At the same time, it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve." This ratio has been followed in R.K. Lakshmanan v. A.K. Srinivasan and Another (1975) 2 SCC 466 and Niranjan Patnaik v. Sashibhusan Kar and Another (1986) 2 SCC 569 (to which one of us was a party). Judged in the light of the above tests, it may be seen that none of the tests is satisfied in this case. It is indeed regrettable that the High Court should have lightly passed adverse remarks of a very serious nature affecting the character and professional competence and integrity of the appellant in purported desire to render justice to Respondents 2 and 3 in the petition filed by them for expunction of adverse remarks made against them." [Underlining added].

36. In Manish Dixit and Others v. State of Rajasthan (2001) 1 SCC 596, this Court held as under:-

"42. .....Such disparaging remarks and the direction to initiate departmental action against him could have a very serious impact on his official career.

43. Even those apart, this Court has repeatedly cautioned that before any castigating remarks are made by the court against any person, particularly when such remarks could ensure serious consequences on the future career of the person concerned, he should have been given an opportunity of being heard in the matter in respect of the proposed remarks or strictures. Such an opportunity is the basic requirement, for, otherwise the offending remarks would be in violation of the principles of natural justice. In this case such an opportunity was not given to PW 30 (Devendra Kumar Sharma). (State of U.P. v. Mohd. Naim AIR 1964 SC 703, Ch. Jage Ram, Inspector of Police and Another v. Hans Raj Midha (1972) 1 SCC 181, R.K. Lakshmanan v. A.K. Srinivasan and Another (1975) 2 SCC 466, Niranjan Patnaik v. Sashibhusan Kar and Another (1986) 2 SCC 569 and State of Karnataka v. Registrar General, High Court of Karnataka (2000) 7 SCC 333)." [Underlining added] Since the High Court has passed strictures against the police officials who were involved in the investigation in FIR No.559/1997 without affording an opportunity of hearing to them, the disparaging

remarks are liable to be set aside.

37. Insofar as the direction to initiate the prosecution under Sections 193, 195 and 211 IPC is concerned, Section 340 Cr.P.C. provides the procedure for offences enumerated in Section 195(1)

(b) Cr.P.C. The object of Section 340 Cr.P.C. is to ascertain whether any offence affecting administration of justice has been committed in relation to any document produced or evidence given in court during the time when the document or evidence was in custodian legis and whether it is also expedient in the interest of justice to take such action as required under Section 340 Cr.P.C.

38. Before directing the prosecution to be initiated under Section 195 Cr.P.C., the court has to follow the procedure under Section 340 Cr.P.C. and record a finding that "it is expedient in the interest of justice.....". Though wide discretion is given to court under Section 340 Cr.P.C., the same has to be exercised with care and caution. To initiate prosecution under Section 195 Cr.P.C too readily that too against the police officials who were conducting the investigation may not be a correct approach. Contention of the learned counsel for the police officials is that before passing the direction to initiate the prosecution for the offences under Sections 193, 195 and 211 IPC, the High Court ought to have followed the procedure contemplated under Section 340(1) Cr.P.C.

39. Section 340(1) Cr. P.C. reads as under:-

> 340. Procedure in cases mentioned in Section 195 – (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in Clause (b) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary-
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> (a) record a finding to that effect;
>
> (b) make a complaint thereof in writing;
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> (c) send it to a Magistrate of the first class having jurisdiction;
>
> (d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-

bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

There are two preconditions for initiating proceedings under Section 340 Cr. P.C. :

> (i) materials produced before the court must make out a prima-facie case for a complaint for the purpose of inquiry into an offence referred to in clause (b)(i) of sub-section (1) of Section 195 Cr.P.C. and
>
> (ii) it is expedient in the interests of justice that an inquiry should be made into the alleged offence.

40. Observing that the court has to be satisfied as to the prima- facie case for a complaint for the purpose of inquiry into an offence under Section 195(1)(b) Cr.P.C., this Court in Amarsang Nathaji as himself and as karta and manager v. Hardik Harshadbhai Patel and Others (2017) 1 SCC 113 held as under:-

> "6. The mere fact that a person has made a contradictory statement in a judicial proceeding is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340(1) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See K.T.M.S. Mohd. and Another v. Union of India (1992) 3 SCC 178). The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case.
>
> 7. In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a prima facie satisfaction of the offence which appears to have been committed.

It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 CrPC has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See Pritish v. State of Maharashtra and Others (2002) 1 SCC 253)

8. In Iqbal Singh Marwah and Another v. Meenakshi Marwah and Another (2005) 4 SCC 370, a Constitution Bench of this Court has gone into the scope of Section 340 CrPC. Para 23 deals with the relevant consideration:

> "23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)

> (b), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint." The same principle was reiterated in Chintamani Malviya v. High Court of Madhya Pradesh (2018) 6 SCC 151.

41. It has been consistently held by this Court that prosecution for perjury be sanctioned by the courts only in those cases where perjury appears to be deliberate and that prosecution ought to be ordered where it would be expedient in the interest of justice to punish the delinquent and not merely because there is some inaccuracy in the statement. In Chajoo Ram v. Radhey Shyam and Another (1971) 1 SCC 774, this Court held as under:-

> "7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge. In the present case we do not think the material brought to our notice was sufficiently adequate to justify the conclusion that it is expedient in the interests of justice to file a complaint. The approach of the High Court seems somewhat mechanical and superficial: it does not reflect the requisite judicial deliberation...."

42. By perusal of the impugned judgment of the High Court, we find that the High Court has not recorded a finding that "it is expedient in the interest of justice to initiate an inquiry into the offences punishable under Sections 193 and 195 IPC against the police officials and under Section 211 IPC against the prosecutrix". Without affording an opportunity of hearing to the police officials

and based on the materials produced before the appellate court, the High Court, in our view, was not right in issuing direction to the Registrar General to lodge a complaint against the police officials and the said direction is liable to be set aside.

43. The High Court erred in brushing aside the evidence of the prosecutrix by substituting its views on the basis of submissions made on the sequence of events in FIR No.558/97 and the report of the Joint Commissioner of Police (Ex.-DW6/A) and the report of the Deputy Commissioner of Police. The High Court erred in taking into consideration the materials produced before the appellate court viz., the alleged complaints made against the prosecutrix and other women alleging that they were engaged in prostitution. Even assuming that the prosecutrix was of easy virtue, she has a right of refuse to submit herself to sexual intercourse to anyone. The judgment of the High Court reversing the verdict of conviction under Section 376(2)(g) recorded by the trial court cannot be sustained and is liable to be set aside.

44. For the conviction under Section 376(2)(g) IPC, the accused shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may be extended to imprisonment for life. After the amendment by Act 13 of 2013 (with retrospective effect from 03.02.2013), the minimum sentence of ten years was increased to twenty years as per Section 376-D and in the case of conviction, the court has no discretion but to impose the sentence of minimum twenty years. However, prior to amendment, proviso to Section 376(2) IPC provided a discretion to the court that "the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than ten years." Though the court is vested with the discretion, in the facts and circumstances of the case, we are not inclined to exercise our discretion in reducing the sentence of imprisonment of ten years imposed upon the respondents-accused.

45. In the result, the impugned judgment of the High Court is set aside and the appeal preferred by the State is allowed. The verdict of conviction of accused-respondent Nos.1 to 4 (CA No.2299/2009) under Section 376(2)(g) IPC and also the sentence of imprisonment of ten years imposed upon them is affirmed. The respondents- accused Nos.1 to 4 shall surrender themselves within a period of four weeks from today to serve the remaining sentence, failing which they shall be taken into custody. We place on record the valuable assistance rendered by the counsel Mr. Praveen Chaturvedi who has been nominated by the Supreme Court Legal Services Committee to argue on behalf of the respondents/accused.

46. The direction of the High Court to lodge complaint against the police officials (appellants in Criminal Appeal No.2298 of 2009) is set aside and the appeal preferred by them is allowed.

.....J. [R. BANUMATHI] .....J. [INDIRA BANERJEE] New Delhi;

October 30, 2018