Babu Ram vs State Of H.P on 26 September, 2024

Neutral Citation No. (2024:HHC:9136) IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA Cr. Appeal No. 322 of 2021 Reserved on: 27.08.2024 .

Date of Decision: 26.09.2024

Babu Ram ...App

Versus

State of H.P. ...Resp

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge. Whether approved for reporting?1 Yes For the Appellant : Mr. G.R. Palsra, Advocate.

For the Respondent/State : Ms. Ayushi Negi, Deputy Advocate General.

Rakesh Kainthla, Judge The present appeal is directed against the judgment and order dated 17.08.2021/18/08.2021 passed by learned Additional Sessions Judge Ghurmarwin, District Bilaspur (Camp at Bilaspur) (learned Trial Court) vide which the appellant (accused before learned Trial Court) was convicted of the commission of offences punishable under Sections 323 and 376 of Indian Penal Code (in short 'IPC') and he was sentenced to undergo rigorous imprisonment for eight years and to pay a fine of 20,000/- and in default of payment of fine to further Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Neutral Citation No. (2024:HHC:9136) undergo rigorous imprisonment for one year for the commission of an offence punishable under section 376 of IPC. He was also sentenced to undergo rigorous imprisonment for a period of one .

year and to pay a fine of 1,000/- and in case of non-payment of the fine to further undergo simple imprisonment for two months for the commission of an offence punishable under Section 323 of IPC. (Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the police presented a challan against the accused for the commission of offences punishable under Sections 376 and 323 of IPC. It

was asserted that the victim (name being withheld to protect her identity) had gone to her field on 18.04.2011 at about 2:30 pm. The accused-Babu Ram was cutting the grass in his field. He picked up the grass and went towards the victim. The victim started going towards her home. When the accused reached near the victim, he gagged her mouth with a black piece of cloth. She tried to rescue herself and the cloth fell.

The accused tied the dupatta of the victim to her mouth and dragged her to a nalli. He gave fist blows on the victim's chest.

The victim fell and became unconscious. She regained Neutral Citation No. (2024:HHC:9136) consciousness and found that her salwar was removed and she was raped. She wore the salwar and went to her home while crying for help. Urmilla Devi (PW5) and Satya Devi, neighbours of .

the victim, went to the victim after hearing her cries. She narrated the incident to them. The villagers called the victim's husband. The victim's husband and brother arrived at her house.

The victim reported the matter to the police. FIR (Ext. PW1/A) was registered in the Police Station. Jagat Singh (PW9) conducted the investigation. He filed an application (Ext. PW2/A) for the medical examination of the victim and sent her with LC-Satya Devi (PW8) to Regional Hospital, Bilaspur. Dr Supriya Atwal (PW2) medically examined the victim and found that there were signs of physical violence and the possibility of sexual intercourse could not be ruled out. She preserved the samples and the clothes and handed them over to the police official accompanying the victim. She issued the MLC (Ext. PW2/C). LC-

Satya Devi deposited the parcel with MHC and handed over the MLC to Jagat Singh. Jagat Singh visited the spot and prepared the site plan (Ext. PW9/A). He seized 06 broken bangle pieces from the spot where the accused had beaten the victim and 9 broken pieces from the spot, where the victim was raped. These were put Neutral Citation No. (2024:HHC:9136) in a cloth parcel (Ext. P1). The parcel was seized with seal 'T'. The parcel was seized vide memo (Ext. PW1/B). Dr Supriya Atwal obtained the blood sample of the victim on the FTA Card on .

28.04.2011. She filled out the identification (Ext. PW4/A) and another form (Ext. PW9/B). These were handed over to MHC along with the letter (Ext. PW9/C). The statements of the witnesses were recorded as per their version. The articles were deposited with HC-Dev Raj (PW10) who made an entry in the malkhana register at Sr. No.36/2011 and 37/2011 and deposited the case property in malkhana. He sent the cloth parcel, vaginal slide and vaginal swab along with the sample seal to FSL Junga through Constable-Sunil Kumar (PW7) vide RC No.62/2011.

Constable-Sunil Kumar deposited all the articles in a safe condition and handed over the receipt to MHC on his return. The accused could not be apprehended and he was declared as a proclaimed offender. The police team apprehended the accused.

Roshan Lal (PW18) arrested him. He filed an application (Ext.

PW12/A) for conducting the medical examination of the accused and obtained the blood sample of the accused. Dr Rishi Nabh (PW12) conducted the medical examination of the accused and issued the MLC (Ext. PW12/B) stating that the accused was Neutral Citation No. (2024:HHC:9136) capable of performing sexual intercourse. He obtained the blood sample of the accused on an FTA Card. He filled out the forms (Ext. PW12/C) and (Ext. PW12/D). He attested the photo of the .

accused on the identification form (Ext. PW12/D) and obtained the thumb impression of the accused on it. The FTA Cards were deposited with HC-Kuldeep Singh (PW16), who made an entry in the malkhana register and sent them to FSL Junga through HHC-

Raj Kumar (PW14) vide RC No. 228/2018. He deposited the articles at FSL Junga and handed over the receipt to MHC on his return. The result of the analysis (Ext. PW11/A) was issued, in which it was mentioned that the salwar, shirt, dupatta, undershirt/vest of the victim contained human blood, and underwear, vaginal smear, and vaginal slide contained human semen. These were subjected to DNA analysis and reports (Ext.

PW11/B and Ext. PW15/A) were issued. The report (Ext. PW11/A) shows that a complete DNA profile of a human male individual was obtained from the vaginal swab of the victim and a partial profile of a human male individual was found in the dupatta and undervest of the victim. Report (Ext. PW15/A) shows that the DNA profile obtained from the vaginal swab completely matched with the blood sample of the accused and the one component of Neutral Citation No. (2024:HHC:9136) the mixed DNA profile obtained from the undervest of the victim matched the blood sample of the accused. One component from the mixed DNA profile obtained from a vaginal smear, and .

vaginal slide matched with the blood sample of the accused. The statements of the remaining witnesses were recorded as per their version and after the completion of the investigation, the challan was prepared and it was presented before the Court of learned Chief Judicial Magistrate, Bilaspur who committed it for trial to the Court of Sessions, who assigned it to learned Additional Sessions Judge (learned Trial Court) for disposal as per the law.

3. The learned Trial Court charged the accused with the commission of offences punishable under Sections 323 and 376 of IPC. The accused pleaded not guilty and claimed to be tried.

4. The prosecution examined 18 witnesses to prove its case. Victim (PW1) narrated the incident. Dr. Supriya Atwal (PW2) conducted the medical examination of the victim. HHC-Ram Paul (PW3) is the witness to the recovery of the pieces of broken bangle from the spot. Suresh Kumar (PW4) is the husband of the victim who was told about the incident telephonically. Urmilla Devi (PW5) did not support the prosecution case. Baldev (PW6) called the victim's husband. HHC-Sunil Kumar (PW7) carried the Neutral Citation No. (2024:HHC:9136) samples to FSL. LC-Satya Devi (PW8) accompanied the victim to the hospital. Jagat Singh (PW9) conducted the initial investigation. HC-Dev Raj (PW10) was posted as MHC with whom .

the case property was deposited. Inspector Raj Kumar (PW11) conducted further investigation and recorded the statements of witnesses. Dr Rishi Nabh (PW12) conducted the medical examination of

the accused. HC-Daulat Ram (PW13) apprehended the accused. HHC-Raj Kumar (PW14) accompanied the accused to the Regional Hospital and brought the samples from the hospital. Inspector Yog Raj (PW15) investigated the matter after the accused was apprehended. HC Kuldeep Singh (PW16) was working as MHC with whom the case property was deposited. Jagdish Chand (PW17) and Roshan Lal (PW18) conducted the investigation partly.

5. The accused in his statement recorded under Section 313 of Cr.P.C. denied the prosecution case in its entirety. He stated that he was innocent and a false case was made against him. He had caught the victim red-handed with one Bhagat Ram. The victim threatened to falsely implicate him in a case. The copies of the judgment, challan and statements were tendered in defence.

Neutral Citation No. (2024:HHC:9136)

6. The learned Trial Court held that the testimony of the victim was credible. It was duly corroborated by the medical evidence and the report of DNA analysis. The minor .

contradictions in the victim's testimony were not sufficient to discard it. The fact that Urmila Devi (PW5) has not supported the version of the prosecution was not sufficient to doubt the same.

The enmity is a double-edged weapon: while it furnishes the motive for false implication, it also furnishes a motive for the commission of a crime; hence, no advantage could be derived from the enmity. The prosecution case that the accused had beaten and raped the victim was established on record; hence, the accused was convicted and sentenced as aforesaid.

7. Being aggrieved from the judgment and order passed by the learned Trial Court, the accused has filed the present appeal asserting that the learned Trial Court failed to properly appreciate the evidence. Urmilla Devi (PW5) did not support the prosecution case and Satya Devi was not examined. There were many contradictions and improvements in the victim's testimony. The victim stated that the house of the accused was not located in her neighbourhood and there is a nallah between the two houses, whereas her husband stated that the victim Neutral Citation No. (2024:HHC:9136) resided in the same house as the accused in different rooms. The defence taken by the accused that the victim was caught with Bhagat Ram and she had threatened to falsely implicate the .

accused was highly probable. She denied that she was not a witness in the case instituted against the present accused for giving beatings to Bhagat Ram, whereas, it was duly proved by the documents brought on record that the victim had deposed in that case. Dr. Supriya Atwal stated that the blood sample was taken by her on 18.04.2011 whereas the documents prepared by her show that the blood sample was taken on 28.04.2011. Thus, the integrity of the case property was not established. Dr. Rishi Nabh admitted that he had not put any separate identification on the FTA Card and the possibility of opening the envelope could not be ruled out. These statements were ignored by the learned Trial Court. The victim stated that her mouth was gagged with the cloth but it was not recovered by the police. The report of the DNA is not conclusive; therefore, it was prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set

aside.

Neutral Citation No. (2024:HHC:9136)

8. I have heard. Mr. G.R. Palsra, learned counsel for the appellant and Ms. Ayushi Negi, learned Deputy Advocate General, for the respondent/State.

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9. Mr. G.R. Palsra, learned counsel for the appellant submitted that the learned Trial Court erred in convicting and sentencing the accused. There were many infirmities in the prosecution case. The testimony of the victim was not reliable.

The defence version that the accused had seen the victim and Bhagat Ram together and the victim had filed a false case against the accused to save herself was highly probable. The victim stated that she had not deposed against the accused for beating Bhagat Ram, which was found to be false by the documents produced on record. The credibility of the victim was highly suspect and the learned Trial Court erred in relying upon her testimony. The integrity of the case property was not established and no reliance can be placed upon the report issued by the FSL;

hence, he prayed that the present appeal be allowed and the judgment and order passed by the learned Trial Court be set aside.

10. Ms Ayushi Negi, learned Deputy Advocate General for the respondent/State supported the judgment and order passed Neutral Citation No. (2024:HHC:9136) by the learned Trial Court. She submitted that minor discrepancies in the testimonies of the victim are not sufficient to doubt the same. The mere error in the statement of the .

Medical Officer regarding the date cannot be used to discard the evidence collected by the prosecution. The DNA analysis is highly accurate and establishes that accused had raped the victim;

hence, she prayed that the present appeal be dismissed.

11. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

12. The victim stated that on 18.04.2011 at about 2:30 pm, she was working in her fields at her village. The accused was cutting grass in his field located adjacent to the victim's field.

When she was going to her home from her field, the accused was walking ahead of her with a bundle of grass. When she reached near nallah, the accused returned and caught her by her hair. She tried to save herself. The accused tried to put one black cloth in her mouth but the cloth fell. The accused tied her mouth with her dupatta and he dragged her towards the nallah. The accused gave fist blows to her on her breast and she became unconscious.

When she regained consciousness, she found her salwar lying beside her and that the accused had committed rape with her.

Neutral Citation No. (2024:HHC:9136) She cried and proceeded towards her house. Her neighbours-

Urmila and Satya came to her. She narrated the incident to them.

The villagers informed her husband. Her husband and her .

brother came to the village and she went with them to the police station where she reported the matter to the police. She was taken to the Medical Officer, who examined her and took her samples. She identified the place, where she was beaten and raped. The police recovered pieces of broken bangles from both these places and seized them. She identified the broken pieces of bangles. She stated in her cross-examination that the accused was not her neighbour. His house is located far away from her house. A nallah separates her house and the house of the accused.

Her land and the land of the accused were separated from the time of their ancestors. She denied that there were separate paths from their fields to their houses. She had told the police that the accused had caught her from her hair. She was confronted with FIR wherein it was not so recorded. She had not sustained any injuries on her face but bluish marks were present on her face. She was dragged for a distance of about 25-30 ft. She had not fallen when she was being dragged but she was struggling on her legs. She sustained injuries when she was Neutral Citation No. (2024:HHC:9136) thrown on the ground near nallah. Her bangles were broken when she was being dragged and she was thrown on the ground.

She regained consciousness after about 20-30 minutes. The .

accused had already left at that time. The accused had not raped her when she was conscious. She voluntarily said that the accused was dragging her before she became unconscious. The bleeding was present on her hands and the blood might be present on her salwar because of such bleeding. She denied that she sustained injuries due to a fall. Her marriage was solemnized in the year 1991 and she did not have any children. She had visited the Doctor because of non-conception. She denied that she told the accused about the non-conception and had physical relations with the accused. She denied that she was a witness in a case in which the accused had beaten one Bhagat Ram of the village. She denied that she had illicit relations with Bhagat Ram and she had filed a false case due to the enmity.

13. The cross-examination of this witness shows that the physical relations between the accused and the victim were not denied; rather, it was suggested that she had told the accused about the non-conception and she had physical relations with the accused. It was laid down by the Hon'ble Supreme Court in Neutral Citation No. (2024:HHC:9136) Balu Sudam Khalde v. State of Maharashtra, 2023 SCC OnLine SC 355 that the suggestion put to the witness can be taken into consideration while determining the innocence or guilt of the .

accused. It was observed: -

> "34. According to the learned counsel, such suggestions could be a part of the defence strategy to impeach the credibility of the witness. The proof of guilt required of the prosecution does not depend on the suggestion made to a witness.
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> 35. In Tarun Bora alias Alok Hazarika v. State of Assam reported in 2002 Cri. LJ 4076, a three-judge Bench of this Court was dealing with an appeal against the order passed by the Designated Court, Guwahati, in the TADA Sessions case wherein the appellant was convicted under Section 365 of the IPC read with Section 3(1) and 3(5) of the Terrorists and Disruptive Activities (Prevention) Act, 1987.
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> 36. In the aforesaid case, this Court, while considering the evidence on record took note of a suggestion which was put to one of the witnesses and considering the reply given by the witness to the suggestion put by the accused, arrived at the conclusion that the presence of the accused was admitted. We quote with profit the following observations made by this Court in paragraphs 15, 16 and 17 as under:
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> "15. The witness further stated that during the assault, the assailant accused him of giving information to the army about the United Liberation Front of Assam (ULFA). He further stated that on the third night, he was carried away blindfolded on a bicycle to a different place and when his eyes were unfolded, he could see his younger brother Kumud Kakati (P.W.-2) and his wife Smt. Prema Kakati (P.W.-
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> 3). The place was Duliapather, which is about 6-7 km.

away from his village Sakrahi. The witness identified the appellant-Tarun Bora and stated that it was he Neutral Citation No. (2024:HHC:9136) who took him in an ambassador car from the residence of Nandeswar Bora on the date of the incident.

16. In cross-examination the witness stated as under:

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> "Accused-Tarun Bora did not blind my eyes nor he assaulted me."

17. This part of the cross-examination is suggestive of the presence of accused Tarun Bora in the whole episode. This will clearly suggest the presence of the accused-Tarun Bora as admitted. The only denial is the accused did not participate in blind-folding the eyes of the witness nor assaulted him."

37. In Rakesh Kumar alias Babli v. State of Haryana reported in (1987) 2 SCC 34, this Court was dealing with an appeal against the judgment of the High Court affirming the order of the Sessions Judge whereby the appellant and three other persons were convicted under Section 302 read with

Section 34 of the IPC. While re-appreciating the evidence on record, this Court noticed that in the cross- examination of PW 4, Sube Singh, a suggestion was made with regard to the colour of the shirt worn by one of the accused persons at the time of the incident. This Court taking into consideration the nature of the suggestion put by the defence and the reply arrived at the conclusion that the presence of the accused namely Dharam Vir was established on the spot at the time of occurrence. We quote the following observations made by this Court in paragraphs 8 and 9 as under:

> "8. PW 3, Bhagat Singh, stated in his examination- in-chief that he had identified the accused at the time of occurrence. But curiously enough, he was not cross-examined as to how and in what manner he could identify the accused, as pointed out by the learned Sessions Judge. No suggestion was also given to him that the place was dark and that it was not possible to identify the assailants of the deceased.
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> 9. In his cross-examination, PW 4, Sube Singh, stated that the accused Dharam Vir was wearing a shirt of Neutral Citation No. (2024:HHC:9136) white colour. It was suggested to him on behalf of the accused that Dharam Vir was wearing a shirt of cream colour. In answer to that suggestion, PW 4 said: "It is not correct that Dharam Vir accused was wearing a shirt of a cream colour and not a white colour at that .
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> time." The learned Sessions Judge has rightly observed that the above suggestion at least proves the presence of accused Dharam Vir, on the spot at the time of occurrence."

38. Thus, from the above, it is evident that the suggestion made by the defence counsel to a witness in the cross- examination if found to be incriminating in nature in any manner would definitely bind the accused and the accused cannot get away on the plea that his counsel had no implied authority to make suggestions in the nature of admissions against his client.

39. Any concession or admission of a fact by a defence counsel would definitely be binding on his client, except the concession on the point of law. As a legal proposition, we cannot agree with the submission canvassed on behalf of the appellants that an answer by a witness to a suggestion made by the defence counsel in the cross- examination does not deserve any value or utility if it incriminates the accused in any manner."

14. Thus, the testimony of the victim that the accused had physical relations with her has to be accepted as correct because of the suggestions made to her. It was laid down by the Hon'ble Supreme Court in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217: 1983 SCC (Cri) 728 that a woman in India will rarely make a false allegation of rape. It was observed:

> 9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence Neutral Citation No. (2024:HHC:9136) of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted

> with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male-

dominated society. We must analyze the argument in .

support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off our feet by the approach made in the Western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution to problems cannot therefore be identical. It is conceivable in Western society that a female may level false accusations as regards sexual molestation against a male for several reasons such as :

> "(1) The female may be a 'good digger' and may well have an economic motive -- to extract money by holding out the gun of prosecution or public exposure.
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> (2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by fantasizing or imagining a situation where she is desired, wanted, and chased by males.
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> (3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

Neutral Citation No. (2024:HHC:9136) (4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

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(5) She may do so to gain notoriety or publicity to appease her ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win the sympathy of others.

(8) She may do so upon being repulsed."

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of urban as well as rural society. It is also by and large true in the context of the sophisticated, not-so-sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by society or being looked down on by society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being Neutral Citation No. (2024:HHC:9136) taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of her upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to .

avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, face the court, face cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

15. Even otherwise, the physical relations are duly supported by the report of the DNA analysis, which shows that the DNA taken from the vaginal swab, under-vest and vaginal smear of the victim matched with the DNA profile taken from the blood of the accused. This is important evidence to corroborate the version of the victim that the accused had sexual relations with her. It was laid down by the Hon'ble Supreme Court in Manoj v. State of M.P., (2023) 2 SCC 353: 2022 SCC OnLine SC 677 that the report of DNA analysis can be used to corroborate the version of the witness. It was observed at page 431:

> 151. During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata [DNA Profiling in Justice Delivery System, Central Forensic Science Neutral Citation No. (2024:HHC:9136) Laboratory, Directorate of Forensic Science, Kolkata (2007).] was relied upon. The relevant extracts of the article are reproduced below:
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> "Deoxyribonucleic acid (DNA) is genetic material .

present in the nuclei of cells of living organisms. The average human body is composed of about 100 trillion cells. DNA is present in the nucleus of a cell as a double helix, supercoiled to form chromosomes along with intercalated proteins. Twenty-three pairs of chromosomes are present in each nucleated cell and an individual inherits 23 chromosomes from the mother and 23 from the father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to each daughter cell. All information about internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases: Adenine (A), Guanine (G), Thymine (T) and Cytosine (C) along with the sugar- phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have the same DNA but it varies from individual to individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA) found in a large number of copies in the mitochondria is circular, double-stranded, 16,569 base pairs in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in a larger number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures. Only 0.1 % of DNA (about 3 million bases) differs from one person to another. Forensic DNA Scientists analyse only a few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.

Neutral Citation No. (2024:HHC:9136) *** DNA Profiling Methodology A DNA profile is generated from the body fluids, stains, and other biological specimens recovered from .

evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with the crime scene can be established. DNA profiling is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed genetic markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing an Automated DNA Sequencer gives a DNA profile unique to an individual (except for monozygotic twins).

Similarly, STRs present on the Y chromosome (Y-STR) can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in the detection of male profile even in the presence of high level of female portion or in case of azoo11permic or vasectomized" male. In cases in which DNA had undergone environmental stress and biochemical degradation, min lists can be used for over routine STR because of shorter amplicon size.

DNA profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities available in the laboratory. The analysis principles, however, remain

similar, which include:

1. isolation, purification & quantitation of DNA

2. amplification of selected genetic markers

3. visualising the fragments and genotyping

4. statistical analysis & interpretation.

In mtDNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:

> Statistical Analysis Neutral Citation No. (2024:HHC:9136) Atypical DNA case involves a comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:
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> (1) Match: If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.
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> (2) Exclusion: If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources. (3) Inconclusive: The data does not support a conclusion of the three possible outcomes, only the "match" between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the match. The match statistics are usually provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

In the case of paternity/maternity testing, exclusion at more than two loci is considered an exclusion. An allowance of 1 or 2 loci possible mutations should be taken into consideration while reporting a match.

Paternity or Maternity indices and likelihood ratios are calculated further to support the match.

Collection and Preservation of Evidence If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving. DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches an area that may contain the DNA to be tested. The Neutral

Citation No. (2024:HHC:9136) exhibits having biological specimen, which can establish a link among victim(s), suspect(s), scene of the crime for solving the case should be identified, preserved, packed and sent for DNA profiling."

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152. In an earlier judgment, R v. Dohoney & Adams [R v. Dohoney & Adams, (1997) 1 Crl App Rep 369 (CA)] the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials : (1) the scientist should adduce the evidence of the DNA comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert if requested, the databases upon which the calculations have been based.

153. The Law Commission of India in its Report [185th Report, on Review of the Indian Evidence Act, 2003.], observed as follows:

> "DNA evidence involves a comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not "match", then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 1,00,000: This is described as the "random occurrence ratio" (Phipson 1999, 15 th Edn., Para 14.32).
>
> Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law."

Neutral Citation No. (2024:HHC:9136) (emphasis in original)

154. In Dharam Deo Yadav v. State of U.P. [Dharam Deo Yadav v. State of U.P., (2014) 5 SCC 509 : (2014) 2 SCC (Cri) 626] this Court discussed the reliability of DNA evidence in .

a criminal trial, and held as follows : (SCC pp. 528-29, para

36) "36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made up of a double-stranded structure consisting of a deoxyribose sugar and phosphate backbone, cross- linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. ... DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are

virtually infallible may be moot, but the fact remains that such tests has come to stay and is being used extensively in the investigation of crimes and the court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century ago, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory."

155. The US Supreme Court in District Attorney's Office for the Third Judicial District v. Osborne [District Attorney's Office for the Third Judicial District v. Osborne, 2009 SCC OnLine US SC 73: 557 US 52 (2009)] dealt with a post-conviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was observed, in the context of the facts, that: (SCC OnLine US SC) "Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there Neutral Citation No. (2024:HHC:9136) have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course, many criminal trials proceed without any forensic and .

scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. ... DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others."

156. Several decisions of this Court -- Pantangi Balarama Venkata Ganesh v. State of A.P. [Pantangi Balarama Venkata Ganesh v. State of A.P., (2009) 14 SCC 607 : (2010) 2 SCC (Cri) 190] , Santosh Kumar Singh v. State [Santosh Kumar Singh v. State, (2010) 9 SCC 747 : (2010) 3 SCC (Cri) 1469] , State of T.N. v. John David [State of T.N. v. John David, (2011) 5 SCC 509 : (2011) 2 SCC (Cri) 647] , Krishan Kumar Malik v. State of Haryana [Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130 : (2011) 3 SCC (Cri) 61] , Surendra Koli v. State of U.P. [Surendra Koli v. State of U.P., (2011) 4 SCC 80 : (2011) 2 SCC (Cri) 92] , Sandeep v. State of U.P. [Sandeep v. State of U.P., (2012) 6 SCC 107 : (2012) 3 SCC (Cri) 18] , Rajkumar v. State of M.P. [Rajkumar v. State of M.P., (2014) 5 SCC 353 : (2014) 2 SCC (Cri) 570] and Mukesh v. State (NCT of Delhi) [Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673] have dealt with the increasing importance of DNA evidence. This Court has also emphasised the need to ensure quality control, about the samples, as well as the technique for testing in Anil v. State of Maharashtra [Anil v. State of Maharashtra, (2014) 4 SCC 69: (2014) 2 SCC (Cri) 266] : (Anil case [Anil v. State of Maharashtra, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266], SCC p. 81, para 18) "18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profiles has also shown a tremendous impact on forensic Neutral Citation No. (2024:HHC:9136) investigation. Generally, when the DNA profile of a sample found at the scene of a crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. A DNA profile is valid and reliable, but the variance in a .

particular result depends on the quality control and quality procedure in the laboratory."

157. This Court, in one of its recent decisions, Pattu Rajan v. State of T.N. [Pattu Rajan v. State of T.N., (2019) 4 SCC 771: (2019) 2 SCC (Cri) 354], considered the value and weight to be attached to a DNA report: (SCC p. 791, para

52) "52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."

158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case."

16. It was submitted that Dr Supriya Atwal (PW2) stated that the blood sample on the FTA card was taken on 18.4.2011 which is incorrect because the blood sample was taken on Neutral Citation No. (2024:HHC:9136) 28.4.2011. This minor discrepancy in the statement of the Medical Officer will not make much difference. Dr Supriya Atwal categorically stated that she had made the entry on the back of .

the MLC regarding the taking of blood samples on the FTA Card.

The entry in the back of the MLC (Ex.PW2/C) reads that the FTA card and blood sample were sent on 28.4.2011. The identification form (Ex.PW4/A) also bears 28.4.2011 as the date of the collection. The signatures of the victim also bear the date 28.4.2011. Thus, the contemporaneous documents show that the blood sample was taken on the FTA Card on 28.4.2011 and not on 18.4.2011.

17. LC Satya Devi (PW8) accompanied the victim to the hospital. The case property was handed over to her. She stated that she received the MLC of the victim and two sealed parcels, one sealed with six seals and the other sealed with three seals, an envelope and a sample seal. One parcel was stated to be containing the clothes of the victim and the other parcel was stated to be containing vaginal slides and vaginal swabs of the victim. She nowhere stated that the blood sample on the FTA card and identification form were also handed over to her on 18.4.2011.

Neutral Citation No. (2024:HHC:9136)

18. Jagat Singh (PW9) conducted the investigation. He stated that the blood sample of the victim was taken on an FTA Card on 28.4.2011 for DNA profiling. Identification forms .

(Ex.PW4/A) and forms (Ex.PW9/B) were filled, which were signed by him. He stated in his cross-examination that blood on the FTA card was taken in his presence. He had accompanied the victim on that day. He was outside the curtain where the blood was taken by the doctor. He denied that the identification mark does not show anything to connect it to the victim. He volunteered to say that the name and address of the victim were mentioned on the envelope in the hospital. He denied that the form was not filled in his presence.

19. There is nothing in the cross-examination of this witness to show that he was making a false statement. His statement is duly corroborated by the identification and another form (Ex.PW-9/B) which bears his signature. The statement of this witness also shows that the blood sample was taken on 28.4.2011 and not on 18.4.2011, as stated by the Medical Officer.

20. Thus, it is duly proved on record that the blood sample of the victim was taken on 28.04.2011 and the statement Neutral Citation No. (2024:HHC:9136) of Dr Supriya Atwal in the Court that the blood sample was taken on 18.04.2011 has to be ignored.

21. The accused was apprehended and his blood sample .

on the FTA Card was taken by Dr. Rishi Nabh (PW12). He stated that police had sought the blood of the accused on the FTA card.

Police brought the forms (Ex.PW12/C) and (Ex.PW12/D). He attested the photograph on the form(Ex.PW12/D). Thumb impressions of the accused were taken in his presence. He obtained a blood sample of the accused on an FTA card. He duly identified the envelope, FTA card and the identification form. He stated in his cross-examination that he had not filled the identification form but volunteered to say that he had signed the same and it was filled in his presence. He admitted that the envelope did not have any seal. He volunteered to say that the envelope bore his signature. He admitted that the FTA card did not bear any separate identification and it is not possible to say about the identity of the sample by looking at the FTA card in isolation. He volunteered to say that he had put the FTA card in the envelope. He admitted that the possibility of opening the envelope without tearing the same cannot be ruled out. He volunteered to say that physical damage would be noticeable.

Neutral Citation No. (2024:HHC:9136)

22. He is a Medical Officer and there is nothing to show that he was making a false statement. Much was made of the admission that the possibility of opening the envelope without .

tearing could not be ruled out but he stated that the evidence of physical damage would be present in such a case.

23. The SFSL report (Ex.PW15/A) does not mention any damage rather it shows that the envelope was bearing one seal, which was intact. Thus, the envelope had a seal when it was sent to FSL and the seal was broken after the card was taken out of the envelope. Therefore, not much can be made

out of the fact that the envelope was not sealed when it was produced before the Court.

24. The fact that the seals were found intact by the laboratory shows that there was no tampering with the case property. It was held in Baljit Sharma vs. State of H.P 2007 HLJ 707, where the report of analysis shows that the seals were intact, the case of the prosecution that the case property remained intact is to be accepted as correct. It was observed:

> "A perusal of the report of the expert Ex.PW8/A shows that the samples were received by the expert in a safe manner and the sample seal separately sent tallied with the specimen impression of a seal taken separately. Thus, there was no tampering with the seal and the seal Neutral Citation No. (2024:HHC:9136) impressions were separately taken and sent to the expert also."

25. Similar is the judgment in Hardeep Singh vs. State of Punjab 2008(8) SCC 557 wherein it was held:

> .
>
> "It has also come on evidence that till the date the parcels of the sample were received by the Chemical Examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the previously mentioned seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium, which was recovered from the possession of the appellant. In that view of the matter, a delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant."

26. In State of Punjab vs. Lakhwinder Singh 2010 (4) SCC 402 the High Court had concluded that there could have been tampering with the case property since there was a delay of seven days in sending the report to FSL. It was laid down by the Hon'ble Supreme Court that case property was produced in the Court and there was no evidence of tampering. Seals were found to be intact, which would rule out the possibility of tampering. It was observed:

> "The prosecution has been able to establish and prove that the aforesaid bags, which were 35 in number, contained poppy husk and accordingly the same were seized after taking samples therefrom which were properly sealed. The defence has not been able to prove that the aforesaid seizure and seal put in the samples were in any manner tampered with before it was examined by the Chemical Neutral Citation No. (2024:HHC:9136) Examiner. There was merely a delay of about seven days in sending the samples to the Forensic Examiner and it is not proved as to how the aforesaid delay of seven days has affected the said examination when it could not be proved that the seal of the sample was in any manner tampered .
>
> with. The seal having been found intact at the time of the examination by the Chemical Examiner and the said fact having been recorded in his report, a mere

> observation by the High Court that the case property might have been tampered with, in our opinion is based on surmises and conjectures and cannot take the place of proof.
>
> 17. We may at this stage refer to a decision of this Court in Hardip Singh v. State of Punjab reported in (2008) 8 SCC 557 in which there was a delay of about 40 days in sending the sample to the laboratory after the same was seized. In the said decision, it was held that in view of cogent and reliable evidence that the opium was seized and sealed and that the samples were intact till they were handed over to the Chemical Examiner, the delay itself was held to be not fatal to the prosecution case. In our considered opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case in this regard.
>
> 18. The case property was produced in the Court and there is no evidence to show that the same was ever tampered with."

27. Similar is the judgment of the Hon'ble Supreme Court in Surinder Kumar vs. State of Punjab, (2020) 2 SCC 563, wherein it was held: -

> 10. According to learned senior counsel for the appellant, Joginder Singh, ASI to whom Yogi Raj, SHO (PW-3) handed over the case property for producing the same before the Illaqa Magistrate and who returned the same to him after such production was not examined, as such, link evidence was incomplete. In this regard, it is to be noticed that Yogi Raj SHO handed over the case property to Joginder Singh, ASI, for production before the Court. After producing the Neutral Citation No. (2024:HHC:9136) case property before the Court, he returned the case property to Yogi Raj, SHO (PW-3) with the seals intact. It is also to be noticed that Joginder Singh, ASI was not in possession of the seals of either the investigating officer or Yogi Raj, SHO. He produced the case property before the .

Court on 13.09.1996 vide application Ex. P-13, the concerned Judicial Magistrate of First Class, after verifying the seals on the case property, passed the order Ex.P-14 to the effect that since there was no judicial malkhana at Abohar, the case property was ordered to be kept in safe custody, in Police Station Khuian Sarwar till further orders. Since Joginder Singh, ASI was not in possession of the seals of either the SHO or the Investigating Officer, the question of tampering with the case property by him did not arise at all.

11. Further, he has returned the case property, after production of the same, before the Illaqa Magistrate, with the seals intact, to Yogi Raj, SHO. In that view of the matter, the Trial Court and the High Court have rightly held that the non-examination of Joginder Singh, did not, in any way, affect the case of the prosecution. Further, it is evident from the report of the Chemical Examiner, Ex.P-10, that the sample was received with seals intact and that the seals on the sample tallied with the sample seals. In that view of the matter, the chain of evidence was complete." (Emphasis supplied)

28. Hence, the learned Trial Court had rightly held that the integrity of the case property was established and the report of the analysis corroborated the version of the victim.

29. Dr Supriya Atwal found injuries on the back of the right hand, back of the right forearm, left breast, right buttock, and multiple abrasions on the lower back and buttock. These Neutral Citation No. (2024:HHC:9136) injuries corroborate the version of the victim that she was beaten and dragged.

30. The victim reported the matter to the police on the .

same day. FIR (Ex.PW1/A) was registered on the date of the incident at 9.00 AM. It contains the details of the incident in the same manner, in which it was narrated in the Court and provides valuable corroboration to the testimony of the victim. It was laid down by the Hon'ble Supreme Court in Girish Yadav v. State of M.P., (1996) 8 SCC 186: 1996 SCC (Cri) 552 that a promptly lodged FIR corroborates the eyewitness's version. It was observed:

> "10. Once it is found that the FIR was promptly lodged after the incident by witness PW 2 Indu Tiwari, and that set in motion the police machinery which started an investigation on the spot immediately thereafter, it must be held that the contents of the FIR would reflect the first-
>
> hand account of what had actually happened on the spot and who was responsible for the offence in question. In this connection learned counsel for the respondent rightly invited our attention to a decision of this Court in the case of State of Punjab v. Surja Ram [1995 Supp (3) SCC 419: 1995 SCC (Cri) 937 : AIR 1995 SC 2413] wherein M.K. Mukherjee, J., speaking for this Court observed that the FIR which was promptly lodged and which contained detailed outline of the prosecution case, clearly corroborates eyewitness account."

31. It was held in Krishnan v. State, (2003) 7 SCC 56: 2003 SCC (Cri) 1577: 2003 SCC OnLine SC 756 that a promptly lodged FIR rules out the possibility of false implication. It was observed:

> Neutral Citation No. (2024:HHC:9136) "17. The fact that the first information report was given almost immediately, rules out any possibility of deliberation to falsely implicate any person. All the material particulars implicating the four appellants were .

given...."

32. It was held in Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379: (2012) 2 SCC (Cri) 468: 2012 SCC OnLine SC 259 that a promptly lodged FIR gives assurance regarding the prosecution's case. It was observed:

> 11. Admittedly, the FIR had been lodged promptly within a period of two hours from the time of the incident at midnight. Promptness in filing the FIR gives certain assurance of the veracity of the version given by the informant/complainant.
>
> 12. The FIR in a criminal case is a vital and valuable piece of evidence though may not be a substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of a coloured version, exaggerated account or concocted story as a result of a large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding the truth of the informant's version. A promptly lodged FIR reflects the first-hand account of what has actually happened, and who was responsible for the offence in question.

(Vide Thulia Kali v. State of T.N. [(1972) 3 SCC 393: 1972 SCC (Cri) 543: AIR 1973 SC 501], State of Punjab v. Surja Ram [1995 Supp (3) SCC 419: 1995 SCC (Cri) 937: AIR 1995 SC 2413], Girish Yadav v. State of M.P. [(1996) 8 SCC 186: 1996 Neutral Citation No. (2024:HHC:9136) SCC (Cri) 552] and Takdir Samsuddin Sheikh v. State of Gujarat [(2011) 10 SCC 158 : (2012) 1 SCC (Cri) 218: AIR 2012 SC 37] .)

33. A similar view was taken in State of Punjab v. Gurpreet .

Singh, (2024) 4 SCC 469: 2024 SCC OnLine SC 209 wherein it was observed:

> 30. Most importantly, Gursewak Singh (PW 2) narrated the entire occurrence on a call made to the Police Control Room within ten minutes of the occurrence. There could not be, in all probabilities, any meeting of the minds within a few minutes after the occurrence, so as to create a false narrative only to implicate Gurpreet Singh. The unfiltered version of the complainant, in our considered opinion, conclusively establishes the veracity of his subsequent deposition. This Court in Nand Lal v. State of Chhattisgarh [Nand Lal v. State of Chhattisgarh, (2023) 10 SCC 470: (2024) 1 SCC (Cri) 105], has categorically held that the prompt lodging of an FIR helps dispel suspicions related to the potential exaggeration of the involvement of individuals and adds credibility to the prosecution's argument. A promptly lodged FIR reflects the first-hand account of what happened and who was responsible for the offence in question. (See also: Thulia Kali v. State of T.N. [Thulia Kali v. State of T.N., (1972) 3 SCC 393: 1972 SCC (Cri) 543], State of Punjab v. Surja Ram [State of Punjab v. Surja Ram, 1995 Supp (3) SCC 419: 1995 SCC (Cri) 937], Girish Yadav v. State of M.P. [Girish Yadav v. State of M.P., (1996) 8 SCC 186: 1996 SCC (Cri) 552] and Takdir Samsuddin Sheikh v. State of Gujarat [Takdir Samsuddin Sheikh v. State of Gujarat, (2011) 10 SCC 158 : (2012) 1 SCC (Cri) 218] .)

34. The victim stated that she narrated the incident to her neighbors-Urmilla Devi and Satya Devi. Urmilla Devi (PW-5) stated that she heard the cries of the victim and she went to her Neutral Citation No. (2024:HHC:9136) home. She inquired about the reasons for crying but the victim did not disclose anything to her. Satya Devi had also accompanied her to the house of the victim. She was permitted to .

be cross-examined. She denied that the victim had narrated the incident to her. She denied the previous statement recorded by the police.

35. Her previous statement was duly proved by Jagat Singh (PW9). He stated that the statement of the witness (Ex.PW9/D) was written as per her version. There is nothing in his cross-examination to show that he was making an incorrect statement. Thus, Urmila Devi is shown to have been made two inconsistent statements: one before the police and another before the Court and her credit has been impeached under Section 155(3) of the Indian Evidence Act and no reliance can be placed upon her testimony.

36. This Court has also laid down in Ian Stilman versus.

State 2002(2) Shim. L.C. 16 that where a witness has been cross-

examined by the prosecution with the leave of the Court, his statement cannot be relied upon. It was observed:

> 12. It is now well settled that when a witness who has been called by the prosecution is permitted to be cross-

examined on behalf of the prosecution, such a witness Neutral Citation No. (2024:HHC:9136) loses credibility and cannot be relied upon by the defence. We find support for the view we have taken from the various authorities of the Apex Court. In Jagir Singh v. The State (Delhi Administration), AIR 1975 Supreme Court 1400, the Apex Court observed :

> .
>
> "It is now well settled that when a witness, who has been called by the prosecution, is permitted to be cross-examined on behalf of the prosecution, the result of that course being adopted is to discredit this witness altogether and not merely to get rid of a part of his testimony".

37. Thus, the learned Trial Court had rightly discarded her statement.

38. to It was submitted that Satya Devi was not examined and an adverse inference has to be drawn against the prosecution. The record shows that the learned Public Prosecutor had given up Satya Devi as having won over by the accused, therefore, an adequate reason was provided by the prosecution for not examining Satya Devi. It was held in Hukam Singh v. State of Rajasthan, (2000)

7 SCC 490 : 2000 SCC (Cri) 1416: 2000 SCC OnLine SC 1311 that the Public Prosecutor is not obliged to examine the witness who will not support the prosecution. It was observed at page 495:

> "13. When the case reaches the stage envisaged in Section 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said section that the Public Prosecutor is expected to produce evidence "in Neutral Citation No. (2024:HHC:9136) support of the prosecution" and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to be examined. If there are too many witnesses on the same point the Public .
>
> Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited if they all had sustained injuries at the occurrence. The Public Prosecutor in such cases is not obliged to examine all the injured witnesses. If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. The time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice.
>
> 14. The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the Public Prosecutor's duty to the Court may require him to produce witnesses from the latter category, also subject to his discretion to limit to one or two among them. But if the Public Prosecutor got reliable information that anyone among that category would not support the prosecution version he is free to state in court about that fact and skip that witness from being examined as a prosecution witness. It is open to the defence to cite him and examine him as a defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner. He can interview the witness beforehand to enable him to know well in advance the stand which that particular person would be adopting when examined as a witness in court.
>
> Neutral Citation No. (2024:HHC:9136)
>
> 15. A four-judge Bench of this Court had stated the above legal position thirty-five years ago in Masalti v. State of U.P. [AIR 1965 SC 202: (1965) 1 Cri LJ 226] It is contextually apposite to extract the following observation of the Bench:
>
> .

> "It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses and if the prosecutor honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the court."

16. The said decision was followed in Bava Hajee Hamsa v. State of Kerala [(1974) 4 SCC 479 : 1974 SCC (Cri) 515: AIR 1974 SC 902]. In Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793: 1973 SCC (Cri) 1033] Krishna Iyer J., speaking for a three-judge Bench had struck a note of caution that while a Public Prosecutor has the freedom "to pick and choose" witnesses he should be fair to the court and to the truth. This Court reiterated the same position in Dalbir Kaur v. State of Punjab [(1976) 4 SCC 158 :

> 1976 SCC (Cri) 527].
>
> 39. This position was reiterated in Rohtash vs. State of Haryana 2013 (14) SCC 434 and it was held that the prosecution is not bound to examine all the cited witnesses and it can drop witnesses to avoid multiplicity or plurality of witnesses. It was observed:
>
> 14. A common issue that may arise in such cases where some of the witnesses have not been examined, though the same may be material witnesses is, whether the prosecution is bound to examine all the listed/cited witnesses. This Court, in Abdul Gani & Ors. v. State of Madhya Pradesh, AIR 1954 SC 31, has examined the aforesaid issue and held, that as a general rule, all Neutral Citation No. (2024:HHC:9136) witnesses must be called upon to testify in the course of the hearing of the prosecution, but that there is no obligation compelling the public prosecutor to call upon all the witnesses available who can depose regarding the facts that the prosecution desires to prove. Ultimately, it is a .

matter left to the discretion of the public prosecutor, and though a court ought to and no doubt would take into consideration the absence of witnesses whose testimony would reasonably be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly, taking into consideration the persuasiveness of the testimony given in the light of such criticism, as may be levelled at the absence of possible material witnesses.

15. In Sardul Singh v. State of Bombay, AIR 1957 SC 747, a similar view has been reiterated, observing that a court cannot normally compel the prosecution to examine a witness which the prosecution does not choose to examine and that the duty of a fair prosecutor extends only to the extent of examination of such witnesses, who are necessary for the purpose of disclosing the story of the prosecution with all its essentials.

16. In Masalti v. the State of U.P., AIR 1965 SC 202, this Court held that it would be unsound to lay down as a general rule, that every witness must be examined, even though, the evidence provided by

such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised.

In such cases, it is always open to the defence to examine such witnesses as their own witnesses, and the court itself may also call upon such a witness in the interests of justice under Section 540 Cr.P.C. (See also: Bir Singh & Ors. vs. State of U.P., (1977 (4) SCC

420)

17. In Darya Singh & Ors. v. State of Punjab, AIR 1965 SC 328, this Court reiterated a similar view and held that if the eye-witness(s) is deliberately kept back, the Court may draw an inference against the prosecution and may, in a Neutral Citation No. (2024:HHC:9136) proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case.

18. In Raghubir Singh v. State of U.P., AIR 1971 SC 2156, this .

Court held as under:

> "10. ... Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need to be produced without unnecessary and redundant multiplication of witnesses. The appellant's counsel has not shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was deliberately kept back by the prosecution. Incidentally, we may point out that the accused too have not considered it proper to produce those persons as witnesses for controverting the prosecution version....."

19. In Harpal Singh v. Devinder Singh & Ann, AIR 1997 SC 2914], this Court reiterated a similar view and further observed:

> "24. ... Illustration (g) in Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if it is a material witness....."

20. In Mohanlal Shamji Soni v. Union of India &Anr., AIR 1991 SC 1346, this Court held:

> "10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either Neutral Citation No. (2024:HHC:9136) the prosecution or the

> defence to examine any particular witness or witnesses on their sides. Nonetheless, if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding .
>
> such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act.
>
> .. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or another proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

21. In Banti @ Guddu v. State of M.P. AIR 2004 SC 261, this Court held:

> "12. In trials before a Court of Session the prosecution "shall be conducted by a Public Prosecutor". Section 226 of the Code of Criminal Procedure, 1973 enjoins on him to open up his case by describing the charge brought against the accused. He has to state what evidence he proposes to adduce for proving the guilt of the accused.....If that version is not in support of the prosecution case it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for the prosecution.
>
> 13. When the case reaches the stage envisaged in Section 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in Neutral Citation No. (2024:HHC:9136) support of the prosecution". It is clear from the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution"

and not in derogation of the prosecution case. At the said stage the Public Prosecutor would be in a .

position to take a decision as to which among the presence cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects.....This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. The time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice.

14. It is open to the defence to cite him and examine him as a defence witness."

22. The said issue was also considered by this Court in R. Shaji (supra), and the Court, after placing reliance upon its judgments in Vadivelu Thevar v. State of Madras; AIR 1957 SC 614; and Kishan Chand v. State of Haryana JT 2013 (1) SC 222, held as under:

> "22. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence, which is important, as there is no requirement in the law of evidence stating that a particular number of witnesses must be examined in order to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise. The legal system has laid emphasis on the value provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been Neutral Citation No. (2024:HHC:9136) provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced over and above this, does not carry any weight."

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23. Thus, the prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. The accused can also examine the cited, but not examined witnesses, if he so desires, in his defence. It is the discretion of the prosecutor to tender the witnesses to prove the case of the prosecution and "the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive." In an extraordinary situation, if the court comes to the conclusion that a material witness has been withheld, it can draw an adverse inference against the prosecution, as has been provided under Section 114 of the Evidence Act. Undoubtedly, the public prosecutor must not take the liberty to "pick and choose" his witnesses, as he must be fair to the court, and therefore, to the truth. In a given case, the Court can always examine a witness as a court witness, if it is so warranted in the interests of justice. In fact, the evidence of the witnesses must be tested on the touchstone of reliability, credibility and trustworthiness. If the court finds the same to be untruthful, there is no legal bar for it to discard the same.

40. This position was reiterated in Rajesh Yadav &Anr versus State Of U P, 2022 (2) RCR (Criminal) 132, wherein it was held: -

> "[31] A mere non-examination of the witness per se will not vitiate the case of the prosecution. It depends upon the quality and not the quantity of the witnesses and their importance. If the court is satisfied with the explanation given by the prosecution along with the adequacy of the materials sufficient enough to proceed with the trial and Neutral Citation No. (2024:HHC:9136) convict the accused, there cannot be any prejudice. Similarly, if the court is of the view that the evidence is not

screened and could well be produced by the other side in support of its case, no adverse inference can be drawn. The onus is on the part of the party who alleges that a witness .

has not been produced deliberately to prove it. The aforesaid settled principle of law has been laid down in Sarwan Singh v. State of Punjab, 1976 4 SCC 369:

"13. Another circumstance which appears to have weighed heavily with the Additional Sessions Judge was that no independent witness of Salabatpura had been examined by the prosecution to prove the prosecution case of assault on the deceased, although the evidence shows that there were some persons living in that locality like the 'pakodewalla', hotelwalla, shopkeeper and some of the passengers who had alighted at Salabatpura with the deceased.

The Additional Sessions Judge has drawn an adverse inference against the prosecution for its failure to examine any of those witnesses. Mr Hardy has adopted this argument. In our opinion, the comments of the Additional Sessions Judge are based on a serious misconception of the correct legal position. The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well- settled that the prosecution is bound to produce only such witnesses as are essential for the unfolding of the prosecution narrative. In other words, before an adverse inference against the Neutral Citation No. (2024:HHC:9136) prosecution can be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the .

prosecution to multiply witness after witness on the same point; it is the quality rather than the quantity of the evidence that matters. In the instant case, the evidence of the eyewitnesses does not suffer from any infirmity or any manifest defect on its intrinsic merit. Secondly, there is nothing to show that at the time when the deceased was assaulted a large crowd had gathered and some of the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and then withheld. We must not forget that in our country there is a general tendency amongst the witnesses in mofussil to shun giving evidence in courts because of the cumbersome and dilatory procedure of our courts, the harassment to which they are subjected by the police and the searching cross-examination which they have to face before the courts. Therefore nobody wants to be a witness in a murder or any serious

offence if he can avoid it. Although the evidence does show that four or five persons had alighted from the bus at the time when the deceased and his companions got down from the bus, yet there is no suggestion that any of those persons stayed on to witness the occurrence. They may have proceeded to their village homes " (Emphasis supplied) [32] This Court has reiterated the aforesaid principle in Gulam Sarbar v. State of Bihar, 2014 3 SCC 401:

"19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but the quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle that evidence must be weighed Neutral Citation No. (2024:HHC:9136) and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on the value provided by each witness, rather than the multiplicity or plurality of witnesses.

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It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that the production of more witnesses does not carry any weight. Thus, a conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. (Vide Vadivelu Thevar v. State of Madras, 1957 AIR(SC) 614: 1957 Cri LJ 1000], Kunju v. State of T.N., 2008 2 SCC 151: (2008) 1 SCC (Cri) 331], Bipin Kumar Mondal v. State of W.B., 2010 12 SCC 91: (2011) 2 SCC (Cri) 150: AIR 2010 SC 3638], Mahesh v. State of M.P., 2011 9 SCC 626: (2011) 3 SCC (Cri) 783], Prithipal Singh v. State of Punjab, 2012 1 SCC 10: (2012) 1 SCC (Cri) 1] and Kishan Chand v. State of Haryana, 2013 2 SCC 502: (2013) 2 SCC (Cri) 807: JT (2013) 1 SC 222].)"

41. Thus, no adverse inference can be drawn for giving up Satya Devi.

42. Much was made out of the fact that the victim had told that the accused was not her neighbour and he was residing in a separate house separated by a nallah whereas her husband (PW4) stated that he and the accused used to reside in the same house in different rooms. No advantage can be derived from this fact. First, it was asked from the witness about the house of the accused on the date of the deposition, which is apparent from the Neutral Citation No. (2024:HHC:9136) use of the word is while describing the house of the accused whereas the husband of the victim stated that at the time of the incident, the accused and he used to reside in a same house in .

different rooms. Therefore, the witnesses were deposing about two different times whereas the victim was deposing about the location of the house on the date of the deposition in the year 2019; her husband was deposing about the house of the accused at the time of the incident in the year 2011. Thus, there are no real contradictions between the testimonies of these witnesses.

Secondly, the contradiction is minor and does not affect the core of the prosecution case regarding the incident. The principle of falsus in uno, falsus in omnibus does not apply to India and the testimonies of the witnesses cannot be discarded simply because part of it is found to be false. It was laid down by the Hon'ble Supreme Court in Mahendran v. State of T.N., (2019) 5 SCC 67:

> (2019) 2 SCC (Cri) 436: 2019 SCC OnLine SC 251 that the principle of falsus in uno, falsus in omnibus does not apply in India. It was observed:
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> "38. It is argued that the prosecution has put on trial twenty-four accused, but the presence of A-11 and A-16 to A-24 was doubted by the learned trial court and they were acquitted on the benefit of the doubt. Five accused, A-10, A-12, A-13, A-14 and A-15 have been granted the benefit of the doubt in appeal as well. The argument that the Neutral Citation No. (2024:HHC:9136) entire case set up is based on falsehood and thus is not reliable for conviction of the appellants, is not tenable. It is well settled that the maxim "falsus in uno, falsus in omnibus" has no application in India only for the reason that some part of the statement of the witness has not .
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> been accepted by the trial court or by the High Court. Such is the view taken by this Court in the Gangadhar Behera case [Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381: 2003 SCC (Cri) 32], wherein the Court held as under: (SCC pp. 392-93, para 15) "15. To the same effect is the decision in State of Punjab v. Jagir Singh [State of Punjab v. Jagir Singh, (1974) 3 SCC 277: 1973 SCC (Cri) 886] and Lehna v. State of Haryana [Lehna v. State of Haryana, (2002) 3 SCC 76:
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> 2002 SCC (Cri) 526]. Stress was laid by the appellant accused on the non-acceptance of evidence tendered by some witnesses to contend about the desirability to throw out the entire prosecution case. In essence, prayer is to apply the principle of "falsus in uno, falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding the acquittal of a number of other co-
>
> accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. The falsity of a particular material witness or material particular would not ruin it from beginning to end. The maxim "falsus in uno, falsus in omnibus" has no application in India and the witnesses cannot be branded as liars. The maxim "falsus in uno, falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely Neutral Citation No. (2024:HHC:9136) involves the question of the weight of evidence which a court may apply in a given set

of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P. [Nisar Ali v. State of U.P., AIR 1957 SC 366: 1957 Cri LJ 550]) Merely because .

some of the accused persons have been acquitted, though the evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab [Gurcharan Singh v. State of Punjab, AIR 1956 SC 460: 1956 Cri LJ 827] .) The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. [Sohrab v. State of M.P., (1972) 3 SCC 751: 1972 SCC (Cri) 819] and Ugar Ahir v. State of Bihar [Ugar Ahir v. State of Bihar, AIR 1965 SC 277: (1965) 1 Cri LJ 256] .) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of Neutral Citation No. (2024:HHC:9136) separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in .

toto. (See Zwinglee Ariel v. State of M.P. [Zwinglee Ariel v. State of M.P., (1952) 2 SCC 560: AIR 1954 SC 15:

1954 Cri LJ 230] and Balaka Singh v. State of Punjab [Balaka Singh v. State of Punjab, (1975) 4 SCC 511:

1975 SCC (Cri) 601] .) As observed by this Court in State of Rajasthan v. Kalki [State of Rajasthan v. Kalki, (1981) 2 SCC 752: 1981 SCC (Cri) 593] normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy

> may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar [Krishna Mochi v. State of Bihar, (2002) 6 SCC 81: 2002 SCC (Cri) 1220]. Accusations have been clearly established against the appellant accused in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned." (emphasis in original)
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> 39. Therefore, the entire testimony of the witnesses cannot be discarded only because, in certain aspects, part of the statement has not been believed."

43. This position was reiterated in Ranvir Singh v. State of M.P., 2023 SCC OnLine SC 94 wherein it was observed:

> 48. The principle that when a witness deposes falsehood, the evidence in its entirety has to be eschewed may not Neutral Citation No. (2024:HHC:9136) have strict application to the criminal jurisprudence in our country. The principle governing sifting the chaff from the grain has to be applied. However, when the evidence is inseparable and such an attempt would either be impossible or would make the evidence unacceptable, the .

natural consequence would be one of avoidance. The said principle has not assumed the status of law but continues only as a rule of caution. One has to see the nature of the discrepancy in a given case. When the discrepancies are very material shaking the very credibility of the witness leading to a conclusion in the mind of the court that it is neither possible to separate it nor to rely upon, it is for the said court to either accept or reject.

49. The said principle of law has been dealt with by this court in Anand Ramachandra Chougule v. Sidarai Laxman Chougala, (2019) 8 SCC 50, which states thus:

> "9. We have considered the respective submissions and perused the materials on record. The relationship between parties and the existence of a land dispute regarding which a civil suit was also pending are undisputed facts. The fact that a verbal duel followed by a scuffle took place between the parties culminating in injuries is a concurrent finding of fact by two courts. The fact that the accused also lodged an FIR with regard to the same occurrence stands established by the evidence of PWs 19 and 22, the investigating officers, who have admitted that the respondent-accused had also lodged BRPS Cr. No. 79/02 -- marked Ext. D-10, which was not investigated by them. Similarly, PW 11, the police constable, deposed that two of the accused were admitted in the District Hospital, Belgaum and that he was posted on watch duty. The occurrence is of 7-6-2002 and respondent-Accused 1 and 2 were discharged on 11-6-2002. Their injury report has not been brought on record by the prosecution and no explanation has been furnished in that regard.

Neutral Citation No. (2024:HHC:9136)

> 10. The burden lies on the prosecution to prove the allegations beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and the probability of its defence. An accused is not required .
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> to establish or prove his defence beyond all reasonable doubt, unlike the prosecution. If the accused takes a defence, which is not improbable and appears likely, there is material in support of such defence, the accused is not required to prove anything further. The benefit of doubt must follow unless the prosecution is able to prove its case beyond all reasonable doubt."

44. Thus, the submission that the testimony of the victim cannot be discarded due to the discrepancy in her testimony regarding the location of the house of the victim and the accused is not acceptable.

45. It was submitted that the victim denied that she was a witness against the accused in a case related to beating of Bhagat Ram and the documents proved this fact; hence, the victim is an unreliable witness. This submission is not acceptable. Learned Trial Court had rightly held that the statement of victim in case of beating Bhagat Ram was examined on 22.07.2019 and 21.10.2019 whereas she was examined in this case on 19.02.2019;

hence the victim had not deposed against the accused before deposing in this case. Further she has not supported the Neutral Citation No. (2024:HHC:9136) prosecution case and it could not be said that she had deposed against the accused.

46. The victim specifically stated that the accused had .

raped her without her consent. There is nothing in her cross-

examination to show the consent. She specifically denied that she had physical relations with the accused with her consent. It was laid down by the Hon'ble Supreme Court in Naim Ahamed vs. State (NCT of Delhi), 2023 SCC OnLine SC 89 that Section 114A of the Indian Evidence Act provides that when the victim states in a case of rape that she had not consented, the Court has to presume that there was no consent. It was observed:-

> "10. It would be germane to note that the basic principles of criminal jurisprudence warrant that the prosecution has to prove the guilt of the accused beyond reasonable doubt by leading cogent evidence, however, considering the ethos and culture of the Indian Society, and considering the rising graph of the commission of the social crime - 'Rape', the courts have been permitted to raise a legal presumption as contained in Section 114A of the Indian Evidence Act. As per Section 114A, a presumption could be raised as to the absence of consent in certain cases pertaining to Rape. As per the said provision, if sexual intercourse by the accused is proved and

> the question arises as to whether it was without the consent of the woman alleged to have been raped, and if she states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

47. It was laid down by the Hon'ble Supreme Court in Neutral Citation No. (2024:HHC:9136) Yedla Srinivasa Rao v. State of A.P. (2006) 11 SCC 615, that in view of Section 114-A when the victim says that she had not consented, the Court has to presume the absence of the consent.

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It was observed:-

> "15. In this connection, reference may be made to the amendment made in the Evidence Act. Section 114-A was introduced and the presumption has been raised as to the absence of consent in certain prosecutions for rape. Section 114-A reads as under:
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> "114-A. Presumption as to the absence of consent in certain prosecutions for rape.-In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

16. If sexual intercourse has been committed by the accused and if it is proved that it was without the consent of the prosecutrix and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. The presumption has been introduced by the legislature in the Evidence Act looking to atrocities committed against women and in the instant case as per the statement of PW 1, she resisted and she did not give consent to the accused at the first instance and he committed the rape on her. The accused gave her assurance that he would marry her and continued to satisfy his lust till she became pregnant and it became clear that the accused did not wish to marry her."

Neutral Citation No. (2024:HHC:9136)

48. This judgment was followed in Anurag Soni Vs State of Chhattisgarh, 2019 (13) SCC 1. Therefore, in view of the binding precedent of the Hon'ble Supreme Court, the Court cannot infer .

consent, when the victim stated that she had not consented to the sexual intercourse; hence, the learned Trial court had rightly held that the prosecution version that the victim was raped has to be accepted as correct.

49. The conduct of the accused in absconding after the incident also amounts towards his guilt. It was laid down by the Hon'ble Supreme Court in Sekaran v. State of T.N., (2024) 2 SCC 176: (2024) 1 SCC (Cri) 548: 2023 SCC OnLine SC 1653 that absconding may not be a circumstance by itself but it can constitute relevant evidence. It was observed at page 186:

> 30. Although not brought to our notice in the course of arguments, it is revealed from the oral testimony of PW 11 that the appellant could be apprehended 3 (three) years after the incident from Puliyur Road junction (1 km away from Ambalakalai) in Kerala after vigorous search.

However, abscondence by a person against whom an FIR has been lodged and who is under expectation of being apprehended is not very unnatural. Mere absconding by the appellant after the alleged commission of the crime and remaining untraceable for such a long time itself cannot establish his guilt or his guilty conscience. Abscondence, in certain cases, could constitute a relevant piece of evidence, but its evidentiary value depends upon the surrounding circumstances. This sole circumstance, Neutral Citation No. (2024:HHC:9136) therefore, does not enure to the benefit of the prosecution."

50. In the present case, the accused was declared a proclaimed offender and was apprehended by the PO Cell. He has .

not assigned any reason as to why he left the place after the incident. The absconding by the accused strengthens the prosecution's version.

51. Therefore, the learned Trial Court had rightly convicted the accused.

52. The learned Trial Court sentenced the accused to undergo rigorous imprisonment for eight years and pay a fine of 20,000/- which was ordered to be paid as compensation to the victim. The offence punishable under Section 376 of IPC was punishable with minimum imprisonment for seven years and the sentence of eight years cannot be said to be excessive. Learned Trial Court had also sentenced the accused to undergo rigorous imprisonment for one year and to pay a fine of 1,000/- for the commission of an offence punishable under Section 323 of IPC.

The manner, in which the offence was committed and the accused had taken advantage of the victim, the sentence of one year cannot be said to be excessive.

Neutral Citation No. (2024:HHC:9136)

53. Therefore, the judgment and order passed by the learned Trial Court are fully sustainable and no interference is required with the same.

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54. Consequently, the present appeal fails and the same is dismissed.

55. Records be sent back forthwith. Pending applications, if any, also stand disposed of.

r to (Rakesh Kainthla)
Judge

26th September, 2024
(saurav pathania)