* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment Reserved on: 25.02.2026***
Judgment pronounced on:10.03.2026

\+ **CRL.A. 896/2017 & CRL.M.(BAIL) 1198/2021**

ANWAR .....Appellant

Through: Mr. Aseem Bhardwaj, Mr. K.K. Vijay, Mr. Gaurav Kumar and Ms. Nikita Vijay, Advocates.

versus

STATE GOVT OF NCT OF DELHI .....Respondent

Through: Mr. Utkarsh, APP for the State with SI Jitender P.S. Nangloi.
Ms. Vrinda Bhandari, (DHCLSC) with Ms. Vanshita, Ms. Pragya Barsaiyan and Ms. Nitya Jain Advocates
Mr. Himanshu Anand Gupta, Advocate for DSLSA with Ms. Mansi Yadav, Mr. Siddharth Barua, Mr. Shekhar Anand Gupta, Mr. Mike Desai, Mr. Navneet Kaur and Ms. Shivani Rampal, Advocates

\+ **CRL.A. 1051/2017**

SANDEEP .....Appellant

Through: Mr. Satyam Thareja, (DHCLSC) with Ms. Vasundhara Nagrath and Mr. Shaurya Katoch, Advocates.

versus

STATE .....Respondent

Through: Mr. Utkarsh, APP for the State with SI Jitender P.S. Nangloi.
Ms. Vrinda Bhandari, (DHCLSC) with Ms. Vanshita, Ms. Pragya Barsaiyan and Ms. Nitya Jain Advocates
Mr. Himanshu Anand Gupta, Advocate for DSLSA with Ms. Mansi Yadav, Mr. Siddharth Barua, Mr. Shekhar Anand Gupta, Mr. Mike Desai, Mr. Navneet Kaur and Ms. Shivani Rampal, Advocates

\+ **CRL.A. 985/2017**

ANISH KUMAR .....Appellant

Through: Mr. S.S. Ahluwalia and Ms. Rimpy Rohilla, Advocates along with appellant in person.

versus

STATE .....Respondent

Through: Mr. Utkarsh, APP for the State with SI Jitender P.S. Nangloi.
Ms. Vrinda Bhandari, (DHCLSC) with Ms. Vanshita, Ms. Pragya Barsaiyan and Ms. Nitya Jain Advocates
Mr. Himanshu Anand Gupta, Advocate for DSLSA with Ms. Mansi Yadav, Mr. Siddharth Barua, Mr. Shekhar Anand Gupta, Mr. Mike Desai, Mr. Navneet Kaur and Ms. Shivani Rampal, Advocates

CORAM:
HON'BLE MS. JUSTICE CHANDRASEKHARAN SUDHA

JUDGMENT

CHANDRASEKHARAN SUDHA, J.

1. In these appeals filed under Section 374 of the Code of Criminal Procedure, 1973 (the Cr.P.C.), the appellants/accused persons, 3 in number, in S.C. No. 135 of 2013 on the file of the Additional Sessions Judge (Special Fast Track Court)-01, West, Tis Hazari Courts, Delhi, assail the judgment and order on sentence dated 18.07.2017. *Vide* the impugned judgment and order on sentence, the accused persons have been convicted and sentenced for the offence punishable under Section 376D of the Indian Penal Code, 1860 (the IPC).

2. The prosecution case is that on 31.05.2013 at about 11:00 P.M., when PW11, the victim, came out of the washroom situated outside her house, A1 forcibly abducted her and made her sit in a Santro car. A2 and A3 caught hold of PW11 while A1 drove the vehicle. Thereafter, PW11 was taken to a godown at

Kamruddin Nagar, Delhi, where A1 to A3, in furtherance of their common intention, committed gang rape on her one after the other. As per the chargesheet/final report dated 18.07.2013, the accused persons are alleged to have committed the offences punishable under Sections 363and 376(2)(g) IPC.

3. Based on Exhibit PW11/A FIS of PW11, crime no. 167/2013 Nangloi Police Station, i.e., Mark A FIR, was registered by PW6, Assistant Sub Inspector. PW18, Woman Sub-Inspector, conducted investigation into the crime and on completion of the same, submitted the chargesheet/final report dated 18.07.2013 before the trial court, alleging the commission of the offences punishable under the aforementioned Sections.

4. When the accused persons were produced before the trial court, all the copies of the prosecution records were furnished to them as contemplated under Section 207 Cr.P.C. After hearing both sides, the trial court *vide* order dated 07.09.2013, framed a Charge for the offences punishable under Section 366 read with

Section 34 IPC and Section 376D IPC, which was read over and explained to the accused persons, to which they pleaded not guilty.

5. On behalf of the prosecution, PWs.1 to 19 were examined and Exhibits PW1/A-C, PW2/A, PW3/A, PW4/A, PW5/A-B, PW6/A-B, PW7/A-C, PW9/A-B, PW10/A, PW11/A-E, PW14/A, PW15/A-B, PW17/A-C, PW18/A-G, PW18/PX1-2, Mark A FIR, Mark A MLC and Mark C were marked in support of the case.

6. After the close of the prosecution evidence, the accused persons were examined under Section 313(1)(b) Cr.P.C. with respect to the incriminating circumstances appearing against them in the evidence of the prosecution. All the accused persons denied the said circumstances and maintained their innocence.

7. After questioning the accused persons under Section 313(1)(b) Cr.P.C, compliance of Section 232 Cr.P.C was mandatory. In the case on hand, no hearing as contemplated under Section 232 Cr.P.C is seen made by the trial court. However, non-

compliance of the said provision does not, *ipso facto* vitiate the proceedings, unless omission to comply with the same is shown to have resulted in serious and substantial prejudice to the accused (See **Moidu K. vs. State of Kerala, 2009 (3)KHC 89 : 2009 SCC OnLine Ker 2888**). Here, the accused persons have no case that non-compliance of Section 232 Cr.P.C has caused any prejudice to them.

8. The accused persons adduced no oral or documentary evidence.

9. On consideration of the oral and documentary evidence and after hearing both sides, the trial court, *vide* the impugned judgment and order on sentence dated 18.07.2017, held the accused persons guilty of the offence punishable under Section 376D IPC. They have been acquitted under Section 235(1) Cr.P.C. of the offence punishable under Section 366 IPC read with Section 34 IPC. The accused persons have been sentenced under Section 235(2) Cr.P.C. to undergo rigorous imprisonment for a period of

20 years along with fine of ₹25,000/- each and in default of payment, to simple imprisonment for a period of 2 years. Aggrieved, the accused persons have preferred these appeals.

10. Heard both sides and perused the records.

11. The only point that arises for consideration in this appeal is whether the conviction entered and sentence passed against the appellants/accused persons by the trial court, despite PW11, the victim, changing her versions repeatedly during the course of her examination before the trial court is justifiable and can be sustained.

12. The gist of the case of PW11, the victim, in Exhibit PW11/A FIS recorded on 01.06.2013 is as follows:- On 31.05.2013 at about 11:00P.M., when she went to the bathroom situated outside her house and was returning therefrom, she found Anwar (A1) standing outside the bathroom. As soon as she came out, Anwar (A1) caught hold of her hand, dragged her and pushed her into a white Santro car. Anish Kumar (A2) and Sandeep (A3),

friends of Anwar (A1), were already present inside the vehicle. Anish Kumar (A2) and Sandeep (A3) held her down inside the car while Anwar (A1) drove the vehicle, and when she raised alarm, one of them covered her mouth. The vehicle was taken to a godown at Kamruddin Nagar, where all three of them pulled her out of the car and took her inside a room within the godown prem*ises.* A wooden platform (*takht*) was lying therein. She was pushed onto the said platform. Anwar (A1) removed her salwar while Sandeep (A3) restrained her. Thereafter, Anwar (A1) raped her, followed by Anish (A2), and thereafter by Sandeep (A3).She was again placed in the car and was pushed out onto the road in front of Bankey Bihari shop in the early morning hours, after which they drove away. She reached her house at about 6:30A.M. and narrated the entire incident to her mother. She accordingly prayed that strict legal action be taken against A1, A2, and A3 in accordance with law.

13. Exhibit PW7/A, the Section 164 statement of PW11, is seen recorded on 03.06.2013 in which she states thus: - “At 11:00P.M., she was outside her house, about 17 steps away, brushing her teeth when Anwar (A1) knocked on the bathroom door. As soon as she came out, they, namely, Anwar (A1), Sandeep (A3) and one of their associates, whose name she does not know, pulled her inside a Santro Car. The three of them took her into a warehouse. All three had been drinking alcohol. There was a dark-complexioned man in the back of the car, Sandeep (A3) pinned her down and gagged her mouth. There was a room built inside the warehouse where the three committed wrong act on her and threatened that they would not let her approach the Court and would shoot her. Anwar (A1) lives in her neighbourhood. On the day of giving the statements, Anwar’s friends came to her house and threatened them. They told her elder sister Mona, not to testify and told them to either take the money or that day they would kidnap the entire family. They were told that they would not be

permitted to reach the Court. When her mother did not find her at home, the police was informed. The three of them kept driving her around in the car all night, and as soon as it was morning, they pushed her out on the road. They threatened her that if she told her parents, they would be killed. As soon as she reached home, she told her mother everything. The police arrived at 06:00 A.M and took her to Sanjay Gandhi Hospital at around 01:00 P.M.

14. PW11, when examined before the trial court on 19.11.2013, was unable to recall the date or month of incident. She deposed that in the summer of 2013, at about 11:00P.M., she had gone to the bathroom situated about 15 to 20 steps away from her room for attending the call of nature. When she was inside the bathroom, someone knocked on the door from outside. As soon as she came out, A1 who was behind the curtain, caught hold of her hand and pulled her inside a car. A3 and one other person were already in the car. All three of them took her to a godown situated in Kamruddin Village. They took her inside a room in the said

godown, and each of the three accused persons raped her against her will. She further deposed that at the time of the incident, she was 17 years and 8 months old. The accused persons threatened her that in case she made any complaint, they would kill her or kidnap her elder sister. Thereafter, the following day, at about 05:00A.M., the accused persons left her near the roadside, following which she reached her house weeping and narrated the entire incident to PW12, her mother. PW11 further deposed that the family members of all three accused persons were threatening her and family not to depose in the present case. Even on the day of Janmashtami, her father was assaulted by some unknown persons. The cross-examination of PW11 was adjourned at the request of the defence counsel.

14.1. PW11 was cross-examined on 06.02.2014. PW11 deposed that prior to the incident she had never made any physical relations with anybody and had never gone with A1 anywhere. She had only seen A1 once or twice at the house under construction in

front of her house and had never seen the other two accused persons. She deposed that she never knew the accused persons by name prior to the incident and that she never identified the three accused persons in any Test Identification Parade (TIP). She denied having gone out with A1 at about 08:00P.M. from her house on the date of the incident. Her mother had never made any complaint to the police regarding the same. PW11 deposed that she does not know whether any call came on A1's mobile phone. She denied that PW12, her mother, had called A1 at 1:47:54 hrs. on 01.06.2013 from her brother's mobile phone, and that A1 had given the phone to her and that her mother had instructed her to return home as her father had woken up. PW11 denied calling A1 from her brother's phone at around 10:56P.M.on 31.05.2013 asking him to pick her up. PW11 admitted that the *Shukra Bazar* (weekly market) had been set up in the street on 31.05.2013 and that her house is located on the main road where many vehicles and people were passing by. She admitted that there was a significant crowd at

the market. Further, cross-examination was adjourned as the prosecutor was unavailable during the post-lunch session and as the trial court had other work to be completed.

14.2. PW11 was recalled and further cross-examined on 04.06.2014. On the said day she deposed thus: -

> *"... I never met accused Anwar in the house which was under construction. I had friendship with accused Anwar. I had physical relations with accused Anwar with my free consent. It is correct that though I had gone with accused Anwar in the night on the day of incident but in the night my father came to know and because of his fear I had lodged this complaint Ex.PW 11/A in PS. I knew only accused Anwar and not other accused persons."*
>
> (Emphasis Supplied)

14.3. On the said day also, her examination was not completed, and hence further cross-examination was adjourned for lack of time. PW11 was recalled and cross-examined further on 18.07.2014. On the said day, she deposed that there was no electricity in the godown during the night and it was dark and that due to darkness, she could not see the other two persons at the time

of the incident. She knew only A1 prior to the incident and did not know the other two persons. She was shown all the three accused persons at the Police Station. She was not taken by the police to Tihar Jail for identification of the culprits in any TIP. She further deposed thus: -

> *"...It is correct that whatever I have deposed in my examination in chief was due to the fear of my father and the police."*
>
> (Emphasis Supplied)

14.4. At this juncture, the prosecutor sought permission of the trial court to re-examine PW11, as she had changed her stand in the cross examination. The request was allowed by the trial court. PW11 was re-examined by the prosecutor on 16.10.2014. On the said day, she deposed thus: -

> *"It is correct that whenever I had appeared and depose before this Court I have taken Oath to tell the truth to the Court. I am aware that I am required to speak the truth before Court and I am also aware that in case I do not speak the truth before the Court, I can be punished for the same.*

My father had threatened me to beat me, if I did not depose as per his instructions. This was on the same day when the incident had occurred. He told me that I have spoiled the reputation of the family. I had gone with my mother to the PS and made the complaint. My father had come there later on after about 10 minutes. At that time the complaint was in the process of being written. I had mentioned the names of accused Anwar, Anish and Sandeep in the complaint as I had seen them in the car. All the three accused had brought me in the car and left me near my residence by bringing me from the godown where the incident had occurred. All the three accused persons were present in the godown.

I had stated all the facts correctly before the Ld. MM in my statement u/s 164 Cr.P.C.

I had been threatened by the friend of accused Anwar and they had tried to injure me in my stomach with glass (kaanch se paet pai vaar karne ki koshish ki thi) and they had also pressed my neck to kill me. This happened about one and half months ago but I do not remember the exact date. The same is mentioned in the medical record. Out of fear I had falsely deposed before the Court on 04.06.2014 and 18.07.2014.

I had gone to PS Nihal Vihar with my complaint when I was threatened and assaulted by the friends of accused Anwar but the police did not take my complaint in writing.

However, on my verbal complaint, I was taken to SGM hospital by the police where I was medically examined. I have brought emergency registration card. The same is Ex. PW11/E (the Addl. PP has pointed out that the date mentioned in the emergency registration card of the prosecutrix is 20.04.2014).

Out of fear and due to the threats, I was compelled to change my stand in my cross examination dated 04.06.2014 and 18.07.2014.

It is correct that on 13.05.2013 at about 11.00 pm all the accused persons Anwar, Anish and Sandeep had abducted me from outside bathroom near house no. 4, Extn. 4 Maharaja wali gali, near water tank, Delhi and taken me to a room constructed at bank godown Shukur Bazar Road (Friday market road) Extn- 2 C Nangloi, where I was gang raped by all the accused persons."

(Emphasis Supplied)

The case was again adjourned on the request of defence counsel.

14.5. When PW11 was further cross-examined on 28.10.2014, in the light of her testimony in the re-examination, she deposed thus: -

"I am not under any fear today. It is correct that I have changed my statement before this Court as initially I had deposed against the accused persons in my examination in chief, retracted in my cross examination and again deposed against the accused in my re-examination by the State.

It is correct that on 31.05.2013 at night I had received a call from my residence made by the mobile phone of my brother by my mother on the mobile phone of accused Anwar. My mother was not aware that I was with accused Anwar.

It is correct that about two months ago there was a fight when my mother and I had gone to the office of some one, where we had forcibly pushed open the door and broken the windows and had fought with the occupants of the office. It is correct that the MLC which I had filed which is Ex.PW11/E is regarding that very fight and not regarding any incident relating to the accused persons.

It is also correct that I have deposed falsely in my re-examination dt. 16.10.2014 that out of fear and due to the threats I was compelled to change my stand in my cross examination dated 04.06.2014 and 18.07.2014.

It is correct that out of fear of my father I had given my evidence as elaborated in my statement under section 164 Cr.P.C, examination in chief and re-examination. It is also

correct that if I was not under fear of my father, I would not have deposed against all the accused persons.

It is wrong to suggest that the accused Anwar and Sandeep never committed any rape or that I had gone with Anwar of my own consent being major. It is further wrong to suggest that accused Sandeep and Anwar never committed any rape upon me."

(Emphasis Supplied)

15. The trial court, while acquitting the accused under Section 366 IPC, held that abduction was not proved beyond reasonable doubt and that doubt existed as to whether PW11 had gone with A1 of her own volition. Once such doubt was recorded about the genesis of the occurrence, the burden upon the prosecution to prove absence of consent under Section 375 IPC became heavier and needed unimpeachable proof. The conviction under Section 376D IPC rests primarily upon the testimony of PW11 read with the DNA report. It is therefore imperative to assess whether PW11 qualifies as a reliable witness whose testimony can be acted upon.

16. In the light of the testimony of PW11, to which I have referred to in detail, the learned Prosecutor was asked whether the

conviction by the trial court is liable to be confirmed. It was quite vehemently and strenuously argued by the learned Additional Public Prosecutor as well as by the learned counsel for PW11, the victim, that the trial court was perfectly justified in convicting the accused persons in the light of the testimony of PW11 in her examination-in-chief as well as re-examination. To support this argument, reference was made to the decision of a Co-ordinate Bench of this Court in **Harvinder v. State (NCT of Delhi), 2025 SCC OnLine Del 6701** and the decision of the Apex Court in **Vinod Kumar v. State of Punjab, (2015) 3 SCC 2020**. It was pointed out that PW11 had fully supported the prosecution case in her examination-in-chief which is in consonance with her earlier statements, i.e., the FIS/FIR and her 164 statement. PW11 turned hostile only because cross-examination was conducted after a period of more than one year of her examination-in-chief, by which time she was won over by the accused persons. However, in the re-examination, PW11 corrected her mistake and supported the

prosecution version and hence, her cross-examination on 04.06.2014 and 28.10.2014 are liable to be ignored, argued the learned prosecutor and the learned counsel for PW11, the victim.

17. **Vinod Kumar** (*supra*) was a case under the Prevention of Corruption Act, 1988. One of the witnesses, a *panch* witness, turned hostile. The Apex Court, *inter alia*, considered the question whether testimony of a hostile witness can be relied upon or not. It was noticed that in the examination -in- chief, the witness had supported the prosecution story in its entirety. However, in the cross-examination, he did not support the prosecution case. After referring to the earlier decisions of the Apex Court, it was held that even if a witness is characterised as a hostile witness, his evidence is not completely effaced. The said evidence remains admissible in trial and there is no legal bar to base a conviction upon his testimony, if corroborated by other reliable evidence. The evidence of such a witness cannot be effaced or washed off the record

altogether but, but the same can be accepted to the extent, it is found to be dependable on a careful scrutiny thereof.

17.1. **Harvinder** (*supra*) was a case involving the offence of rape. The prosecutrix as well as her father turned hostile. It was held that though the prosecution witnesses have turned hostile, their testimony cannot be washed off or rejected in *toto*. Their evidence merits a closer scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. After employing caution and separating the truth from exaggeration, lies and improvements, the court can come to the conclusion that the residuary evidence is sufficient to secure a conviction. After referring to the various decisions of the Apex Court on the point it was held thus: -

> *"13. Records would reveal that the prosecutrix has maintained consistency in relation to the material facts of the offense across multiple stages. She has consistently stated that she was contacted by appellant/Lalu on 29.12.2014, was taken by appellant/Harvinder to Bhajanpura on the pretext of a job, was given milk after which she felt uneasy, and was*

thereafter raped by both appellants. This version is recorded in the initial complaint on 01.01.2015 (Ex PW1/A), her brief description of the incident in the MLC (Ex. PW1/E) prepared on. 01.01.2025, her statement under Section 161 CrPC dated. 01.01.2025, her statement under S. 164 CrPC recorded on 03.01.2015 (Ex PW1/F), and her examination-in-chief recorded on 05.10.2015 and 30.05.2016). It was only in her cross examination which was recorded on 26.09.2016 i.e. almost a year later that she turned hostile. Pertinently, when she was re-examined on 23.10.2017, she again re-affirmed her earlier version and stated that she had deposed truthfully during her examination-in-chief on 05.10.2015 and 30.05.2016. Thus, overall, she has remained consistent and the cross-examination appears to be a lone aberration. Her entire testimony cannot be effaced from the record only on this account.....”

(Emphasis Supplied)

18. As is evident from a reading of the aforesaid paragraph, the conclusion is that the prosecutrix has given a consistent version in her FIS/FIR; in her Section 161 statement and in her Section 164 statement. Thus, overall she has remained consistent and that the “*lone aberration*” is her version in the cross-examination.

18.1. The statements made under Section 161 Cr.P.C. are statements made to the police during the course of investigation and the same cannot be used except for the purpose stated in the proviso to Section 162(1) Cr.P.C. Under the proviso to Section 162(1) Cr.P.C., such statements can be used only for the purpose of contradicting a prosecution witness in the manner indicated in Section 145 of the Evidence Act and for no other purpose. They cannot be used for the purpose of seeking corroboration or assurance for the testimony of a witness in court. [See **Tahasildar Singh v. State of UP, AIR 1959 SC 1012; Satpal v. Delhi Administration, (1976) 1 SCC 727 and Delhi Administration v. Lakshman Kumar, 1985 KHC 741: (1985) 4 SCC 476**].

18.2. It is well settled that a statement under Section 164 Cr.P.C. is not a substantive piece of evidence of the truth of the facts stated. It can be used to corroborate or contradict the maker (See **Brij Bhushan Singh v. Emperor, AIR 1946 PC 38; Mamand v. King Emperor, AIR 1946 PC 45; Bhuboni Sahu v.**

The King, AIR 1949 PC 257; State of Delhi v. Ram lohiya, AIR 1960 SC 490; State of Rajasthan v. Kartar Singh, AIR 1970 SC 1305; Ramkishan Singh v. Harneet Kaur, AIR 1972 SC 468 and Dhanbal v. State of Tamil Nadu, AIR 1980 SC 628).

18.3. Likewise, FIS/FIR is also not a substantive piece of evidence. It can only be used to corroborate the informant under Section 157 or to contradict the informant under Section 145 of the Evidence Act if the informant is called as a witness at the time of trial. It cannot be used for corroboration or contradiction of any witness other than the one lodging the FIS/FIR [See **State of Madhya Pradesh v. Ramjan Khan, 2024 INSC 823 and Dharma Rama Bhagare v. State of Maharashtra, (1973) 1 SCC 537**].

18.4. On the other hand, the testimony of a witness before the court is substantive evidence. The testimony includes examination -in-chief, cross examinationand re-examination. The right of cross - examination is included in the right of an accused in a criminal

case, to confront the witness against him not only on facts but also to discredit the witness by showing that his testimony - in - chief was untrue and biased. The purpose of cross-examination of a witness has been succinctly explained by a Constitution Bench of the Apex Court in **Kartar Singh v. State of Punjab, 1994 KHC 1173: (1994) 3 SCC 569** thus-

> *"S.137 of the Evidence Act defines what cross - examination means and S.139 and S.145 speak of the mode of cross - examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross - examination is an acid - test of the truthfulness of the statement made by a witness on oath in examination - in - chief, the objects of which are : (1) to destroy or weaken the evidentiary value of the witness of his adversary; (2) to elicit facts in favour of the cross - examining lawyer's client from the mouth of the witness of the adversary party; (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness; and the questions to be addressed in the course of cross - examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."*
>
> (Emphasis Supplied)

18.5. The aforesaid view has been reiterated in **Jayendra Vishnu Thakur v. State of Maharashtra 2009 KHC 4688: (2009) SCC 104** wherein it is observed:

> "*24. A right to cross - examine a witness, apart from being a natural right is a statutory right. S.137 of the Evidence Act provides for examination – in- chief, cross - examination and re - examination. Section 138 of the Evidence Act confers a right on the adverse party to cross - examine a witness who had been examined -in- chief, subject of course to expression of his desire to the said effect. But indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis - ' - vis opinion.*"

(Emphasis Supplied)

19. The decisions of the Apex Court are binding on this court by virtue of Article 141 of the Constitution and in such circumstances, the strenuous arguments advanced by the learned Additional Public Prosecutor and the learned counsel for PW11

based on the dictum in **Harvinder** (*supra*), cannot be accepted.

20. A reading of the various statements of PW11, beginning from the earliest version, that is, the FIS/FIR till her testimony before the Court reveals progressive and material alterations at successive stages. In Exhibit PW11/A FIS recorded on 01.06.2013, she alleged that A1 had forcibly taken her in a Santro car and that all three accused persons committed gang rape on her in a godown. In this version, there is no disclosure of any prior relationship, acquaintance, or consensual intimacy with A1. The narrative was of forcible abduction followed by non-consensual penetrative sexual assault. A reading of the FIS/FIR gives the impression that PW11 did know all the accused persons as all of them are specifically named in the FIS. In Exhibit PW7/A Section 164 statement, PW11 has specifically named A1 and A3. But her case is that the third person present in the car was unknown to her. She describes the third person in the car as a dark-complexioned man. A2 has not been named in her Section 164

statement. No Test Identification Parade (TIP) was conducted. So, how was A2 identified?

21. When PW11 entered the witness box and her examination-in-chief was recorded on 19.11.2013, she once again categorically deposed that all the three accused persons had committed gang rape upon her after taking her to the warehouse. She identified them in court. However, a marked shift appears in her cross-examination dated 06.02.2014, where she admitted that she knew A1 prior to the incident. The departure became even more pronounced in her cross-examination dated 04.06.2014, wherein she admitted that she had friendship with A1 and had physical relations with him earlier. She further stated that the complaint had been lodged because she was afraid of her father. This admission substantially diluted the earlier portrayal of complete absence of prior relationship and directly affected the prosecution's case on consent and genesis. In further cross-examination dated 18.07.2014, she admitted that it was dark at the

godown and that she could not properly see the other two persons. She also conceded that no TIP was conducted and that she had identified the accused persons in the police station. These admissions assume significance in view of the prosecution case that all the three accused persons acted conjointly and were clearly identified at the time of the occurrence.

22. Thereafter, when recalled and re-examined on 28.10.2014, PW11 attempted to explain her earlier statements by attributing them to fear, threats and pressure, saying that she had been instructed what to depose and that she was under fear, threat, etc. at different points of time. Thus, the re-examination introduced yet another version explaining away prior admissions, resulting in multiple and mutually inconsistent narratives regarding prior relationship, voluntariness, identification and the circumstances in which the complaint came to be lodged. The cumulative effect of these sequential deviations, from the FIS/FIR, to the Section 164 statement, to the examination-in-chief, to the multiple cross-

examinations, and finally to re-examination, demonstrates not mere minor discrepancies but substantive oscillation on material particulars touching the credibility of the witness and, more importantly, the core issue of consent. The testimony of PW11 while she was cross-examined again after the re-examination is also important. She then admitted that she was under no fear or threat on that day. She admitted that she had changed her stand during her examination in chief, cross-examination, and re-examination. She admitted that in the night of 31.05.2013, Anwar (A1) had received a call from her mother while she was with him. She also admitted that in her re-examination conducted on 16.10.2014, she had deposed falsely that it was because of fear and threats, that she had been compelled to change her version in the cross-examination conducted on 04.06.2014 and 18.07.2014. She also admitted that it was out of fear of her father she had given the version as revealed in her 164 statement, examination- in- chief and re-examination. She also admitted that had she not been under

fear of her father, she would not have deposed against the accused persons.

23. The learned Prosecutor and the learned counsel for the victim then argued that the case of PW11 that, she had been gang raped was never challenged or cross-examined by the accused persons. Even assuming that PW11 had consensual relations with A1, that would not exonerate A2 and A3 because the version of PW11 that she was raped by the latter was never challenged. I am afraid, I am unable to accept this argument also. PW11 has no case that while she and A1 were having a consensual relationship, A2 and A3 had barged in and forced themselves on her. She has never such a case. Therefore, if the argument is accepted, this court would be developing a case for PW11 which she herself does not have.

24. As regards medical evidence, the MLC records no external or internal injuries on the genital area and no signs suggestive of force. While it is true that absence of injury is not

conclusive, in a case alleging gang rape by three adult males, complete absence of injury assumes relevance, particularly when the testimony of the prosecutrix itself is not wholly consistent. The principle enunciated in **Lalli Ram v. State of Madhya Pradesh (2008) 10 SCC 69**, though rendered in the context of Section 376(2)(g) IPC, remains instructive that where the version of the prosecutrix is self-contradictory and inconsistent with medical evidence, conviction cannot rest solely upon such testimony without corroboration.

25. Exhibit PW18/PX1 FSL Report indicates that alleles from the blood samples of the accused were accounted for in the allelic data obtained from the underwear of PW11. Referring to the scientific evidence it was submitted that the same corroborates the prosecution version. According to the learned prosecutor, even if the testimony of PW11 is not of sterling quality, this court cannot completely discard her testimony. In such circumstances, the court can look into the other pieces of evidence for corroboration. The

scientific evidence clearly shows that all the accused persons did have sexual intercourse with PW11. It was also submitted that scientific evidence alone can form the basis of conviction.

26. In this context, I refer to the following dictums of the Apex Court – In **Ishwari Prasad Misra v. Mohammad Isa, 1963 (3) SCR 722**, it was observed;

> "*Evidence given by expert can never be conclusive, because after all it is opinion evidence*", *a statement which carries us nowhere on the question now under consideration. Nor, can the statement be disputed because it is not so provided by the Evidence Act and, on the contrary, S. 46 expressly makes opinion evidence challengeable by facts, otherwise irrelevant. And as Lord President Cooper observed in Davis v. Edinburgh Magistrate: "The parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert*".
>
> (Emphasis Supplied)

26.1. In **Magan Bihari Lal v. State of Punjab, AIR 1977 SC 1091**it has been held thus-

> "*... It is now well settled that expert opinion must always be received with great caution and perhaps none so with more*

caution than the opinion of a handwriting expert. There is a profusion of precedential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law."

(Emphasis Supplied)

26.2. **Murari Lal v. State of M.P. 1980 (1) SCC 704**, the Apex Court while laying down the principles with regard to the extent to which reliance can be placed on the evidence of an expert witness and when corroboration of such evidence may be sought, opined thus-

"4. We will first consider the argument, a stale argument often heard, particularly in Criminal Courts, that the opinion - evidence of a handwriting expert should not be acted upon without substantial corroboration. We shall presently point out how the argument cannot be justified on principle or precedent. We begin with the observation that the expert is no accomplice. There is no justification for condemning his opinion - evidence to the same class of evidence as that of an accomplice and insist upon corroboration. True, it has occasionally been said on very high authority that it would be hazardous to base a conviction solely on the opinion of a handwriting expert. But, the hazard in accepting the opinion

of any expert, handwriting expert or ***any other kind of expert****, is not because experts, in general, are unreliable witnesses - the quality of credibility or incredibility being one which an expert shares with all other witnesses -* ***but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion.*** *The more developed and the more perfect a science, the less the chance of an incorrect opinion and the converse if the science is less developed and imperfect. The science of identification of finger - prints has attained near perfection and the risk of an incorrect opinion is practically non - existent. On the other hand, the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness. His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides……"*

(Emphasis Supplied)

27. When the attention of the learned Additional Public Prosecutor was drawn to the aforesaid decisions, it was submitted

that the Apex court in those cases was considering the report of a handwriting expert, which science is not 100 % correct. On the other hand, the result of a DNA examination is 99.99 % correct and therefore, there is no reason to disbelieve the report of the expert.

28. Here again, I disagree with the argument advanced by the learned Additional Public Prosecutor. In **Murari Lal** (*supra*) the Apex court has cautioned and pointed out the hazard in accepting the opinion of any expert, handwriting expert or any kind of expert (without corroboration) by pointing out that it's not because they are unreliable witnesses but, because all human judgment is fallible and an expert may also go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. Moreover, the mere fact that the accused persons had sexual intercourse with PW11 is not sufficient to prove the offence charged against them. PW11 was admittedly, a major at the time of the incident. Therefore, the question of

consent assumes great significance. The trial court disbelieved the case of kidnapping of PW11 on the ground that it was possible that PW11 had gone on her own accord. The testimony of PW11 certainly raises doubts about the case of gang rape. It seems that PW11 went on her own accord. Her father found out about the same. PW11 also speaks of her father berating her by accusing her of spoiling the family's honour. In such circumstances under compulsion of the father, the complaint seems to have been lodged with the police. Such a possibility also cannot be ruled out.

29. In criminal jurisprudence, if two views are possible, the one favouring the accused must be adopted. In the present case, the evidence does not exclude the possibility of consensual intercourse. The prosecution has failed to establish, beyond reasonable doubt, the offence punishable under Section 376D IPC.

30. The finding of the trial court that there are only minor inconsistencies in the testimony of PW11 is apparently incorrect. On overall re-appreciation of the evidence, this Court is of the

considered view that the trial court went wrong in convicting the appellants on the basis of the aforesaid unsatisfactory evidence. Hence, an interference into the impugned judgement is called for.

31. In the result, the appeals are allowed and the impugned judgment of conviction and order on sentence are set aside. The appellants (A1 to A3) are acquitted under Section 235(1) Cr.P.C. of the charge under Section 376D IPC. They are set at liberty and their respective bail bonds shall stand cancelled.

32. Application(s), if any, pending, shall stand closed.

33. Copy of this judgment be placed in all the connected matters.

CHANDRASEKHARAN SUDHA
(JUDGE)

MARCH 10, 2026
Mj