

(2009) 03 P&H CK 0269

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 324-SB of 1996

Heena alias Babita

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision: March 27, 2009

Acts Referred:

- Penal Code, 1860 (IPC) - Section 366

Citation: (2010) 1 RCR(Criminal) 898

Hon'ble Judges: Sham Sunder, J

Bench: Single Bench

Advocate: Bipan Ghai, with Mr. Deepak Garg, Rajinder Goyal, for the Appellant; P.S. Sullar, D.A.G., Haryana, for the Respondent

Final Decision: Allowed

Judgement

Sham Sunder, J.

This judgement, shall dispose of Criminal Appeal No. 324- SB of 1996, filed by Heena alias Babita wife of Sandeep, and Hardevi wife of Navneet Bajaj, and Criminal Appeal No. 338-SB of 1996, filed by Sandeep son of Ved Parkash Sharma, Dheeraj son of Navneet Rai, Krishan Kumar Malik son of Sain Ditta, Vijay Kumar son of Gurdayal Singh, Krishan Kumar Takkar son of Inder Dass Khatri, and Krishan alias Kaka son of Chaudhary Lal, accused (now appellants), against the judgement of conviction and the order of sentence, dated 24.04.96, rendered by the Court of Additional Sessions Judge, Kurukshetra, vide which, it convicted and sentenced them, as under :-

Name of the accused (now appellants)	Offence for which convicted	Sentence awarded
1	2	3

iHeena alias
BabitaHardevi

(a) u/s 366 of the
Indian Penal Code.

To undergo rigorous imprisonment for a period of five years each and to pay a fine of Rs. 1000/-, each, in default thereof, to further undergo rigorous imprisonment for a period of six months each.

iii Sandeep iv
Dheeraj

(b) u/s 366 of the
Indian Penal Code.

To undergo rigorous imprisonment for a period of five years each and to pay a fine of Rs. 1000/-, each, in default thereof, to further undergo rigorous imprisonment for a period of six months each.

v Krishan Kumar
Malikvi Vijay
KumarviiKrishan
Kumar Takkar

(c) u/s 366 of the
Indian PenalCode.

To undergo rigorous imprisonment for a period of five years each and to pay a fine of Rs. 1000/-, each, in default thereof, to further undergo rigorous imprisonment for a period of six months each.

(d) u/s 376(2)(g) of the Indian Penal Code.

To undergo rigorous imprisonment for a period of ten years each and to pay a fine of Rs. 2,000/-, each, in default thereof, to further undergo rigorous imprisonment for a period of one year each.

All the substantive sentences were ordered to run concurrently.

2. The prosecution case, proceeded in the manner, that the prosecutrix aged about 17 years, resident of Sarswati Road, Pehowa, had passed 10th class. Her father died about 12 years earlier to 23.06.94. She had got two sisters namely Sangeeta, and Ritu. Ritu was 8 years old, at the relevant time. The prosecutrix, her mother Narayani Devi, and younger sister Sangeeta, were running a book seller shop. There were vacations in the school. She alongwith her mother and three sisters after closing the book shop, came to Darra Khera, in Thanesar, to meet her mother's sister (Mausi), about 15 days before 23.06.94. They were residing with her mother's sister (Mausi). On 23.06.94, at about 1.00 PM, the prosecutrix alongwith her sister Ritu, came to Sector 13, Kurukshetra, to meet their aunt, wife of Des Raj. She was talking to her aunt. At about 2.00 PM, Hardevi, her god-father's sister (Bua), accompanied by her daughter Heena, Heena's husband Sonu, and Heena's brother Dheeraj, residents of Dakshinpuri near Virat Cinema, Flat No. 244, Block No. 20, near New Madangir, Delhi, accompanied by six boys, whose names, the prosecutrix did not know, but could identify them, if shown to her, came to the house of her aunt aforesaid. Thereafter, she was forcibly put in a blue Maruti van and was taken near a bridge in a vacant bungalow (kothi). It was further stated that in that bungalow (kothi), she was subjected to sexual intercourse forcibly by one hefty man, who was being called as Kaka, and by another man, who was short statured (geetha), having a beard after removing her clothes. It was further stated that the family of the godsister of her father was sitting in another room in that bungalow. It was further stated that the remaining six persons were in the same room, who were fondling her. Some of them inserted finger in her anus. Some of them gave tooth bite on her face. Thereafter, all of them, took her forcibly in a Maruti van to Radaur, to the house of the in-laws of her father's sister Hardevi. Thereafter, her father's sister Hardevi, cut her hair and gave her beatings with shoes. It was further stated that after Criminal Appeal No. 324-SB of 1996 6 Criminal Appeal No. 338-SB of 1996 getting an opportunity, she boarded the bus and came to Kurukshetra. Thereafter, she accompanied by her mother and younger sister, went to the Police Station on

23.06.94, and made a statement exhibit PE, containing the aforesaid facts, which was recorded by the Police. It was read-over and explained to her, and after admitting the same to be correct, she signed it. Endorsement PE/1, was appended on the said statement and the same was sent to the Police Station, on the basis whereof, the first information report PE/2, was registered.

3. During the course of investigation of a case under the Immoral Traffic Act, Hardevi and Heena, were arrested, on 27.06.94, in the instant case. Sandeep and Dheeraj, accused, surrendered before the Police, on 27.06.94. On 27.06.94, the statement of the prosecutrix, u/s 164 of the Code of Criminal Procedure, was got recorded from the Magistrate. In that statement, the prosecutrix named the remaining four accused instead of six accused. In that statement, she also stated that one boy who was being named as Krishan alias Kaka son of Chaudhary Lal, and another boy, who was being named as Krishan Kumar Malik son of Sain Ditta, committed sexual intercourse with her forcibly.

4. On 28.06.94, one Ramesh Miglani, produced accused Krishan alias Kaka son of Chaudhary Lal, Vijay Dua son of Gurdayal Singh, Krishan Kumar Malik son of Sain Ditta, and Krishan Kumar Takkar son of Inder Dass Khatri. On 28.06.94, the prosecutrix came to the Police Station and made supplementary statement. In that statement, she named all the accused with their parentages etc. The statements of the witnesses were recorded. After the completion of investigation, the accused were challaned.

5. On their appearance, in the Court of the Committing Magistrate, the accused were supplied the copies of documents, relied upon by the prosecution. After the case was received by commitment, charge under Sections 366 and 376 (2) (g) of the Indian Penal Code, was framed against the accused, which was read-over and explained to them, to which they pleaded not guilty, and claimed judicial trial.

6. The prosecution, in support of its case, examined as many as 14 witnesses. Krishan Singh, Head Constable (PW1), tendered his affidavit PA, with regard to the handling of the clothes etc. of the prosecutrix.

7. Ram Kumar, who was the Moharrir Head Constable, in the Police Station, at the relevant time, appeared as (PW2), and tendered his affidavit PB. Constable Ved Parkash (PW3), tendered his affidavit PC. He took the parcels of clothes to the office of the Forensic Science Laboratory.

8. Mukesh Kumar, Draftsman (PW4), prepared the scaled site plan PD of H.No. 196/13, Housing Board, Kurukshetra, belonging to Bimla Devi and her husband Des Raj, on the pointing out of Bimla Devi and Des Raj. Assistant Sub Inspector Jagdish Singh (PW5), recorded the formal first information report exhibit PE/1.

9. Dr. Sushma Saini, Medical Officer (PW6), examined the prosecutrix on 24.06.94, at 3.30 AM, and observed, as under :-

(i) She was fully conscious co-operative girl of average built, wearing brown printed salwar kameej. The shirt was torn from front. Salwar and Kameej were removed and sent for chemical examination. There were multiple linear abrasions in front of left fore-arm and palm on lateral and front side.

(ii) A round interrupted abrasion on left cheek which was reddish blue in colour. She was complaining pain in head and neck and gave a history of cutting of hair. She was wearing brown under-wear which was also removed and sent for chemical examination.

According to the doctor, there was no mark of injury on the breasts. The same were hemispherical and developed.

On local examination, white discharge was found in and around vulva. Two swabs were taken and sent for chemical analysis. Labia majora and labia minora were healthy and had no mark of injury on them. There was redness at intoritus. Hymen had old-healed tear at 2O, 5O and 10O clock position. The tears were not red hot or tender and they did not bleed on touching.

The vagina admitted two fingers easily. Cervices were backward. Uterus was ante-verted nulliparus size fornices were free. Two slides were prepared from the posterior vaginal secretion and sent for chemical examination. Trouser (salwar), shirt (kameej), and under-wear of the prosecutrix, duly sealed, and a card-board box containing two swabs and two slides, duly sealed, as well as sealed envelope containing an MLR and letter to the Director, Forensic Science Laboratory, Madhuban, alongwith sample of the seal, used were handed over to the Investigating Officer.

10. Brij Mohan, Assistant Sub Inspector (PW7), stated that Krishan alias Kaka, son of Chaudhary Lal, accused, produced one Maruti van No. DL-5C-6467, which was taken into possession by Inspector Sohan Singh, vide memo exhibit PH.

11. Baldev Kumar (PW8), was the registered owner of the van aforesaid. He produced the registration certificate PJ, before the Police.

12. The prosecutrix appeared as (PW9), and broadly supported Criminal Appeal No. 324-SB of 1996 9 Criminal Appeal No. 338-SB of 1996 the case of the prosecution. Her statement in detail shall be discussed in the subsequent paragraphs.

13. Dr. M.P. Singh (PW10), examined the accused namely Krishan Kumar Malik son of Sain Ditta Mal, Krishan Kumar Takkar son of Inder Dass Khatri, Krishan alias Kaka son of Chaudhary Lal Khatri, and Vijay Kumar son of Gurdayal Singh. He did not find any injury on the person of these accused. He, however, opined that there was nothing suggestive of the fact that any of them was not fit to commit sexual intercourse.

14. Sohan Singh, Inspector/Station House Officer (PW11), investigated the case on 25.06.94. He verified the facts when Ramji Lal, Sub Inspector, was conducting the investigation of the case. Thereafter, he took over the investigation himself.
15. Sh. Jagdeep Jain, Judicial Magistrate 1st Class, Kurukshetra, (PW12), recorded the statement exhibit PR of the prosecutrix, u/s 164 of the Code of Criminal Procedure.
16. Ramji Lal, Sub Inspector (PW13), initially recorded the statement of the prosecutrix, forming the basis of the first information report and, thus, partly investigated the case.
17. Constable Amar Nath (PW14), took the special report to the Illaqa Magistrate.
18. Des Raj and Bimla Devi, prosecution witnesses, were given up, as won-over by the accused. Raj Pal, Clerk of the Municipal Committee, Pehowa, Constable Jagdish Chand, Dr. Sudha Parihar, Subhash Chand, Naraini Devi, Assistant Sub Inspector Raj Kumar, and Kasturi Lal, prosecution witnesses, were given up as unnecessary. Thereafter, the Public Prosecutor, for the State, closed the prosecution evidence.
19. The statements of the accused, u/s 313 of the Code of Criminal Procedure, were recorded. They were put all the incriminating circumstances, appearing against them, in the prosecution evidence. They pleaded false implication. Accused Sandeep, in his statement, u/s 313 of the Code of Criminal Procedure, stated that he was innocent. It was further stated by him, that, as a matter of fact, after the death of her father, the prosecutrix joined musical group of Heena on salary basis. It was further stated by him, that during her tenure of service with them, she developed relations with his brother-in-law namely Dheeraj and once she enticed him away without their knowledge and consent and then his mother-in-law Hardevi moved an application to the Police of Delhi. It was further stated by him that the prosecutrix also started playing mischief, in their business. As a result of these circumstances, they had to remove her, from the musical group and thereafter she had been nursing grievance and grudge, against him and his family. It was further stated by him that on 23.06.94, they had come to attend Satsang at the house of sister of his mother-in-law at Pehowa, where the prosecutrix also came and demanded Rs. 20,000/-, from them, as arrears of her wages, upon which, he retorted that she had already bungled a huge amount, from their business, and then there ensued exchange of hot words. On the morning of 24.06.94, they left for Haridawar, and as soon as, they reached at the reception of hotel at Haridawar, the prosecutrix accompanied by Police party arrived there and, in that position, he, his mother-in-law, wife Heena, and brother-in-law Dheeraj, were forcibly brought to Kurukshetra. It was further stated by him that thereafter he was falsely implicated, in the instant case, at the instance of the prosecutrix, who was thick with the Police of Kurukshetra.
20. Accused Heena, Dheeraj, and Hardevi, also took up the same plea, as was taken up by Sandeep, accused, in his statement, u/s 313 of the Code of Criminal

Procedure.

21. Accused Krishan alias Kaka son of Chaudhary Lal, Krishan Kumar Malik son of Sai Ditta, Krishan Kumar Takkar son of Inder Dass, and Vijay Kumar son of Gurdial Singh, denied the allegations, in their statements, u/s 313 of the Code of Criminal Procedure. They further stated that they never came to Kurukshetra, on that day. Vijay Kumar, accused, further stated that he was in service, and was present, in his office, on that day. It was further stated by him, that he never came to Kurukshetra, on that day, and was falsely involved.

22. In their defence, the accused examined Bimla Devi wife of Des Raj (DW1), from whose house, the prosecutrix was allegedly abducted, Ujjagar Singh, Duty Inspector, Haryana Roadways, Kurukshetra (DW2), Nasib Singh, Senior Assistant, United India Insurance Corporation, Kaithal (DW3), Jit Ram, Deputy Superintendent, Civil Surgeon Office, Kurukshetra (DW4), and Dev Raj, Chief Inspector, working as Duty Inspector, Haryana Roadways, Kurukshetra (DW5). Hardevi, accused, also tendered birth certificate of the prosecutrix as DB. As per the said certificate, she was born on 23.04.76 and, as such, was more than 18 years of age, at the time of commission of the alleged offences. Thereafter, the accused closed the defence evidence.

23. After hearing Counsel for the parties, and, on going through the evidence, on record, the trial Court, convicted and sentenced the accused, as stated above.

24. Feeling aggrieved, the aforesaid appeals, were filed by the appellants.

25. I have heard the Counsel for the parties, and have gone through the evidence and record of the case, carefully.

26. It is settled principle of Criminal Jurisprudence, that the prosecution, is required to prove its case, against the accused, beyond a reasonable doubt. The Court is not required to act on mere suspicion, conjectures or surmises or suspicious circumstances, to bring home the guilt to the accused. Reasonable doubt should not be stretched too far, to suspect everything so as to defeat the ends of justice. In [Gurbachan Singh Vs. Satpal Singh and others](#), , the principle of law, laid down, was to the effect, that reasonable doubt, is simply that degree of doubt, which could permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of offence to be investigated. Exaggerated devotion to the rule of benefit of doubt, must not nurture fanciful doubts, and lingering suspicions and thereby destroy social defence. Justice cannot be made sterile, on the plea, that it is better to let hundred guilty escape, than punish an innocent. Letting guilty escape is not doing justice according to law. In [State of U.P. Vs. Anil Singh](#), , the principle of law, laid down, was to the effect, that it is necessary to remember that a judge does not preside over a criminal trial merely to see, that no innocent man is punished. A Judge also presides to see that guilty man does not escape. One is as important, as the other. Both are public duties, which the Judge has to perform.

27. Before touching the merits of the case, in the light of the evidence, on record, in the first instance, it must be stated, as to what approach, the Court should adopt, while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex related offence. Is it essential that the evidence of the prosecutrix should be corroborated in material particulars, before the Court bases a conviction on her testimony ? Does the rule of prudence demand that in all cases save the rarest of rare, the Court should look for corroboration before acting on the evidence of the prosecutrix ? Let us see, if the Evidence Act, provides the clue to this riddle. Under the Evidence Act, evidence means and includes all statements, which the Court permits or requires to be made before it, by the witnesses, in relation to the matters of fact, under inquiry. u/s 59 of the Evidence Act, all facts, except the contents of documents, may be proved by oral evidence. Section 118 then illustrates, as to who may give oral evidence. According to that Section, all persons are competent to testify, unless the Court considers that they are prevented from understanding the questions, put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even, in the case of an accomplice, Section 133 provides that he/she shall be a competent witness, against an accused person, and the conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section 114, which lays down a rule of practice, says that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated, in material particulars. Thus, u/s 133, which lays down a rule of law, an accomplice is a competent witness, and the conviction based solely on his uncorroborated evidence, is not illegal, although in view of Section 114 illustration (b), the Courts do not, as a matter of practice, do so, and look for corroboration, in material particulars. This is the conjoint effect of Sections 133 and 114 illustration (b).

27-A. In *State of Maharashtra v. Chandraprakash Kewalchand Jain with Stree Atyachar Virodhi Parishad v. Chandraprakash Kewalchand Jain & Anr.* 1990 (2) Ch LR 228 (SC), it was held as under :-

A prosecutrix of a sex-offence cannot be treated at par with an accomplice. She is in fact a victim of the crime. The evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness u/s 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence, as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person, who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act, similar to illustration (b) to Section 114 which required it to look for corroboration. If for the

same reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony, short of corroboration, required in the case of an accomplice. The nature of evidence to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation, in accepting her evidence. We have, therefore, no doubt, in our minds, that ordinarily the evidence of a prosecutrix, who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage :-

It is only, in the rarest of rare cases if the Court finds that the testimony of the prosecutrix is so trustworthy truthful and reliable that other corroboration may not be necessary.

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily, the evidence of the prosecutrix, must carry the same weight, as is attached to an injured person, who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony, if there is independent evidence lending assurance to her accusation.

We think it proper, having regard to the increase in the number of sex-violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars, except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe would not be believed unless it is corroborated in material particulars, in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the Western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, evident that respect for womanhood, in our country is on active and cases of molestation and rape are steadily growing. Indian woman is now required to suffer indignities in different forms. From lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those, who violate the social norms. The standard of proof to be required by the Court in such cases, must take into account the fact that such crimes are generally

committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity.

It is time to recall the observation of this Court made not so far back in *Bhaiwaca Bhognibhai Hirjinbhai* :-

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 doing insult to injury. Why should the evidence 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 analyse 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 the feet by the approach, made in the Western world which has its own social milieu, 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 turn-Key basis and to transplant it on the 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 of problems, therefore, cannot be identical.

Further this Court said;

Without the fear of making too wide a statement or of over-stating the case it can be said that rarely will a girl or a woman in India level false allegations of sexual assault.... The statement is generally true in the context of the urban as also 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 nonpermissive 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 ostracised by the society or being looked down by the 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 own 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 an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being 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 the 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, to face the Court, to face the cross-examination, by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

28. The Counsel for the appellants, at the very outset submitted, that there was no corroboration to the statement of the prosecutrix, who appeared as PW9, and, as such, the trial Court, was wrong, in placing reliance, on her statement to record conviction and award sentence. As stated above, there is no provision of law, which requires that the statement of the prosecutrix before being acted upon, must be corroborated. It is only as a matter of prudence, that the Courts require that the evidence of the prosecutrix, find corroboration, through other evidence. In the instant case, the prosecutrix while appearing as PW9, in clear-cut terms, stated that on 23.06.94, at about 1.45 PM, when she alongwith her younger sister was present in H. No. 196/13, Housing Board Colony, Kurukshetra, where, she had gone to meet her aunt Bimla Devi, Har Devi, her daughter Heena, Sandeep @ Sonu husband of Heena, Dheeraj brother of Heena, and Krishan @ Kaka came there. She further stated that she was dragged by them from her hair. It was further stated by her that she was forcibly put in a Maruti van, parked outside the house of Des Raj husband of Bimla Devi. She further stated that the other accused namely Krishan Kumar Malik, Krishan Takkar, and Vijay Dua, were sitting in the van. She further stated that she was forcibly pushed in a room of a house, which was bolted from outside. Thereafter, Krishan Kumar Malik, Kaka (whose complete name, she did not know), Krishan Takkar, and Vijay Dua, came in that room and bolted the same from inside. She further stated that the remaining accused were in the adjoining room. It was further stated by her that Krishan Kumar Malik, Krishan alias Kaka, Krishan Kumar Takkar, and Vijay Dua, accused, then tore her clothes and stripped her naked. It was further stated by her that Krishan alias Kaka son of Chaudhary Lal Khatri, and Krishan Kumar Malik son of Sain Ditta, committed sexual intercourse with her forcibly. It was further stated by her, that Vijay Dua, accused, gave her a tooth bite, on her cheek, whereas, Krishan Takkar, accused, continued fondling the parts of her body. It was further stated by her, that thereafter they took her in the same van to Radaur. The number of that Maruti van was DL-5C- 6467. It was further stated by her, that they took her to the house of the in-laws of Hardevi, accused. Hardevi and Heena, accused, cut off her hair and the other accused forcibly caught her. It was

further stated by her that she, finding an opportunity, escaped therefrom, and then reached Kurukshetra, where she made statement PE, on the basis whereof, the first information report, was recorded. The statement of the prosecutrix was duly corroborated by Dr. Sushma Saini, Medical Officer, PW6, who medico-legally examined the prosecutrix on 24.06.94, at 3.30 AM. She found her shirt torn. She also found multiple linear abrasions in front of left fore-arm and palm on lateral and front side. She also stated that the possibility of intercourse with the prosecutrix, could not be ruled out. Further corroboration to the statement of the prosecutrix was provided through exhibit PG, report of the Forensic Science Laboratory, Haryana, Madhuban. On one dark brown stripped under-wear of the prosecutrix, two microscopic glass slides, having whitish smear on one surface and two cotton wool swabs on small sticks, described as vaginal swabs, which were taken at the time of the medical-examination of the prosecutrix, human semen was detected. Immediately after the prosecutrix escaped from the clutches of the accused, she came to the Police Station, to report the matter. In between, there was no interval. The report of the Forensic Science Laboratory, Madhuban, therefore, clinchingly proved the commission of sexual intercourse, with the prosecutrix. The prosecutrix, as stated above, in clear-cut terms deposed that both the accused namely Krishan Kumar Malik son of Sain Ditta, and Krishan alias Kaka son of Chaudhary Lal Khatri, committed sexual intercourse with her forcibly. There was no reason, on the part of the prosecutrix to depose falsely. Before levelling allegations against Heena @ Babita, Hardevi, Sandeep, Dheeraj, Krishan Kumar Malik, and Krishan @ Kaka, the prosecutrix must have thought a number of times. At the relevant time, no doubt, the prosecutrix was above 18 years of age, but she ♦ was unmarried. She must be knowing that, in case, the allegations of rape, and abduction against Krishan Kumar Malik, and Krishan @ Kaka, and the allegations of abduction, against Heena @ Babita, Hardevi, Sandeep, and Dheeraj, with an intent to compel or seduce her to illegal intercourse, by Krishan Kumar Malik, and Krishan @ Kaka, were proved to be false, she would be looked down upon in the society. No young girl would stake her honour, just for the sake of levelling false allegations of rape, and abduction against the accused. The participation of Krishan Kumar Malik son of Sain Ditta, and Krishan alias Kaka son of Chaudhary Lal Khatri, in the commission of offences, punishable under Sections 366 and 376(2)(g) of the Indian Penal Code, as also of Heena @ Babita, Hardevi, Sandeep, and Dheeraj, accused, in the commission of offence, punishable u/s 366 of the Indian Penal Code, therefore, stood proved, from the cogent and convincing evidence, produced by the prosecution.

29. Even Section 114-A deals with the presumption, as to the absence of consent in prosecution for rape. Section 114-A of the Indian Evidence Act, 1872, reads as under :

114-A Presumption as to 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) or 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 found 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.

29-A A plain reading of the provisions of Section 114-A, leaves no manner of doubt, that where sexual intercourse is proved by the accused, and the question, 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. No doubt, such a presumption is rebuttable. In the instant case, it has already been discussed above, that the sexual intercourse with the prosecutrix was committed forcibly. Even if, it is admitted that she was a member of the musical party, of some of the accused, and she was found dancing with Dheeraj, accused, as per the photographs D1 to D11, that did not mean that she was a consenting party. She, however, clarified that these photographs were taken in the function, at the time of the birthday of Dheeraj. That did not, in any way indicate, the consent of the prosecutrix. The presumption arising in favour of the prosecution u/s 114-A of the Indian Evidence Act, could not be successfully rebutted by the accused. The trial Court, was right in recording conviction and awarding sentence to accused namely Heena alias Babita, Hardevi, Sandeep, and Dheeraj, for the offence, punishable u/s 366 of the Indian Penal Code, and accused namely Krishan Kumar Malik, and Krishan @ Kaka, for the offences, punishable under Sections 366 and 376(2)(g) of the Indian Penal Code. The trial Court was, however, wrong in recording conviction and awarding sentence, to Vijay Dua and Krishan Kumar Takkar, as would be discussed hereinafter. The submission of the Counsel for the appellants, to the extent referred to above, being without merit, is rejected.

30. No doubt, the trial Court, also convicted the accused namely Vijay Dua and Krishan Kumar Takkar, for the offences, punishable under Sections 366 and 376(2)(g) of the Indian Penal Code. There is no material, on the record, that these accused abducted the prosecutrix or played any part in her abduction. Even, according to the prosecutrix herself, they did not commit sexual intercourse with her. She, however, stated that they fondled the parts of her body and one of them, had a bite at her cheek. For constituting the offence, punishable u/s 376(2)(g) of the Indian Penal Code, proof of common intention of the accused, is the essential ingredient. Even if, it is assumed, that both the accused namely Vijay Dua, and Krishan Kumar Takkar, were present, at the place of occurrence, it could not be said that they shared common intention with their co-accused namely Krishan Kumar Malik, and Krishan alias Kaka, for the commission of offence, punishable u/s 376(2)(g) of the Indian Penal Code. Had they shared common intention with Krishan Kumar Malik and Krishan @ Kaka, they would have also committed sexual intercourse with the prosecutrix. It appears that both of them, were falsely implicated, by the prosecutrix, just with a view to exaggerate the number of the accused. Both these accused namely Vijay Dua, and Krishan Kumar Takkar,

therefore, did not commit any offence. The trial Court, was wrong, in recording conviction and awarding sentence to them, for the offences, punishable under Sections 366 and 376(2)(g) of the Indian Penal Code. The findings of the trial Court, recording conviction and awarding sentence to Vijay Dua, and Krishan Kumar Takkar, for the offences, punishable under Sections 366 and 376(2)(g) of the Indian Penal Code, being incorrect, are reversed.

31. An argument was raised, by the Counsel for the appellants, that the prosecution miserably failed to prove their identity, as the perpetrators of crime, beyond a reasonable doubt. In her statement, exhibit PE, on the basis whereof, the first information report, was registered, she named Hardevi, Heena alias Babita, Sandeep husband of Heena, and Dheeraj brother of Heena. They being her relatives were known to her earlier to the occurrence also. She also named Kaka, and a short statured man as accused, who committed rape with her. However, it may be stated here, that, in the first instance, the prosecutrix was abducted from the house of Bimla Devi, her father's sister. Thereafter, she was taken to a bungalow, where the accused namely Krishan Kumar Malik, and Krishan alias Kaka, committed rape with her. It was not that she had only a glimpse of the accused. In the process of abduction of the prosecutrix, as also commission of rape with her, she had a sufficient opportunity to recognize the accused. How she could forget the description, of the persons, who abducted her and the persons, who committed rape with her. Had she been having only a fleeting glimpse of the accused, it would have been said that she was unable to identify them properly. When a witness has a sufficient opportunity to identify the perpetrators of crime, then their identification, in the Court, could be said to be valid. The identity of the aforesaid accused, as the perpetrators of crime, was, thus, fully proved, from the evidence on record. The submission of the Counsel for the appellants, in this regard, being without merit, must fail, and the same stands rejected.

32. No doubt, Bimla Devi, from whose house, the prosecutrix was abducted, was not examined by the prosecution. She, on the other hand, was given up, as won over by the accused. Bimla Devi, when appeared as, DW1, stated that the prosecutrix was not abducted from her house. Since this witness was not going to support the case of the prosecution, the Public Prosecutor for the State, was right, in giving her up, as won over. The discretion exercised by the Public Prosecutor for the State, in giving her up, as won over by the accused, therefore, could not be said to be, in any way, arbitrary or capricious. On the other hand, it could be said to be bonafide. In *Masalti v. State of U.P.*, AIR 1965, SC, 202, it was held that it is, undoubtedly, the duty of the prosecution to lay before the Court, all material witnesses, available to it, whose evidence is necessary for unfolding its case, but it would be unsound to lay down it, as a general rule, that every witness must be examined, even though his evidence, may not be material, or even if, it is known that he/she has been won over or terrorized. The principle of law laid down in *Masalti's* case (*supra*) is fully applicable to the instant case. Since Bimla Devi was given up as won over by the accused, she

was supposed to depose in their favour, by appearing as a defence witness. No reliance on her statement, therefore, can be placed. The trial Court was, thus, right in disbelieving and discarding her statement.

33. It was next submitted by the Counsel for the appellants, that Krishan Kumar Malik son of Sain Ditta, was handicapped, to the extent of 55 per cent. He also placed reliance on D4, certificate issued by the doctor, in that regard. The mere fact that he was handicapped, did not mean that he could not participate in the abduction of the prosecutrix and commission of rape with her. The trial Court, took into consideration D4, certificate, showing that his leg was affected and he was handicapped, to the extent of 55 per cent, and came to the conclusion that this disability of Krishan Kumar Malik son of Sain Ditta, did not, in any way, prove that he was not one of the participants in the commission of crime. In this view of the matter, no help, could be drawn, from D4, the certificate of disability of Krishan Kumar Malik son of Sain Ditta, accused. This certificate could not absolve him of his liability of commission of crime. The trial Court, rightly discarded this certificate for coming to the conclusion that Krishan Kumar Malik, accused, committed the offences, punishable under Sections 366 and 376(2)(g) of the Indian Penal Code.

34. The Counsel for the appellants, last of all, submitted that since the appellants have been facing the protracted criminal proceedings since 24.06.94, the date, when the first information report, was registered against them and already a period of 14 years has lapsed, lenient view be taken, in the matter of sentence. He further submitted that the sentence awarded by the trial Court, is harsh. He also submitted that the prosecutrix has contracted marriage and entered into a compromise with the appellants. The mere fact that the prosecutrix has entered into a compromise with the accused, in itself, is not sufficient to reduce the sentence, as the offences committed by the accused are very heinous. The sentence awarded by the trial Court, cannot be said to be harsh, in any manner. Undue sympathy to impose inadequate sentence, would do more harm to the justice system, to undermine the public confidence, in the efficacy of law, and the society could no longer endure under such serious threats. It is, therefore, the duty of every Court, to award proper sentence, having regard to the nature of offence, and the manner, in which, it was executed or committed. In case, in such like heinous offences, inadequate sentence is awarded or the sentence awarded by the trial Court, is reduced, that would amount to mockery of justice. No ground, whatsoever, therefore, is made out, to reduce the sentence, awarded to the accused, namely Heena @ Babita, Hardevi, Sandeep, Dheeraj, Krishan Kumar Malik, and Krishan @ Kaka, by the trial Court. The submission of the Counsel for the appellants, being devoid of merit, is rejected.

35. For the reasons recorded above, Criminal Appeal No. 324-SB of 1996, filed by Heena alias Babita, and Hardevi, and Criminal Appeal No. 338-SB of 1996, filed by Sandeep, Dheeraj, Krishan Kumar Malik, and Krishan alias Kaka, are dismissed. The judgement of conviction and the order of sentence, rendered by the trial Court, qua

Heena alias Babita, Hardevi, Sandeep, Dheeraj, Krishan Kumar Malik, and Krishan alias Kaka, are upheld. If the appellants are on bail, their bail bonds shall stand cancelled.

36. Criminal Appeal No. 338-SB of 1996, filed by Vijay Kumar, and Krishan Kumar Takkar, is accepted. The judgement of conviction and the order of sentence, rendered by the trial Court, qua Vijay Kumar, and Krishan Kumar Takkar, are set-aside. They shall stand acquitted of the charge, framed against them. If they are on bail, they shall stand discharged of their bail bonds. If they are in custody, they shall be set at liberty, at once, if not required, in any other case.

37. The Chief Judicial Magistrate, is directed to comply with the judgement promptly, in accordance with the provisions of law, on receipt of a copy thereof, and send the compliance report within 02 months.