

(2001) 1 ShimLC 281

High Court of Himachal Pradesh

Case No: Criminal Appeal No's. 452 of 1999

Harish Kumar and
Others

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision: Aug. 10, 2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) " Section 161, 272, 275, 276, 277#Evidence Act, 1872 " Section 114, 118, 27#Penal Code, 1860 (IPC) " Section 120B, 366, 368, 376, 376(2)

Citation: (2001) 1 ShimLC 281

Hon'ble Judges: M.R. Verma, J

Bench: Single Bench

Advocate: Jagdish Vats and Vinay Thakur, in Cr. A. Nos. 452 484 of 1999 and Vinod Sharma, in Cr. A. No. 531 of 1999, for the Appellant; K.D. Batish, A.A.G. and B.B. Sharma, Asstt. A.G., for the Respondent

Judgement

M.R. Verma, J.

Since all these three appeals arise out of the same impugned common judgment dated 28.10.1999 passed by the learned

Sessions Judge, Kinnaur Sessions Division at Rampur, therefore, are being disposed of by this common judgment.

2. Each of the Appellants-accused (hereinafter referred to as "the accused") in these appeals stand convicted and sentenced by the learned

Sessions Judge vide the impugned judgment as under:

Name of the Offence for which Sentence imposed

Appellant convicted :

Ram Kedar u/s 366 I.P.C. Rigorous imprisonment for

three years and fine of Rs.

1,000/- and in default of

payment of fine, rigorous

imprisonment for a further

period of 6 months.

u/s 376(2)(g) I.P.C. Rigorous imprisonment for 5

years and fine of Rs. 2,000/-

and in default of payment of

fine, rigorous imprisonment

for a further period of one

year.

u/s 506 I.P.C. Rigorous imprisonment for two

years.

Laxmi Nand u/s 366 I.P.C. Rigorous imprisonment for

three years and fine of Rs.

1,000/- and in default of

payment of fine, rigorous

imprisonment for a further

period of six months.

u/s 376(2)(g) I.P.C. Rigorous imprisonment for

five years and fine of Rs.

2,000/- and in default of
payment of fine, rigorous
imprisonment for a further
period of one year.

u/s 506 I.P.C. Rigorous imprisonment for two
years.

Parveen Kumar u/s 376(2)(g) I.P.C. Rigorous imprisonment for 5
years and fine of Rs. 2,000/-
and in default of payment of
fine, rigorous imprisonment
for a further period of one
year.

Harish Kumar u/s 368 I.P.C. Rigorous imprisonment for two
years and fine of Rs. 1,000/-

. In default of payment of
fine, rigorous imprisonment
for a further period of three
months.

Thakur Bhagat u/s 366 I.P.C. Rigorous imprisonment for 3
years and fine of Rs. 1,000/-

. in default of payment of
fine, rigorous imprisonment
for a further period of six
months.

u/s 506 I.P.C. Rigorous imprisonment for a
period of 2 years.

Bishan Singh u/s 366 I.P.C. Rigorous imprisonment for 3
years and fine of Rs. 1,000/-

. In default of payment of
fine, rigorous imprisonment
for a further period of 6
months.

u/s 506 I.P.C. Rigorous imprisonment for a
period of 2 years.

In the case of the accused to whom more than one substantive sentence of imprisonment
has been awarded, such sentences have been ordered to
run concurrently.

3. Case of the prosecution, in brief, is that on 22.4.1994, Surinder Kumar, informant
(PW-2) accompanied by his wife Sarita alias Sarswati (PW-

1) and nephew Dalip Kumar (PW-3) started from his village Kundiar in Uttar Kashi (U.P.)
to visit Sewajin, his Booa (father's sister) at Sangla in

Kinnaur District of Himachal Pradesh. On 24.4.1994 at about 3.30 p.m. they reached
Tapri where they hired a room in the hotel of one Sita Ram

and stayed there. However, at about 5 p.m., accused Laxmi Nand and Ram Kedar came
in the said room and asked PW-1 and his companions

to show the permits to enter District Kinnaur. PW-1 informed that they did not possess
such a pass/permit whereupon the said accused persons

threatened them to be taken into custody by the police and to be lodged in the lock-up.
They, however, assured PW-1 that they would get the

requisite permits from S.D.M., Bhawanagar. On being frightened by the situation, PW-1
and his companions left Tapri on foot and started towards

Wangtu. When they had travelled a distance of about 2 kms., accused Laxmi Nand and Ram Kedar who were following them, forcibly caught

hold of the complainant and his companions and took the prosecutrix (PW 1) with them forcibly. PW-2 and his nephew (PW-3) were also

threatened by them. PW-2 and PW-3 thereafter tried to search out PW-1 and the accused but of no avail. Therefore, PW-2 reported the matter

at Police Post, Tapri vide report Ex. PW-2/A on the basis of which a formal FIR Ex. PW-2/B was registered at Police Station, Bhawanagar. The

police took up the investigation. During the course of investigation, the police took in possession Entry Register of National Dhaba, Tapri Ex. PW-

2/C where PW-1 and party had taken a room on rent vide memo Ex. PW-2/D. On 26.4.1994, Ranjo Devi, wife of accused Laxmi Nand

produced the prosecutrix (PW-1) at Police Station, Bhawanagar saying that accused Laxmi Nand and Ram Kedar had taken her to the house of

Laxmi Nand on the night of 24.4.1995. Thereafter, the prosecutrix was handed over to her husband Surinder Kumar (PW-2) vide memo Ex. PW-

1/A. The prosecutrix was then got medically examined at District Hospital, Recong-Peo and Dr. B.R. Kashyap (PW-8) who conducted the

medical examination of the prosecutrix issued the MLR Ex. PW-8/A, opining that the hymen was torn and evidence of recent trauma was present,

inasmuch as the edges of hymen were red and congested and were bleeding on touch and vaginal smear had live sperms and the prosecutrix had

the sexual inter-course. Her wearing apparels were taken in possession and were sealed and sent to chemical examination. On the basis of a joint

disclosure statement made by accused Parveen Kumar, Laxmi Nand and Ram Kedar Ex. PW-2/E, accused got recovered a double bed sheet

from the residential room of accused Parveen Kumar which was taken in possession vide memo Ex. PW-2/F. Pursuant to another disclosure

statement Ex. PW-2/G made by accused Laxmi Nand alias Lachhi Ram and Ram Kedar, one Bichhona (bed mat) was recovered from the

residential house of accused Ram Kedar and was taken in possession vide memo Ex. PW-2/H. During the course of investigation, it also surfaced

that two vehicles were used for taking the prosecutrix to the place where she was subjected to rape and the drivers of those vehicles were accused

Harish Kumar and one Kaul Ram (who is stated to be absconding) and that accused Thakur Bhagat and Bishan Singh who beat up the informant

also facilitated the commission of the offence complained against. The learner's licence (driving licence) of accused Harish Kumar was taken in

possession by the police vide memo Ex. PW-5/A and the documents relating to the vehicle driven by him were also taken in possession from Tilak

Raj Sharma (PW-6). The documents relating to the van being driven by the absconding accused Kaul Ram were also taken in possession by the

police vide memo Ex. PW-5/B. The vehicles were identified by Sarita Devi (PW-1) in the presence of S.D.M., Nichar who issued the certificate

about such identification Ex. PC. Accused Ram Kedar, Laxmi Nand and Parveen Kumar were also got medically examined and their Medico

Legal Certificates are respectively Exs. PG, PH and PJ. The place from where the prosecutrix was forcibly removed by the accused has been

depicted in rough site plan Ex. PA and the places of commission of rape has been depicted in rough site plans Exs. PD and PE. The wearing

apparels of the prosecutrix taken in possession by the doctor (PW-8) who medically examined her; underwear, banyan and pant of accused Laxmi

Nand; Pant and shirt of accused Ram Kedar; and underwear, Banyan and pant of accused Parveen Kumar, the bed-sheet and Bichhona (bed

mat) apart from the wearing apparels of absconding accused Kaul Ram were got chemically analysed in the State Forensic Science Laboratory

and vide report Ex. PW-8/B received from the said Laboratory, human blood and semen stains were found on the Salwar and shirt of Sarita Devi,

bed-sheet and Bichhona. Semen stains were found on the underwear and banyan of accused Laxmi Nand and underwear of Parveen Kumar.

4. On being satisfied of the involvement of the accused persons and said Kaul Ram in the commission of the offences the officer incharge, police

station, Bhawanagar submitted a charge-sheet against the accused persons and as a consequence, accused Laxmi Nand, Parveen Kumar and Ram

Kedar came to be tried on a charge u/s 376(2)(g) read with Sections 120B, 368 read with Sections 120B, 366 read with Sections 120B and 506

read with Section 120B IPC and accused Harish Kumar, Thakur Bhagat and Bishan Singh on a charge u/s 368 read with Sections 120B, 366

read with Sections 120B and 506 read with Section 120B IPC.

5. To prove the charges against the accused, the prosecution examined 13 witnesses. The accused were examined u/s 313 Code of Criminal

Procedure wherein they denied the prosecution case as a whole and denied their involvement in the commission of the offences for which they

were charged. Accused Parveen Kumar has further stated that on the night intervening 24th/25th of April, 1994 and also on the night intervening

25th/26th April, 1994, he had slept for the night in a hired room on a double bed alongwith the driver and conductor of a bus.

6. Accused Thakur Bhagat has further stated that on the morning of 24.4.1994 he had gone to village Ramni and then to Jani returned to Tapri at

about 7 p.m. and then left for his village Chigon. On the morning of 25.4.1994, he left his village to village Urni from where he went to village

Meeru, stayed there for the night and returned to Tapri on the morning of 26th April, 1994. Accused Parveen Kumar led evidence and examined

Joginder Pal (DW-1) and Rattan Lal (DW-2).

7. The learned Sessions Judge convicted and sentenced the accused as aforesaid. Hence the present appeals.

8. I have heard the learned Counsel for the accused persons and the learned Additional Advocate General for the Respondent-State and have also

gone through the records.

9. Be it stated at the very out-set that the trial Judge while recording the evidence in the case has not done so with the care and caution expected of

him with the result that some incongruities had crept in the records of evidence. To be precise, the statements of the prosecutrix (PW-1) and the

informant (PW-2) who are the most material prosecution witnesses, as available in Hindi and English records of evidence, are at variance and the

statement of Dr. B.R. Kashyap (PW-8) another material witness contains cuttings and hand made additions which are not owned by the trial Court

as having been made by the Judge or under his direction/authority as is evident from the zimini order dated 23.12.1998 and the contents of para 15

of the impugned judgment. The said lapses in recording the evidence thus raises for determination the following questions:

(i) Whether the statements of PW-1 and PW-2 as in Hindi record are to be deemed as correct and read in evidence or their statements as in

English record are to be deemed as correct and read in evidence? and

(ii) Whether the statement of PW-8 is to be read in evidence by ignoring the unauthorised cuttings and additions or as it remains after such cuttings

and additions ?

10. In so far as question (i) supra is concerned, I am of the view that Hindi being the language of the Subordinate Courts in the State of H.P., the

statements usually being made by the witnesses in Hindi, read over to and acknowledged by them as such, it is the statement recorded in Hindi

which must be read in evidence when there is variance in Hindi and English versions.

This view is fully supported by the ratio in *Vijander Singh v.*

State of H.P. (1999) (2) SLC 171. A learned Single Judge of this Court while dealing with a situation similar to one giving rise to the question

under reference after noticing the relevant provisions of law, i.e. Sections 276, 277 and 272 of the Code of Criminal Procedure and the Rules and

orders of the High Court of Punjab as applicable to H.P., held as follows:

10. Under Chapter I, Part-N Volume-I of the Punjab High Court Rules and Orders, which has been adopted for application to the old areas of

Himachal Pradesh vide notification dated 20.6.1950, ""Hindi"" in Devnagri script has been made the language of the courts subordinate to the High

Court. Therefore, for all the subordinate courts in the State of Himachal Pradesh, the language of the Court is ""Hindi"" in Devnagri script.

11. If language of the Court is ""Hindi"", then primarily the Hindi record of evidence has to be looked into. Therefore, I proceed to examine the case

on the basis of such ""Hindi"" record of evidence.

11. The view that in case of variance in the vernacular and English records of evidence, the vernacular version in which the witness has made the

statement, and which is read over and acknowledged by him is further supported by the view taken in The State of Maharashtra Vs. Bhaurao

Udan and Others, , wherein it has been held that when a question arises as to what exactly the witness has stated in his statement, it is the Marathi

deposition of the witness that has to be taken into account and not the memorandum in English prepared by the Judge.

12. In view of the above position in law, the statements of PW-1 and PW-2 as recorded in Hindi shall be read as evidence in the case. In case

similar variance is noticed in the statement of any other witness, the version as in Hindi record shall be taken into account.

13. To find out the correct answer to question (ii) supra, a reference may be made to Section 278 of the Code of Criminal Procedure which reads

as under:

278. Procedure in regard to such evidence when completed.- (1) As the evidence of each witness taken u/s 275 or Section 276 is completed, it

shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be

corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Presiding Judge may,

instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks

necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language,

the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

14. It is evident from a bare reading of the above provisions that the object of these provisions is to obtain and maintain accurate records of the

depositions made by the witnesses and is not intended to permit a witness to resile from his statement in the name of corrections. It is for this

reason that the Presiding Judge has been given the discretion either to correct the statement or to make a memorandum of objection about the

correction claimed by the witness to be made in the statement and record his remarks thereon instead of making the correction as may be claimed.

In view of the object as aforesaid, it is the duty of the Presiding Judge to make the corrections, if necessary, after due application of mind himself.

Therefore, any correction made in the deposition by a person other than the Judge save and except under his direction and duly authenticated by

him shall be liable to be ignored.

15. In view of the above, the additions/cuttings unauthorisedly made in the evidence of PW-8 shall have to be ignored.

16. It was contended by the learned Counsel for accused Harish Kumar, Thakur Bhagat and Bishan Singh (Appellants in Appeal No. 452 of

1999) that there is no incriminating evidence against accused Harish Kumar and there is no reference to accused Thakur Bhagat and Bishan Singh

in the formal FIR Ex. PW-2/B which is based on the report Ex. PW-2/A lodged by PW-2 in Police Post, Tapri after more than 12 hours of the

occurrence. It was further contended that they are not named even by the prosecutrix (PW-1) and Dalip Kumar (PW-3) in their statements

recorded by the police u/s 161 Code of Criminal Procedure respectively Exs. DA and DB as abductor or assailants and have been named as

accused for the first time during the course of recording of evidence at the trial. They were admittedly not previously known to the prosecutrix

(PW-1), informant (PW-2) and the other alleged eye witness of the occurrence (PW-3) therefore, their identity as the alleged assailants is highly

doubtful, more so when the alleged occurrence took place during night.

17. I have, with the help of the learned Counsel for the accused, gone through the entire evidence on record. It is only in the cross-examination of

the prosecutrix (PW 1) that accused Harish Kumar was driver of one of the vehicles in which she was removed by accused Ram Kedar and

Laxmi Nand and she had then seen accused Harish Kumar for the first time and, thereafter saw him only in the Court while deposing as PW-1. In

the examination-in-chief, the prosecutrix has not stated anything about the complicity of accused Harish Kumar in abducting her. Otherwise there is

no evidence on the record as to how the identity of accused Harish Kumar as the driver of the vehicle in question was traced and established. Even

the investigating officer has not been able to explain as to how he came to know that out of the two vehicles in which prosecutrix was removed one

was driven by accused Harish Kumar. The prosecutrix was so removed during night, then how she could preserve the facial features of accused

Harish Kumar so as to identify him after a period of 3 years, is not explained nor her identifying the said accused in the Court in such circumstances

can be held dependable and reliable identification of the accused.

18. The learned Counsel for the accused had submitted that in the evidence of PW-1 recorded in English, it is specifically stated by her that ""the

vehicle of accused Harish Kumar was stopped by accused Laxmi Nand and Ram Kedar forcibly and thereafter I was taken away"" and thus even if

it is presumed that accused Harish Kumar was driving the vehicle in question, it was not his voluntary act and he was made to do so forcibly.

However, this version is not contained in the statement of the prosecutrix as recorded in Hindi, therefore, the version as in English and relied for the

accused is ignored. Nevertheless, as already stated hereinabove, even the Hindi version of the statement of prosecutrix is not reliable to establish

the identity of accused Harish Kumar as an abductor. There is no other material on record to prove the complicity of accused Harish Kumar in the

commission of an offence u/s 366 IPC for which he has been convicted and sentenced.

19. The version of the prosecution as contained in the FIR Ex. PW-2/B is that on 24.4.1994 complainant (PW-2) the prosecutrix (PW-1) and

PW-3 after reaching at Tapri hired a room in the hotel and were resting therein when two persons came there. They enquired from the complainant

and party whether they were having permit to enter Kinnaur. When they were informed that complainant (PW-1) and his companions were not in

possession of any permit, they were threatened by those two persons that police would put them behind the bars. At the same time they assured

that they would get the permit from the S.D.M., Bhawanagar. At about 6.30 p.m. the complainant and party left towards Wangatu. When they had

covered a distance of about 2 kms. the said two persons came there, caught hold of the complainant party forcibly and took away the prosecutrix,

and threatened PW-1 and PW-3 who were left behind. On some subsequent information, these two persons have been named in the FIR as

accused Ram Kedar and Laxmi Nand. Thus there is no reference in the FIR to any person other than Ram Kedar and Laxmi Nand as the

offenders nor there is any reference to any beating of Surinder Kumar (PW-2) and Dalip Kumar (PW-3) by any person. So is the version in the

statements of PW-1 and PW-3 u/s 161 Code of Criminal Procedure Exs. DA and DB respectively. Thus it is for the first time in the Court that

PW-1, PW-2 and PW-3 the only eye witnesses of the occurrence had stated that accused Thakur Bhagat and Bishan Dass appeared at the scene

when the complainant party after having travelled a distance of about 2 kms. from Tapri towards Wangtu were resting on the road and beat up

PW-2 and PW-3 and accused Ram Kedar and Laxmi Nand forcibly took away the prosecutrix.

20. No doubt the object of FIR from the point of view of the informant is to set the criminal law in motion and from the point of view of the

investigating agency is to obtain information about the alleged criminal activity so as to enable it to take appropriate steps to trace and bring to the

book the guilty person(s). Nevertheless, it is extremely vital and valuable piece of evidence for corroborating the oral evidence and to show on

what materials the investigation commenced and what was the story originally told. It is from this document that the court may come to a

conclusion whether the original version has been improved upon in material particulars or not. In case the FIR is recorded at the instance of an eye

witness of the occurrence, the introduction of material facts such as naming more eye witnesses or offenders or weapon of offence by the informant

himself, may, depending on the facts and circumstances of the case, render the improved version unreliable.

21. In this case, the FIR has been lodged by PW-2, an eye witness of the alleged occurrence. It cannot be believed that while reporting the

incident, he forgot for any reason to state that apart from accused Ram Kedar and Laxmi Nand who forcibly removed his wife (PW-1) from the

place of occurrence, two more persons had arrived on the spot who had beaten him and PW-3. Personal severe beating as the alleged beating is

claimed to be, cannot be forgotten within a few hours. So is the case about the number of the assailants.

22. In any case, if the version regarding involvement of accused Bishan Dass and Thakur Bhagat could not be given by PW-1 at the time of

lodging of the FIR which itself was lodged after about 12 hours of the occurrence, there is no reason as to why the other two eye witnesses i.e.

PW-1 and PW-3 had not stated about the appearance of these accused on the spot and the alleged beating. The unexplained omission in this

regard in the statements Exs. DA and DB of PW-1 and PW-3 respectively, is yet another factor which renders the versions of PW-1, PW-2 and

PW-3 given for the first time at the trial regarding involvement of accused Bishan Dass and Thakur Bhagat in the commission of the offence as an

afterthought, hence unreliable.

23. There is yet another reason to disbelieve the version regarding complicity of accused Bishan Dass and Thakur Bhagat in crime. Admittedly,

they were not known to the eye witnesses. The alleged occurrence took place at about 7.30 p.m. in the month of April when the visibility

presumably was not clear. In such a situation it was necessary for the investigating agency to get test identification parade of these two accused

persons held to enable the witnesses to identify them. However, no test identification parade was held. Further, the prosecution has not properly

explained as to how the investigating agency came to know about the involvement of Thakur Bhagat and Bishan Dass in the commission of the

offences alleged to have been committed by them.

24. The learned Trial Judge explained the omissions on the basis of the inference that Thakur Bhagat is a police constable and Bishan Dass is a

member of SSB-a para military force, and are local persons whereas the complainant party are the outsiders, therefore, the omission to name

Bishan Dass and Thakur Bhagat in the FIR is with a view to weaken the case against them. However, such an inference not supportable by

sufficient material on the record is not justified, more-so when their identity is not properly established.

25. In State of H.P. v. Lakh Raj and Anr. 2000 Supreme Court Cases (Cri) 147, the Apex Court has held as under:

In her statement before the trial court the prosecutrix admitted that she had not known Respondent 2 earlier and further that no identification

parade was conducted by the investigating agency. She further admitted having seen Respondent 2 in the Court only after the day of occurrence.

How Respondent 2 was named as an accused person is a mystery shrouded with doubts which has not been properly and sufficiently explained by

the prosecution. During the investigation of a crime the police agency is required to hold identification parade for the purposes of enabling the

witness to identify the person alleged to have committed the offence particularly when such a person was not previously known to the witness or

the informant. The absence of test identification may not be fatal if the accused is known or sufficiently described in the complaint leaving no doubt

in the mind of the Court regarding his involvement. Identification parade may also not be necessary in a case where the accused persons are

arrested at the spot. The evidence of identifying the accused person at the trial for the first time is, from its very nature, inherently of a weak

character. This Court in *Budhsen and Another Vs. State of U.P.*, , held that the evidence in order to carry conviction should ordinarily clarify as to

how and under what circumstances the complainant or the witness came to pick out the particular accused person and the details of the part which

he allegedly played in the crime in question with reasonable particularity. In such cases/test identification is considered a safe rule of prudence to

generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There

may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can

safely rely without such or other corroboration. Though the holding of identification proceedings are not substantive evidence, yet they are used for

corroboration purposes for believing that the person brought before the court was the real person involved in the commission of the crime. The

identification parade even if held, cannot, in all cases, be considered as safe, sole and trustworthy evidence on which the conviction of the accused

could be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the

complainant.

26. In view of the above proposition and foregoing discussion, even accused Thakur Bhagat and Bishan Dass also could not have been convicted

and sentenced for the alleged commission of the offences for which they have been convicted and sentenced.

27. So far as accused Ram Kedar (Appellant in Criminal Appeal No. 531 of 1999) and accused Laxmi Nand and Parveen Kumar (Appellants in

Criminal Appeal No. 484 of 1999) are concerned, they stand on a different footing, inasmuch as the evidence in the case is concerned. According

to the prosecution, they are the rapists who gang raped the prosecutrix.

28. It was contended for the accused that the statement of the prosecutrix is not reliable about the involvement of these accused persons in the

commission of the offences alleged to have been committed by them, for the reasons that (i) the accused were not earlier known to the prosecutrix,

informant (PW-2) and PW-3 and test identification parade of the accused was not held; (ii) she could not name the different places from where

she was allegedly abducted initially and later allegedly put in the second vehicle; (iii) her statement is self contradictory about the manner of her

alleged removal in the vehicle; (iv) no marks of violence/struggle were found on her person at the time of her medical examination which belie the

version regarding alleged forcible abduction and rape; (v) the evidence regarding alleged recovery of incriminating Gadda and bed sheet and

pointing out the place of rape by the accused is inadmissible in evidence and has been wrongly relied upon by the trial Court for convicting the

accused persons; (vi) the most material witness namely Rajo Devi who allegedly brought the prosecutrix to the police station after the occurrence

has not been examined, therefore, an adverse inference has to be drawn against the prosecution and (vii) there is delay in lodging the FIR which

has not been explained and is fatal to the prosecution case.

29. It is true that accused Ram Kedar and Laxmi Nand who have been named in the FIR were not earlier known to the informant (PW 2) and his

companion (PW-3) and none of them particularly PW-2 the informant could properly explain as to how they came to know the names of Ram

Kedar and Laxmi Nand. However, there is cogent and reliable evidence on the record to establish their identity. Similarly, there is evidence to

establish the identity of accused Parveen Kumar though he was also not earlier known to the prosecutrix (PW-1) who has stated about his

involvement in the case as one of the rapists.

30. PW-2, the informant has stated about the arrival of accused Ram Kedar and Laxmi Nand in the hotel at Tapri where the complainant party

was staying and regarding inquiries made by them about the complainant party having any permit (pass) to enter Kinnaur. When the witness

informed them in the negative, the said accused told them that police would arrest and put them behind the bars for having entered Kinnaur without

permit. PW-2 has further stated that these two accused assured them that they would get the requisite pass from SDM, Bhawanagar. So has been

stated by PW-1 and PW-3. This discussion was of serious nature so far as the complainant and his companions (PW-1 and PW-3) were

concerned. Therefore, they must be attentive during discussion and thus had ample time and opportunity to see Ram Kedar and Laxmi Nand so as

to preserve their facial features to identify them at a later stage. Moreover, the prosecutrix who, as per her version, was detained by accused Ram

Kedar, Laxmi Nand and Parveen Kumar at different places for two days and was subjected to rape, can undoubtedly identify these accused.

31. In view of the above, the contention of the learned Counsel for these accused that they were not known to the witnesses earlier and their test

identification parade was not held, therefore, their identification by the prosecutrix (PW-1), informant (PW-2) and PW-3 for the first time in the

Court is unreliable, is not sustainable.

32. The prosecutrix admittedly belongs to Uttar Kashi in Uttar Pradesh. At the relevant period, she was visiting a place not earlier known to her.

Therefore, she could not be expected to name the places from where she was initially abducted and subsequently removed from one vehicle to

another. Therefore, her inability to name such places is no reason to disbelieve her statement and thus the contention raised for the accused in this

regard is without any substance.

33. The version of the prosecutrix about her removal in the vehicles at one stage in her cross-examination is that she was taken to the house of

Ram Kedar in the vehicle driven by Kaul Ram but then added that she was taken upto Wangtu in one vehicle and thereafter was taken to the

house of Ram Kedar in another vehicle which was driven by Harish Kumar. She has then stated that initially she was taken by Harish Kumar upto

the bridge and then Kaul Ram took her to the house of Ram Kedar. She repeated that she was taken upto the bridge in the vehicle by Harish.

When this statement is read as a whole, it can be gathered from it that initially the prosecutrix was removed in one vehicle upto a bridge and

thereafter by another vehicle upto the house of Ram Kedar. The names and identity of the drivers of these vehicle is immaterial because identity of

the accused-drivers by the prosecutrix has already been disbelieved. However, her inability to correctly name the drivers of the vehicles used for

her removal, in no way, renders her statement about her forcible taking to the house of Ram Kedar accused unreliable. Therefore, the contention

that contradictions in her statement about the manner of her removal in the vehicles render her statement unreliable is not sustainable.

34. At the time of medical examination of the prosecutrix by PW-8, no scratches or abrasions were found over her face, neck, breast and

abdomen. However, as per the statement of PW-8 read with MLC Ex. PW-8/A, dried blood was found on the inner aspect of the thighs of the

prosecutrix. Hymen was torn and its edges were red and congested and was bleeding on touch and thus there was evidence of trauma. The smear

showed presence of alive spermatozoa. As per the opinion given by PW-8 the prosecutrix was used for sexual inter-course within two or three

days of examination and that was forcible. Thus, this is not a case of no injury at all on the person of the prosecutrix. The presence of evidence of

trauma and presence of spermatozoa in the smear lend credence to the version of the prosecutrix that she was subjected to forcible sexual inter-

course within 2-3 days of her medical examination. Be it stated that absence of injuries on the person of the prosecutrix is not a positive indication

of her being a consenting and willing partner to the act of sex nor does it necessarily belie the version of abduction by use of threats as in this case.

35. It can legitimately be inferred from the statements of the prosecutrix, the informant (PW-2) and PW-3 that they were already under fear of

being apprehended by the police for having entered Kinnaur District without a pass. While on way to Bhawanagar, PW-2 and PW-3 were beaten

up in the presence of the prosecutrix and she herself was removed from their company. As stated by the prosecutrix, she was threatened by the

accused that in case she cried, she would be thrown down from the bridge and despite objection was subjected to sexual inter-course under threat

to her life. She was in an unknown place with strangers, hundreds of miles away from her home and separated from her husband and the only other

known person PW-3 and removed to unknown places. In such a situation, when volitional faculty is clouded, the resistance cannot be expected of

a woman of about 19 years of age.

36. In *Pritam Singh v. State of H.P.* Cr.A. No. 224 of 1999, decided on 28.9.1999, this Court has held as under:

20. The other factor in view of which the absence of the injuries on the person of the prosecutrix is rendered insignificant is that prosecutrix and her

daughter-in-law having a small child were present in their house at a lonely place and there was no male member of the family. In such a situation

the accused in the night not only asked for stay in the house but insisted to stay there, though prosecutrix was unwilling to give him the shelter in the

same house. The reason is apparently want of faith in the goodness and bona fide of the accused coupled with the fear that if the accused was

permitted to stay there something unwanted might happen. In that mental state the prosecutrix offered alternative accommodation for the stay of the

accused which he rejected and then clandestinely she was assaulted. She had to ensure not only her safety, but the safety of her daughter-in-law

also who was all alone in the house when the prosecutrix was assaulted. The assault by the accused to whom, despite her not liking his stay in her

house, she offered alternative accommodation and took the trouble to take him there, was bound to cause amazement if not shock. Thus, the

prosecutrix, in the circumstances of the case must be under fear, anxiety and amazement at the relevant time and could not give the required

resistance. Thus, the helpless submission in the face of inevitable compulsion when volitional faculty is clouded in such a situation cannot be termed

as consent as understood in law. Consent and submission are two different acts inasmuch as every consent involves submission but mere

submission does not involve consent. Therefore, submission of her body by a woman under fear or helplessness is no consent which is a voluntary

and conscious acceptance of what is proposed. Therefore, mere absence of injuries (as assumed) on the person of the prosecutrix is no reason to

disbelieve her statement. The view finds support from Milind Ambadas Mhaske and etc. Vs. State of Maharashtra, wherein it has been held as

under:

10. The learned Counsel for the Appellant further submits that the medical evidence and also results of Chemical Analyser do not prove that under

any circumstances the accused having sexual inter-course with the prosecutrix. He relied upon the observations of the Doctor having found no

injury in the private part of the prosecutrix and this will go a long way in establishing that she was a consenting partner. We cannot give much

credence to this argument. The Doctor opined in this case, she being a married woman and being the mother of two sons, injuries are not

necessarily to be seen even if she showed resistance. When a grown up woman is threatened by a man using force by showing weapon and

subjected to sexual inter-course, absence of any injury in private part cannot be a mitigating circumstance to infer consent of the woman....

21. In case Utam Alias Bhadrya and another Vs. The State of Maharashtra, the same view was taken and it was held as under:

8. The prosecution has examined Dr. Smt. Sankar (PW-7) who examined the prosecutrix Purna on 6.11.1984 at about 10 p.m. Dr. Smt. Sankar

gave a report dated 6.11.1984 (Exhibit 27). She did not find any injury on her person or on her private parts. She, however, opined that it was not

possible for her to give a definite opinion whether prosecutrix was raped or not.

10. ...In the present case, the girl is not that young and it is also not known whether she was really virgin or not at the time of the incident. On the

contrary, suggestions were made to her by the accused that she had sexual relations with them as well as with some other persons. Dr. Smt.

Sankar, in her report (Exhibit 27), has stated that the girl was young and well built. Having regard to all these facts, we do not think that mere

absence of the injury, either on the person or private parts of the girl or the Appellants, is an indication of innocence of the Appellants.

37. It follows that even total absence of injuries on the person of the prosecutrix, in a case of rape and abduction, is no ground to infer that such

offences have not been committed. In this case, there is evidence of trauma and medical opinion that the prosecutrix had been subjected to forcible

sexual inter-course. Therefore, the contention of the learned Counsel for the accused that absence of injuries on the person of the prosecutrix

belies the prosecution version regarding rape and abduction, does not hold good.

38. The so called joint disclosure statement of accused Parveen Kumar, Laxmi Nand and Ram Kedar Ex. PW-2/E about one of the places where

prosecutrix was raped and joint identification of such place by them vide memo Ex. PW-2/F and similar joint statement by accused Ram Kedar

and Laxmi Nand Ex. PW-2/G about the other place where the prosecutrix was raped and joint identification of such place by them vide memo Ex.

PW-2/H are inadmissible in evidence.

39. It is well settled that where several accused give information as contemplated u/s 27 of the Evidence Act, it is only the information given by that

accused who gave it first which can be proved u/s 27 supra. When a joint statement giving such information is recorded, it is not possible to

conclude as to which one of the accused gave the information first. If the discovery is also jointly effected, again it will not be possible to conclude

as to which one of the accused first led to the discovery. Therefore, the joint information given by more than one accused and a discovery effected

jointly by more than one accused shall be inadmissible in evidence.

40. It is also well settled that a fact may be said to be discovered when the knowledge of the existence of such fact was, for the first time, derived

from the information furnished by the accused. It follows that where a fact is already within the knowledge of the police, then it cannot be a

discovery of that fact again as a result of the information given by the accused subsequently. Therefore, any discovery of a fact on the basis of the

information derived from the accused by the police subsequent to the acquiring of knowledge of such fact from any other source shall be

inadmissible in evidence.

41. In this case, the police had recorded the statement of the prosecutrix before the alleged disclosures made by the accused, the information

allegedly disclosed by the accused was recorded in the form of a joint statement and the accused allegedly led to joint discovery of fact already

known, therefore, the disclosure statements and consequential discovery memos are inadmissible in evidence.

42. It may be pointed out here that while getting the places of occurrence identified from the accused, the police vide memos Exs. PW-2/H and

PW-2/F took in possession a mattress Ex. P-3 from the house of accused Ram Kedar and a bed sheet Ex. P-4 from the residential room of

accused Parveen Kumar allegedly at the instance of accused Ram Kedar and Parveen Kumar respectively. However, these recoveries were not

made pursuant to information derived either jointly or individually from them. In fact, there is no reference to bed sheet or mattress in the alleged

disclosure statements Exs. PW-2/E and PW-2/G. Therefore, these cannot be treated as facts discovered within the scope of Section 27 of the

Evidence Act.

43. It is case of the prosecution that the prosecutrix was brought to the police station by Rajo Devi wife of accused Laxmi Nand. Said Rajo Devi

has not been examined by the prosecution. As per the contention of the learned Counsel for the accused, from this lapse, an inference adverse to

the prosecution must be drawn. Rajo Devi had not been examined by the prosecution and was given up on the ground that she is related to the

accused and had been won over by them. Admittedly, Rajo Devi is wife of accused Laxmi Nand. The plea that she had been won over by the

accused does not appear to be far from being true and in view of her relation with the accused, she could hardly be expected to support the

prosecution case. The prosecution is obliged to examine the material witnesses and the failure to do so will result in drawing an adverse inference

against the prosecution. However, before drawing such adverse inference, it has to be determined whether the witness whose production has been

withheld was in fact a "material witness". Said Rajo Devi has not witnessed the abduction. She is not a witness of criminal intimidation or the rape.

Her evidence, at the most, is about her bringing the prosecutrix to the police station. In the facts and circumstances of the case, particularly the role

played by her, she cannot be termed as a material witness, therefore, her non-production is inconsequential and does not, in any manner, affect the

value whatsoever of the statement of the prosecutrix.

44. According to the prosecution version duly supported by the prosecutrix, PW-2 and PW-3, the prosecutrix was abducted by accused Ram

Kedar and Laxmi Nand on 24.4.1994 at about 7.30 p.m. The Daily Diary Report Ex. PW-2/A about her abduction was recorded on 25.4.1994

at 8.45 a.m. in police post, Tapri and formal FIR Ex. PW-2/B was recorded in police station, Bhawanagar on 25.4.1994 at 11.45 a.m. As per the

contents of Ex. PW-2/A, PW-1 and PW 2 continued search for the prosecutrix till the lodging of the report. So is stated by PW-2 Surinder

Kumar (PW-2) in his examination-in-chief. However, in his cross-examination, at one stage, he has stated that after the occurrence, he alongwith

PW-3 had returned to the hotel and lodged the report at about 10 or 11 which was recorded by the police. At another stage, he has stated that he

had gone to the police post during night but the report was lodged in the morning. However, he has denied the suggestion that he stayed with ASI

for the night. Thus the witness has made a confused statement about the lodging of the report. However, in my view, the delay, if any, in lodging the

FIR in this case cannot be treated as fatal to the case of the prosecution because the possibility of deliberations and manipulations before the

lodging of the report are clearly ruled out in the facts and circumstances of the case.

45. The commission of the major offence i.e., the offence of rape in this case could not be reported at the time of making of the report Ex. PW-

2/A because at that time the informant (PW-2) was unaware of the commission of the rape on his wife. The commission of this offence was

divulged by the prosecutrix in her statement u/s 161 Code of Criminal Procedure recorded on 26.4.1994. The informant, the prosecutrix and PW-

3 belong to Uttar Kashi in Uttar Pradesh. The accused who are residents of Kinnaur District in H.P. were not known to them, hence they have no

reason to falsely implicate the accused in the commission of the offences. Therefore, the delay in reporting the matter to the police is not fatal to the

case of the prosecution.

46. In fact the fate of the case of the prosecution against accused Ram Kedar, Laxmi Nand and Parveen Kumar, hinges on the reliability of the

statement of the prosecutrix. Before I proceed to examine the value and reliability of the statement of the prosecutrix, it is expedient to refer to the

settled position of law in this regard.

47. In State of Punjab Vs. Gurmit Singh and Others, while dealing with the question of credence to be given to the evidence of the prosecutrix in a

rape case and the standard of corroboration required to sustain conviction on such statement, the Hon"ble Supreme Court has ruled as under:

7. ...

The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a

court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual

molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement

of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution

case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not

overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of

her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her

testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such

cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed

with doubt, disbelief or suspicion The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to

satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of

law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par

with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence,

which is not found to be self-inflicted, is considered to be a good witness in the same sense that he is least likely to shield the real culprit, the

evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an

imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the

prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl

subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her

evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and

circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of

testimonial tyranny making justice a casualty, Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the

case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain,

Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:

A prosecutrix of a sex offence cannot be put on 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 requires it to look for corroboration. If for some 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 required 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 of 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.

It was further held as follows:

20. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the

statement of the prosecutrix which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix

inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds

it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration

required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial

Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

48. PW-1 Sarswati, the prosecutrix, has stated about the arrival of accused Ram Kedar and Laxmi Nand to the hotel at Tapri where she was

staying alongwith PW-2 and PW-3, the enquiries made by them from PW-2 about the pass to enter Kinnaur and giving of the threats that they

could be harassed by the police and about the assurance given by the said accused to get pass for them. She has further stated about their

departure towards Bhawanagar and her taking away by the said accused forcibly and under threat to the house of accused Ram Kedar in village

Nichar and then committing rape on her and extending of threat to her life as a consequence of her objecting to forcible sexual inter-course with

her by the said accused. She has further stated that on the next day she was taken to the hotel of accused Parveen Kumar and was subjected to

rape by accused Ram Kedar, Parveen Kumar and Laxmi Nand. On the next day she was removed to the house of Laxmi Nand from where she

was taken to the police station by Rajo Devi wife of accused Laxmi Nand, and was handed over to her husband PW-2. She has further stated

about her medical examination in the hospital at Recong Peo. There is nothing unnatural in her statement except that she could not give the names

of a few places and a consistent version about the manner in which she was removed from the place of occurrence to the house of Ram Kedar.

She was on her first visit to Kinnaur and thus not aware of the topography of the area and was taken away by persons not earlier known to her.

Therefore as already held in the earlier part of this judgment, these lapses do not render her statement unreliable. There is no cogent and convincing

reason to disbelieve her evidence.

49. The version of the prosecutrix about the identity of accused Ram Kedar and Laxmi Nand as the abductors is corroborated by the evidence of

PW-2 and PW-3. Her version that she was subjected to rape is fully supported by the medical evidence as already discussed.

50. Accused Ram Kedar, Laxmi Nand and Parveen Kumar led evidence and examined DW-1 Joginder Pal and DW-2 Rattan Lal, presumably to

prove that nothing happened in the hotel of accused Parveen Kumar on 25.7.1994, the day when according to the prosecution, the prosecutrix

was raped by these accused in the residential room of accused Parveen Kumar. However, there is nothing in the statements of the aforesaid DWs

which may, in any manner, controvert the prosecution version about the gang rape of the prosecutrix by these accused persons on 25.7.1994

within the residential room of accused Parveen Kumar.

51. In view of the statement of the prosecutrix duly corroborated by other evidence as aforesaid, commission of the offences punishable under

Sections 366, 376 and 506 IPC by accused Ram Kedar and Laxmi Nand and commission of an offence punishable u/s 376 IPC by accused

Parveen Kumar stand duly proved beyond any reasonable doubt. Therefore, their convictions and sentences awarded to them by the learned

Sessions Judge do not call for any interference.

52. As a result, Criminal Appeal No. 452/1999 is allowed. The conviction of and sentences awarded to accused Harish Kumar, Bishan Singh and

Thakur Bhagat are set aside and they are accordingly acquitted. Fine, if recovered from them, shall be refunded to them. Bail bonds furnished by

them are discharged.

53. Criminal Appeal Nos. 484/1999 and 531 of 1999 are dismissed and the convictions of and sentences awarded to the Appellants therein are

maintained and affirmed. Accused Laxmi Nand Parveen Kumar who are on bail shall surrender to their bail bonds within one month from the date

of this judgment, failing which the learned trial Judge will secure their presence by issue of non-bailable warrants and commit them to prison to

serve out the sentences of imprisonment imposed on them. Accused Ram Kedar is undergoing the imprisonment in the Jail. A copy of this

judgment be sent to the Superintendent of the concerned Jail for information of accused Ram Kedar.

54. Before parting with the case, it may be pointed out that the vernacular and English versions of the evidence in this case are at variance on

various particulars betraying lack of proper control over the proceedings by the concerned Sessions Judge. He has authenticated both the versions

as correct without due application of mind. Statement of PW-8 contains additions and cuttings and corresponding zimini orders (or any separate

memorandum recorded by the Sessions Judge) do not show as to how these changes in the statement had been brought about and whether these

have been carried out with his permission and under his authority or not. A sessions trial is a very sensitive and important class of criminal cases. A

Sessions Judge can ill afford such lapses which create confusion and difficulties in appreciating the evidence and may result in passing a wrong

judgment. The Registrar General to place the matter before the Hon"ble Chief Justice for such orders as may be deemed fit and proper in view of

the above observations.