A VIJAY @ CHINEE

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 660 of 2008)

JULY 27, 2010

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[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860 – s. 376(g) – Commission of gang rape by appellant and others – Conviction and sentence u/s. C *376/34 by courts below, as regard appellant – Justification of – Held: Justified – Statement of the doctor that at the relevant time, prosecutrix was a minor – Consistent statement of prosecutrix that intercourse was against her wishes, she was forcibly caught, threatened and thereafter, subjected to gang* D *rape – Place and incident of occurrence not disputed – Discrepancies in the statement of prosecutrix and evidence on record immaterial – Failure to hold test identification parade – Effect of.*

According to the prosecution case, the appellant and E **others committed gang rape of the victim. Thereupon, a case for offence punishable u/s. 376/34 IPC was registered. The prosecutrix was medically examined. The appellant and the other accused were arrested. The investigation was carried out. The trial court convicted** F **the appellant and the other accused u/s. 376/34 IPC and sentenced them to undergo 10 years' rigorous imprisonment along with fine of Rs. 500/-. The High Court upheld the conviction of the appellant and co-accused R. Accused A died during the pendency of the appeal. The** G **remaining four accused were acquitted. Therefore, the appellant filed the instant appeal.**

Dismissing the appeal, the Court

HELD: 1. The statement of prosecutrix, if found to be

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worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix. [Para 15] [1164-F-H] A

State of Maharashtra vs. Chandraprakash Kewalchand Jain **AIR 1990 SC 658**; *State of U.P. vs. Pappu @Yunus and Anr.* **AIR 2005 SC 1248**; *State of Punjab vs. Gurmit Singh and Ors.* **AIR 1996 SC 1393**; *State of Orissa vs. Thakara Besra and Anr.* **AIR 2002 SC 1963**; *State of Himachal Pradesh vs. Raghubir Singh* **(1993) 2 SCC 622**; *Wahid Khan vs. State of Madhya Pradesh* **(2010) 2 SCC 9**; *Rameshwar vs. State of Rajasthan* **AIR 1952 SC 54, relied on.** B C

2. The Test Identification Parade is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. Holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought before the court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can 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. The actual evidence is what is given by the witnesses in the court. [Paras 16 and 19] [1164-G-H; 1165-A-B; 1166-D] D E F

State of H.P. vs. Lekh Raj **AIR 1999 SC 3916**; *Malkhan Singh vs. State of M.P.* **AIR 2003 SC 2669**; *Mulla and Anr. vs. State of Uttar Pradesh* **(2010) 3 SCC 508**; *Matru @ Girish Chandra vs. The State of Uttar Pradesh* **AIR 1971 SC 1050**; *Santokh Singh vs. Izhar Hussain and Anr.* **AIR 1973 SC 2190, relied on.** G

3.1. Even if there are some omissions, contradictions H

A **and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict**
B **the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be**
C **attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses. [Para 24] [1169-C-F]**

Sohrab and Anr. vs. The State of M.P. **AIR 1972 SC 2020;** *Bharwada Bhogini Bhai Hirji Bhai vs. State of Gujarat*
D **AIR 1983 SC 753;** *Prithu @ Prithi Chand and Anr. vs. State of Himachal Pradesh* **(2009) 11 SCC 588;** *State of U.P. vs. Santosh Kumar and Ors.* **(2009) 9 SCC 626, relied on.**

3.2. The evidence of the witnesses must be read as
E **a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds**
F **to reject the evidence as a whole. [Para 25] [1168-G-H]**

State of Rajasthan vs. Om Prakash **AIR 2007 SC 2257;** *State of U.P. vs. M.K. Anthony* **AIR 1985 SC 48;** *State vs. Saravanan and Anr.* **AIR 2009 SC 152, relied on.**

G **4. The absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. [Para 26] [1168-G-H]**

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Gurcharan Singh vs. State of Haryana **AIR 1972 SC 2661**; *Devinder Singh and Ors. vs. State of Himanchal Pradesh* **AIR 2003 SC 3365, relied on.** A

5. The age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/ school registers etc. [Para 28] [1169-F-G] B

Modi's Medical Jurisprudence and Toxicology, **23rd Edn., referred to.** C

6. A person coming from altogether different background and having no education may not be able to give a precise account of the incident. However, that cannot be a ground to reject his testimony. In rape cases, it is impossible to lay down with precision the chain of events, more particularly, when illiterate villagers with no sense of time are involved. [Para 31] [1171-C-D] D

Dimple Gupta (minor) vs. Rajiv Gupta **(2007) 10 SCC 30**; *Virendra @ Buddhu and Anr. vs. State of U.P.* **(2008) 16 SCC 582, referred to.** E

7.1. As the statement of PW 3-doctor who examined the prosecutrix makes it clear that at the relevant time the prosecutrix had very little developed breast and the growth of her armpit hair was at its initial/first stage, the court believed that she was below 16 years of age. The prosecutrix stated in her deposition that she was sent for a Radiological Test to place J and she could not explain as to why the report of the Radiological Test could not be produced before the trial court. The circumstances, under which the report of the Radiological Test could not be produced before the trial court, would have been explained only by the Investigating Officer. There is nothing on record to show that the defence had put any such question to the I.O. F G H

during his examination before the trial court. The I.O. was the only competent person to throw light on the issue of the non-production of the report of the Radiological Test and in the facts and circumstances of the case, no adverse inference could be drawn against the prosecution in the said issue. More so, the prosecution had no control over prosecuting agency. The position for not holding the Test Identification Parade in this regard is the same. [Para 32] [1171-H; 1172-A-D]

7.2. Under s. 114-A of the Evidence Act, 1872, inserted by amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. In the instant case, the prosecutrix had been consistent throughout in her statement that intercourse was against her wishes and that there was no consent as she had forcibly been caught and threatened and thereafter, she had been subjected to gang rape. The courts below reached the correct conclusion that the prosecutrix was a minor. There is nothing on record to establish the consent of the prosecutrix. [Paras 34 and 35] [1172-G-H; 1173-A-B]

7.3. The medical examinations of the appellant and other accused were also conducted soon after their arrest on the next day and it was found that the appellant and others were fit and competent to perform sexual intercourse. There is nothing on record to contradict or disprove the statement of the prosecutrix that the appellant and others took her behind the Railway School and when she cried out, one of the accused showed her a knife and in the meanwhile, accused, the appellant pressed her mouth and raped her. Thereafter, the other

accused persons raped her turn by turn and all of them ran away when the police reached there. [Para 36] [1173-C-D]

7.4. The contradictions, inconsistencies and discrepancies between the statement of the prosecutrix and the other evidence on record are immaterial for the reason that the trial court as well as the High Court considered these aspects and came to the conclusion that none of those contradictions goes to the root of the case. The prosecutrix was at the place of the incident and the appellant and other accused had intercourse with her. Even if it is presumed that she was major, there is nothing on record to show that she had given her consent. There is nothing on record to show that she had some basic education or had a sense of time and place. Such improvements have to be ignored as they do not go to the root of the case. There are concurrent findings of fact by both the courts below. The courts below have applied settled principles of law in the correct perspective. [Paras 38 and 40] [1174-A-C; 1175-A]

Sunil vs. State of Haryana (2010) 1 SCC 742; *Sukhwant Singh vs. State of Punjab* (1995) 3 SCC 367, distinguished.

7.5. An illiterate rustic village girl having no sense/ estimate/assessment of time and place, found herself apprehended by the appellant and his accomplices and forced to surrender under the threat to life, it is quite possible that she could not even raise hue and cry. She had no option except to surrender. It appears to be a case of non-resistance on the part of the prosecutrix because of fear and conduct of the prosecutrix cannot be held to be unnatural. [Para 44] [1176-C-D]

7.6. There is no dispute regarding the place of occurrence and the incident that occurred. The defence could not establish that it was a case of consent. FIR was

A lodged most promptly. Appellant and other accused were arrested on the next day. The prosecutrix as well as the appellant and other accused were medically examined on the next day. The appellant or any other accused were not known to the prosecutrix. No reason could be there
B for which the prosecutrix would have enroped them falsely. It could not be a case of consent by the prosecutrix, even if it is assumed that she was major. The discrepancies in the statement of the prosecutrix have to be ignored. There is no material on record on the basis
C of which, a different view or conclusion from that of the courts below could be taken. [Paras 45 and 46] [1176-E-G]

Case Law Reference:

D	AIR 1990 SC 658	Relied on. Para 9
	AIR 2005 SC 1248	Relied on. Para 10
	AIR 1996 SC 1393	Relied on. Para 11
	AIR 2002 SC 1963	Relied on. Para 12
E	(1993) 2 SCC 622	Relied on. Para 13
	(2010) 2 SCC 9	Relied on. Para 14
	AIR 1952 SC 54	Relied on. Para 14
F	AIR 1999 SC 3916	Relied on. Para 16
	AIR 2003 SC 2669	Relied on. Para 17
	(2010) 3 SCC 508	Relied on. Para 18
G	AIR 1971 SC 1050	Relied on. Para 18
	AIR 1973 SC 2190	Relied on. Para 18
	AIR 2007 SC 2257	Relied on. Para 21
	AIR 1985 SC 48	Relied on. Para 22
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AIR 2009 SC 152	**Relied on.**	**Para 23**
AIR 1972 SC 2020	**Relied on.**	**Para 24**
AIR 1983 SC 753	**Relied on.**	**Para 24**
(2009) 11 SCC 588	**Relied on.**	**Para 24**
(2009) 9 SCC 626	**Relied on.**	**Para 24**
AIR 1972 SC 2661	**Relied on.**	**Para 26**
AIR 2003 SC 3365	**Relied on.**	**Para 27**
(2007) 10 SCC 30	**Referred to.**	**Para 31**
(2008) 16 SCC 582	**Referred to.**	**Para 31**
(2010) 1 SCC 742	**Distinguished.**	**Para 41**
(1995) 3 SCC 367	**Distinguished.**	**Para 41**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 660 of 2008.

From the Judgment & Order dated 5.9.2006 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 15 of 1991.

Anip Sachthey, Mohit Paul, Shagun Matta, Sharin Danial for the Appellant.

Siddhartha Dave, Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 5.9.2006 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 15/1991 by which it had affirmed the judgment of the Trial Court i.e. Additional Sessions Judge, Sihore, Camp Katni dated 14.12.1990 in Sessions Case No. 85/1989, wherein the appellant had been convicted under

A Section 376/34 of the Indian Penal Code. 1860 (hereinafter called as 'IPC') and sentenced to undergo 10 years' RI along with fine of Rs.500/-. In the event of default in payment of fine, the appellant would further undergo RI for three months. A part of the fine imposed on the appellant and his co-accused was B directed to be paid to the prosecutrix Asha @ Gopi as compensation.

2. Facts and circumstances giving rise to this appeal are that on 6.12.1988, an FIR under Section 376/34 IPC was C registered against the appellant and six others at Police Station Katni, District Jabalpur, on the information of one Asha @ Gopi that she had been subjected to gang rape by the appellant and six others at about 6.00 p.m. on the said date. The police after recording the FIR, sent the prosecutrix to the hospital at Katni D for medical examination. The appellant was arrested on 7.12.1988 and subjected to medical tests along with the other accused on 8.12.1988. After the completion of the investigation, the police filed a charge sheet against the appellant and six others. As they denied the charges, refuted the prosecution story and pleaded innocence, all of them were E put to trial.

3. The Trial Court after concluding the proceedings vide judgment and order dated 14.12.1990 convicted all the accused persons including the appellant herein for committing gang rape F and sentenced each of them to 10 years' RI and fine of Rs.500/ - each.

4. Aggrieved by the said judgment and order dated 14.12.1990 passed by the Sessions Court, the appellant and G other accused preferred Appeal Nos. 15/1991, 3/1991, 1185/ 1990 and 1194/1990 before the High Court of Madhya Pradesh at Jabalpur. The High Court vide impugned judgment and order dated 5.9.2006 dismissed the appeal of the appellant and one other co-accused, Raju @ Ramakant. One accused, namely Anil, died during the pendency of the said appeal. The High H

Court acquitted the remaining four accused. Hence, this appeal by the appellant herein.

5. Shri Anip Sachthey, learned counsel appearing for the appellant has submitted that the prosecutrix was a major and it was a case of consent. He has further submitted that conviction cannot be based on the sole deposition of the prosecutrix. There is no other evidence to corroborate her version. The prosecutrix's statement suffers from material discrepancies. On the date of examination of the prosecutrix no physical injury was found on her person or on her private parts. The prosecutrix had given a most improbable and unacceptable version of events that the appellant continued to rape her for about two hours. Then one another accused raped her for about an hour. Also, in spite of the fact that the appellant and others had been arrested on the next date of the incident, the Investigating Officer did not conduct the Test Identification Parade. The prosecutrix was examined on the next day i.e. on 7.12.1988 by Dr. Rupa Lalwani, Medical Officer (PW-3), and the said Medical Officer referred her for a Radiological Test to determine her age, but the report of the said test has never been brought on record. Thus, an adverse inference is to be drawn against the prosecution. The appeal deserves to be allowed. The appellant had falsely been enroped in the crime.

6. On the other hand, Shri Siddhartha Dave along with Ms. Vibha Datta Makhija, learned counsel appearing for the State of M.P., vehemently opposed the appeal contending that the prosecutrix was a minor on the date of the incident. The non-production of the report of the Radiological test and not holding the Test Identification Parade would not discredit the investigation or the prosecution case. The non-existence of any injury on the person of the prosecutrix cannot be a ground to dis-believe her version. The prosecutrix had such a social background that she did not have any sense of time, duration etc. and, thus, she was not able to give a precise account of each activity of the incident. She had lost her father; and was

A an uneducated, rustic villager, who came from a very poor family. The discrepancies in the statement of the witnesses or the prosecutrix are such that the same are not sufficient to demolish the prosecution's case. In a rape case, an accused can be convicted on the sole testimony of the prosecutrix. The
B appeal lacks merit and is liable to dismissed.

7. We have considered the rival submissions made by learned counsel for the parties and perused the record.

8. Before we proceed to examine the impugned judgments
C of the courts below and facts of the case, it may be desirable to refer to the settled legal principles which have to be applied in the instant case.

LEGAL ISSUES:

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Sole Evidence of Prosecutrix :

9. In *State of Maharashtra Vs. Chandraprakash Kewalchand Jain* AIR 1990 SC 658, this Court held that a woman, who is the victim of sexual assault, is not an accomplice
E to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under :-

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> "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 under Section 118 and her evidence must receive the same weight as
G 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

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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 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."

10. In *State of U.P. Vs. Pappu @Yunus & Anr.* AIR 2005 SC 1248, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under :-

"It is well settled that a prosecutrix complaining of having

A been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical
B form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her
C testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."

11. In *State of Punjab Vs. Gurmit Singh & Ors.* AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with
D such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration
E unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR
F for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under :-

"The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three
G desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to
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discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.....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.....Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.....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.

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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

A *trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."*

12. In *State of Orissa Vs. Thakara Besra & Anr.* AIR 2002 SC 1963, this Court held that rape is not mere a physical B assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a C serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In *State of Himachal Pradesh Vs. Raghubir Singh* (1993) 2 SCC 622, this Court held that there is no legal D compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is E absence of circumstances which militate against her veracity.

14. A similar view has been reiterated by this Court in *Wahid Khan Vs. State of Madhya Pradesh* (2010) 2 SCC 9, placing reliance on earlier judgment in *Rameshwar Vs. State of Rajasthan* AIR 1952 SC 54.

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15. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

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Test Identification Parade:

16. Holding of the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the purpose of corroboration; for believing that a person brought H before the Court is the real person involved in the commission

of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can 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. (Vide *State of H.P. Vs. Lekh Raj* AIR 1999 SC 3916).

17. In *Malkhan Singh Vs. State of M.P.* AIR 2003 SC 2669, this Court has observed as under:

> "It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine."

18. In *Mulla & Anr. Vs. State of Uttar Pradesh* (2010) 3 SCC 508, this court (one of us, Hon'ble P. Sathasivam, J.) placed reliance on *Matru@Girish Chandra Vs. The State of Uttar Pradesh* AIR 1971 SC 1050; and *Santokh Singh Vs. Izhar Hussain & Anr.* AIR 1973 SC 2190, wherein it had been held that the Tests Identification Parades do not constitute substantive evidence. They are primarily meant for the purpose of providing the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. The Test Identification Parade can only be used as corroboration of the statement in Court.
The necessity for holding the Test Identification Parade can arise only when the accused persons are not previously known to the witnesses. The test is done to check the veracity of the witnesses. The court further observed as under :-

> "The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police.

A The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused B to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court."

C 19. Thus, it is evident from the above, that the Test Identification is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The D actual evidence is what is given by the witnesses in the court.

Discrepancies and inconsistencies in depositions of witnesses:

E 20. It is settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety.

21. In *State of Rajasthan Vs. Om Prakash* AIR 2007 SC F 2257, while dealing with a similar issue, this Court held that "*irrelevant details which do not in any way corrode the credibility of a witness cannot be levelled as omissions or contradictions.*"

G 22. In *State of U.P. Vs. M.K. Anthony* AIR 1985 SC 48, this Court laid down certain guidelines in this regard, which require to be followed by the courts in such cases. The Court observed as under :-

"While appreciating the evidence of a witness, the H

approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."

23. In *State Vs. Saravanan & Anr.* AIR 2009 SC 152, while dealing with a similar issue, this Court observed as under :-

"…..while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon

A appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor B detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies."

C 24. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to D convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all E the details, minor discrepancies are bound to occur in the statements of witnesses (vide *Sohrab & Anr. Vs. The State of M.P.* AIR 1972 SC 2020; *Bharwada Bhogini Bhai Hirji Bhai Vs. State of Gujarat* AIR 1983 SC 753; *Prithu @ Prithi Chand & Anr. Vs. State of Himachal Pradesh* (2009) 11 SCC 588; F and *State of U.P. Vs. Santosh Kumar & Ors.* (2009) 9 SCC 626).

25. Thus, in view of the above, the law on the point can be summarised to be that the evidence of the witnesses must be G read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole. H

Injury on the person of the Prosecutrix

26. In the case of *Gurcharan Singh Vs. State of Haryana* AIR 1972 SC 2661, this Court has held that *"the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless, surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape"*

27. In *Devinder Singh & Ors. Vs. State of Himanchal Pradesh* AIR 2003 SC 3365, a similar issue was considered by this Court and the court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found on the genital areas. However, it was found that prosecutrix was used to sexual intercourse. This Court held that the fact that no injury was found on her body only goes to show that she did not put up resistance.

Determination of Age

28. As per Modi's Medical Jurisprudence and Toxicology, 23rd Edn., the age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

Teeth- (Dental - Age)

29. So far as permanent teeth are concerned, eruption

A generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth :-

Central incisors	- 6th to 8th year
Lateral incisors	- 7th to 9th year
Canines	- 11th to 12th year
Second Molars	- 12th to 14th year
Third Molars or Wisdom Teeth	- 17th to 25th year

In total, there are 32 teeth on full eruption of permanent teeth.

Secondary Sex Characters

30. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages :-

(a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;

(b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;

(c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs;

The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:

(i) Breasts and papilla are elevated as a small mound, and

there is enlargement of areolar diameter. A

(ii) More elevation and enlargement of breast and areola, but their contours are not separate.

(iii) Areola and papilla project over the level of the breast. B

(iv) Adult stage – only the papilla projects and the areola merges with the general contour of the breast.

Evidence of Rustic/ illiterate villager

31. In *Dimple Gupta (minor) Vs. Rajiv Gupta,* (2007) 10 C SCC 30, this Court held that a person coming from altogether different background and having no education may not be able to give a precise account of the incident. However, that cannot be a ground to reject his testimony. The court observed that in a case like rape, "it is impossible to lay down with precision D the chain of events, more particularly, when illiterate villagers with no sense of time are involved."

A similar view has been re-iterated by this Court in *Virendra @ Buddhu & Anr. Vs. State of U.P.* (2008) 16 SCC 582. E

32. The case requires to be considered in the light of the aforesaid settled legal propositions.

Shri Anip Sachthey, learned counsel for the appellant, submitted that the prosecutrix was a major on the date of F incident and that it was a clear case of consent. The Trial Court as well as the High Court examined the issue involved herein very minutely. Dr. Rupa Lalwani (PW-3), who had examined the prosecutrix on 7.12.1988, has stated that in the examination she found that there were in all 28 teeth in both the jaws; her breast G had developed a little; the armpit hairs were in its initial stage; but there were pubic hair present around her vagina. On the basis of this, she opined that at relevant time, prosecutrix was aged between 12 and 14 years. As the statement of Dr. Rupa Lalwani (PW-3) makes it clear that the prosecutrix Asha @ Gopi H

had very little developed breast and the growth of her armpit hair was at its initial/first stage, the Court believed that she was below 16 years of age. Undoubtedly, Asha @ Gopi, the prosecutrix had stated in her deposition that she was sent for a Radiological Test to Jabalpur and she could not explain as to why the report of the Radiological Test could not be produced before the Trial Court. In fact, the circumstances under which the report of the Radiological Test could not be produced before the Trial Court, would have been explained only by the Investigating Officer. Unfortunately, there is nothing on record to show that the defence had put any such question to the I.O. during his examination before the Trial Court. In our opinion, the I.O. was the only competent person to throw light on the issue of the non-production of the report of the Radiological Test and in the facts and circumstances of this case, no adverse inference can be drawn against the prosecution in this issue. More so, the prosecution had no control over prosecuting agency. Same remains the position for not holding the Test Identification Parade in this case.

33. Dr. Rupa Lalwani (PW-3) had stated that hymen of the prosecutrix was found completely torn and fresh blood was oozing out of it and she further opined that the vagina of a girl becomes loose even after one intercourse and two fingers can easily enter into her vagina. She had further opined that loosening of vagina and entering two fingers into vagina of a girl cannot give presumption that the girl was habituated to sexual intercourse.

34. Under Section 114-A of the Indian Evidence Act, 1872, which was inserted by way of amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

35. Asha @Gopi, the prosecutrix had been consistent throughout in her statement that intercourse was against her wishes and that there was no consent as she had forcibly been caught and threatened and thereafter, she had been subjected to gang rape. In view of the above, we are of the view that the Courts below reached the correct conclusion that the prosecutrix was a minor. Be that as it may, there is nothing on record to establish the consent of the prosecutrix in this case.

36. The medical examinations of the appellant and other accused were also conducted soon after their arrest on the next day and it was found that the appellant and others were fit and competent to perform sexual intercourse. There is nothing on record to contradict or disprove the statement of the prosecutrix that the appellant and others took her behind the Railway School and when she cried out, one of the accused showed her a knife and in the meanwhile, accused Vijay, the appellant pressed her mouth and raped her. Thereafter, the other accused persons raped her turn by turn and all of them ran away when the police reached there.

37. Shri Sachthey, learned counsel for the appellant, would point out the discrepancies between the statement of the prosecutrix and the other evidence on record. In the Court, she stated that she had gone to work at a business place for sorting apples and when she went to answer the call of nature, the accused met her and took her near the school and raped her. This statement was inconsistent with her version in the FIR, wherein, it was mentioned that when she was going to get her chappals repaired, she was forcibly taken by the accused to the school and was raped. There was also a contradiction in her statement regarding the dress she was wearing at that time as at one stage, she had stated that she was wearing sari, but at another stage, she stated that she was wearing a frock and vest. Shri Sachthey further submitted that as per the prosecutrix, the appellant had sexual intercourse with her for two hours and one other accused had it for about one hour. Such a course is wholly unnatural and improbable and, therefore, the evidence

A given by the prosecutrix cannot be held to be reliable.

38. We have considered the contradictions, inconsistencies and discrepancies pointed out by Shri Anip Sachthey, however, they are immaterial for the reason that the B Trial Court as well as the High Court have considered these aspects and came to the conclusion that none of those contradictions goes to the root of the case. Admittedly, the prosecutrix was at the place of the incident and the appellant and other accused had intercourse with her. Even if it is presumed that she was major, there is nothing on record to C show that she had given her consent. There is nothing on record to show that she had some basic education or had a sense of time and place. Such improvements have to be ignored as they do not go to the root of the case. The Trial Court has recorded the following findings in this regard:

D

> "(1) Her father is not alive. All these facts clearly prove that she was uneducated, poor and helpless child labour and, therefore, minor contradictions only given by her are very natural. ..... All depends upon the observance and E memory of an individual.
>
> (2) The level of understanding of the prosecutrix is very-very low. It appears that in fact she wants to clarify that invariably one may not believe or presume that her consent was there in the gang rape and perhaps therefore she tried F to give such a statement.....This clearly demonstrates that a testimony and understanding is of a very low level and on the same basis she has been stating about her age also."

G 39. The High Court has considered the discrepancies in her statement as to whether she was going to get her chappal repaired or was easing herself and came to the conclusion that such contradictions had no material bearing on the prosecution's case as "the fact remains that at that time she was going through that area.".

H

40. There are concurrent findings of fact by both the courts below. The courts below have applied settled principles of law in the correct perspective which we have explained hereinabove.

41. We do not find any force in the submissions made by Shri Anip Sachthey, learned counsel appearing for the appellant, that the instant case was squarely covered by the judgment of this Court in *Sunil Vs. State of Haryana* (2010) 1 SCC 742, wherein in a similar case, for non-production of the report of Radiological Test, an adverse inference was drawn against the prosecution and the appellant therein had been acquitted. In the said case, this Court had relied upon the judgment in *Sukhwant Singh Vs. State of Punjab* (1995) 3 SCC 367, wherein it has been held as under:

> ".....failure to produce the expert opinion before the trial Court in such cases affects the creditworthiness of the prosecution case to a great extent."

42. The facts of the case are quite distinguishable. In the said case, the basic issue was merely as to whether the prosecutrix was a minor. The prosecutrix was examined by Dr. Sadhna Verma (PW-1), and found that her Secondary Sex Characters were well developed. She carried out a local examination and in her opinion, the prosecutrix was major. The report reads :

> "Labia majora was well developed. Pubic hair was present. Carunculae myrtiformes was present. Vagina admitting two fingers. Uterus was normal and retroverted, furnaces free.
>
> For her age verification, she was referred to dental surgeon and radiologist opinion."

43. The report of the Medical Officer in the said case was quite contrary. That was a case under Sections 363, 366-A and 376 IPC and in her statement under Section 164 of Code of

A Criminal Procedure, 1973, the prosecutrix had stated that she was in love with the appellant therein and she had always been a consenting party. This Court itself, after appreciating the statement of Dr. Sadhna Verma (PW1), came to the conclusion that the prosecutrix therein was major. Thus, it is evident that
B the ratio of the said judgment has no application in the instant case.

44. If we examine the whole case in the totality of the circumstances and consider that an illiterate rustic village girl having no sense/estimate/assessment of time and place, found
C herself apprehended by the appellant and his accomplices and forced to surrender under the threat to life, it is quite possible that she could not even raise hue and cry. She had no option except to surrender. It appears to be a case of non-resistance on the part of the prosecutrix because of fear and the conduct
D of the prosecutrix cannot be held to be unnatural.

45. There is no dispute regarding the place of occurrence and the incident that occurred. The defence could not establish that it was a case of consent. FIR had been lodged most
E promptly. Appellant and other accused were arrested on the next day. The prosecutrix as well as the appellant and other accused were medically examined on the next day. The appellant or any other accused was not known to the prosecutrix. No reason could be there for which the prosecutrix would have enroped them falsely. Definitely, it could not be a
F case of consent by the prosecutrix, even if it is assumed that she was major. The discrepancies in the statement of the prosecutrix have to be ignored as explained hereinbefore.

46. There is no material on record on the basis of which,
G this Court may take a different view or conclusion from the courts below. We do not find any force in this appeal, which is accordingly dismissed.

N.J. Appeal dismissed.