

A MD.ALI @ GUDDU

V.

STATE OF U.P.

B (Criminal Appeal No. 2238 OF 2010)

MARCH 10, 2015

[DIPAK MISRA AND N.V. RAMANA, JJ.]

C *Penal code, 1860 – ss. 363, 366 and 376 – Conviction under, by courts below – On appeal, held: The accused were convicted without proper appreciation of evidence – In view of the unexplained delay in lodging FIR, non-examination of*
D *witness, the associated circumstances and the medical evidence, the testimony of the prosecutrix cannot be treated as so natural and truthful to inspire confidence – The accused were erroneously convicted.*

E *Constitution of India, 1950 – Art. 136 – Criminal appeal by special leave – Scope of – Held: In such appeal, Supreme Court normally does not appreciate evidence and go into the question of credibility of witness, except where the conclusions recorded by High Court are manifestly*
F *perverse and unsupportable by the evidence on record.*

Allowing the appeals, the Court

HELD: 1. In an appeal under Article 136 of the
G **Constitution, this Court does not normally appreciate the evidence by itself and go into the question of credibility of witness. The assessment of the evidence by the High Court is accepted as final, except where the conclusions recorded by the High Court are manifestly perverse and**
H **unsupportable by the evidence on record. [Para 15] [427-**

F-H; 428-A]

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Arunachalam v. P.S.R. Sadhanatha and Anr. 1979 (3) SCR 482 : (1979) 2 SCC 297; *State of U.P. v. Babul Nath* 1994 (2) Suppl. SCR 598: (1994) 6 SCC 29; *Ganga Kumar Srivastava v. State of Bihar* 2005 (2) SCC 211; *Alamelu and Another v. State, represented by Inspector of Police* 2011 (2) SCR 147 : (2011) 2 SCC 385 – relied on.

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2. The conclusions arrived at by the High Court in the present case are totally unsupportable on the basis of the evidence on record. There is no proper appreciation of evidence by trial court and definitely the High Court has failed to exercise its appellate jurisdiction in proper perspective as is expected from it in law. [Paras 16 and 17] [428-B]; [429-D-E]

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Kamlesh Prabhudas Tanna v. State of Gujarat 2013 (9) SCR 257: (2013) 15 SCC 263; *Padam Singh v. State of U.P.* 1999 (5) Suppl. SCR 59 = (2000) 1 SCC 621; *Rama v. State of Rajasthan* (2002) 4 SCC 571; *Iqbal Abdul Samiya Malek v. State of Gujarat* 2012 (8) SCR 1012 = (2012) 11 SCC 312; *Padam Singh v. State of U.P.* 1999 (5) Suppl. SCR 59: (2000) 1 SCC 621; *Bani Singh v. State of U.P.* 1996 (3) Suppl. SCR 247 : (1996) 4 SCC 720; *Majjal v. State of Haryana* (2013) 6 SCC 798 – relied on.

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3. FIR was lodged almost after expiry of eleven days alleging the factum of kidnapping by the accused persons. In rape cases, the delay in filing the FIR by the prosecutrix or by the parents in all circumstance is not of significance such delay would depend upon facts of

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A each case, regard being had to the trauma suffered by
the prosecutrix and various other factors. In the present
case, the prosecutrix was missing from home. In such a
situation, it was a normal expectation that either the
mother (PW2) or the brother would have lodged a
B missing report at the police station. The same was not
done. This action of PW-2 really throws a great challenge
to common sense. No explanation has been offered for
such delay. In the absence of any explanation, it gives
C rise to a sense of doubt. That apart, the factum that the
appellant informed the mother of the victim that he had
left the prosecutrix at the door of her house also does
not command acceptance. The recovery of the
prosecutrix by the brother and her friends also creates
D a cloud of suspicion. Therefore, the prosecution version
that one 'A' had informed the brother of the prosecutrix
that his sister was at his place but for reasons best
known to the prosecution, 'A' has not been examined.
That apart, the persons who were accompanying the
E brother have also not been examined by the
prosecution. Thus, the manner of recovery of the
prosecutrix from the house of 'A' remains a mystery.
[Paras 16 and 20] [428-B-C, F-G; 432-D-G]

F *Rajesh Patel v. State of Jharkhand* 2013 (2) SCR
411 : (2013) 3 SCC 791—relied on.

4. On the basis of the sole testimony of the
prosecutrix, if it is unimpeachable and beyond reproach,
G a conviction can be based. The grammar of law permits
the testimony of a prosecutrix can be accepted without
any corroboration without material particulars, for she
has to be placed on a higher pedestal than an injured
witness. But when a Court, on studied scrutiny of the
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evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. The present case would show, that the testimony of the prosecutrix does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, the trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same. It has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. The evidence of the prosecutrix is not of such quality which can be placed reliance upon. [Para 21] [432-H; 433-A-H; 434-A-B]

Case Law Reference

1979 (3) SCR 482	relied on.	Para 12
1994 (2) Suppl. SCR 598	relied on.	Para 14
(2005) 6 SCC 211	relied on.	Para 14
2011 (2) SCR 147	relied on.	Para 15

- | | | | |
|---|-------------------------|------------|---------|
| A | 2013 (2) SCR 411 | relied on. | Para 16 |
| | 2013 (9) SCR 257 | relied on. | Para 17 |
| | 1999 (5) Suppl. SCR 59 | relied on. | Para 17 |
| B | (2002) 4 SCC 571 | relied on. | Para 18 |
| | 2012 (8) SCR 1012 | relied on. | Para 18 |
| | 1999 (5) Suppl. SCR 59 | relied on. | Para 18 |
| C | 1996 (3) Suppl. SCR 247 | relied on. | Para 18 |
| | (2013) 6 SCC 798 | relied on. | Para 18 |

CRIMINAL APPELLATE JURISDICTION: Criminal

D Appeal No. 2238 of 2010.

From the Judgment and Order dated 25.03.2009 of the High Court at Allahabad in Cr. Appeal No. 602 of 2006.

E **WITH**

Crl. A. Nos. 425 of 2015 and 636 of 2012

Lajja Ram, Ashok Kumar Gupta II, for the Appellant.

F Ratnakar Dash, Abhish Kumar, Archana Singh for the Respondent.

The Judgment of the Court was delivered by

G **DIPAK MISRA, J.** 1. Leave granted in SLP (Crl.) No. 9896 of 2011.

2. The present appeals are directed against the common judgment and order dated 25.03.2009 passed by the High Court of Judicature at Allahabad in Criminal Appeal

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No. 602 of 2006 and Criminal Appeal No. 863 of 2006 whereby the learned Single Judge has given the stamp of approval to the judgment and order dated 30.01.2006 passed by the learned Additional Sessions Judge/F.T.C., Hapur, District Ghaziabad whereunder he had convicted the appellants under Section 363, 366 and 376 I.P.C. and sentenced each of them to undergo three years rigorous imprisonment under Section 363 IPC and to pay a fine of Rs.2,000/- with a default clause, five years rigorous imprisonment and to pay a fine of Rs.3,000/- under Section 366 IPC and ten years rigorous imprisonment and to pay a fine of Rs.5,000/- under Section 376 IPC with the default sequitur. All the sentences were directed to run concurrently.

3. The prosecution case, as has been unfurled, is that a written report was filed by the complainant, Smt. Aneesa, PW-2, on 3.12.1996 on the allegation that on 22.11.1996, around midnight, her daughter, Gulistan, PW-1, aged about 14 years, went out of her house to answer the call of nature but did not return for a considerable time. Being anxious, she went in search of her and at that time Ali Waris, one of the appellants herein, informed her that he had left her daughter at his door. Thereafter, PW-2 and his son Abrar, PW-4, searched for her in the neighbourhood as well as amongst the relatives but as it turned out to be an exercise in futility, she sensed some foul play and eventually informed the police that Ali Waris and Mohammad Ali @ Guddu had kidnapped her daughter. After the criminal law was set in motion, the investigating agency commenced the search of the victim. As the factual matrix would uncurtain, Abrar had along with co-villagers, namely, Arif s/o Md. Rafi, Zulfi, Papat, Shafiq and others had gone in search of his sister, they had reached village Loni and Arif s/o Azam Khan brought Gulistan from a house and handed over to him. All of them along with Gulistan went to the police

A station on 18.1.1997 and PW-2 and Gulistan, PW-1, submitted
an application at the police station Dhaulana. The statement
of the victim was recorded under Section 164 of the Code of
Criminal Procedure. The investigating agency sent the victim
for medical examination, recorded the statements of seven
B witnesses, prepared the site plan and after completing other
formalities placed the chargesheet against eight accused
persons, namely, Ali Waris, Md. Ali, Mehmood, Allahrakha,
Sirajoo, Fazal, Shamshad and Sarfraz for the offences
C punishable under Sections 363, 366, 368 and 376, IPC before
the competent Court which in turn committed the matter to the
Court of Session.

4. The accused persons abjured their guilt and pleaded
false implication due to political rivalry relating to Gram Sabha
D Pradhan elections.

5. In course of trial, the prosecution, to bring home the
charges, examined seven witnesses, namely, Gulistan, PW-
1, the prosecutrix, Anisha, PW-2, the informant and the mother
E of the victim, Liyaqat Ali, PW-3, Abrar, PW-4, the brother of
the victim, Maqsood, PW-5, Mahavir Singh, PW-6 and Dr.
Rekha Singh, PW-7 who had examined the victim. Be it noted,
PWs 3 and 5 have turned hostile.

F 6. The accused persons in their statements recorded
under Section 313 of CrPC denied their involvement in the
occurrence. Their plea was that they had supported Ali Waris
in village Pradhan election and the rival party Arif, a relative of
PWs 1, 2 and 4 was defeated. The defence in order to establish
G its plea examined one witness, namely, Jaggi Rana, DW-1.

7. The learned trial Judge on appreciation of evidence
brought on record came to hold that the prosecution had been
able to establish the charges against four accused persons,
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namely, Ali Waris, Mohd. Ali @ Guddu, Mehmood and Fazal A
for the offences under Sections 366, 368 and 376 of I.P.C.,
but had failed to bring home charges against other accused
persons and on that basis convicted and imposed the
sentence as has been stated hereinbefore.

8. Being aggrieved by the aforesaid judgment of B
conviction and order of sentence, Fazal Mohd. Ali and
Mehmood preferred Criminal Appeal No. 602 of 2006 and Ali
Waris preferred an independent Appeal being Criminal Appeal C
No. 863 of 2006. It is worthy to state here that the State had
not assailed the judgment of acquittal of the four accused
persons. The High Court appreciated the evidence and by
placing reliance on the testimony of PWs 1, 2 and 4 had opined
that the findings recorded by the learned trial Judge was D
flawless. Being of the said view, it affirmed the judgment of
conviction and the order of sentence.

8. We have heard Mr. Lajja Ram, learned counsel for
the appellants and Mr. Ratnakar Dash, learned senior counsel E
for the State.

9. It is submitted by the learned counsel for the
appellants that the learned trial Judge as well as the High Court
has absolutely gone wrong by coming to hold that the age of
the victim was less than eighteen years on the date of F
occurrence. It is his further submission that the appreciation
of evidence by the trial Court and the High Court is totally
perverse inasmuch as in the obtaining factual matrix, the
evidence of the prosecution witnesses could not have been G
remotely given credence to. Learned counsel has seriously
criticized the delay in lodging of the FIR, regard being had to
the unnatural facet, for PW-2 had lodged the FIR after 11 days
whereas any reasonable person would have immediately
informed the police about the missing of his/her daughter. It is H

A canvassed by him that the entire allegations of the prosecution are built on an unacceptable plinth and regard being had to the evidence brought on record which is completely sketchy, the conviction could not have been recorded. Mr. Lajja Ram has submitted that the medical evidence does not support the
B prosecution version and the present case being not one where the evidence of the prosecutrix is so unmatched that solely on the basis of her testimony and the conviction can be recorded, said medical evidences gains significance.
C Learned counsel would submit that the testimony of the victim, the conduct of the mother and the nature of allegations made against the accused persons lead to a definite conclusion that the entire story put forth by the prosecution is wholly incredible and the learned trial Judge has lent credence to the testimony
D on assumed reasoning and the High Court has concurred with the same without proper appreciation of the evidence which is the obligation of the appellate Court hearing a criminal appeal.

E 9. Mr. Ratnakar Dash, learned senior counsel appearing for the State in his turn would contend there has been a concurring finding of facts with regard to the age and there is no justification or warrant to interfere with the same. Learned senior counsel would submit that the prosecutrix was
F under constant fear as has been stated by her and hence, under the obtaining circumstances there is no reason not to believe her testimony and unsettle the conviction. It is urged by him that findings recorded by the trial Court which have been
G concurred with by the High Court, by no stretch of imagination, can be called perverse warranting interference by this Court.

H 10. To appreciate the rival submissions raised at the bar, we have bestowed our anxious consideration to weigh and analyse the evidence brought on record for the purpose

whether testimony of the victim deserves acceptance and ultimately the prosecution case deserves acceptance. Though the learned counsel for the parties have urged the point with regard to the age of the prosecutrix, the same need not be adverted to. Suffice it to mention that PW-2, the mother of the victim, had alleged that her daughter was fourteen years of age on 22.11.1996 when she was kidnapped. The ossification test has pointed out that she was approximately eighteen years of age. The learned trial Judge has opined that she was less than eighteen years and the High Court has accepted the same. The said issue would gain prominence, if the story set forth by the prosecution is accepted to be credible, for then only the question of consent by the prosecutrix for the offences would arise. If the entire prosecution story is discarded as being incredulous, then the said aspect would certainly melt into insignificance.

11. Having stated so, we shall proceed to deal with the pertinent facts in this regard. Prior to that it is essential to address the issue of propriety and the conceptual parameters or conceptions based on well accepted norms and paradigms to exercise the power of this Court under Article 136 of the Constitution.

12. In **Arunachalam v. P.S.R. Sadhanatha and Anr.**¹ it has been expressed thus:

“The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the court to set limits to itself within which to exercise such power. It is now the well-established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional

¹ (1979) 2 SCC 297

- A circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction
- B between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted 'perversely or otherwise improperly'."

[emphasis supplied]

- C 13. In ***State of U.P. v. Babul Nath***², a two Judge Bench has laid down thus:

- D "At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of
- E course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of
- F the High Court are manifestly perverse and unsupportable from the evidence on record."

- G 14. In ***Ganga Kumar Srivastava v. State of Bihar***³, the Court after referring to series of decisions on exercise of the power of this Court under Article 136 of the Constitution culled out following principles:

"(i) The powers of this Court under Article 136 of the

2 (1994) 6 SCC 29

3 (2005) 6 SCC 211

Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact save in exceptional circumstances. A

(ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted perversely or otherwise improperly. B

(iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court. C

(iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it. D

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record." E

15. In *Alamelu and Another v. State, represented By Inspector of Police*⁴, it has been stated that even though the powers of this Court under Article 136 of the Constitution are very wide, but in criminal appeals, this Court would not interfere with the concurrent findings of fact save in very exceptional cases. In an appeal under Article 136 of the Constitution, this Court does not normally appreciate the evidence by itself and go into the question of credibility of witness. Elaborating further, the Court has opined that the F
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- A assessment of the evidence by the High Court is accepted as final except where the conclusions recorded by the High Court are manifestly perverse and unsupportable by the evidence on record.
- B 16. Keeping the aforesaid principles in view, we shall proceed to scrutinize the materials on record, for we are convinced that the conclusions arrived at by the High Court are totally unsupportable on the basis of the evidence on record. For the aforesaid purpose, first we shall advert to the issue of
- C lodging of the First Information Report. As is demonstrated, the victim missed from the house on 22.11.1996 but the mother lodged the FIR on 3.12.1996 almost after expiry of eleven days alleging the factum of kidnapping by the accused persons,
- D namely, Ali Waris and Md. Ali @ Guddu. It is interesting to note that the mother, had alleged that Ali Waris had left the girl at her door steps. In such a circumstance, if nothing else, the PW-2, the mother, who is expected to have necessitous concern, could have gone to the police station to lodge a
- E missing report which could have prompted the investigation officer to act. It baffles the commonsense that the mother after searching in the neighbourhood as well as amongst the relatives still, for some unfathomable reason that defeats the basic human prudence approached the police station quite
- F belatedly. It is apt to mention here that in rapes cases the delay in filing the FIR by the prosecutrix or by the parents in all circumstance is not of significance. The authorities of this Court have granted adequate protection/allowance in that aspect regard being had to the trauma suffered, the agony
- G and anguish that creates the turbulence in the mind of the victim, to muster the courage to expose oneself in a conservative social milieu. Sometimes the fear of social stigma and on occasions the availability of medical treatment to gain normalcy and above all the psychological inner strength to undertake
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such a legal battle. But, a pregnant one, applying all these allowances, in this context, it is apt to refer to the pronouncement in **Rajesh Patel v. State of Jharkhand**⁵ wherein in the facts and circumstances of the said delay of 11 days in lodging the FIR with the jurisdictional police was treated as fatal as the explanation offered was regarded as totally untenable. This Court did not accept the reasoning ascribed by the High Court in accepting the explanation as same was fundamentally erroneous.

17. Coming to the case at hand, after the mother lodged the FIR implicating Ali Waris and Md. Ali, the brother, PW-2, with his friends recovered the prosecutrix from village Loni and she was examined under Section 164, CrPC. As is evident, she had left home on 22.11.1996. As alleged, she was fourteen years of age. The trial court on the basis of radiological test has opined that she was below eighteen years of age and the High Court has accepted the same. The factum of age only if the findings recorded by the trial court and High Court are accepted, for as we find, there is no proper appreciation of evidence by trial court and definitely the High Court has failed to exercise its appellate jurisdiction in proper perspective as is expected from it in law. In **Kamlesh Prabhudas Tanna v. State of Gujarat**⁶ dealing with the duty of the appellate court, this Court observed:-

“At this juncture, we are obliged to state that though it may be difficult to state that the judgment suffers from sans reasons, yet it is not at all difficult to say that the reasons ascribed are really apology for reasons. If we allow ourselves to say so, one may ascribe certain reasons which seem to be reasons but the litmus test is

⁵ (2013) 3 SCC 791

⁶ (2013) 15 SCC 263

A to give seemly and condign reasons either to sustain or
overturn the judgment. The filament of reasoning must
logically flow from requisite analysis, but, unfortunately,
the said exercise has not been carried out. In this context,
B we may refer with profit to the decision in *Padam Singh*
v. *State of U.P.*⁷, wherein a two-Judge Bench, while
dealing with the duty of the appellate court, has expressed
thus:

C "2. ... It is the duty of an appellate court to look into the
evidence adduced in the case and arrive at an
independent conclusion as to whether the said evidence
can be relied upon or not and even if it can be relied
upon, then whether the prosecution can be said to have
D been proved beyond reasonable doubt on the said
evidence. The credibility of a witness has to be adjudged
by the appellate court in drawing inference from proved
and admitted facts. *It must be remembered that the*
appellate court, like the trial court, has to be satisfied
E *affirmatively that the prosecution case is substantially*
true and the guilt of the accused has been proved
beyond all reasonable doubt as the presumption of
innocence with which the accused starts, continues right
through until he is held guilty by the final Court of Appeal
F *and that presumption is neither strengthened by an*
acquittal nor weakened by a conviction in the trial court."

18. In **Rama v. State of Rajasthan**⁸ the Court has
expressed about the duty of the appellate court thus:

G "4. ... It is well settled that in a criminal appeal, a duty is
enjoined upon the appellate court to reappraise the
evidence itself and it cannot proceed to dispose of the

H ⁷ (2000) 1 SCC 621
⁸ (2002) 4 SCC 571

appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused, which cannot be permitted under law.”

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Similar principles have been reiterated in *Iqbal Abdul Samiya Malek v. State of Gujarat*⁹, *Padam Singh v. State of U.P.*¹⁰ and *Bani Singh v. State of U.P.*¹¹

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19. A three-Judge Bench in *Majjal v. State of Haryana*¹² has ruled thus:

“It was necessary for the High Court to consider whether the trial court’s assessment of the evidence and its opinion that the appellant must be convicted deserve to be confirmed. This exercise is necessary because the personal liberty of an accused is curtailed because of the conviction. The High Court must state its reasons why it is accepting the evidence on record. The High Court’s concurrence with the trial court’s view would be acceptable only if it is supported by reasons. In such appeals it is a court of first appeal. Reasons cannot be cryptic. By this, we do not mean that the High Court is expected to write an unduly long treatise. The judgment may be short but must reflect proper application of mind to vital evidence and important submissions which go to the root of the matter.”

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20. The obtaining factual matrix has to be appreciated

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9 (2012) 11 SCC 312

10 (2000) 1 SCC 621

11 (1996) 4 SCC 720

12 (2013) 6 SCC 798

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A on the touchstone of the aforesaid parameters. Be it clearly
stated here delay in lodging FIR in cases under Section 376
IPC would depend upon facts of each case and this Court has
given immense allowance to such delay, regard being had to
B the trauma suffered by the prosecutrix and various other factors,
but a significant one, in the present case, it has to be
appreciated from a different perspective. The prosecutrix was
missing from home. In such a situation, it was a normal
C expectation that either the mother or the brother would have
lodged a missing report at the police station. The same was
not done. This action of PW-2 really throws a great challenge
to common sense. No explanation has been offered for such
D delay. The learned trial Judge has adverted to this facet on an
unacceptable backdrop by referring to the principle that
prosecutrix suffered from trauma and the constraint of the social
E stigma. The prosecutrix at that time was nowhere on the
scene. It is the mother who was required to inform the police
about missing of her grown up daughter. In the absence of
any explanation, it gives rise to a sense of doubt. That apart,
F the factum that the appellant informed the mother of the victim
that he had left the prosecutrix at the door of her house also
does not command acceptance. The recovery of the
prosecutrix by the brother and her friends also creates a cloud
of suspicion. We are not inclined to believe the prosecution
G version as has been projected that one Arif had informed the
brother of the prosecutrix that his sister was at his place but
for reasons best known to the prosecution, Arif has not been
examined. That apart, the persons who were accompanying
the brother have also not been examined by the prosecution.
H Thus, the manner of recovery of the prosecutrix from the house
of Arif remains a mystery.

21. Be it noted, there can be no iota of doubt that on
the basis of the sole testimony of the prosecutrix, if it is

unimpeachable and beyond reproach, a conviction can be A
based. In the case at hand, the learned trial Judge as well as
the High Court have persuaded themselves away with this
principle without appreciating the acceptability and reliability
of the testimony of the witness. In fact, it would not be B
inappropriate to say that whatever the analysis in the impugned
judgment, it would only indicate an impropriety of approach.
The prosecutrix has deposed that she was taken from one
place to the other and remained at various houses for almost
two months. The only explanation given by her is that she was C
threatened by the accused persons. It is not in her testimony
that she was confined to one place. In fact, it has been borne
out from the material on record that she had travelled from
place to place and she was ravished number of times. Under
these circumstances, the medical evidence gains significance, D
for the examining doctor has categorically deposed that there
are no injuries on the private parts. The delay in FIR, the non-
examination of the witnesses, the testimony of the prosecutrix,
the associated circumstances and the medical evidence, leave
a mark of doubt to treat the testimony of the prosecutrix as so E
natural and truthful to inspire confidence. It can be stated with
certitude that the evidence of the prosecutrix is not of such
quality which can be placed reliance upon. True it is, the
grammar of law permits the testimony of a prosecutrix can be F
accepted without any corroboration without material particulars,
for she has to be placed on a higher pedestal than an injured
witness, but, a pregnant one, when a Court, on studied scrutiny
of the evidence finds it difficult to accept the version of the
prosecutrix, because it is not unrepachable, there is G
requirement for search of such direct or circumstantial
evidence which would lend assurance to her testimony. As
the present case would show, her testimony does not inspire
confidence, and the circumstantial evidence remotely do not
lend any support to the same. In the absence of both, we are H

A compelled to hold that the learned trial Judge has erroneously convicted the accused-appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same.

B 22. Resultantly, the appeals are allowed, judgment of conviction and order of sentence are set aside and as the appellants are on bail, they be discharged of their bail bonds.

Kalpana K. Tripathy

Appeals allowed.

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v.

STATE OF HARYANA

Criminal Appeal No. 65 of 2012

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MARCH 10, 2015

**[FAKKIR MOHAMED IBRAHIM KALIFULLA AND
ABHAY MANOHAR SAPRE, JJ.]**

C

Penal Code, 1860 – s.376 – Punishment for rape – Rape of a young girl aged 16 years 3 months – Late disclosure of the incident by the prosecutrix to her mother since prosecutrix threatened with dire consequences by accused – Conviction of accused for the offence punishable u/s. 376 and sentenced to 7 years' RI with fine by the courts below – On appeal, held: Prosecutrix is a reliable and truthful witness – Her testimony suffers no infirmity or blemish whatsoever – Medical evidence supports the commission of sexual violence on her – Even the accused did not dispute the factum of commission of offence by him on the prosecutrix because his only defence was that the prosecutrix had consented to the commission of the sexual act – Thus, the statutory presumption contemplated u/s.114-A of the Evidence Act invoked against the accused rendering him liable to suffer conviction u/s. 376 for commission of offence of rape on the prosecutrix – Also late disclosure of the incident by the prosecutrix to her mother and consequently delay in filing FIR was natural and satisfactorily explained – Lapses on the part of the investigating agency not fatal to the prosecution case – Thus, courts below rightly convicted the accused – As regards sentencing, lenient view cannot be taken since the accused was awarded minimum mandatory

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A *sentence of 7 years – Evidence Act, 1872 – s. 114-A.*

Dismissing the appeal, the Court

B **HELD: 1.1** The FIR was lodged when the prosecutrix disclosed to her mother of the incident first time as to what had happened with her hardly two weeks before the date of disclosure and the mother, in turn, immediately made a complaint to the police station and disclosed to the SI, who visited her place on coming to know of the incident. The late disclosure of the offence by the prosecutrix was also well justified by her in her statement recorded under Section 164 Cr.P.C. and also in her evidence wherein she said that the appellant had taken her photographs and had also recorded her talks with him on mobile. The accused was, as per her version, threatening her from raising any kind of alarm with the use of such evidence in his possession. The conduct of the prosecutrix, in this regard, therefore, appears to be most natural. She did not inform the incident immediately to the parents and waited for two weeks to eventually disclose to her mother. [Paras 17, 18] [448-E-H; 445-A-B]

F **1.2** The situation in which a young illiterate girl, who had just crossed her 16th year and who was subjected to sexual violence against her will would immediately react cannot be overlooked. If the Investigating Officer did not conduct the investigation properly in not being able to seize the photographs and recorded conversation then it could not have been made a ground to discredit the sworn testimony of the prosecutrix, which was otherwise found to be trustworthy and consistent. No one can dispute that the prosecutrix had no control over the investigating agency

and nor the lapse on the part of the investigating agency could in any manner affect the creditability of the statement of the prosecutrix. [Paras 20 and 21] [445-D-G] A

1.3 The courts below rightly placed reliance on the sworn testimony of the prosecutrix on this issue and came to a just and proper conclusion that having regard to the facts and circumstances of the case coupled with the explanation given by the prosecutrix, there was no delay in lodging the FIR by her mother and even if there was some delay then the same was satisfactorily explained. [Para 22] [445-G-H]; [446-A] B C

1.4 The prosecutrix, in her sworn testimony, in clear terms stated that she did not give her consent for commission of the act to the appellant and that he committed the act of sexual violence on her against her will. The appellant was not able to give any satisfactory explanation in his statement recorded under Section 313 of the Code nor was he able to adduce any defence evidence to rebut the presumption contained in Section 114-A of the Evidence Act, 1872 against him. So far as commission of sexual intercourse is concerned, it is proved with the medical evidence that it was performed by the appellant with the prosecutrix. [Para 26] [447-D-G] D E F

1.5 In a case of rape, no self-respecting woman would ever 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. The testimony of the prosecutrix in such cases is vital and unless there are compelling reasons, which necessitate looking for corroboration of her statement or where there are compelling reasons for rejecting of her testimony, there G H

A is no justification on the part of the court to reject her testimony. [Para 27] [447-G-H]; [448-A]

1.6 In the instant case, on careful analysis of the statement of the prosecutrix created an impression on the minds that she is a reliable and truthful witness and her testimony suffers from no infirmity or blemish whatsoever. That apart, even the medical evidence supports the commission of sexual violence on her. Indeed, even the appellant did not dispute the factum of commission of sexual intercourse by him on the prosecutrix because the appellant's only defence was that since the prosecutrix had consented to the commission of the sexual act, no offence of rape was made out against him. Thus, there is no hesitation in invoking the statutory presumption contemplated under Section 114-A of the Evidence Act against the appellant rendering him liable to suffer the conviction under Section 376 of IPC for commission of offence of rape on the prosecutrix. The finding of commission of rape by the appellant on the prosecutrix, which was rightly recorded by the two courts below, is upheld. [Para 28, 29, 30] [448-B-H]

1.7 The submission that looking to the young age of the appellant and further he being the first offender and lastly, the fact that he has already undergone 3 years 1 month in jail, this Court should take some lenient view in the matter of awarding of the sentence to him, cannot be accepted since the appellant has been awarded minimum mandatory sentence of 7 years for the offence under Section 376 IPC, which may extend to imprisonment for life and the fine once the offence the offence under Section 376 IPC is proved. [Paras 31, 32]

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[448-H]; [449-A-B]

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***Uday vs. State of Karnataka* 2003 (2) SCR 231:
(2003) 4 SCC 46 – distinguished.**

***State of Punjab vs. Gurmit Singh & Ors.* 1996 (1) SCR
532: (1996) 2 SCC 384 – referred to.**

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Case Law Reference

1996 (1) SCR 532 Referred to. Para 16

2003 (2) SCR 231 Distinguished. Para 34

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**CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 65 of 2012**

**From the Judgment and Order dated 15.03.2010 of the High
Court of Punjab & Haryana at Chandigarh in Criminal Appeal
No. 2109-SB of 2009**

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Vijay Panjwani (A.C.) for the Appellant.

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**Bhakti Vardhan Singh (for Kamal Mohan Gupta) for the
Respondent.**

The Judgment of the Court was delivered by

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**ABHAY MANOHAR SAPRE, J. 1. This criminal
appeal is filed by the accused against the final order/judgment
dated 15.03.2010 passed by the High Court of Punjab and
Haryana at Chandigarh in Criminal Appeal No.2109-SB of
2009 which arises out of judgment/order dated 18.08.2009/
20.08.2009 passed by the Additional Sessions Judge, Panipat
in Misc. Sessions Case No. 31 of 2007.**

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**2. By impugned judgment/order, the High Court upheld
the conviction and sentence of the appellant awarded by the**

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A Sessions Court for the offence punishable under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentenced him to undergo rigorous imprisonment for 7 years and a fine of Rs.5000/- and in default of payment of fine to undergo rigorous imprisonment for another six months.

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3. In order to appreciate the issue involved in the appeal, few relevant facts need mention infra,

C 4. The prosecutrix (name withheld by us) was a young girl aged around 16 years 3 months at the relevant time. She had no educational background. She was the resident of Vidya Nand Colony, Panipat and was living with her parents and two younger sisters and three brothers. Her father, Abid was a labourer in one factory and her mother was running a small grocery shop in their house. The appellant-accused, a young boy in his twenties was also residing with his family as their neighbour. He was also running his own grocery shop in his house.

E 5. On 02.04.2007, Sub Inspector (SI)-Prithvi Raj of Police Station Chandni Bagh received information about the sexual assault on the prosecutrix, who was taken to the General Hospital, Panipat. After receipt of the information, SI rushed to the General Hospital, Panipat to find out the details. He was told that the prosecutrix was not admitted to the hospital but was got examined by the doctors. He then collected parcel of slides, swab of the prosecutrix, samples of tests done on the prosecutrix and a copy of the MLR and then went to the prosecutrix's residence and met her mother, Ruksana on 04.04.2007.

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6. Ruksana-the mother of prosecutrix then gave her statement saying that she has three daughters - the eldest being the prosecutrix aged around 14 years. Her husband

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was working as labourer and she was running a small grocery shop. She said that the appellant (accused), their neighbour, entered in their house a few days back in night and when she saw him, he slipped away. She had complained about this behavior of appellant to his parents but his parents did not pay any heed to her complaint. She then said that after some days, in their absence, Sajida-wife of Salim, who was living as their tenant in the same house, came to their house and enticed the prosecutrix on the pretext that she should talk with the appellant-accused regarding her love otherwise he would end his life by consuming poison. Ruksana further narrated that a fortnight back, on hearing the noise, she woke up and saw that her daughter was coming down from the staircase. On being asked, the prosecutrix did not give any response and avoided to give answer. However, later on, she told Ruksana (her mother) that the appellant had raped her in the night forcefully without her consent and threatened her not to disclose this incident to her parents or to anyone else she will have to face the dire consequences.

7. This disclosure made by Ruksana led to registration of FIR No. 144 dated 04.04.2007 in the Police Station Chandni Bagh, Panipat against the appellant-accused and Sajida, who as mentioned above, was living as tenant of the prosecutrix's father in the next room. The statement of the prosecutrix under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") was recorded. Her ossification test was also got done. The statements of other witnesses were recorded. The appellant and Sajida were arrested. The appellant was medically examined. After completing the investigation and collecting the necessary evidence, a charge-sheet was filed against the appellant and Sajida under Sections 376/506/120-B of IPC.

A 8. On their appearance, the accused were supplied with
all the documents relied on by the prosecution. The case was
then committed to the Court of Sessions where the court
framed the charges. So far as the appellant and Sajida were
concerned, both were charged for the offence punishable under
B Section 120-B IPC. So far as the appellant was concerned,
he was also charged for the offence punishable under Section
376 IPC. Both the accused pleaded not guilty and claimed
trial.

C 9. With a view to connect the appellant and Sajida with
the crime, the prosecution examined 14 witnesses namely,
Ruksana, the Complainant(PW-1), the prosecutrix (PW-2), Dr.
Rahul Diwan (PW-3), Dr. Shashi Garg (PW-4), Dr. Nidhi Kharab
(PW-5), Dr. Ashwani Kumar (PW-6), Ghansham Dass, ASI
D (PW-7), Rajbir Singh, ASI (PW-8), Constable Jagbir Singh
(PW-9), Head Constable Dharam Pal (PW-10), Constable
Joginder (PW-11), Head Constable Dharampal (PW-12),
Prithvi Raj, Inspector (PW-13) and ASI Rajbir Singh (PW-14)
E whereas the defence examined four witnesses, namely, Hawa
Singh, Clerk, Death and Birth, Municipal Council, Panipat as
DW-1, Ashok Kumar Bathla, Senior Supervisor, BSNL,
Panipat as DW-2, Salim as DW-3 and Head Constable
Kuleep as DW-4.

F 10. The Sessions Judge by judgment/order dated
18.08.2009/20.08.2009 held that no case of conspiracy was
proved against the appellant and Sajida of any nature and since
involvement of Sajida was not proved in this case, therefore,
G both of them were acquitted of the charge of conspiracy. So
far as the appellant-accused (Deepak) was concerned, it was
held that the prosecution was able to prove the commission of
offence of rape on the prosecutrix by the appellant and
accordingly he was convicted for the offence punishable under
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Section 376 IPC and was sentenced to undergo 7 years' RI A
with a fine amount of Rs.5000/- and in default to undergo further
RI for 6 months.

11. Feeling aggrieved by the said order/judgment, the
appellant filed appeal before the High Court. By impugned B
judgment/order, the High Court dismissed the appeal and
upheld the conviction and sentence awarded to the appellant
by the Sessions Court. It is against this judgment/order, the
accused-Deepak has filed this appeal by way of special leave. C

12. Learned Counsel for the appellant mainly urged
three submissions. In the first place, he urged that since there
was inordinate delay in filing the FIR of the incident of alleged
rape by the victim or/and her family members, the conviction
of the appellant becomes unsustainable in law and was, D
therefore, liable to be set aside. Secondly, he made his
submission based on the age of the prosecutrix. According to
the learned counsel, since the age of the prosecutrix was above
sixteen, it should have been held to be a case of consent given
voluntarily by the prosecutrix rendering the appellant's E
conviction bad in law and lastly, the ingredients of rape were
not proved against the appellant, no case of rape within the
meaning of Section 376 of IPC was made out. It is essentially
these three submissions, which were elaborated by the learned F
counsel in his arguments by referring to the contents of the FIR
and the evidence on record.

13. In contra, learned counsel for the respondent-State
supported the reasoning and the conclusion of the courts below
and contended that the appeal being wholly devoid of merit, G
the same deserves dismissal.

14. Having heard the learned counsel for the parties
and on perusal of the record of the case, we find no merit in H

A any of the submissions of the learned counsel for the appellant.

15. Coming to the first submission relating to the lodging of the FIR for the commission of the offence is concerned, in our considered opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but also considering the facts and circumstances of the case, it was natural.

C - 16. The Courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family. Indeed, this has been the consistent view of this Court as has been held in **State of Punjab vs. Gurmit Singh & Ors.** [(1996) 2 SCC 384].

F 17. Keeping this well settled principle in mind, we find that the FIR in this case was lodged on 04.04.2007 when the prosecutrix disclosed to her mother of the incident first time as to what had happened with her hardly two weeks before the date of disclosure and the mother, in turn, immediately made a complaint to the police station and disclosed to the SI, who visited her place on coming to know of the incident. The late disclosure of the offence by the prosecutrix was also well justified by her in her statement recorded under Section 164 of the Code and also in her evidence wherein she said that

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the appellant had taken her photographs and had also recorded her talks with him on mobile. The accused was, as per her version, threatening her from raising any kind of alarm with the use of such evidence in his possession. A

18. The conduct of the prosecutrix, in this regard, therefore, appears to us to be most natural. She did not inform the incident immediately to the parents and waited for two weeks to eventually disclose to her mother. It was for the reason that the appellant was all along threatening the prosecutrix of the dire consequences with the use of the evidence, which he was having with him against her. B C

19. We do not agree with the submission of the learned counsel for the appellant when he contended that since no efforts were made by the prosecution to file the photographs and the recorded conversation of the prosecutrix with the appellant and, therefore, the prosecutrix's version should not be relied on. D

20. We cannot overlook the situation in which a young illiterate girl, who had just crossed her 16th year and who was subjected to sexual violence against her will would immediately react. Again, in our considered view, if the Investigating Officer did not conduct the investigation properly in not being able to seize the photographs and recorded conversation then it could not have been made a ground to discredit the sworn testimony of the prosecutrix, which was otherwise found to be trustworthy and consistent. E F

21. No one can dispute that the prosecutrix had no control over the investigating agency and nor the lapse on the part of the investigating agency could in any manner affect the creditability of the statement of the prosecutrix. G

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A 22. In our considered opinion, the courts below,
therefore, rightly placed reliance on the sworn testimony of the
prosecutrix on this issue and came to a just and proper
conclusion that having regard to the facts and circumstances
B of the case coupled with the explanation given by the
prosecutrix, there was no delay in lodging the FIR by her mother
and even if there was some delay then, in our considered view,
the same was satisfactorily explained.

C 23. This takes us to the next two submissions of the
learned counsel for the appellant. The courts below have held
that the age of the prosecutrix on the date of commission of
the offence was around 16 years and 3 months. Assuming this
finding to be proper, we are of the considered opinion that
D these submissions have no merit in the light of the statutory
presumption contained in Section 114-A of the Evidence Act,
1872 against the appellant, which in our opinion remain
unrebutted at the instance of the appellant.

E 24. Section 114-A of the Indian Evidence Act was
brought on statute book with effect from 25.12.1983 by the
Criminal Law (Amendment) Act, 1983. It reads as under:

F **“114-A. Presumption as to absence of consent in
certain prosecutions for rape – In a prosecution for
rape under clause (a) or clause (b) or clause (c) or
clause (d) or clause (e) or clause (g) of sub-section
(2) of Section 376 of the Indian Penal Code (45 of
1860), where sexual intercourse by the accused is
G 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.”**

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25. In order to enable the court to draw presumption as A
contained in Section 114-A against the accused, it is necessary
to first prove the commission of sexual intercourse by the
accused on the prosecutrix and second, it should be proved
that it was done without the consent of the prosecutrix. Once B
the prosecutrix states in her evidence that she did not consent
to act of sexual intercourse done by the accused on her which,
as per her statement, was committed by the accused against
her will and the accused failed to give any satisfactory
explanation in his defence evidence on this issue, the court C
will be entitled to draw the presumption under Section 114-A
of the Indian Evidence Act against the accused holding that he
committed the act of sexual intercourse on the prosecutrix
against her will and without her consent. The question as to
whether the sexual intercourse was done with or without D
consent being a question of fact has to be proved by the
evidence in every case before invoking the rigour of Section
114-A of the Indian Evidence Act.

26. Coming now to the case in hand, we find that the E
prosecutrix, in her sworn testimony, in clear terms has said
that she did not give her consent for commission of the act to
the appellant and that he committed the act of sexual violence
on her against her will. The appellant was not able to give any
satisfactory explanation in his statement recorded under F
Section 313 of the Code nor was he able to adduce any
defence evidence to rebut the presumption contained in
Section 114-A of the Indian Evidence Act, 1872 against him.
So far as commission of sexual intercourse is concerned, it is
proved with the medical evidence that it was performed by the G
appellant with the prosecutrix.

27. We are alive to the law laid down by this Court
wherein it is ruled that in a case of rape, no self- respecting H

- A woman would ever 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. The testimony of the prosecutrix in such cases is vital and unless there are compelling reasons, which necessitate looking for corroboration of her statement or where there are compelling reasons for rejecting of her testimony, there is no justification on the part of the court to reject her testimony.

28. In the instant case, our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness and her testimony suffers no infirmity or blemish whatsoever. That apart, as observed supra, even the medical evidence supports the commission of sexual violence on her and we need not elaborate on this issue any more in the light of concurrent finding of the courts below having been recorded against the appellant holding in clear terms that sign of commission of rape on her by the appellant stood proved by medical evidence beyond reasonable doubt. Indeed, even the appellant had not disputed the factum of commission of sexual intercourse by him on the prosecutrix because as taken note of, the appellant's only defence was that since the prosecutrix had consented to the commission of the sexual act, no offence of rape was made out against him. This argument we have already rejected.

29. In the light of this, we have no hesitation in invoking the statutory presumption contemplated under Section 114-A of the Evidence Act against the appellant rendering him liable to suffer the conviction under Section 376 of IPC for commission of offence of rape on the prosecutrix.

30. In the light of foregoing discussion, we uphold the finding of commission of rape by the appellant on the prosecutrix, which in our view, was rightly recorded by the two

courts below.

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31. The last submission of learned counsel for the appellant was that looking to the young age of the appellant and further he being the first offender and lastly, the fact that he has already undergone 3 years 1 month in jail, this Court should take some lenient view in the matter of awarding of the sentence to him.

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32. We find no merit in this submission for the simple reason that the appellant has been awarded minimum mandatory sentence of 7 years. In other words, once the offence under Section 376 IPC is proved then the minimum sentence is 7 years, which may extend to imprisonment for life and the fine. Therefore, the appellant should feel fortunate that he was awarded only 7 years' sentence else it could have been even more.

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33. Since the State has not filed any appeal for enhancement of sentence, we need not go into this question except to reject the submissions urged by the learned counsel for the appellant being totally devoid of substance.

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34. Learned counsel for the appellant had placed reliance on the decision of this Court in **Uday vs. State of Karnataka** [(2003) 4 SCC 46] in support of his submissions. We have gone through the facts of this case and find that in the light of what we have held on appreciation of the evidence of this case, the decision relied upon may not help the appellant. In our opinion, it is distinguishable on facts.

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35. In the light of foregoing discussion, we find no merit in this appeal, which fails and is accordingly dismissed. Since the appellant is on bail by the order passed by this Court on 06.01.2012, his bail bonds stand cancelled and he is directed to surrender forthwith to serve out the remaining period of his sentence.

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