

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

Cr. Appeal No. 08/2016
MP No. 01/2016

Date of Decision:- 28.09.2017

Parvez Ahmad Dar

vs.

State of J&K

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge.

*Whether to be reported in **Media/Press** : Yes*

*Whether to be reported in **Journal/Digest** : Yes*

Appearing counsel:-

For the petitioner(s): Mr. M.M.Iqbal, Advocate.

For the respondent(s): Mr. B.A.Dar, Sr.AAG.

- 1.** Appellant after facing trial has been convicted for commission of offences punishable under Sections 376(1), 342 and 506-II RPC vide judgment dated 22.02.2016; and vide order dated 29.02.2016 has been sentenced under Section 376(1) RPC to rigorous imprisonment for a period of ten year and fine of Rs.25,000/-, in default of payment to undergo further rigorous imprisonment for a period of six months. Under Section 342 RPC has been sentenced to rigorous imprisonment for a period of one year and fine of Rs.500/-, in default of payment to undergo further rigorous imprisonment for a period of seven days. And

under Section 506-II RPC has been sentenced to rigorous imprisonment for a period of two years and fine of Rs.500/-, in default of payment to undergo further rigorous imprisonment for a period of seven days. All the sentences have been directed to run concurrently, the period of imprisonment already undergone has been directed to be set off. The amount of fine, if realized, has been directed to be paid to the victim.

2. Aggrieved by the said judgment and order appellant has assailed the same by the medium of the instant criminal appeal.
3. Heard learned counsel for the appellant as well as learned Senior Additional Advocate General at length.
4. For appreciating the rival contentions it shall be advantageous to precisely notice the factual background and evidence as led by both prosecution and the defense.

Factual Background

5. An orphan minor girl (hereinafter referred to as “prosecutrix”), below 18 years of age, class 9th student, on the date of occurrence has been raped by the accused “a tutor” at his own residence. Upto 8th standard accused was her private tutor, thereafter in

the 9th standard she was asked by the accused to go to another tutor namely Mushtaq Ahmad, who demanded tuition fee of Rs.7,000/-.

6. On the date of occurrence i.e. 12.12.2013 when the prosecutrix came back from school told her mother that she has to pay Rs.7000/- as tuition fee to the new tutor-Mr. Mushtaq Ahmad, her mother (PW-2) contacted the accused (earlier tutor) and told him that she being a poor lady is not in a position to pay Rs.7000/- in one go so will pay the same in three installments. Mother(PW-2) gave Rs.2000/- to her daughter-prosecutrix for payment to Mushtaq Ahmad(new tutor) through the accused(earlier tutor). When the prosecutrix reached the house of the accused while entering in, she found two students namely Gagandeep Singh(PW-4) and Ajaz Ahmad Sheikh(PW-5) coming down from stairs accompanied by accused upto the ground floor, both of them left the house but the accused returned back and caught hold of the prosecutrix and raped her, in the process she bled, then he left her but intimidated not to divulge it to anyone; she then went to the Mushtaq Sir for tuition thereafter she reached back home. In the meantime her brother (PW-1) came from his office told his mother (PW-2) that he is tired and hungry, give

something to eat; prosecutrix was asked by mother PW-2 to prepare tea for him, while doing so she fell unconscious. PW-1-brother rushed and took her in his lap and found her trouser wet with blood, he asked her mother to look into it, something is wrong, and asked her sister-prosecutrix with anger what has happened to her, she replied that "Autowalas" committed rape upon her and again fell unconscious. She was taken to the L.D Hospital where doctors asked them that it is a case of rape police should be informed.

7. PW-1 lodged the written report(Ext.PW1) with the police in Police Station, Saddar, Srinagar mentioning therein that his sister(prosecutrix) was coming back from tuition and while walking on the Barzulla Bund she was forcibly taken by some unknown persons who have raped her, when she came to her home she narrated the same to her mother, she was in acute mental trauma and could not speak much, kindly take legal action.

8. Based on the said report, case was registered as FIR No. 242/2013 P/S Saddar for commission of offence punishable under Sections 363 and 376 RPC, P/S Saddar.

9. The prosecutrix had the tear near fourchette so was profusely bleeding. She was admitted in the hospital,

taken to the theatre. PW-1 was asked to arrange one pint of blood which he donated. The prosecutrix remained admitted in the hospital for treatment, thereafter she narrated the actual position as to what had happened to her. As divulged by her that the rape was committed by Autowalas was mentioned, in view of the fact, that when her brother and mother noticed her position at her home they were absolutely in anger and she thought that her brother will go to the house of the accused and will kill him, therefore, has said that Autowala raped her.

10.On completion of investigation of the case, it was concluded that the accused had confined the prosecutrix, intimidated her and then raped her, as such, commission of offence punishable under Sections 376, 342 and 506 RPC was proved to have been committed by the accused.

11.The charge sheet(challan) was presented before the Chief Judicial Magistrate, Srinagar on 18.01.2014, and transferred to the court of Judicial Magistrate 1st class(Forest Magistrate) Srinagar who in turn committed the case to the court of Session's Judge Srinagar on the same date i.e. 18.01.2014. Learned Sessions Judge assigned the case to the Fast track

court(2nd Additional Sessions Judge, Srinagar)
(hereinafter referred to as trial court).

12. Learned trial court after hearing both the sides vide order dated 20.02.2014 framed charge against the accused for commission of offences punishable under Sections 376, 342 and 506 RPC. Accused pleaded not guilty and claimed to be tried.

13. The prosecution in support of its case produced all the 13 listed witnesses. However listed PW-10 (Mushtaq Ahmad Bhat) was not the actual witness infact it was Suhail Ahmad Kanth, Scientific Officer, FSL, Srinagar. An application was filed by the APP for substituting Mushtaq Ahmad Bhat. Learned trial court vide order dated 29.07.2015 in exercise of powers under Section 540 Cr.PC allowed substitution of the name, as such, actual witness PW-10 Suhail Ahmad Kanth was summoned and examined.

14. The prosecution evidence was closed on 08.08.2015. Accused was examined in terms of Section 342 Cr.PC. The incriminating circumstances as appeared in the evidence were put to him. He has denied complicity in the crime and added that witnesses have given false evidence. Statement of prosecutrix recorded by the trial court is in conflict with her statement as recorded under Section 164-A Cr.PC; further added that as per

the statement of the doctor-witness no vaginal penetration has occurred, how there was a tear in the fourchette, in that direction proper investigation has not been conducted. Actual facts have not been unraveled by the investigating agency. The statement of prosecutrix is quite contrary to the medical evidence. Witness PW-1 has mentioned that Auto-walas were involved in the commission of offence, he has been implicated.

15.After closure of evidence and examination of the accused under Section 342 Cr.PC, learned trial court was required to hear both, APP as well as defense in terms of Section 273 Cr.PC which has not been done so as to ascertain as to whether accused was required to enter upon defense. Be that as it may be, as it has not caused any prejudice to either side because the accused has entered upon the defense and has produced as many as five witnesses. Trial has concluded in conviction and sentence as referred to above in the first para of the judgment.

16.The first contention of learned counsel for the appellant is that the testimony of the prosecutrix is not credible because at the first instance she divulged to her mother(PW2) on 12.12.2013 that two Auto-walas committed rape upon her. This contention is

misplaced. The prosecutrix in her statement recorded before the learned trial court has clearly qualified that her mother(PW-2) while noticing her pant blood stained asked her to state the truth as to what has happened to her, prosecutrix told that she has been raped, however, did not name accused. On hearing this, brother (PW1) of the prosecutrix struck his head and was aghast, and she being under intimidation of the accused, noticing the condition of her brother said Auto-wala ravished her. She was taken to hospital; doctors told her mother(PW2) what has happened to her, to which she replied that Auto-wala had raped her. Doctors refused to treat her until police would be informed then her brother accordingly informed the police. She was taken to the theatre where her fourchette was stitched. In the cross-examination of the defense counsel she had further qualified that in the beginning she did not disclose the name of the accused because of fear and on noticing the anger of her brother she thought that he will go to the house of the accused and will kill him, so she has mentioned that some Auto-wala raped her.

The prosecutrix has clearly explained as to why some unknown Auto-wala was mentioned by her,

therefore, to say that on this count testimony of the prosecutrix is not credible is totally unacceptable.

17.Next it was contended by learned counsel that if the testimony of the prosecutrix is taken correct a question arises as to why after leaving the house of the accused she went to Mushtaq Sir for tuition and why she did not divulge it there she went to her home, there again she did not divulge it until she fell unconscious and her pant got wet due to blood which was noticed by her brother and mother, there again she did not divulge the name of the accused. Same would suggest that her testimony is not free from blame.

This contention is also misplaced because the prosecutrix as referred to above has clearly explained as to what has happened to her and why she did not divulge the name of the accused.

18.Learned counsel next contended that there are no eyewitnesses to the occurrence except what prosecutrix has divulged.

It is true that in the facts and circumstances there can't be eyewitness to the actual occurrence; the prosecutrix is the actual witness to the happening which she had clearly divulged when she was examined and cross-examined in the trial court. She has given clear picture of the occurrence. Taking

her statement as a whole she appears most credible witness. Her testimony is absolutely free from suspicion, and inspires confidence for holding that the accused has committed rape upon her.

19. Learned trial court has in detail mentioned in the judgment the statement of the prosecution witnesses statement of prosecutrix, in detail, as reflected in the trial court judgment, is reproduced hereunder:-

“PW-8(i.e. prosecutrix name withheld) has deposed that the accused is known to her. On 12.12.2013 she had gone to school and she left the school at 2 PM and came to her house. Her mother namely Dilshada asked her to pay Rs.2000/- as tuition fee to accused. She used to take tuition from the accused upto 8th class and in 9th class accused asked her to read tuition from Mushtaq Sir who was friend of the accused. She took tuition from Mushtaq Sir for 15/20 days and thereafter Mushtaq Sir asked her to pay him Rs.7000/- as tuition fee. She told about this to her mother as her father had already expired. On this her mother told the accused on telephone that they cannot pay Rs.7000/- at a time but they can pay the said amount in instalments. On this the accused replied to her mother that she can pay the said amount in installments. Thereafter on the date of occurrence she took Rs.2000/- and went to the accused to pay the same to him and when she reached on the ground floor of the house of the accused, she did not find anyone there. Thereafter she went to second storey and there was no body in the second storey also and thereafter she went to third storey and she found the accused there. Two students namely Gagandeep and Aijaz Sheikh were taking tuition from the accused and they were coming out after taking tuition at that time. The accused also went with them but he returned back. After waiting about 5 minutes she also come down and when she reached on the first storey she saw accused there and she paid Rs.2000/- to him and when she tried to come out, she found jaali(net)

door locked from outside and accused had come in through window type door of the kitchen. When she tried to go out from there, the accused caught her by her hair from behind and pushed to adjoining room and was pulled down. Thereafter accused opened her trouser and due to this the button of her trouser was also broken. The accused caught her hand and closed her mouth and committed rape with her due to which bleeding started. Accused frightened due to bleeding and he left her. She started weeping. She was in bad condition. Thereafter, accused asked her to straightway go to take tuition, so that her family members may not become aware of this incident and he also threatened that in case she will disclose to anybody he will kill her brother as her father has already died. Thereafter she came out through the kitchen door as main door was bolted from outside and went to Mushtaq Sir. After about half an hour Mushtaq Sir asked her as to why she is frightened and she replied that she is alright. Thereafter Mushtaq Sir relieved her at about 5 PM and she went to her house and she reached her house at 5.30 PM. She put off her sweater and pant. Her sweater and trouser were strained with blood. Her bag was also blood stained. Thereafter she sent into the kitchen and in the meantime her brother Umar came and her mother asked her to prepare tea for him and in the meantime she became unconscious and fell down and thereafter her brother took her to drawing room and they gave her water and her brother wanted to take her to medical shop but her mother saw blood stained clothes and she told that something wrong has happened and she should be taken to hospital. Thereafter her mother asked her to tell the truth and she told that rape has been committed with her, but she did not name anybody. On hearing this her mother became very angry and due to the fear of the accused and on seeing the anguish of her brother she said unknown 'Autowala.' Thereafter she was taken to LD Hospital and when the doctors asked her mother as to what has happened, on this her mother told that some unknown Autowala has committed rape. The doctors did not agree to provide treatment till the police would come. Thereafter her brother went to police station and police came in the hospital. The police asked the doctors to provide her treatment and told that they will inquire from there

on her recovery. Thereafter she was taken to theatre and doctors gave her four stitches. The accused who is present in the court has committed rape with her. She has received injury due to the force applied by the accused and so bleeding has started to her. She has given statement before judge and the same is correct and is marked as Mark "A" which also bear her signatures. She has seen the seized trouser in the court and it is the same trouser. However, the said trouser was not torn and the trouser which has been shown to her in the court is torn. She is reading in Modern High School. The seized trouser is marked as "P".

In cross-examination by the defense counsel she has deposed that she has studied in Cambridge School Balgarden from Nursery to 6th class. She does not remember when she had left that school. Her date of birth is 12.04.1996 but the said date of birth is not correct as same has been got entered by her father. However, her date of birth in the certificate is entered as 12.04.1996. She has not visited the house of the accused after the occurrence. Police has recorded her statement on 13.12.2013 but she has not seen her said statement in the court. She does not remember as to how many pages her statement was comprising of. They have left the hospital at about 3-4 PM on 13.12.2013 and thereafter went to police station and her statement has been recorded in the police station. When she has given her statement under section 164(A) Cr.PC she was knowing the meaning of word 'rape' and she has stated before the judge that rape has been committed with her but word "Zor-Zabardasti" has been written in her statement and word rape has not been written in her statement under section 164(A) Cr.PC. The doctors have not asked her about the incident but they had asked about the same from her family members as she was unconscious at that time. Her father has expired due to accident in the year 2011. She has no knowledge as to whether her father was having another wife at Jammu. They are two sisters and one brother. Her sister is 8/9 year elder to her and she has performed her marriage by fleeing away from her house but she does not know the name of her husband or where she has married. It is not correct that someone has committed rape with her said sister and her family members have taken

Rupees six lac as compensation from said rapist. She cannot read the site plan. The site plan has been prepared by the I.O himself and not on her identification. The blood stained blanket has not been shown to her in the court. The trouser which has been shown to her in the court was not torn when it was produced before the police by her family members. Her sweater has also been taken by her family members to the police but the same has been returned by the police. The said sweater was also blood stained. Her uniform pent which was stained with blood is shown to her in the court as same was not seized by the police. The said pent is lying in her house and she has washed the same. She has never been operated for piles. She has been operated for appendix in June 2013 and she has received stitches in the said operation in her belly. She had shaved her pubic hair 2/3 days before 12th December 2013. One can sometimes receive injury while shaving pubic hair. She has not seen the accused locking the door from outside but when she tried to come out, she found the door locked from outside. She has not seen the accused locking the door and she has not stated before judge that accused has locked the door. She has heard her statement under section 164(A) Cr.PC and it is not correct that "as soon as she was coming down the accused locked the door from outside" however, she has stated before the judge Sahib that when she tried to open the door the same was locked from outside. The occurrence has not taken place in the kitchen but it has taken place in the room attached to the kitchen. There was a big ventilator (window) in the kitchen. She has cried loudly on spot. She was studying with the accused for the last ¾ years but the accused had not committed any illegal act with her. Other female students also used to study with him. She has taken four notes of Rs.500 denomination from her mother. It is not correct in her statement recorded under section 164(A) Cr.PC that first she went to Mushtaq Sir for taking tuition. The floor of the room of the accused became blood stained when the accused opened her trouser and pent. After putting on her trouser and pent she had gone to Mushtaq Sir. She does not know as to how and what treatment was given to her in the theatre as she was given anesthesia at that time. When she has gone to doctors for second time they have told her about

giving stitches to her. She has no knowledge about the hymen. When she had gone to Mushtaq Sir at that time she was bleeding. She went to Mushtaq Sir at about 3.30 PM and she had left from there at about 5.30 PM. It is not correct that tenants reside in the house of the accused. It is also not correct that the wife and daughter of the accused were present in the kitchen when she had gone to pay cash to the accused as suggested by the counsel for the accused. She is having mobile phone and its number is 8713864499. Her mother is also having mobile phone and its number is saved in her mobile. Her statement under section 164(A) Cr.PC is incorrect to the extent that her mother had told her that she had talked on telephone to Mushtaq Sir. She has no knowledge till date as what is called "rape" as she has not seen the rape. The accused has gagged her mouth and sat on her and so she could not stand up as he was weighty. She has first cried but when the accused closed her mouth, thereafter she could not cry. She cannot say where she has received injury she could not see that part where she had received injury and doctors have told her about stitches when she had gone to the doctors second time for checkup. The male organ of the accused has not fully penetrated and when the accused tried to penetrate forcefully, she received injury and bleeding started. She cannot say how much male organ of the accused had penetrated. She has not seen the male organ of the accused. It is not correct that she has received injury while shaving her pubic hair. She has not mentioned about her stitches to the judge in her statement under section 164(A) Cr.PC. Her statement recorded under section 164(A) Cr.PC contain only the year of its recording and it does not contain the date on which it is recorded. The said statement was not read over to her and she was asked to put her signatures on the said statement. In the beginning she had not disclosed the name of the accused because of fear on seeing the anguish of her brother as she thought that he may go to the house of the accused and kill him so she has mentioned some autowala and she has mentioned this before Magistrate under section 164(A) Cr.PC. Her statement under section 164(A) Cr.PC is read over to her in the court and this thing is not mentioned in her said statement. She has stated in her statement under section 164(A) Cr.PC that the

accused has threatened to kill her brother in case she will disclose the incident to anybody. However, her said statement to this extent is incorrect that the accused had threatened to kill her.”

20.The statement of the prosecutrix clearly indicates as to under what circumstances and how she has been raped and under what circumstances she had divulged to her mother and brother about the commission of rape by the unknown Auto-wala. The explanation tendered by the prosecutrix is quite acceptable. Lodging of the report (Ext.PW1) by the brother of the prosecutrix mentioning commission of offence by unknown Auto-wala is explained because what was divulged by the prosecutrix to her mother and brother same was reported to the police. The condition of the prosecutrix as per her statement is quite evident so even PW1 cannot be blamed for having reported in Ext.PW1 that two Auto-walas have committed wrong with her sister(prosecutrix).

21.The testimony of PW1-brother of the prosecutrix and PW2-mother of the prosecutrix clearly suggest as to how the matter was reported to the police, what was the condition of the prosecutrix when she came back to home and how she was handled, twice she had fallen unconscious then in the said condition she was admitted in the hospital, one pint of blood was

transfused to her, so under such circumstance how PW1 and PW2 would mention the name of the accused when same was not divulged to them by the prosecutrix. The prosecutrix has tendered acceptable explanation for not initially divulging the name of the accused fearing that her brother in a fit of rage, in case she would have named the accused, may have gone to the house of the accused and killed him. Under such circumstances theory of autowalas committing the offence and report Ext.PW1 as lodged, cannot be said to be misplaced because what knowledge the PW1 and PW2 had initially about the position of the prosecutrix cannot be said to have in any manner impeached the credit of such witnesses.

22. PW1-brother and PW2-mother of the prosecutrix have given the clear picture about prosecutrix as to how they handled her.

23. PW1 has clearly stated as to what he reported to the police; he is clear in his deposition before the trial court that when he reached back home he was feeling hungry, asked her mother to give something to eat who in turn asked his sister(prosecutrix) to prepare tea for her brother, while doing so she all of sudden fell unconscious then he lifted her took her to one side administered water then asked her what is the

problem; she again fell unconscious. They got worried and started making preparation to take her to the doctor and as soon as he lifted her in his lap his hands became wet, on noticing this he took her to the kitchen and told his mother that the trouser of his sister is wet with blood. On this his mother asked the prosecutrix about her bleeding and she replied that she has been raped by Auto-wala, then again fell unconscious. They took her to L.D. Hospital. Doctors there asked them to report it to the police which they did accordingly. One pint of blood was given by PW1 same was transfused to her, when she was taken to the theatre she was unconscious then was shifted to the ward. Thereafter when she was discharged from hospital and brought back to her home, PW1 came to know that Parvaiz Ahmad Dar is the actual accused. He again went to the police on 26.12.2013 where his statement was recorded, he informed the police that assailant autowala was mentioned by her sister due to trauma as the accused had threatened her that in case she will narrate the incident to anybody he will kill her brother and mother.

24. PW2-mother of the prosecutrix has made it clear that the prosecutrix used to get tuition from the accused upto 8th standard but when she was promoted to 9th

class accused told her that he cannot give tuition to her and asked her to go to Mushtaq Ahmad. Thereafter she went to Mushtaq Ahmad(PW6) who asked her to pay Rs.7000/- as tuition fee. PW2- mother of the prosecutrix replied that she cannot pay this much fee and will talk to the accused about the payment. Thereafter accused took up the matter with Mushtaq Sir and next day informed PW2 that he had talked to Mushtaq Sir and he has agreed to take the tuition fee in three installments. On the date of occurrence when prosecutrix returned from school, she took Rs.2000/- and went to the house of the accused and came back to home at 5.30 PM. When PW1-brother of the prosecutrix came back to his home, mother PW2 asked prosecutrix to prepare tea. While doing so she fell down, PW1 lifted her to one side of the room and administered water as soon as they lifted the prosecutrix they told her what has happened to her, to which she replied she has been raped by autowala and then again fell unconscious. She was taken to L.D Hospital for treatment, there she was taken to operation theatre, one pint of blood was donated by her brother(PW1) and the matter was reported to the police mentioning that autowala was the assailant. Infact accused had raped her but due to threat from

the accused that he will kill her mother and brother in case she discloses the incident to anybody prosecutrix could not divulge the name of the real culprit. PW2-mother of the prosecutrix has also qualified that her husband had already died some four years back.

25.Two witnesses PW1 and PW2, brother and mother of the prosecutrix have given the real picture as to what happened with the prosecutrix when she came back to her home in the evening of the date of occurrence and what was her condition and under what circumstances she had divulged autowala had committed rape and on that basis report was lodged with the police. The testimony of these two witnesses is free from blame, whatever prosecutrix had divulged, same was reported to the police and then whatever surfaced was made clear. The theory of autowala has been clearly explained and it was qualified that only the accused had committed wrong with the prosecutrix.

26.The presence of the prosecutrix in the house of the accused is also supported by two important witnesses PW4 -Gangandeep Singh and PW5-Aijaz Ahmad, students of the accused, who at that time were taking tuition from him and when the prosecutrix entered the house of the accused they left, accused accompanied them to the ground floor. These two witnesses in their

deposition before the trial court have clearly stated that they went to Parvaiz Ahmad Dar(accused) for taking tuition on 12.12.2013. The accused asked them whether prosecutrix has come as she has to pay fee to him, on this they replied that she has not come as yet. Thereafter accused taught them till 3.15 PM and when they were leaving prosecutrix came and she met them on the stairs.

27.Both of them have clearly stated that when they were going back after taking tuition from the accused they saw the prosecutrix on the stairs of the house of the accused, therefore, presence of the prosecutrix on the date of occurrence is fully proved. Then what happened to the prosecutrix in the house of the accused is clearly stated by her before the trial court and even in her statement recorded under Section 164-A Cr.PC.

28.The position of the prosecutrix, as it was, is also clearly stated by PW7-Dr.Sameena Sultan, who has stated that in the month of December 2013 she was posted in LD Hospital; prosecutrix was brought in the said hospital with alleged history of sexual assault.

29.It is trite that the statement of prosecutrix if inspires confidence has to be accepted, and on her acceptable testimony conviction can be recorded. Corroboration is

required in cases where there are compelling reasons but in the instant case the statement of prosecutrix is such which inspires confidence for holding that the accused is the only person who has assaulted her. In this connection learned trial court has rightly relied upon the judgment rendered by the Hon'ble Apex Court in case ***Narender Kumar Vs. State(NCT of Delhi) 2012(7) SCC 171***, Para 16, as quoted by the learned trial court, is reproduced hereunder:-

“16. It is a settled legal position that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice in the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony.”

30. Apart from the afore-stated legal position the statement of the prosecutrix is otherwise corroborated by PW4 – Gagandeep Singh and PW5- Ajaz Ahmad who on the date of occurrence were taking tuition in the house of the accused and they had seen the prosecutrix coming there when they were leaving, therefore, presence of the prosecutrix in the house of the accused is fully proved and the learned trial court has rightly observed as under:-

“The prosecutrix was the 9th class student having good understanding and she was a student of the accused and reading tuition with the accused. In normal course no female student would come forward and say that she has been raped by her teacher/tutor unless it is true. There is no reason to suspect or disbelieve the statement of the prosecutrix. There is also no reason as to why she should have falsely implicated the accused who was her teacher as well tutor especially when there was no hostility or enmity between the accused and prosecutrix or her family.”

31. Learned trial court has also rightly observed that the statement of prosecutrix is also corroborated by other witnesses.

32. The next limb of the argument of learned counsel for the appellant is that the prosecutrix no-doubt was taking tuition from the accused upto 8th standard, she had come to the house of the accused for onward payment of Rs.2000/- to next tutor Mushtaq Ahmad

but no wrong was committed with her at the residence of the accused. Supporting this submission has placed reliance on the testimony of five defense witnesses. Those defense witnesses, according to him, have stated that the prosecutrix had come in their presence. She paid Rs.2000/- and left in the normal course. No wrong has been committed with her.

33. The defense witness DW1-Adil Bashir Bhat, a tenant of the accused, has stated that he was present in the house at the time of occurrence. The accused was teaching two students on the upper storey of the house; one student was Muslim and another Sikh. He saw the said students coming down after getting tuition and in the meantime the prosecutrix also came to the house of the accused and saw the accused and the prosecutrix talking to each other in the corridor of the house. The wife, children, and sister of the accused were also present on the said date.

34. DW2-Shoib Ahmad Dar has stated that he took his children to the accused for tuition; he saw two students coming back after taking tuition, one Muslim and another Sikh. He had seen prosecutrix on the said date and had seen her going to and coming from her tuition from Master Mushtaq. He himself has seen the

prosecutrix coming out of the house of the accused.

He admitted that he is the cousin of the accused.

35.DW5- Masrat(sister of the accused) has stated that two students one Muslim and another Sikh were taking tuition. She witnessed everything; prosecutrix came to the house of the accused having some money with her. At that time one tenant was also present in the house.

36.These three defense witnesses have also clearly established that the prosecutrix had come to the house of the accused and also deposed that two students (PW4 and PW5) were also present. The said three DWs being close persons to the accused have tried to cover up the story of rape but in the process have admitted the presence of the prosecutrix in the house of the accused and also presence of PW4 and PW5. PW4 and PW5, two students, were neutral witnesses, they have not said about the presence of defense witnesses in the house of the accused, at the time prosecutrix had come to the house of the accused. It appears that the theory narrated by these defense witnesses is with all calculations so as to make the court to believe such story and to create confusion about what actually happened with the prosecutrix. There could be no reason nor there is any plausible

explanation forthcoming that the testimony of the prosecutrix is false.

37. No student without any cause or justification would ever blame his/her teacher, even an iota of evidence has not come-forth from the prosecution witnesses or from the defense witnesses which would suggest any enmity or animosity which would have persuaded the prosecutrix to go to such extent of involving her teacher in such crime. When there is no enmity or animosity why should a young minor student involve her teacher, therefore, the contention that the accused has been implicated is far from the truth.

38. Learned counsel tried to project that statement of prosecutrix suggest that there was an element of consent. The prosecutrix as per date of birth recorded in school leaving certificate is above 16 years of age; such a submission is misplaced because Section 375(d) RPC description sixthly-with or without consent, when she is under 18 years of age constitutes the offence under Section 375 RPC. Prosecutrix admittedly on the date of occurrence was below 18 and above 17 years of age; her consent if at all would have been discernible still same was immaterial.

39. Learned counsel for the appellant as a last ditch effort had made an endeavour to convince and

persuade that even if the occurrence has taken place still the act committed does not fall within the definition of rape under Section 375 RPC. Buttrressing his submission has referred to the medical evidence and stressed that as per the statement of doctor-PW7, the slides taken from vagina and perineal area show no spermatozoa; hymen was intact admitted one finger with difficulty; no vaginal penetration has occurred. There was a perineal tear on the fourchette which was bleeding and stitched. In the referred specific portion of the testimony of the said witness she has stated that the patient was bleeding and she was hiding it from her mother. The tear of fourchette can be caused by pulling legs forcibly apart. The patient was conscious well oriented but not cooperative that is why she had been given anesthesia.

40. Learned counsel would submit that the tear in fourchette at the most would amount to the offence punishable under Section 323 RPC. Now a question is as to whether the act committed by the accused falls within the definition of rape punishable under Section 376(1) RPC, the direct testimony of the prosecutrix is such which leaves no room for doubt about the commission of the offence punishable under Section 376(1)RPC.

41.PW7-Dr. Sameena Sultan posted in L.D Hospital on the date of occurrence had examined the prosecutrix. While examining her she has recorded her finding which stands exhibited as Ext.PW7. She has recorded amongst other things as under:-

“No mark of violence on any part of the body or any other private parts”

Then on PV she has recorded as under:-

“Small tear seen near fourchette”

Then in reply to the question of I.O has recorded in Ext.PW7/A as under:-

“Distance between vagina and fourchette is almost 1-2 cm. Fourchette is a part just posterior to vagina where two labia minora from across mucosa from a fold of skin. Cause of bleeding is trauma(sexual trauma cannot be ruled out). The tear on fourchette does not mean penetration of vagina. Tear on fourchette could be due to sexual trauma because patient was a virgin, other cases of trauma could also be a reason for trauma like fall on the sharp object or due to legs being pulled apart forcibly.”

Then again in terms of her reply Ext.PW7/C has recorded as under:-

“Slides taken from vagina and perineal area show no spermatozoa. Hymen was intact admitted one finger with difficulty. No vaginal penetration has occurred. There was a perineal tear on post fourchette which was bleeding and stitched. She is fit to give statement. For age estimation Radiology and Dental opinion to be taken.”

42.In her statement before the learned trial court she has stated that there was no mark of violence on the body of the prosecutrix except her private parts. There was history that the patient had washed her body twice and had changed her clothes. On local examination she found that there was a small tear on posterior of vagina on fourchette which was bleeding profusely. She was given anesthesia. Stitching of tear was done and the patient was also given one pint of blood. Hymen was intact; cause of bleeding was trauma. Then in cross-examination she has stated that the patient was bleeding and she was hiding it to her mother. The tear of fourchette can be caused by pulling legs forcibly apart. The patient was conscious well oriented but not cooperative that is why she had been given anesthesia. In the concluding part of her statement in cross-examination she has stated as as under:

“No vaginal penetration has been caused though it does not rule out rape. Rape means mere touch of vulva. Reaching to pelvis amounts to rape”.

43.Now coming to the statement of prosecutrix which is direct evidence regarding actual happening. The prosecutrix-PW8 in her statement has made it clear

that when she tried to come out of the house of the accused she found jaali(net) door locked from outside and the accused had come in through window type door of the kitchen, caught her from hair from behind and pushed to adjoining room and was pulled down. Thereafter accused opened her trouser and due to this the button of her trouser was also broken. The accused caught her hand and closed her mouth and committed rape with her due to which bleeding started. Her trouser was stained with blood. She was taken to operation theatre and doctors gave her four stitches. Accused present in the court has committed rape with her. She has received injury due to force applied by the accused and she started bleeding. In the cross-examination has qualified that the occurrence has not taken place in the kitchen but in the room adjacent to the kitchen of the house of the accused. She cried loudly. She has further qualified as under:-

“The male organ of the accused has not fully penetrated and when the accused tried to penetrate forcefully, she received injury and bleeding started. She cannot say how much male organ of the accused had penetrated. It is not correct that she has received injury while shaving her pubic hair.”

44. I have gone through the statement of prosecutrix as recorded by the learned trial court as the same in the

facts and circumstances was found necessary. During the cross-examination of the defense counsel prosecutrix has qualified that she does not know what rape means nor had seen the same. Accused sat on her body; she could not stand up but cried. At that time she did not know about the injury, she came to know about it only when the injuries were stitched by the doctors. Then has qualified that the male organ of the accused has not fully penetrated in the vagina of the prosecutrix. It is correct that the accused while penetrating applied force which resulted in oozing of blood. She does not know what hymen means. The portion wherefrom urine passes she had injury which was stitched.

45. Important question which emerges from the aforesaid testimony of the prosecutrix and that of the medical evidence is as to whether penetration has taken place so as to hold that the act of the accused falls within the ambit of Section 375 RPC punishable under Section 376(1) RPC. Hon'ble Apex Court in the judgment rendered in the case ***Tarkeshwar Sahu Vs. State of Bihar reported in (2006) 8 Supreme Court Cases 560*** has elaborately dealt with the ingredients of the offence under Sections 376/511, 375, 354 RPC. Para

12, 13, 14, 15, 16, 17, 18, 20 and 21 are advantageous to be quoted:

“12. The word “penetrate”, according to Concise Oxford Dictionary means “find access into or through, pass through”.

13. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC.

14. Position of law in England is the same. To constitute the offence of rape, there must be a penetration. Even the slightest penetration will be sufficient. Where a penetration was proved, but not of such a depth as to injure the hymen, still it was held to be sufficient to constitute the crime of rape. This principle has been laid down in R.v.M’Rue and R.v.Allen. In R.v.Hughes and R.v.Lines, the Court has taken the view that “proof of the rupture of the hymen is unnecessary.” In R.v. Marsden, the Court has laid down that “it is now unnecessary to prove actual emission of seed; sexual intercourse is deemed complete upon proof of penetration only.”

15. In Nirmal Kumar v. State of Haryana the Court held as under;(CriLJ p.3356, para 39).

Even slightest degree of penetration of the vulva by the penis with or without emission of semen is sufficient to constitute the offence of rape. The accused in this case had committed rape upon a minor girl aged 4 years and he could not explain the reasons regarding congestion of labia majora, labia minora and redness of inner side of labia minor and vaginal mucosa of victim. Stains of semen were also found on the underwear worn by the accused. The conviction of accused held proper.

16. The distinction between rape and criminal assault has been aptly described in the English case R. v. James Lloyd. In this case, while summing up the charge to the jury, Patterson, J. observed: (ER p.142).

“In order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part.”

17. A similar case was decided by Mirza and Broomfield, JJ. of the Bombay High Court in *Ahmed Asalt Mirkhan*. In that case the complainant, a milkmaid, aged 12 or 13 years, who was hawking milk, entered the accused's house to deliver milk. The accused got up from the bed on which he was lying and chained the door from inside. He then removed his clothes and the girl's petticoat, picked her up, laid her on the bed, and sat on her chest. He put his hand over her mouth to prevent her from crying and placed his private part against hers. There was no penetration. The girl struggled and cried and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault. The point of distinction between an offence to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he is just going to have sexual connection with her.

18. In *Halsbury's Statutes of England and Wales*, 4th Edn., Vol.12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse.

19. In *Encyclopedia of Crime and Justice* (Vol.4, p.1356), it is stated “.....even slight penetration is sufficient and emission is unnecessary.”

20. In *Aman Kumar v. State of Haryana* this Court stated as under: (SCC p.386, para 7).

“7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little.”

21. In view of the catena of judgments of the Indian and English Court, it is abundantly clear that slight degree of penetration of the penis in the

vagina is sufficient to hold the accused guilty for the offence under Section 375 IPC punishable under Section 376 IPC.”

46.In the backdrop of the evidence and the position as it exists in the case on hand it is clear that the ‘fourchette’ (***in terms of Mosby’s Medical Dictionary is defined as: “a tense band of mucous membranes at the posterior angle of the vagina that connects the posterior end of the labia minora”***) was torn to the extent that four stitches were required to be given, for so doing patient was given anesthesia. Prosecutrix had qualified that accused tried to penetrate forcefully, in the process bleeding had started. Though hymen, as per the medical evidence, was intact, still the act committed by the accused amounted to the offence punishable under Section 376(I) RPC. Para 13 of the judgment as quoted above is clear in this regard. In view of the explanation to Section 375 RPC slightest penetration is sufficient to constitute offence under Section 375 RPC.

47.In view of the law laid down by the Hon’ble Apex Court as referred hereinabove and applying the same to the occurrence as stated by the prosecutrix coupled with the medical evidence more particularly the statement of PW7-Dr. Sameena Sultan that no vaginal

penetration has been caused though it does not rule out rape. Rape means mere touch of vulva. Reaching to pelvis amounts to rape, so even doctor witness has made it clear that even in absence of vaginal penetration rape cannot be ruled out.

48.For the facts and circumstances of the case more particularly the statement of the prosecutrix and in view of the law as laid down by the Hon'ble Apex Court there is hardly any scope for taking exception that the rape has not been committed. True it is that the FSL evidence is lacking but it has come in the evidence that the expert team visited the spot but it was stated to them that the floor of the room was washed, so there could be no scope for collecting any evidence from the spot.

49.Learned trial court has rightly placed reliance on the judgment rendered by the Hon'ble Apex Court in case titled ***Wahid Khan vs. State of Madhya Pradesh reported in AIR 2010 SC(1)*** and has rightly quoted Para 25 and 26, which for facility for reference are quoted hereunder:-

“25. It has been a consistent view of this Court that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.

26. It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) at page 495 which reads thus: “Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.”

50. On complete appreciation of evidence as led by the prosecution and proper appreciation of the arguments as were advanced and for the reasons stated hereinabove and for the reasons recorded by the learned trial court there is no scope for taking any exception to the findings recorded by the learned trial court.

51. Learned trial court has appreciated the evidence, the arguments and has applied the law properly. Well-reasoned judgment, recording conviction, impugned in this appeal, does not call for any interference.

52. Teacher - student relationship is pious breach whereof is a blot on the noble profession of a teacher. Parents rightly believe teachers equally to be the parents. Teacher is a nation builder who imparts education to the youth from elementary level so that youth becomes role model. Teachers are considered to be trustees as they are primarily entrusted with the pious job of developing the children(pupil) into fine citizens. Such citizens after reaching to the higher positions when applauded, make their mentors/teachers proud and a teacher feels himself at the top of the world. Teacher as a matter of fact contributes in making the society well refined.

53. Unfortunately accused a perverted teacher in effect a destructor who normally could be a father figure has tarnished the life of an orphan girl who used to get tuition from him. Whole system works on trust and confidence. Teacher is never expected to be a devil. The teacher(accused) who has displayed devilish brutality is a shame for himself. How the poor girl(prosecutrix) can come out of the stigma for which none else but her teacher -a fatherly figure is responsible. Teacher community, a nation builder community, but for such

perverted teacher(accused), therefore, learned trial court has appropriately awarded the sentence.

54. The judgment and order of sentence are upheld. Appeal is dismissed accordingly.

55. The victim(prosecutrix), an orphan, is entitled to compensation under Jammu and Kashmir Victim Compensation Scheme, 2013 notified vide SRO 229 dated 23.09.2013. Learned Principal District & Sessions Judge, Srinagar (Chairman, District Legal Services Authority) shall process the case of the prosecutrix for payment of Rs.1.50 lac (Rupees One Lac Fifty Thousand) only, as compensation as permissible in accordance with the said Scheme, which on sanction shall be kept in a fixed term deposit in the name of the victim initially for a period of six year.

56. Copy of the judgment be supplied to the accused free of cost.

57. Trial court record along-with copy of the judgment be sent back to the trial court. Judgment copy be also sent to the court of Session's Judge Srinagar(Chairman, District Legal Services Authority).

58. Necessary information regarding dismissal of the appeal be also sent to the Superintendent Jail concerned.

(Mohammad Yaqoob Mir)
Judge

Srinagar
28.09.2017
Muzammil. Q