THE HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE
CRA No. 482/2014

(Vijay and another Vs.State of M.P.)

Shri Kushal Goyal, learned counsel for the appellant.

Shri Sandeep Mehta, learned counsel for the respondent/State.

CRA No.656/2014

(Ramkishore Vs. State of M.P.)

Shri Bhaskar Agrawal, learned counsel for the appellant.

Shri Sandeep Mehta, learned counsel for the respondent/State.

J U D G M E N T
(29/05/2020)

Since the present matters are connected and arise out of common judgment dated 14.03.2014 passed by 7th Additional Session Judge, Indore (M.P.) in Session Trial No. 985/2011, they are being decided by the present common judgment.

(2). The appellant Vijay and Sanjay have preferred the present appeal against the aforesaid judgment passed by 7th Additional Session Judge, Indore passed in Session Trial No.985/2011, being aggrieved with their conviction and sentence whereby the appellant Vijay has been convicted under Section 363 of I.P.C. and sentence to undergo three years R.I. with fine of Rs.2,000/- whereas the appellant Sanjay has been convicted under Section 385 of I.P.C. and sentenced to

undergo 2 years and fine of Rs.2,000/-.

(3). The appellant Ramkishore has preferred the present appeal against the aforesaid judgment whereas he has been convicted for the offence under Section 363 and 385 of I.P.C. and sentenced to undergo three years and two years R.I. and fine of Rs. 2,000/- each respectively with default stipulation.

(4). Facts of the case, in short are that on 05.09.2011 at about 09:15 hours victim was returning home after dropping off her brother at Gumasta Nagar. On the way she met her neighbor namely Gaurav, when she was talking with Gaurav at the same time the appellant Ramkishore Shivhare and co-accused Vijay approached the couple and slept Gourav thereafter she was taken to a house situated in a colony at Gopur Square at gun point by the appellant/accused Ramkishore Shivhare. On the way accused Sanjay met Ramkishore Shivhare who was also accompanied them. The house in which victim was taken away was occupied by co-accused Anita and one other female and 3-4 children were also present in the house. Co-accused Sanjay snapped the photo of victim from his mobile. After that Ramkishore also clicked some photographs of the victim standing alongwith the co-accused Sanjay. The accused persons threatened the victim in lieu of cooperation. The victim insisted that she want to go to her house. Then accused persons insisted the victim to provide her

mobile phone number to them so that on their call she must come to meet. Then co-accused Sanjay accompanied the victim to her house. On 06.09.2011 co-accused Sanjay called the victim from the mobile number 9300011333 and asked the victim to come at Gangwal bus stand, Indore. From the aforesaid over act the victim got scared, hence she narrated the incident to her mother and thereafter she informed the incident to Ms. Deepika Shinde, Sub Inspector, Crime Branch and then she lodged written complaint to the police Station Chandannagar, on the basis of which FIR bearing crime number 846/11 under Section 363, 365,342,506, 368 read with Section 34 of I.P.C. was registered against the appellants and co-accused Anita. Appellants were arrested by the police, their cellphone and other incriminating articles were seized. After completing necessary investigation, charge-sheet was filed before the Court of Judicial Magistrate First Class, Indore, who thereafter committed the case to the Court of Session Judge, Indore and ultimately it was transferred to 7th Additional Sessions Judge, Indore.

(5). The appellants absurd their guilt and pleaded that they are innocent and have been falsely implicated in the present crime due to the enmity. In support of its case, defence, examined Ramehshwar Singh (DW-1) Nodal Officer idea telecome in their defence.

(6). The trial court after considering the evidence

adduced by the parties acquitted the co-accused Anita from all the charges however, the appellants have been convicted and sentenced as mentioned above. Hence, this appeal.

(7). Learned counsel for the appellants has submitted that the trial court has not properly considered and appreciated the evidence and wrongly convicted the appellants. It is also submitted that the incident alleged to have been occurred at 09:15 pm on 05.09.2011 but the FIR has been lodged on 21 hours of 06.09.2011 and no explanation has been brought by the prosecution regarding the delay of 24 hours in lodging the FIR which clearly goes to show that the false case has been cooked up against the appellants. It is further submitted that according to the victim before lodging the FIR at Police Station Chandanagar she reported the matter to crime branch (We care for you) where her statement was recorded but the prosecution has concealed this material evidence on record. It is also contended that the trial court has not taken into consideration the material discrepancies and omissions in the statement of victim and her mother. It has further been contended that the prosecution has failed to prove that at the time of incident, the victim was below 18 years of age inspite of that the trial court has committed error in convicting the appellant for the offence under Section 363 of I.P.C. It has further been

submitted that prosecution had not produced any photo of the victim alleged to have been clicked by the appellant during the incident, therefore, charge under Section 385 of I.P.C. has not been proved. The prosecution has also not proved the call details of any accused or victim as such a serious doubt cast on prosecution case. It has also been contended that the trial court has not properly considered the statement of independent witness Gaurav who was present at the time of incident but he has not supported the alleged occurrence as stated by the victim. It has also been submitted that the identification of the appellants during test identification parade in jail is meaningless as the victim has seen the appellants in Chandannagar Police Station. Because the victim and her mother in their deposition has said that a joint photo of the victim and accused Sanjay has been snapped in the mobile of the appellant has not seen by them and also no such photographs has been produced by the prosecution for establishing the charge of extortion as such holding guilt for the charge of section 385 of I.P.C is bad in law. Under these circumstance, learned counsel for the appellants prays for setting aside the impugned judgment.

(8). Per contra, learned public prosecutor appearing on behalf of the respondent/State has supported the impugned judgment & order of conviction by

submitting that the learned trial Court, on proper evaluation of evidence, has recorded conviction and that the same does not call for any interference.

(9). I have heard learned counsel for the parties and perused the impugned judgment and record of the trial court.

(10). Victim (PW-1) deposed that on 05.09.2011 she was returning home after dropping off her brother at Gumasta Nagar. Then on the way her neighbor Gourav met her. He stopped her and started talking. During this One Vijay Sharma and Inspector R.K. Shivhare came their and asked their name. Thereafter Vijay Sharma slept Gourav and he was asked to leave the place, then he left from there. After this they started threatening her saying they have killed three girls and nobody came to know. Then accused Ramkishore took out his gun applied on her waist, he set back her vehicle and asked her to walk to Gopur square. Thereafter he calls Sanju and asks him to come to Gopur square. After reaching their accused Shivhare asked her to follow behind Sanju's vehicle and they took her to a house in Suryadev Nagar. That house was occupied by two females, one of which was accused Anita. Thereafter accused Sanjay took her some picture by his mobile phone, then Ramkishore snapped her photographs standings alongwith accused Sanjay. They took her address and mobile number and

threatened that whenever they call her she has to come otherwise they will print Sanju and her photographs on newspaper and will wright that you were talking in dark. Thereafter accused Sanjay accompanied to leave her home. Next day she made written complaint of the incident to the police.

(11). Victim (PW-3) has admitted in her cross-examination conducted by APP after declaring her hostile that Sanju had called her 3 to 4 times in day from his mobile number 9300011333 and asked her to come to the Gangwal bus stand. From this incident she was very scared so she went to crime branch office and meet Shinde madam. At the behest of Shinde Madam she called Sanju and said that I am very scared, do not show my photo to anyone, where you asked me to meet, I am ready to come there. He asked her to come to meet him at Gangwal bus stand at 05:00 pm then she went to Gangwal bus stand with Shinde madam and her team at 05:00 pm.

(12). Rekha (PW-4) stated that victim is her daughter aged about 16 years and she is studying in 11th class. On 05.09.2011 at about 09:00 pm the victim went to drop off her cousin at Gumasta Nagar. When she did not come for an hour she called her but did not pick the phone. When she called Gumasta Nagar then she told that victim left immediately. Then she go out for search her. The victim got a call while she was on

the way and said that she is near Jain temple, come and take her. She was nervous and crying. Then she reached there and asked to victim, she narrated her the incident. Next day they went to crime branch office and made a written complaint of the incident, thereafer they lodged the report at police Station Chandanagar.

(13). Gourav (PW-6) deposed that 6-7 months ago he was returning to home to meet his friend at that time police checking on the square phooti kothi in this process victim was stopped by the police for checking but she was not having papers relating to her vehicle and during this checking process the victim has threatened the police man for dire consequences and she had said that she being the relative of MLA if she is not left she will take of their uniform. He further stated that he told the police officers that this vehicle is in the name of mother of the victim, its paper will show tomorrow thereafter they came to their home. During cross-examination conducted by the APP he denied the incident as narrated by the victim. Thus this witness has not supported the prosecution story.

(14). Pawan Mishra (PW-7) Station House Officer, Police Station Chandanagar Indore stated that on 06.09.2011 victim made a written complaint against the accused person. On the basis of which he registered the FIR Ex. P/6 at crime No.486/11 for the offence under Section 363,365,342 and 506/34 of

I.P.C. He visited the place of occurance and prepared spot map Ex. P/7. On 06.09.11, he arrested the accused Vijay Sharma, Ramkishore Shivhare and Sanjay. He also seized mobile phones from the accused persons. During investigation he recorded the statement of victim, her mother, Gaurav Jain, Anita, Bhavya Jain, and Kittu @ Pooja.

(15). Vijay Deshpandey is the Sub Divisional Engineer BSNL company Indore. He had produced the record of mobile number 9425894661 which was in the name of accused Ramkishore Shivhare. This witness has also proved customer application form of the said mobile number. He further stated that the aforesaid mobile sim has been used through mobile set belonging to IMSI No. 404582101668026, 404582106358645 and 404582106898207. This witness also produced the record of the mobile number 9479993583. As per record the said mobile was issued in the name of SSP control room, Indore. A customer application form alongwith ID proof are proved as Ex. P/19 and P/20. This witness has also produced the record of mobile number 8989111220 which has issued in the name of mother of victim and customer application form alongwith ID proof are proved as Ex.P/24 and P/25.

(16). Gourav Kapoor (PW-11) is working as Nodal Officer reliance communication, Bhopal he has proved

the customer application form of mobile number No.9300011333 alongwith ID proof and proved it as Ex. P/28. As per record the said sim is in the name of Mukesh S/o Lekhraj Verma, R/o 20, Saibaba Colony, Phooti Kothi Road, Near Sai Baba School, Indore. This witness accepted that ID proof which is election card and the photo affixed in the said card appears to be accused Vijay Sharma.

(17). Sai Dutt Bohre is the nodal officer of Airtel Mobile company. This witness has produced the customer application form of mobile number 9893619559 alongwith its ID proof. As per record the aforesaid mobile is registered in the name of Shri Omprakash Sharma S/o Shri Prem Narayan Sharma R/o 49-B, Sai Baba nagar, Indore. This witness also accepted that the photo in the ID appears to be of accused Vijay Sharma. According to the witness Vijay Sharma also filed electricity bill in support of address proof. This document proved as Ex.P/30.

(18). Call details in respect of mobile number 9893619559 and 9300011333 has not been provided by the concerned cellular phone company. The prosecution has relied the secondary evidence in form of printed copy of call details of the said mobile phones, which is silent about the source of information. The calls details of mobile number 9425894661 and 8989111220 could not be available.

The call details of mobile number 9300011333 indicats that accused person were in contact each other at the time of occurrence but no call has been made from their mobile phone to the victim.

(19). Learned counsel for the applicant submits that reliance on electronic records which are stated to be on the strength of the recovery of mobile phones and conversations between the two has neither been proved in Court, nor any admissible evidence was led in terms of Section 65-B of the Indian Evidence Act to prove the said calls and the trial court only drew inferences on the basis of the statements made by the prosecution witnesses which did not substantiate and prove the utilization of such electronic instrument for calling or convey any message to each other .

(20). From perusal of the record, it appears that the secondary evidence in form of printed copy of call details relating to the mobile phones seized from the appellant/accused persons is not accompanied by the certificate in terms of Section 65B obtained at the time of taking the documents, without which, the secondary evidence pertaining to the electronic record, is inadmissible.

(21). In the case of ***Harpal Singh alias Chhota Vs. State of Punjab 2017 (1) SCC 734*** the Hon'ble Supreme Court has held as under:

> 56. Qua the admissibility of the call details, it is a matter of record that though PWs 24, 25, 26 and 27 have endeavoured to prove on the basis of the printed copy of the computer generated call details kept in usual ordinary course of business and stored in a hard disc of the company server, to co-relate the calls made from and to the cellphones involved including those, amongst others recovered from the accused persons, the prosecution has failed to adduce a certificate relatable thereto as required under Section 65-B(4) of the Act. Though the High Court, in its impugned judgment, while dwelling on this aspect, has dismissed the plea of inadmissibility of such call details by observing that all the stipulations contained under Section 65 of the Act had been complied with, in the teeth of the decision of this Court in Anvar P.V. ordaining an inflexible adherence to the enjoinments of Sections 65-B(2) and (4) of the Act, we are (Lateef Gauli Vs. State of M.P.) unable to sustain this finding. As apparently the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of Section 65-B(2) had been complied with, in the absence of a certificate under Section 65-B(4), the same has to be held inadmissible in evidence.
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> 57. This Court in Anvar P.V. has held in no uncertain terms that the evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Act would have to yield thereto. It has been propounded that any electric record in the form of secondary evidence cannot be admitted in evidence unless the requirements of Section 65-B are satisfied. This conclusion of ours is inevitable in view of the exposition of law pertaining to Sections 65-A and 65-B of the Act as above.

(22). Although the call details of the mobile phones has already been admitted in evidence by the trial court but in the case of ***Dayamathi Bai Vs. K.M. Shaffi reported in (2004) 7 SCC 107***, the Apex Court has held as under:

> 13. We do not find merit in this civil appeal. In the present case the objection was not that the certified copy of Ext. P-1 is in itself inadmissible but that the mode of proof was irregular and insufficient. Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before

the document is marked as an exhibit and admitted to the record (see Order 13 Rule 3 of the Code of Civil Procedure). This aspect has been brought out succinctly in the judgment of this Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple to which one of us, Bhan, J., was a party vide para 20 : (SCC p. 764) "20. The learned counsel for the defendant- respondent has relied on Roman Catholic Mission v. State of Madras in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in (Lateef Gauli Vs. State of M.P.) evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking (Lateef Gauli Vs. State of M.P.) indulgence of the court for permitting a

> regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."
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> (emphasis in original)
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> 14. To the same effect is the judgment of the Privy Council in the case of Gopal Das v. Thakurji in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edn., p. 1084, it has been stated that where copies of the documents are admitted without objection in the trial court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be (Lateef Gauli Vs. State of M.P.) taken at the time of admission and such objection will not be allowed at a later stage.

(23). Thus, it is clear that where the mode of proof was irregular or insufficient and where the document is already marked as exhibit, then the objection with regard to its mode of proof cannot be raised at a later stage, however, where the document itself is not admissible, then it has to be excluded though it might have been brought without any objection.

(24). The Supreme Court in the case of ***Anvar***

P.V. Vs. P.K. Basheer reported in (2014) 10 SCC 473 has held as under :

> 17. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45- A--opinion of Examiner of Electronic Evidence.
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> 18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.
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> 19. It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is (Lateef Gauli Vs. State of M.P.) adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.
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> 20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.
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> 22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65- A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections

> 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An (Lateef Gauli Vs. State of M.P.) electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

(25). In the light of the judgment passed in the case of ***Dayamathi Bai*** and ***Anvar P.V.*** (supra), it is clear that the electronic document without accompanied by a certificate under Section 65-B of Evidence Act is not admissible in law, therefore, the trial court has committed error in relying the call details filed by the prosecution.

(26). Bihari Singh (PW-1) is the Tehsildar,who had conducted the test identification parade. This witness has stated that on 15.09.2011 at about 11:00 am he had conducted the test identification parade and victim had identified the appellant Vijay Sharma, Sanjay Thakur and Ramkishore Shivhare and the test identification memo is Ex.P-1 to P-3. At the time of identification parade no police personnel was present. Nothing could be elucidated from the evidence of this witness, which may make his evidence doubtful. Thus, it is clear that victim (PW-3) had identified the appellants. it is well established principle of law that the Test Identification Parade conducted by the police,

at the best, can be treated as corroborative piece of evidence but the substantive piece of evidence is identification of the appellant in the dock.

(27). The Supreme Court in the case of ***Sheo Shankar Singh Vs. State of Jharkhand and another reported in (2011) 3 SCC 654***, has held as under:-

> "46. It is fairly well-settled that identification of the accused in the Court by the witness constitutes the substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the Court who claims to identify the accused persons otherwise unknown to him. Test Identification parades, therefore, remain in the realm of investigation.

(28). The Supreme Court in the case of Pramod Mandal v. State of Bihar ***(2004) 13 SCC 150*** where this Court observed:

> "20. It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal

> because of there being only one identifying witness? Prudence therefore demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or rejection of such identification.

(29). The Supreme Court in the case of ***Mulla and another Vs. State of U.P. reported in (2010) 3 SCC 508*** has held as under:-

> "55. The identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two-fold. First is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Therefore, the following principles regarding identification parade emerge:
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> (1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses;
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> (2) this condition can be revoked if proper explanation justifying the delay is provided; and, (3) the authorities must make sure that the delay does not result in exposure of the accused which may lead to mistakes on the part of the witnesses."

(30). The identification memo Ex. P/1 to P/3 disclosed that the identification parade was conducted after two months of the arrest of the accused persons and no proper explanation has been offered by the prosecution for justifying the said delay. From the testimony of victim (PW-3), it appears that she was not known the name of the appellants. She in para 11 of her deposition had admitted that in the FIR Ex.P/5 word " Chandannagar Sub Inspector was later on

added. In para 12 of her statement she stated that at the time of occurrence she was unaware of the full name of the appellants. Further Rekha (PW-4) the mother of the victim in para 5 of her statement also deposed the similar facts regarding the identity of the accused persons. The victim has admitted that she identified the appellant Ramkishore Shivhare based upon the name plate which he wore at the time of alleged incident but no such specification have been mentioned by the victim in the written complaint Ex.P-5 and victim also admitted in cross-examination that when she went to the police Station Chandannagar for lodging the FIR at that time Ramkishore Shivhare was present there and she saw him there. According to her the accused Vijay and Sanjay has already been apprehended by the crime branch before lodging the FIR at Police Station Chandannagar meaning thereby she has also seen the aforesaid accused persons. In these circumstance, the test identification parade of the accused persons is meaningless.

(31). Learned counsel for the applicant contended that the testimony of victim PW-3 becomes highly doubtful and supecious becasue of multiple contradictions and ommissions on the vital aspect of prosecution case. It would be neccesary to consider what are the important ommission in the evidence of PW-3. This ommission are postive assertain in the

court and absence of that part in the FIR or in the statement of victim (PW-3) recorded by the police. So I am noting down what is stated by her in the court but absence in the police statement;

(1). Which accused slept the Gaourav.

(2). The accused threatened her saying that they had killed three girls and nobody came to know.

(3). Accused Shivhare took out his gun and applied her waist, he set back her vehicle.

(4). Accused Shivhare calls Sanju and asks him to come to the Gopur square. (5). Accused took her address and mobile number and asked him to come to meet him at Gangwal bus stand where Shinde madam caught her.

(32). In the case of **State Of U.P. vs Ballabh Das And Ors. AIR 1985 SC 1384**, the Hon'ble Supreme Court declared the law that it is manifest that a FIR is not intended to be a very detailed document and is meant to give only the substance of the allegations made. In the case of **Pedda Narayana & Ors vs State Of Andhra Pradesh AIR 1975 SC 1252**, it is em**p**hasized that where the FIR lodged very soon after the offen**ce** revealing the names of the a**cc**used, et**c**. giving essential details, but without **c**ontaining overt a**c**ts attributed to ea**c**h of the

a**cc**used, it is not fatal to the **c**ase of the **p**rose**c**ution, be**c**ause it is neither **c**ustomary nor ne**ces**sary to mention every minute detail in the FIR.

(33). In the present case the details of the incident as narrated by victim (PW-3) finds no place in FIR Ex.P-5, therefore, it may amount to improvement. If I take the guidance from the settled law as above, such an event is not fatal to the case of the prosecution. But still such an event of a First Information Report omitting to mention some important theory or fact or where the prosecution witnesses introduces a theory or a fact not from the FIR, the Courts would examine the same with all caution and the accused is entitled to demonstrate by various means that such a conduct of the prosecution witnesses cannot be safely accepted.

(34). The Supreme Court in the case of Sunil Kumar Sambhudayal Gupta vs State Of Maharashtra, (2010) 13 SCC 657 has observed as under:

> 30. So far as the stay of the deceased with her parents after coming from Kanpur to Kalyan at the guest house is concerned, admittedly at that time the relations between the parties were strained because of the suspicion that the deceased was having an illicit relationship with Kake. However, it has been admitted by Ramkishan (PW.8), father of the deceased, that subsequently the relations became normal and they were invited at the house of the appellants after the deceased tendered an apology to her mother-in- law. The said witness did not state in his statement before the police that when he went to see the appellants on 17.2.1985, they had asked him whether he had brought

> gold ornaments or had come empty handed or that he was told that the deceased would not be allowed to live there and they would make her condition even more miserable. Such an improvement was made while deposing in court and no explanation could be furnished by him as to why such vital facts were not stated by him at the time of recording his statement under Section 161 Cr.P.C. This statement is to be discarded as it is not safe to hold the appellants guilty of the offences alleged against them on such an improved version.
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> 31. The deposition of Manorma (PW.7), aunt of the deceased is by no means different, as she had also made major contradictions and improvements in her statement made in court. She had not stated in her police statement that the appellants were demanding gold ornaments from the deceased and her family or that the appellants were keeping the deceased starving and were not allowing her to meet her daughter, Mili. The explanation furnished by her that she had not been feeling well and had forgotten to narrate such material facts, cannot be believed.
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> 32. The statement of Rajesh (PW.2), the brother of the deceased is also full of contradictions and suffers from major improvements. The contradictions are of such a nature that they impair the whole of his evidence. The same cannot be held to be clarificatory. He was not in a position to state what ornaments his family had presented to the deceased on different occasions. More so, it was not even stated in his police statement that after the birth of Mili, his family had given gold ornaments as demanded by the appellants. He could not even furnish an explanation as to why the demand of a gold chain is not evident from any of the letters between the parties, except in the letter (Ext. P- 21).

(35). While deciding such a case, the Court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness

liable to be discredited. However, if the omissions, and contradictions as pointed out by this court in the light of the evidence of the prosecution witnesses are considered, then, it would be clear that these omissions are not minor in nature. They give a deep dent to the prosecution case and they are major omissions, contradictions in the evidence of the victim therefore, the accused persons are entitled to the benefit of said omissions and contradictions.

(36). Rekha (PW-4) the mother of the victim stated that at the time of occurrence the age of the victim was 16 years. The prosecution has filed copy of certificate of continuous and comprehensive evaluation in relation to the secondary school examination session (2009-2011) conducted by the Central Board of Secondary Education New Delhi for the proof of age of the victim in which her date of birth is mentioned 19.07.1995, however, the original certificate has not been filed by the prosecution nor it has been proved by the person who has certified it, therefore, this document cannot be taken into the consideration for proof of the age of the victim. Rekha (PW-4) admitted in her cross-examination that she was married 22 years back. The victim is her elder daughter and she was borne within 3 to 4 years of the marriage which indicates that the age of the victim was about 18 years at the time of incident. In these circumstance, the trial

court has committed error in holding that at the time of incident the victim was below 18 years and therefore, she was minor.

(37). Victim (PW-3) and her mother Rekha (PW-4) stated in their statement that the joint photo of victim and accused Sanju has been snapped in the mobile phone of the appellant Ramkhsore Shivhare. The said mobile phone was sent to the Central Forensic Science Laboratory Hyderabad but in the examintion no such photograph was found in the mobile phone of the appellant and no such photograph of the victim with Sanju (Sanjay) has been produced by the prosecution for establishing the charge of extortion, therefore, the trial court has committed error in convicting the appellants for the offence under Section 385 of I.P.C.

(38). After the aforesaid discussion, this court is of the view that there are material omissions and contradictions in the statement of the victim (PW-3) and her mother (PW-4). The FIR has been lodged after 24 hours of the alleged incident and victim failed to furnish any convincing reason to explain the delay in lodging the FIR. Victim in para 10 of her testimony has deposed that many person alongwith their families are residing near by to the place of occurrence. However, she did not raised any alarm nor did she inform anyone about her alleged ordeal. Further the victim in her statement very categorically admitted that Mr Paras

Saklesha MLA is her maternal uncle and he was also present in the office of crime branch when she reached there for lodging the report against the appellants, which corroborated the defence of accused persons regarding their false implication in the present crime under the political influence. The prosecution has also failed to establish that at the time of incident, the victim was minor and accused persons snapped her photograph with intent to extort her. In these circumstance, the trial court has committed error in convicting the appellant Ramkishore for the offence punishable under Section 363, 385 of I.P.C, Appellant Vijay for the offence under Section 363 and Sanju (Sanjay) for section 385 of I.P.C., ***Hence, present appeal is succeeded and the appellants are acquitted from the aforesaid offence***.

(39). The appellants are on bail, therefore bail bonds are discharged. The appellants would be entitle to get back fine amount if they had deposited before the trial court.

Let a copy of judgment be sent back to the concerned trial court alongwith record for information and compliance.

(S. K. AWASTHI)
JUDGE

praveen