*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 01.09.2017
Delivered on: 25.09.2017

\+ **CRL.A.944/2016**

MAHMOOD FAROOQUI ..... Appellant

versus

STATE (GOVT OF NCT OF DELHI) ..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr. Kapil Sibal, Sr. Adv. and Mr. Prashanto Chandra Sen, Sr. Adv. with Ms. Nitya Ramakrishnan, Mr. Ashwath Sitaraman, Ms. Suhasini Sen & Mr. Nizam Pasha & Mr. Shivanshu Singh.

For the Respondent: Ms. Richa Kapoor, ASC
Insp. Ram Niwas W/SI Seema, P.S. New Friends Colony

For the Complainant: Ms. Vrinda Grover & Ms. Ratna Appnender.

CORAM:-
HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. Mahmood Farooqui, the appellant, has been convicted under Section 376(1) of the IPC vide judgment dated 30.07.2016 passed by the Additional Sessions Judge – Special Fast Track Court, Saket Courts, New Delhi in Sessions Case No.118/15 (New SC No.1590/2016), arising out of FIR No.273/2015 dated 19.06.2015 (P.S. New Friends Colony) registered under Section 376 of the IPC.

He has been sentenced by order dated 04.08.2016 to undergo RI for 7 years, and to pay a fine of Rs.50,000/-.

2. The prosecutrix, in her FIR has stated that she is a student of Columbia University, New York and is a fulbright fellow affiliated with Delhi University, History Department and had been pursuing her PhD work in the field of Hindi literature and Nath Sampraday. She had come to Delhi in June, 2014 and was in search of some contact at Gorakhpur for the purposes of getting information regarding Nath Sampraday. It was in this connection that she was introduced to the appellant through a friend, Danish Hussaini, who has been examined as PW10 in the trial. On the day of the occurrence i.e. on 28.03.2015, she had called the appellant requesting him to arrange for tickets of his performance which was to be staged a day after. The appellant invited her over to his house for dinner. Later, at 4 o"clock in the afternoon, the appellant informed her that he would be going to a wedding. The prosecutrix thought that perhaps the appellant and his wife would be going to the wedding. She thereafter arrived around 9 p.m. at the house of the appellant and saw two students leaving the house. After exchanging brief courtesies with them, the prosecutrix went upstairs

and the door was opened by Ashish Singh, a friend of the appellant who has been examined as PW12. The prosecutrix found the appellant to be in an intoxicated and lachrymose state. The prosecutrix was asked to go to the office room of the appellant. After waiting there for about 20 minutes, the prosecutrix came out of the office room for a smoke on the porch when she was asked by the appellant to sit down near him. The prosecutrix hugged the appellant, enquired from him as to whether there was a need for a group hug and also asked him about the reason for his sadness. At that point of time, the appellant is said to have told Ashish (PW12) to leave the room and also informed that one Darrain (DW3) would be coming. After Ashish left the company of the prosecutrix and the appellant, the appellant called Darrain and also put him on speaker phone. The prosecutrix heard Darrain saying that he would not come. The prosecutrix then called Darrain when the appellant had left the room. Darrain was informed by the prosecutrix that the appellant was drunk and that Darrain needed to come to his house. Darrain expressed his inability and promised to talk to her the next day. Thereafter, the appellant came back and he and the prosecutrix had a talk for a while. It has been alleged by the

prosecutrix that thereafter the appellant kissed her, to which she responded by saying that she did not think that it was what he needed. The appellant kept on kissing the prosecutrix and telling her about her being a great woman. He also disclosed his intention of *sucking* her to which she promptly denied. The appellant and the prosecutrix were seated on the couch. The prosecutrix has then alleged that the appellant tried to pull down her underwear and she kept on pulling it up. The prosecutrix was thereafter immobilized by the appellant who forced oral sex upon her.

3. The prosecutrix has stated that in the first instance, she was scared because of the strength of the appellant but because she did not want to get hurt, she pretended an orgasm. The appellant tried to repeat what he had done but in the meantime the door bell rang and the two friends of the appellant returned. Thereafter, the prosecutrix wanted to leave and so she booked a MERU cab and simultaneously texted her friend Danish Hussaini (PW10). She also told Ashish (PW12) that she wanted to go but was asked by Ashish to stay back for a while as in case the wife of the appellant, Anusha (not examined) did not return, she will have to feed the appellant. The prosecutrix, in

the event of the driver of the MERU cab not locating the house of the appellant, wanted to get a rickshaw but she was dissuaded and was told that it was dangerous for her in the night to take a rickshaw ride. The wife of the appellant in the meantime returned and the appellant asked her to go. Taxi was fetched by Ashish. When the prosecutrix got into the car, she immediately called Danish Hussaini (PW10) and told him about what had happened between her and the appellant. She has stated in her complaint that she wanted to take legal action against the appellant for his act and that she did not want to go through the medical examination.

4. On the aforesaid complaint, FIR No.273/15 dated 19.06.2015 was registered for investigation under Section 376 of the IPC.

5. The police after investigation submitted charge sheet whereupon cognizance was taken and the case was committed to the court of sessions for trial.

6. Charge was framed against the appellant for the offence under Section 376 of the IPC to which the appellant pleaded not guilty and claimed to be tried.

7. The trial court after examining 20 witnesses on behalf of the prosecution and 6 witnesses on behalf of the defence, convicted the appellant under Section 376(1) of the IPC vide judgment dated 30.07.2016 and by order dated 04.08.2016 sentenced him to undergo RI for 7 years and to pay a fine of Rs.50,000/-.

8. During the trial, the prosecutrix, who was examined as PW5, supported the prosecution version and stated that in order to complete her dissertation work on Nath Sampraday, she was in search of a contact person and was introduced to the appellant through a common friend, Danish (PW10). The prosecutrix met the appellant regarding her research and he also agreed to meet her at Archive Library, Teen Murti where she had been conducting her research. Later, in the year 2014, she met the appellant in the canteen outside the library and she was put in touch with other scholars. The appellant and the prosecutrix communicated with each other and exchanged SMS messages. She has deposed that she met the appellant for the second time in Nagaland Café with her friend, a student of PhD from Columbia University who was working on Indian drama. Thereafter,

the prosecutrix was in constant communication with the appellant through SMS messages.

9. For the third time, the prosecutrix has deposed, she met the appellant in January 2015 when he had invited her to attend a dinner party at his house at Sukhdev Vihar, New Delhi. On one occasion, the prosecutrix was also invited by the appellant to come to Gorakhpur along with him and his wife to which she had initially agreed but later, after finding that it would be inconvenient for her because of her commitment with her academic advisor at Jaipur, she declined the offer. The prosecutrix thereafter went to Jaipur to meet her academic advisor. After her return from Jaipur in early February 2015, she was called by the appellant who inquired her whereabouts. On her informing the appellant that she was in Hauz Khas Village, the appellant told her that he would be coming to Hauz Khas Village along with his friend Darrain Shahidi (Dw3). After about half an hour, the appellant and his friend Darrain Shahidi came. The prosecutrix found him drunk. They all went to a café in Hauz Khas Village where they had liquor and food. From there, they all went to one Radhika (not examined), a friend of the appellant at Hauz Khas.

There again, the appellant consumed liquor. From Radhika‟s house, all the aforesaid persons went to Nagaland Kitchen in the car of the appellant. During the journey, the appellant kissed her and the prosecutrix returned his kiss. Immediately after reaching Nagaland Kitchen, the appellant left on somebody‟s telephone call. The prosecutrix was thereafter only in the company of Darrain and Radhika, both of whom told her about the excessive drinking habit of the appellant.

10. The prosecutrix thereafter did not have any contact with the appellant till she was again invited for dinner by the appellant at his house. On that occasion also, the appellant, his wife and the prosecutrix consumed liquor and during the period of brief absence of his wife who was moving from one room to another, the appellant and the prosecutrix exchanged kisses. She was also asked by the appellant to stay over and sleep on a couch which she refused. She has deposed before the trial court that since she did not want the relationship to go any further, she left the house of the appellant by calling an Uber Taxi.

11. On one occasion, on a dry day, on the asking of the appellant, the prosecutrix had arranged for a bottle of liquor for him. The

prosecutrix has taken reference of another rendezvous with the appellant when she had invited him on her birthday party at Hauz Khas Village for which she had extended the invitation to Darrain and the wife of the appellant also. However, because of over intoxication of the appellant, as was informed to her by Darrain, nobody came to the party.

12. Then came the day when the alleged occurrence took place. The prosecutrix has averred that on 28.03.2015 she had gone to the house of Sonal Shah, one of her friends, at Jungpura Extension at about 10 a.m. when the aforesaid friend expressed her desire to learn Urdu. It was then that the prosecutrix had telephonically requested the appellant for arranging two tickets for his performance so that her friend could learn Urdu. The appellant promptly promised for the tickets and also invited her for dinner. At about 4:00 p.m, the prosecutrix was informed that the plan of the appellant had changed and he further enquired from her whether she would care for attending a wedding to which she agreed. She was also asked by the appellant to bring Rs.1,000/- as gift. The prosecutrix presumed that she would go to the wedding venue with the appellant and his wife. The

prosecutrix, according to her deposition, prepared herself for the wedding by properly attiring herself. For some reason or the other, instead of 8 p.m., she reached the house of the appellant at 9:00 p.m. in a MERU cab.

13. Thereafter, the prosecutrix has narrated the same story which she has stated in the FIR. She had a brief exchange of courtesy with two students who were leaving the house of the appellant, one of whom was Ankit who was introduced to her by the appellant. The main door of the house, as has been stated by the prosecutrix in the FIR, was opened by Ashish (PW-12). The appellant introduced Ashish (PW-12) to her, who led her to the living room. The appellant, as stated earlier, was intoxicated and was crying. Ashish (PW-12) was comforting him. The appellant thereafter asked her to wait in his office room which was on the other side of the kitchen. After remaining in the office room for 20 minutes, she came out on the porch for a smoke when she was ushered in by the appellant. The prosecutrix has clearly stated that the appellant at that time was crying so bitterly that nasal mucus dripped down to his moustache. The prosecutrix thereafter made a drink for herself and on the asking of the

appellant, offered him also a glass of lightly prepared Vodka. This was the time when Ashish (PW-12) left the house. The appellant told her that he was upset about the conduct of his wife and his mother. The appellant also called up Darrain (PW-13) and put him on speaker phone. Darrain, by that time, had refused to come. For a while, when the appellant had left the room, the prosecutrix called up Darrain and asked him to come over to which he refused and promised to talk to her on the next day.

14. During the trial, the prosecutrix has stated that Darrain also asked her to stay back and take care of the appellant as he had to give a performance on the next day. She was advised by Darrain to give water to the appellant and to put him to sleep. The appellant thereafter came back to the room crying. The prosecutrix tied to comfort him and in the process joked with him. She has stated that she felt „very maternal" towards the appellant. Kisses were exchanged and the appellant asked her for a sexual favour which she denied. Thereafter, as narrated in the FIR, she was put down and was subjected to forced oral sex.

15. What is new and different in the deposition of the prosecutrix as compared to the averments made in the FIR is that she claims to have remembered the case of *Nirbhaya,* whose offender had declared that if she (*Nirbhaya*) had not protested, she would have lived her life. The prosecutrix claims that she kept quiet and faked an orgasm in order to avoid any physical harm to her. It was at that time that the door bell rang; when she got up and found that Ashish and another person, namely the brother of the appellant (Mashood @ Roomi) had come back. The aforesaid two persons again started comforting the appellant. The prosecutrix went back to the living room and called a MERU cab. She told Ashish that she was wanting to leave but Ashish insisted her to stay on for five more minutes, as in case, the wife of the appellant did not return, somebody would be needed to feed the appellant. The prosecutrix suggested to Ashish to order a pizza for the appellant. The prosecutrix waited for the MERU cab. The cab driver could not find out the house of the appellant and finally refused to come. The prosecutrix wanted to leave by rickshaw but it was told by Ashish that it was dangerous in the night. Ashish thereafter offered to fetch a cab for her. It was at this point of time that the prosecutrix

started texting Danish Hussaini (PW10) through WhatsApp from her mobile. The wife of the appellant, in the meantime had arrived. The appellant came back to the living room and asked the prosecutrix to leave the house. The prosecutrix wanted to talk to someone who knew her and the appellant, both. So she texted Danish Hussaini through WhatsApp and told him that the appellant was in a mess, that she was invited by him for a wedding but the appellant was drunk and his wife had left the house and had come back only at that time when the prosecutrix wanted to get out of the house but she was having a problem in getting a cab. She texted and asked Danish Hussaini to talk to her. Danish is said to have replied to her by suggesting that she should leave the house and get an auto and once she is into the car, Danish would talk to her. Ashish by that time had called a cab. After getting into the cab, the prosecutrix called Danish and told him that accused has committed forced oral sex on her and she is very upset. Then Danish asked her as to whether she had protested, she replied in the affirmative. She talked to Danish for about half an hour. Since she was not in a good shape of mind and did not want to be left alone, she went to Hauz Khas Village where she reached at 11.30 p.m. and

sat there till around 1.30 a.m, when she finally left that place for her house at Jung Pura Extension.

16. On 30.03.2015, the prosecutrix is said to have sent an e-mail (Ex.PW 3/C-9) to the appellant. For the sake of completeness, the e-mail referred to above is being extracted below:

> *"I tried calling you, but was unable to get through, I want to talk with you about what happened the other night. I like you a lot. You know that I consider you a good friend and I respect you, but what happened the other night wasn't right. I know you were in a very difficult space and you are having some issues right now, but Saturday you really went too far. You kept asking me if you could suck me and I knew you were drunk and sad and things were going awful. I knew that this wasn't going to help things and I told you many times I didn't want to. But you did become forceful. I went along, because I did not want things to escalate, but it was not what I wanted. I was just afraid that something bad would happen if I didn't. This is new for me. I completely own my sexually and I consider you a good friend. I like you. I am attracted to you, but it really made me feel bad when this happened. I haven't known what to say to you since then, I wasn't sure if I would say anything. In the end I consented, but it was because of pressure and your own force physically on me. I did not want things to go bad. I have only decided to tell you how I feel for your own well being. I am afraid that if you don't realize that this is unacceptable, you may try this on another woman when you are drunk and she will not be so understanding.*
>
> *I do love you and wish you well. I want the best for you, whatever that is, but I also need you to know doing what you did the other night is unacceptable. I hope this*

doesn't affect our friendship, but am willing to deal with the repercussions if it does."

17. The prosecutrix has deposed that on the receipt of the e-mail referred to above, the appellant expressed his sincerest apologies ["*My deepest apologies*"]. The prosecutrix has deposed that she wanted to ignore this fact but she could not. On 01.04.2015, she wrote to her Academic Advisor, Allison Busch, at Columbia University through e-mail (Ex.PW5/D) that she was sexually assaulted and wanted to come home. There was no response of the Academic Advisor till 08.04.2015. During this period she was in contact with her mother and sisters who wanted her to come home but she waited for the response of her Academic Advisor. On 08.04.2015, she received an e-mail (Ex.PW3/C-15) from the Academic Advisor. By this time the prosecutrix had made up her mind to go back home. On 12.04.2015, the prosecutrix again sent an e-mail (Ex.PW3/C-10) to the appellant telling him as to how he had afflicted her life and the life of her family members.

"Xxxx for doing this. xxxx for taking away my confidence, xxxx for making me leave India the country I love. Xxxx for taking advantage of my kindness. xxxx. You were supposed to be my friend. Instead you manipulated me. You hurt me. I said no. I said no many

times. You didn't listen. You pinned my arms. You pulled my underwear down.

In the past two weeks I have blamed myself. I have spent the last two weeks crying, processing. I have thought about death. My mother tried to fly here to get me. My sister has put my nieces on the phone to talk with me so I don't hurt myself, so I remember them and not this, not you.

I have been trying to figure out what I could have done differently, but I couldn't do anything differently. You invited me to a wedding. I was supposed to be going to a wedding with you and anusha or darain or who the xxxx ever. I was supposed to be going to a wedding.

I have spent the past two weeks protecting you, like I did that night. The only thing I know is I didn't do anything wrong but that doesn't matter. I am xxxx scared now. I am xxxx screwed up now. I used to own my sexuality. You took that from me, you forced me to do something I did not want to do. I stopped struggling because I was scared. I wanted to get out. I did get out.

So remember this, what you did that night wasn't one night, what you did that night continues to affect me and my suffering, my pain. It's on your hands, when I carry this forward in life. It is your sin that I carry forward. It is you sin that I have to overcome.

You disgust me……"

18. On the same day i.e. on 12.04.2015 she received an e-mail (Ex.PW3/C-11) from the wife of the appellant namely Anusha which is as hereunder:

"Hi ……Prosecutrix,
I chanced upon your email you sent Mahmood today. I am forced into the situation of checking his mail because he

isn't available at the moment and we still need to figure out our show schedules.
I am deeply disturbed by your email. What you have described is an ordeal. I cannot imagine how you have dealt with it so far. Needless to say that I stand with you. If you require any help of any nature including legal, I will assist. This is completely unacceptable behaviour, especially for me since it happened under my roof.
You'd obviously wonder why I have not confronted Mahmood with this but instead I am writing to you directly. The reason for that is that Mahmood is in a rehab. I don't know how and when it would be appropriate to speak with him. The issue is also complicated by the fact that he is a Bi-polar depressive.
I really don't know how to express how responsible I feel. I have already spoken with his psychiatrist, and we both feel that this matter should be reported to the authorities if you so wish.
Please find me and his family with you in the process of healing, as I hope the process will be of healing.

Deeply troubled.

Anusha."

19. The wife of the appellant had apologized for what had happened to the prosecutrix. The prosecutrix also replied to the e-mail (Ex.PW3/C-12), telling the wife of the appellant not to blame the bipolar disorder of her husband for the sexual assault on her and that rape and sexual assault is executed with power.

"Anusha, I am sorry you found out in this way. I know that this is very painful for you too. You are not

responsible for anything that happened to me. You must not take responsibility for his actions. They are not your actions. They are his. Mahmood is the only one responsible. As you can see I am angry and hurt and processing this is very difficult right now. I cannot do it on my own at the moment and I do not have the resources in India to figure out how to begin the healing process, so I am leaving tonight to go back to New York. I need to be around my family and my colleagues. I need to get help and support for this.

Just please do me a favour and do not blame this on his bi-polar condition, at least in my presence. I know about the condition, but sexual assault has nothing to do with bi-polar and everything to do with power. The assertion of power over another human being."

20. The prosecutrix thereafter left India on 14.04.2015. On 15.04.2015 she again received an e-mail from the wife of the appellant which is as hereunder:

"Hi ....Prosecutrix

I am glad to know that you will be among your friends and family for the moment. I hope that you will be able to overcome this horrible incident. As I said before, his brothers and I will completely support you in whatever you wish to do about it.
I understand how angry you must be and therefore misread my categorical position on such matters. The reason I mentioned Bi-polar is because that is the reason why I don't have access to Mahmood and therefore I am unable to confront him at present.

Best
Anusha"

21. The prosecutrix thereafter went to New York and saw a counsellor at Columbia University because she was very traumatized. By late April, she had decided to file a report about it in the Department of Gender Based Misconduct at Columbia University. It was at that point of time that she decided to return to India to file a complaint against the appellant and also to continue with her research. She wrote to the Head of Fulbright Fellowship intimating him about the sexual assault on her and her desire to go back to India to pursue the case against the appellant but she was advised to stay in America because her research visa was to expire on 11.05.2015. The research visa could not be extended and the prosecutrix had to come to India on a 30 days‟ tourist visa only for the purposes of filing a complaint against the appellant.

22. The prosecutrix came to India on 06.06.2015. Because of her being unaware of the procedure in India and for fear, she visited the police station of New Friends Colony only on 19.06.2015 and gave her complaint (Ex.PW5/A) to a lady police officer. Since the prosecutrix was not in a proper shape of mind, she could not actually state in the complaint as to what had happened to her and therefore she

added that the appellant had forced oral sex on her, in her complaint and appended her initials. She was given a copy of the FIR (Ex.PW1/A) and was taken to AIIMS for her medical examination. However she refused to undergo any gynecological examination. Her statement was recorded under Section 164 Cr.P.C. (Ex.PW5/B) at Saket Courts. She claims to have handed over her laptop, I phone and the dress worn at the time of incident and the photos which she had clicked along with the cat of the appellant on the day of the incident, to the police on 07.07.2015. She also gave the details of e-mail exchanged between her, appellant and his wife. She had taken out the printouts of the screen shots on her mobile phone and had handed over to the police. She also handed over a transcript of the conversation between her and one Ms. Mathangi Krishnamurthy during the period 31.03.2015 to 01.04.2015 (Ex.PW3/C-17 to Ex.PW3/C-20).

23. During cross-examination the prosecutrix has stated that her mobile (MO2) was only the mobile she had used in March 2015. She has stated that seeing the appellant in an intoxicated condition, she was not alarmed as she had seen him in such condition even prior to the date of the occurrence and was also not aware as to whether his

wife Anusha was at home. During cross-examination she admitted of several communications via e-mails and WhatsApp between her and Danish Hussaini after 28.03.2015 but she was not sure if there was any telephonic conversation with him after 28.03.2015. Before going to US in April 2015, the prosecutrix claims to have visited Rajasthan. She has tried to explain that she was making an attempt to forget what was meted out to her by the appellant and wanted to concentrate on her work. She knew that the appellant was alcoholic but had never found him misbehaving under the influence of liquor before the incident. She denied that her version is an exaggerated account of what happened on the day of the occurrence and that she had tried to put up a different case altogether than what was suggested by her in the FIR. She has categorically denied that on 30.03.2015, the appellant had called her and had told her that he did not appreciate her moves to insinuate a closeness with him and that he did not share the same feeling and wished the association to end. She expressed her complete ignorance about the fact as to whether US Embassy rendered counsellor services to American citizens who are subjected to crime and assault in India including emergency services. When the

prosecutrix spoke to the American Embassy, she was specifically told that no help would be available to her as it is a private matter. She claims her ignorance about the advisories rendered by the American Embassy.

24. Since the major thrust of the argument in defence of the appellant is on the fact that at no point of time the appellant was alone with the prosecutrix in his house and specially at the time when the occurrence is said to have taken place which is after 10.09 p.m. and that if at all such an occurrence had taken place, it was consensual, it would be necessary to examine the deposition of Murtaza Danish Hussaini (PW10), Ashish Singh (PW12) and Anuj Pawra (PW20).

25. Murtaza Danish Hussaini (PW10) has deposed that he knew the appellant for the last 10 years as he was his collaborator in the traditional art form of story telling, „*Dastangoi*" since 2005. He had met the prosecutrix in June 2014, who was undertaking research at Gorakhpur on Nath Samraday. Since the prosecutrix wanted to know somebody who was proficient in History and had idea about Gorakhpur, he introduced her to the appellant in June 2014.

26. On 28.03.2015, he was at Dehradun. At about 10:30 p.m, he started receiving WhatsApp messages on his mobile phone from the prosecutrix which clearly indicated that she was sexually assaulted by the appellant. He asked her to leave the house of the appellant immediately. A little later, the prosecutrix is said to have called him while sitting in the cab that she had experienced something which she had never encountered before i.e. the appellant had forced himself upon her. On further query, the prosecutrix told him that the appellant forced oral sex on her. On PW10 asking her as to why she did not leave the house immediately, she responded by saying that the friends of the appellant came at that time and that she was trying to arrange a cab but one of the friends of the appellant told her that it was not safe and that the cab would be arranged by one of them.

27. On hearing about the aforesaid incident, PW10 claims to have gone under shock. While the prosecutrix talked to him, she also cried. PW10 met the police for the first time when he was called in the police station. During the cross-examination, he admitted of knowing the parents, brothers and the in-laws of the appellant. He had talked to the prosecutrix on phone after 28.03.2015 but could not tell the dates

on which such conversation took place. He came to know about the complaint only after the same was lodged with the New Friends Colony police station.

28. With respect to the WhatsApp messages exchanged between him and the prosecutrix, he has stated before the court that neither did he hand over those to the police nor the police asked for it and that he had deleted such messages in April 2015. The prosecutrix had asked him about a criminal lawyer but because of his not knowing anyone in that field, he could not help. He was also forwarded/sent the e. mails exchanged between the prosecutrix and the appellant and his wife sometime after 28.03.2015 but he never responded to those e. mails. PW10 admits of calling the prosecutrix on her mobile on 12.04.2015 after the occurrence on 28.03.2015. During the cross-examination, the aforesaid witness has denied of having received any call from the prosecutrix on 11.06.2015 but admitted that he talked to her on 14.06.2015 and 20.06.2015.

29. Prior to PW10 having talked to the prosecutrix, the wife of the appellant had called him for intervening on behalf of the appellant and for speaking to the prosecutrix. When PW10 talked to the prosecutrix

about settling the issue, she became very angry and told him that after the trauma she had undergone, she would not withdraw her complaint and disconnected the telephone. The aforesaid fact was communicated to the appellant and his wife. PW10 has admitted of receiving number of telephone calls from many friends regarding the issue of settling the dispute. When confronted with the WhatsApp message (Mark PX) exchanged between him and the prosecutrix on 28.03.2015, he stated that such messages did not mention of sexual assault.

30. Ashish Singh (PW12) who is a journalist working with Aaj Tak channel, stated before the trial court that he is a childhood friend of the appellant and hails from Gorakhpur. On 28.03.2015, at about 8:30/ 9:00 p.m. he had gone to the house of the appellant when Ankit and Poonam (students) were having discussion with the appellant. The aforesaid two students left after 5-10 minutes. While he and the appellant were talking, the prosecutrix arrived, who was introduced to him by the appellant. The prosecutrix was asked by the appellant go to the study room since the appellant wanted to talk to PW12. After some time, the prosecutrix joined him and the appellant. PW12

thereafter went downstairs to bring something and came back along with the brother of the appellant after 20-25 minutes. He found the appellant and the prosecutrix sitting in the living room and the appellant was writing something. PW12 sat there for some time and also talked to the prosecutrix and the appellant. The prosecutrix thereafter, wanted to go and PW12 called a taxi on which the prosecutrix left.

31. During cross-examination, PW12 has categorically stated that he left the house of the appellant at about 9:30 p.m. and returned about 10-15 minutes or 20-25 minutes but definitely before 10:00 p.m. He had telephoned his common friend Radhika at about 10:15 p.m. PW12 knew that Darrain was expected there between 9:00 p.m. to 9:30 p.m. He claims to have sent a text message to his wife after arriving at the house of the appellant. [It may be noted here that while PW12 was being cross-examined, he had taken out his mobile phone from his pocket and showed the SMS sent to his wife at 10:02 p.m. on 28.03.2015. This evidence was produced before the court for the first time during trial. An objection was raised by the prosecution that such SMS was not admissible in evidence as it did not comply with the

mandatory requirements of law as laid down in ***Anvar P.V. vs. P.K. Basheer and Others (2014) 10 SCC 473***, in the light of the Indian Evidence Act and Income Tax Act, 2000.] He had talked to prosecutrix about Gorakhpur after his return. The prosecutrix had taken his telephone number. The aforesaid witness has affirmed the fact that Anusha, wife of the appellant, had gone to her parents‟ house and was expected to bring food. He has also confirmed the fact that the prosecutrix was talking from her phone to somebody. The wife of the appellant (Anusha) returned before the prosecutrix had left the house of the appellant. While going, the prosecutrix had hugged the appellant and had waived a good bye. Ashish Singh had gone downstairs to see her off. The prosecutrix is said to have called him after reaching her destination at 23:25:46 hours from mobile telephone No.7042132004. He thereafter left the house of the appellant at about 11:30/12:00 in the night.

32. The aforesaid witness was re-examined on 22.02.2016. During the re-examination, he stated that when he returned to the house of the appellant on 28.03.2015, the prosecutrix was sitting quietly in the room and he also denied other suggestions to him regarding his

tampering or doctoring the SMS message to his wife at 10:02 p.m. in order to help the appellant. However, he has admitted that he did not inform the IO about the SMS message to his wife. On being crossed by the defence counsel, PW12 gave the mobile number of his wife and also stated that the wife of the appellant had come within few seconds of his sending the message to his wife.

33. Anuj Pawra (PW20), owner of Moonshine Café and Bar at Hauz Khas has deposed that the prosecutrix used to stay at Hauz Khas Village and was a regular customer of his café and bar. He had met her in September/October 2014. On 28,.03.2015, the restaurant of PW20 had completed one year and to celebrate that event, he had called his customers. He had spoken to the prosecutrix also for 3-4 times from his telephone number. In his cross-examination with respect to call details, he has stated that he wanted to invite the prosecutrix in the event on that day but she refused by saying that she had to go for a dinner at her friend‟s house. With respect to a call on 28.03.2015 at 22:11:22 hours from the mobile number of the prosecutrix, he has stated that he could not converse with the prosecutrix as the line got disconnected. However, he has stated that

the prosecutrix came to his restaurant at 11:30 p.m. on 28.03.2015. When PW20 asked the prosecutrix about the call which he had received from her, she expressed her ignorance.

34. On behalf of the appellant, it has been argued that from the deposition of the witnesses, certain undisputed facts emerge. The prosecutrix arrived at the house of the appellant between 8:54 p.m. and 10:56 p.m. on 28.03.2015. Ashish Singh (PW12) was present in the house when the prosecutrix had entered the same. Ashish Singh went out of the house around 9:30 p.m. and returned after 20-25 minutes along with the brother of the appellant. The prosecutrix remained in the house for another 45 minutes or so in the house of the appellant. Ashish Singh escorted the prosecutrix downstairs and saw her off. The prosecutrix called Ashish Singh after reaching Hauz Khas at 11:25 p.m.

35. From the CDRs, it has been sought to be established that from 8:48 p.m. to 9:30 p.m., Ashish (PW12) was in the house of the appellant; between 9:34 p.m. and 9:48 p.m. he had moved out to a different cell tower but was back to the cell tower of the appellant at 10:02 p.m. Thereafter, he remained in the house of the appellant till

about 12:00 p.m. The wife of the appellant had arrived before the prosecutrix left the house of the appellant. It was therefore suggested that the sexual assault on the prosecutrix by the appellant after 10:09 p.m. was not possible. The admitted case of the prosecution is that after ending the call on mobile phone with Danish Shaheedi (DW3) at 10:09 p.m. and before she used her mobile for starting the MERU app, the prosecutrix had conversation with the appellant for some time. Then the assault is said to have taken place. The assault, admittedly, had been perpetrated immediately prior to the arrival of Ashish and Roomi in the house of the appellant.

36. From the deposition of Ashish Singh (PW12), it has been argued, it becomes very clear that he texted his wife telling her that he has reached the house of the appellant at 10:02 p.m. Thus, Ashish Singh had left the house of the appellant at 9:30 p.m. and had come back at 10:02 p.m. and thereafter remained in the house of the appellant till mid night. This timing is confirmed by the testimony of the prosecutrix wherein she says that PW12 opened the door for her at 9 p.m. She was asked to wait in another room and she joined the appellant and PW12 about 20 minutes later in the living room.

Thereafter, according to the prosecutrix, Ashish Singh went out of the house and returned later with the brother of the appellant. Ashish Singh thereafter saw her off. The prosecutrix had taken his telephone number and had called PW12 after reaching her destination, which fact is born out from the CDR of the prosecutrix. Thus, the story of the prosecution that the assault took place after 10:09 p.m. in the absence of Ashish Singh is rendered completely false.

37. Mr. Kapil Sibal, learned senior advocate appearing for the appellant has submitted that the veracity of this sequence of events could be tested from other evidence on record.

38. Vikram Kumar, who has been examined as DW5 is a business Analyst, IT Corporate, MERU Cab Company Pvt. Ltd, Hyderabad. He has stated before the trial court that the servers of the MERU cab are located at Bombay. But the technical team which has access on the server is at Hyderabad. He had accessed the booking data and trip data of a customer having mobile No.70421320004 which stood in the name of the prosecutrix. On 28.03.2015, three booking were made from the aforesaid mobile phone through the mobile app at 20:07, 22:12 and 22:35. The aforesaid witness has proved the Excel sheet

print (Ex.DW5/B) and the certificate under Section 65 of the Evidence Act (Ex.DW5/C) as well as (Ex.DW5/B) which contains the name and mobile number of the driver, subscriber‟s first name and the mobile number. He has stated that there were three different timings of pressing of the booking button by the customer. The receipt of the request for booking on the server and the difference of the time between the pressing of the button for request and its receipt at the server can vary from 10-16 seconds, depending on the speed of the network. He also testified to the fact that the normal time taken by a customer or the time of opening the phone till the booking of the cab varies from 30-60 seconds, depending upon the make of the telephone and the network which is being used as well as the personal speed of the customer on the apparatus.

39. Rajesh Pal (DW2), an Assistant Manager, MERU Cab Company Pvt. Ltd. brought the record of MERU cab booking from the mobile number of prosecutrix (Ex.DW2/A). He has also confirmed that three bookings were made on 28.03.2017 through mobile app. The time of the first booking was 20:07 hours, the second booking was at 22:12 hours. The driver‟s name was Vinod Kumar Sharma.

He further testified that the second booking was cancelled by the customer. The time of the third booking was 22:35 hours when the name of the driver was Manish Kumar. This time also, the booking was cancelled by the customer.

40. Thus, what can be inferred from the aforesaid deposition is, as has been argued, that the MERU server registered booking of the prosecutrix at 10:12:07 p.m. This means that the prosecutrix would have begun operating her app sometime before. The timing therefore of the prosecutrix starting her phone can be fixed at 10:10 p.m. or 10:11 p.m. The call was made, admittedly, after the occurrence which is alleged to have taken place after 10:09 p.m. Thus, it has been suggested, that the time window for the whole sequence of events is completely untrustworthy as only a minute or two would have been left for the act complained of to be performed.

41. This could be tested from another documentary evidence. There was supposedly a blank call to Anuj Pawra (PW20) at 10:11:21 p.m. for 20 seconds. This call was apparently made when the prosecutrix was in the house of the appellant and perhaps during the time that occurrence had taken place. The call to the MERU app was

after the occurrence. Thus the attempt at calling the taxi was only before 10:11 p.m.

42. The second argument on behalf of the appellant is in the nature of an alternative argument that, if at all, such an occurrence had taken place, it was with the consent of the prosecutrix. It has been suggested that the e-mail of the prosecutrix on 30.03.2015 clearly depicts that there was some kind of an affectionate/intimate relationship between the appellant and the prosecutrix. A day after the alleged occurrence, the prosecutrix was communicating with the appellant that she liked him and that she considered him to be a good friend and respected him but, what happened on the night of 28.03.2015 was not right. The prosecutrix had herself offered an explanation for the same and had stated that she knew that the appellant was in a difficult space and was having some issues. However, simultaneously, she stated that on 28.03.2015, the appellant *went really too far*. She had also stated that the appellant was drunk and was continuously asking for sexual favours but she had declined and had expressed that she did not want to go for it. However, the appellant became forceful and the prosecutrix alleges to have *gone along* because she did not want the

matter to escalate. She thereafter said that *it was not what she wanted* and it was only because of the fear of something bad happening to her if she went along. In the same breath, the prosecutrix has stated that the experience was new for her but she still remained attracted to the appellant. She felt bad with what had happened and she did not know how to say this to the appellant. She was not even sure that she would confront the appellant with this happening. Thereafter, the prosecutrix has clearly stated that "in the end she consented, but it was because of pressure and the physical force of the appellant on her". Since she did not want the things to go bad, she decided to tell the appellant that she felt strongly for the well being of the appellant. However, to what she was subjected to, was unacceptable and in case the appellant tried this with another woman while under intoxication, she would not be as understanding. Later, the prosecutrix had also written to the appellant that she hoped that this incident would not affect their friendship but she was willing to deal with the repercussions if at all it took place.

43. Mr. Sibal, learned senior advocate argued that even if the act was not with her consent, she actually communicated something which was taken as a consent by the appellant.

44. Explanation (2) to Section 375 of the IPC defines consent in the context of the offence of rape. It sates as follows:

> ***"Explanation 2:-*** *Consent means an unequivocal voluntary agreement when a woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:*
>
> *Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*
>
> ***Exception 1.-*** *A medical procedure or intervention shall not constitute rape.*
>
> ***Exception 2-*** *Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."*

45. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act; provided that a woman who does not physically resist to the act of penetration shall not by the reason *only* of that fact be regarded as consent to sexual activity. Thus, consent as defined under Section 375 of the IPC includes non-verbal and verbal communication. It has been argued that what has been communicated to the appellant at the relevant time is important. It was suggested that

it was communicated to the appellant that there was consent because of the following circumstances:

(a) The prosecutrix had been in the company of the appellant and continued to be so even when she knew about his drinking habits and also when he was heavily drunk and befuddled on that day. The prosecutrix had exchanged kisses and hugs with the appellant in the past. The prosecutrix had accepted a kiss from the appellant even while the appellant was in the company of his wife and the wife had, for a brief period, gone out of the room, on an earlier occasion.

(b) The prosecutrix had been cracking jokes and indulged in playful banter immediately prior to the occurrence.

(c) During the act, the prosecutrix feigned orgasm.

(d) Prior to the act, the appellant had asked her for sexual favours to which she did not stoutly resent or deny.

(e) The prosecutrix continued to remain in the company of the appellant.

(f) That the prosecutrix was under fear, was absolutely unknown to the appellant, (refer to Section 90 of the IPC which provides that a consent is not such a consent if it is given by a person under fear and injury or under a misconception of fact and if the person doing the act knows, or has reason to believe that the consent was given in consequence of such fear or such misconception.)

(g) The conduct of the prosecutrix, post occurrence, namely her remaining in the house when Ashish Singh (PW12) and Roomi, brother of the appellant, came back to the house of the appellant.

(h) The prosecutrix did not communicate about this occurrence to either PW12 or the brother of the appellant or Anusha, the wife of the appellant who later arrived in the house and lastly the e-mail dated 30.03.2015.

46. With reference to the e-mail dated 30.03.2015, it has been argued that the e-mail was affectionately remonstrative that the appellant went a bit too far on the other night and that the prosecutrix

went along and feigned orgasm. The history of intimacy and the unabashed liking/attraction of the prosecutrix towards the appellant may have given an impression to the appellant of consent. The orgasm which was feigned by the prosecutrix, avowedly for the purposes of preventing further damage to her, may have been taken by the appellant as willingness on the part of the prosecutrix because it understood/misunderstood as a non-verbal communication of consent. Absence of any real resistance of any kind re-affirms the willingness. An expression of disinclination alone, that also a feeble one, may not be sufficient to constitute rape.

47. In the present case, the unwillingness of the prosecutrix was only in her own mind and heart but she communicated something different to the appellant. If that were not so, the prosecutrix would not have told the appellant that he had gone too far on that night. At what point of time, during the act, did she not give the consent for the same, thus, remains unknown and it can safely be said that the appellant had no idea at all that the prosecutrix was unwilling. It is not unknown that during sexual acts, one of the partners may be a little less willing or, it can be said unwilling but when there is an assumed

consent, it matters not if one of the partners to the act is a bit hesitant. Such feeble hesitation can never be understood as a positive negation of any advances by the other partner.

48. The conduct of the prosecutrix, it has been argued, suggests volumes about the falsity of the prosecution version. The communication of the prosecutrix via e-mail dated 30.04.2015 is one such incidence of the prosecution version to be absolutely incorrect. A person who has been violated against her wishes would not be so understanding as to confront the appellant with such simple reproach. No communication on the next day between the prosecutrix and the appellant further buttresses the aforesaid argument. A day after the occurrence, the prosecutrix cannot be said to be under any fear of reprisal or reaction and her not approaching the issue with the appellant is rather surprising.

49. Mr. Sibal has argued that within few hours of the e-mail exchange of 30.03.2015 referred to above, the appellant had called the prosecutrix on her phone which lasted for 76 seconds. This fact has not been stated by the prosecutrix and when she was confronted, she has denied the same. The CDR records reveal the same and it was not

in the mouth of the prosecutrix to have completely denied this fact or to keep it hidden from the prosecution or to feign ignorance about the same. She cannot be expected to have forgotten about the aforesaid call as it was made after the e-mail message to the appellant by her. It is thereafter, as has been submitted, that there was another exchange of e-mail on 12.04.2015, wherein the prosecutrix was abusive and spoke about her having been raped despite her resistance. It has also been suggested that after the aforesaid call of the appellant to the prosecutrix, that for the first time, she set up a case of sexual assault which becomes evident from the communication on 31.03.2015 to Mathangi, a friend of the prosecutrix and thereafter to her supervisor on 01.04.2015. The intensity/seriousness of the allegation kept on increasing successively.

50. In his statement recorded under Section 313 of the Cr.P.C., the appellant has admitted that the prosecutrix had sent him an e-mail (Ex.PW3/C-9) to which he had replied as "my sincerest apologies". He has stated that it was written only after reading the first two lines of the e-mail as the appellant was busy that morning and was constantly in communication with other artists and writers regarding

his performance of „*Dastangoi*". The first impression of the appellant after going through 2-3 lines of the e-mail dated 30.03.2015 was that the prosecutrix was upset because full attention was not given to her on the last night. Only after the entire e-mail was read by him later that he realized the necessity of calling the prosecutrix and telling her that there never was any intimacy between him and her and that it shall never be and he did not want to continue any alliance with her.

51. The denial of the prosecutrix about this telephone call of the appellant is very consequential and appears to be deliberate. The reaction of the prosecutrix became different only after this call by the appellant to her.

52. Apart from the above, Mr. Sibal, learned senior advocate for the appellant also drew the attention of this Court to the response of the wife of the appellant which made it very obvious that the appellant was a bipolar patient and was under a rehabilitation regimen.

53. So far as the conduct of the prosecutrix is concerned, it has been argued, that she has deliberately avoided to come with clean hands before the police and before the Trial Court. It was suggested that she deleted the WhatsApp messages to destroy inconvenient evidence and

has made best efforts to conceal the deletion of the first communication after the alleged incident. The telephone was handed over to the police on 07.07.2015 only. She also concealed a pretty long conversation between the appellant and herself on 30.03.2015 soon after the exchange of the email. With respect to the call to Anuj Pawra (PW.20) and about her fixing a MERU cab also, certain vital information have been withheld by her. Coupled with all this, the delay in lodging the FIR has also not been properly explained.

54. The prosecutrix, it has been argued, cannot be believed as she is the sole witness/victim of the occurrence but her evidence is not of a stellar quality. In ***Rai Sandeep @ Deepu vs. State: (2012) 8 SCC 21***, the Supreme Court has defined as to who is a "sterling witness". A "sterling witness" is one who is of a very high quality and caliber, whose version is unassailable and the court considering the version of such a witness should be in a position to accept it on, its face value without any hesitation. The Supreme Court in Rai Sandeep (supra) has gone on to state that to test the quality of such a witness, the status of the witness would be immaterial and the relevant consideration would only be the truthfulness of the statement made by such a witness. If the

statement is consistent right from the starting point till the end and is found to be natural and consistent with the case of the prosecution, his deposition is safe to be relied upon. There should not be any prevarication in the version of such a witness to be called a "sterling witness". The version of such witness should have a correlation with each and every supporting material of the case and should match with the version of every other witness. It was summed up by the Supreme Court by stating that if the version of a witness, on the core spectrum of the crime, remains intact and the other materials match such version in essential particulars, then only, it would enable a Court to rely upon the core version. The test to be applied for considering such witness to be truthful is similar to the test applied in case of circumstantial evidence where there are no missing links in the chain of the circumstances to hold an accused guilty of the offence alleged against him.

55. Thus, it was argued that there are serious doubts as to the possibility of the commission of the act complained of, in the light of the independent record namely the CDRs of Ashish Singh (PW.12) and MERU booking records. The testimony of the prosecutrix is at

complete variance with other prosecution witnesses. Even she (prosecutrix) has been inconsistent on very many material particulars. A reference has been made to the case of ***Tameezuddin @ Tammu vs State Of (Nct) Of Delhi*** *: **(2009) 15 SCC 566,*** where the Supreme Court has held as here under:

> *"It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."*

56. As opposed to the aforesaid submissions, Ms.Vrinda Grover, learned counsel appearing for the complainant/prosecutrix has argued that the averments made by her in the FIR, the statement given by her under section 164 of the Cr.P.C. and her deposition before the Trial Court are absolutely consistent with respect to the guilt of the appellant. The appellant had committed forced oral sex upon the prosecutrix within the meaning of section 375(d) of the IPC. On 30.03.2015, the appellant, in his email reply to the prosecutrix,

admitted of the same and apologized to her for having committed the act without her consent and against her will.

57. It was further submitted on behalf of the prosecutrix that she was unable to cope with the emotional and mental trauma and therefore she returned to USA. Only when she became confident of the support from her family and her friends in the USA that she gathered courage to return to India to lodge the FIR on 19.06.2015 at New Friends Colony police station.

58. The evidence of the prosecutrix, it has been urged, is of sterling quality and is consistent with other evidence collected during the course of trial and matches with the independent records comprising emails, sms, WhatsApp communication and Call Data Records (CDRs). It has been vehemently argued that the prosecutrix categorically said „no" to the advances of the appellant when he began to kiss her and also pushed him away. The statement of the prosecutrix clearly reveals that while the appellant attempted to disrobe her, she kept on pulling her underwear up. It was only because of the physical strength of the appellant that he pinned the prosecutrix down and forced oral sex on her.

59. Learned counsel for the prosecutrix has drawn special attention to the statement of the prosecutrix where she has said that she became scared and a thought passed in her mind that she would also meet the same fate as *Nirbhaya* and therefore, she faked an orgasm because she wanted to end the traumatic encounter. In the first communication to the appellant after the incident, the prosecutrix made him known that the act was against her will and without her consent and therefore was a grave violation of her sexuality, which was totally unacceptable to her. In fact, in her deposition, the prosecutrix has vividly stated about the act of the appellant upon her.

60. In so far as the other material particulars of the case matching with the version of the prosecutrix is concerned, it has been submitted that on 28.03.2015, the appellant had spoken to the prosecutrix over phone and had invited her to his house for dinner in the evening. Later, the programme was changed and the appellant informed the prosecutrix that they would be going to a wedding and also asked her to bring Rs.1,000/- as gift for the wedding. In the night of 28.03.2015, while for a brief period, when the appellant was alone in the company of the prosecutrix, he subjected her to rape. Immediately after the

rape, the prosecutrix communicated with the Danish Hussaini (PW10), a common friend of the appellant and her and informed him that something untowards had happened which had made her upset and that she urgently needed to speak to him. After leaving the house of the appellant, the prosecutrix gave PW.10, on telephone, the detailed version of how the appellant had violated her bodily integrity. This conversation lasted for over half an hour. All these sequence of events have been cogently narrated by the prosecutrix in her deposition before the Trial Court.

61. The fact that the appellant wrote back to the prosecutrix expressing his apology is an indication of an acceptance of the guilt of the appellant and it has to be read as an admission and subsequent conduct of the appellant, under section 8 of the Evidence Act.

62. In the WhatsApp conversation between the prosecutrix and her friend Mathangi Krishnamurthy (Ex.PW.3-C/16) and her email to her academic advisor Allison Busch (Ex.PW.3-C/14 & 15), the prosecutrix has laid bare her heart and mind regarding the trauma faced by her. Thereafter, the email of the prosecutrix to the appellant further establishes that the occurrence had taken place as alleged and

she made it clearly known to the appellant that she is going to prosecute him. The wife of the appellant replied to her email which also indicates that she accepted the accusation and believed her statement. The email exchanged between the wife of the appellant and the return of the email have been exhibited as Ex.PW.3-C/11 and Ex.PW.3-C/13. In April, 2015, the prosecutrix reported about the rape to Columbia University, Department of Gender based misconduct and also informed one Adam Grotski (Head of Fulbright Administration) that she has been sexually assaulted and had returned to US to cope with the post-incident trauma. Since the visa was not extended, the prosecutrix obtained a tourist visa, only for the purposes of lodging the complaint against the appellant.

63. It has been argued that if upon consideration of the prosecution case in its entirety, the testimony of prosecutrix inspires confidence, there should be no necessity of corroboration of her evidence and such hunt for corroboration has to be avoided. The sole testimony of the prosecutrix in cases of rape is sufficient for conviction. It has been argued that the Supreme Court in ***State of Punjab vs. Gurmeet Singh***:

(1996) 2 SCC 384 has made the following observations with respect to the evidence of a victim of sexual assault.

> *"The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault*

is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:

> *"A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the*

> *testimony of the prosecurtix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."*

64. Reference has also been made to the judgments delivered in ***Aslam vs. State of Uttar Pradesh: (2014) 13 SCC 350***; ***Ravinder vs. State of Madhya Pradesh***: ***(2015) 4 SCC 491***; and ***Om Prakash vs. State of Uttar Pradesh***: ***(2006) 9 SCC 787*** to canvas the proposition that victim of sexual assault cannot be treated as an accomplice and therefore the evidence of the victim does not require any corroboration and that it must be relied upon by the Court if such statement is cogent and trustworthy.

65. It has next been argued that even if there are some minor discrepancies in the version of the prosecutrix and that also on non-material aspects, that does not entitle the prosecution case to be

thrown out. The pre and post incident conduct of the prosecutrix, it has been argued, cannot be faulted with to prop up a false and improbable theory. The absence of corresponding CDRs when the prosecutrix spoke about having talked to the appellant at 4:30 p.m. in the evening of 28.03.2015 or when the prosecutrix stated that she was asked by the appellant to go to a wedding and the prosecutrix was not found to be attired in a wedding dress are ancillary matters and cannot be given any undue importance or relevance.

66. The testimony of the prosecutrix has been fully corroborated by the evidence of Danish Hussaini (PW10) The WhatsApp chat conversation completely matches with the prosecution version that the prosecutrix was trying to book a taxi after the incident and she also contemplated of taking an auto and was suggested that she should not hire an auto in the night as it is dangerous. It has been submitted on behalf of the prosecutrix that in the WhatsApp chat, the prosecutrix deliberately did not write that she had been raped because it was not the incident which could have been summarized in a WhatsApp conversation. This cannot be read as an evidence against the appellant as not displaying the conduct of a victim of sexual assault.

67. The prosecutrix was in a hostile environment and therefore she had to be careful in forwarding messages. The other inmates of the house were all closely associated to the appellant and the prosecutrix could not have taken any risk. However, the urgency which she depicted in the WhatsApp conversation speaks for itself.

68. The subsequent conduct of the prosecutrix, it has been argued, is very normal, natural and reasonable as she had been raped by a friend and not a stranger. That the prosecutrix went to Hauz Khas village because she did not want to be alone. She had also been advised by Danish Husaini (PW10) not to remain alone and to take care of herself. There is no evidence, it has been argued, that at Hauz Khas, she indulged in any conviviality. If the prosecutrix chose a busy place to be in, to overcome her trauma, the same should not be read as an unnatural conduct of a victim of rape.

69. The Supreme Court in ***Mukesh vs. State of Chhattisgarh***: ***(2014) 10 SCC 327,*** which was a case of rape, has held that the state of mind of the prosecutrix cannot be precisely analyzed on the basis of speculation because each person reacts differently to a particular stressful situation.

70. The delay in the lodging of the FIR has been satisfactorily explained and once the explanation is found to be satisfactory, no adverse inference can be drawn against the prosecutrix.

71. The Supreme Court in ***State of Uttar Pradesh vs. Manoj Kumar Pandey***: ***(2009) 1 SCC 72***; ***Satpal Singh vs. State of Haryana: (2010) 8 SCC 714***; and ***Santhosh Moolya and Ors. Vs. State of Karnataka: (2010) 5 SCC 445*** has held that the normal rule regarding the duty of the prosecution to explain the delay in lodging the FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of the FIR does not per se apply to cases of rape. It was held by the Supreme Court that such was the consistent view for a very long time.

72. More or less similar arguments have been advanced on behalf of state by Ms.Richa Kapoor, learned Additional Standing Counsel.

73. From a conspectus of the entire of facts and circumstances and the arguments advanced on behalf of the parties, what is clearly indicated is that the prosecutrix had become very familiar with the appellant in recent past and had opportunity to interact with him on several occasions. The alcoholism of the appellant was not a secret for the prosecutrix.

74. The relationship extended beyond a normal friendship or a relationship between a guide and a researcher. According to her own version, physical contact with the appellant in the nature of a kiss or a hug was being accepted by the prosecutrix without any protest. In fact, on one occasion, while the prosecutrix was in the company of the appellant and his wife and the wife of the appellant had been moving from one room to another, the prosecutrix and the appellant both had taken a bold step of kissing each other. True it is that such past conduct will definitely not amount to consent for what happened in the night of 28.03.2015, if at all it had happened, as for every sexual act, everytime, consent is a must. The consent does not merely mean hesitation or reluctance or a „No" to any sexual advances but has to be an affirmative one in clear terms.

75. Section 375 of the IPC reads as hereunder:

> *"**375 Rape**—A man is said to commit "rape" if he-—*
>
> *a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
> *b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation I.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

76. The explanation (2) and the proviso make it very clear that consent has to be categorical, unequivocal, voluntary and could be given by words, gestures or any form of verbal or non-verbal communication signifying willingness to participate in a specific sexual act. By way of precaution, a proviso has been added to the aforesaid explanation namely that a woman who does not physically resist an act of rape shall not by that reason *only* be regarded as having consented to such sexual activity.

77. The WhatsApp communication between the prosecutrix and the appellant on 30.03.2015 signifies that what happened in the night of 28.03.2015 was not acceptable to her because it was something which

she never wanted. The communication further reads that the appellant, on that night went too far. This obviously means that there were some earlier encounters which may not have been of such intensity or passion but physical contact in some measure was accepted. Under such circumstances, this Court is required to see as to what was communicated to the appellant. It is a matter of common knowledge that different persons have different inclinations for sexual activity and immediately preceding the act, there are different ways of people of responding to the advances, entreaties or request.

78. Instances of woman behavior are not unknown that a feeble „no" may mean a „yes". If the parties are strangers, the same theory may not be applied. If the parties are in some kind of prohibited relationship, then also it would be difficult to lay down a general principle that an emphatic „no" would only communicate the intention of the other party. If one of the parties to the act is a conservative person and is not exposed to the various ways and systems of the world, mere reluctance would also amount to negation of any consent. But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically

proficient, and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble „no‟, was actually a denial of consent.

79. Section 90 of the IPC reads as hereunder:

> *"**90. Consent known to be given under fear or misconception**.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."*

80. What the aforesaid section of the IPC mandates is that the accused must know that the consent which was given was under a fear of injury or misconception of fact.

81. The fact situation with which this Court is faced is like this: The prosecutrix has come to the house of the appellant on his invitation. Both the prosecutrix and the appellant have consumed liquor in varying measures. The appellant has been displaying drunken-cum-lachrymose behavior from before the arrival of the prosecutrix. The prosecutrix, out of concern for the appellant, mixes a light drink of vodka for the appellant. In the immediate past, two of the associates of the appellant had left the house of the appellant for a brief period, only to return later. Another person namely Darain Shahidi (DW.3) was expected to arrive but he disclosed his unwillingness/incapability of coming to the house of the appellant, which was heard by the prosecutrix as well. The prosecutrix continues to chat with the appellant and at times has been asking personal questions regarding the cause of trouble of the appellant to which the appellant responded that it was his wife and mother. There are some exchanges between the parties regarding their being good persons in their individuals rights. The prosecutrix starts feeling *motherly* towards the appellant. Then the appellant communicates his desire to *suck* her. The prosecutrix says „No" and gives a push but ultimately goes along. In

her mind, the prosecutrix remembers a clip from the case of Nirbhaya, a hapless girl who was brutally raped and killed, when the maelfactor had declared that if she (Nirbhaya) did not resist, she might have lived.

82. There is no communication regarding this fear in the mind of the prosecutrix to the appellant. The prosecutrix makes a mental move of feigning orgasm so as to end the ordeal. What the appellant has been communicated is, even though wrongly and mistakenly, that the prosecutrix is *okay* with it and has participated in the act. The appellant had no opportunity to know that there was an element of fear in the mind of the prosecutrix forcing her to go along. After completing the act, the appellant asks the prosecutrix that he wishes to do it again. In the mean time, the privacy is disturbed with the ringing of the door bell and the arrival of the two associates of the appellant. In such a scenario, when there are two competing claims juxtaposed each other, the call is difficult.

83. The questions which arise are whether or not there was consent; whether the appellant mistakenly accepted the moves of the prosecutrix as consent; whether the feelings of the prosecutrix could be effectively communicated to the appellant and whether mistaking

all this for consent by the appellant is genuine or only a ruse for his defence. At what point of time and for which particular move, the appellant did not have the consent of the prosecutrix is not known. What is the truth of the matter is known to only two persons namely the appellant and the prosecutrix who have advanced their own theories/versions.

84. In order to answer the aforesaid questions, it would be necessary to see what the word "consent", especially in relation to sexual activity, connotes. In normal parlance, consent would mean voluntary agreement of a complainant to engage in sexual activity without being abused or exploited by coercion or threats. An obvious ingredients of consent is that, as consent could be given, it could be revoked at any time; rather any moment. Thus, sexual consent would be the key factor in defining sexual assault as any sexual activity without consent would be rape. There is a recent trend of suggesting various models of sexual consent. The traditional and the most accepted model would be an "affirmative model" meaning thereby that "yes" is "yes" and "no" is "no". There would be some difficulty in an universal acceptance of the aforesaid model of consent, as in

certain cases, there can be an affirmative consent, or a positive denial, but it may remain underlying/dormant which could lead to confusion in the mind of the other.

85. In an act of passion, actuated by libido, there could be myriad circumstances which can surround a consent and it may not necessarily always mean yes in case of yes or no in case of no. Everyone is aware that individuals vary in relation to expositing their feelings. But what has to be understood is that the basis of any sexual relationship is equality and consent. The normal rule is that the consent has to be given and it cannot be assumed. However, recent studies reveal that in reality, most of the sexual interactions are based on non-verbal communication to initiate and reciprocate consent. Consent cannot also be analyzed without taking into account the gender binary. There are differences between how men and women initiate and reciprocate sexual consent. The normal construct is that man is the initiator of sexual interaction. He performs the active part whereas a woman is, by and large, non-verbal. Thus gender relations also influence sexual consent because man and woman are socialized into gender roles which influence their perception of sexual

relationship and expectation of their specific gender roles with respect to the relationship. However, in today‟s modern world with equality being the buzzword, such may not be the situation.

86. Today, it is expected that consent be viewed as a clear and unambiguous agreement, expressed outwardly through mutually understandable words or actions. Inheres in it is the capacity to withdraw the consent by either party at any point of time. Normally, body language or a non-verbal communication or any previous activity or passivity and in some cases incapacitation because of alcohol consumption, may not be taken as consent. However, in the present case, as has been stated, the appellant has not been communicated or at least it is not known whether he has been communicated that there was no consent of the prosecutrix.

87. Another important aspect which is required to be gone into, especially for the purposes of this case, is whether it would be necessary for a just decision in this case, to look into the evidence/circumstances of the display of Rape Trauma Syndrome (hereinafter called RTS) by the prosecutrix.

88. The RTS is the psychological trauma experienced by a rape victim which includes disruption of normal, physical, emotional, cognitive and interpersonal behavior. The theory of RTS was first propounded by a psychiatrist Ann Wolbert Burgess and sociologist Lynda Lytle Holmstrom in 1974. It was described as a cluster of psychological and physical science, symptoms and reactions which are common to most rape victims immediately following and for months or years after the incident of rape. Three stages have been identified in RTS: (a) the acute stage, (b) the outer adjustment stage and (c) the renormalization stage. The acute stage occurs immediately after the occurrence and it may include disorganized behavioral pattern like diminished alertness, hysteria, confusion, bewilderment and may be, extreme sensitivity to the reaction of other people. The second stage comes when the victim has assumed his/her normal lifestyle but is still suffering from profound internal turmoil. This stage could last for several months and could extend to several years also after rape. This stage is identified with refusal to discuss rape or analyzing why it happened, a general sense of helplessness, panic attacks and disassociation meaning, a kind of feeling that one is not attached to

one‟s body. The rape victims in this stage can see the world as a more threatening place to live in. In the renormalization stage, adjustment begins and the incident no longer remains the central focus in the life of the victim. The negative feelings of guilt and shame are resolved and the survivor does not blame herself for the attack.

89. The reaction of the individual to similar fact situations can vary and, therefore, it cannot be said that a particular conduct of a person, which is not in conformity with the general conduct of another who, would be faced with similar circumstance, that such conduct belies the allegations. It would thus be unfair to the complainant/victim to judge the veracity of her accusation on the basis of RTS displayed by her. If a rape victim resorts to an individual/specific coping mechanism, that ought not to delegitimize her reaction to rape.

90. For the aforesaid reason, this Court does not propose to analyze the post rape conduct of the prosecutrix as suggested on behalf of the appellant. Having said so, it can safely be held that the circumstances which have been suggested by the defence namely: (i) the prosecutrix not running away from the place of occurrence; (ii) her remaining present in the house of the appellant for about good 45 minutes post

rape; (iii) not divulging about the act to either PW.12 or brother of the appellant who came along with PW.12 or to the wife of the appellant; (iv) no communication with the appellant till 30.03.2015; (v) first communication to the appellant being in the nature of a minor abjuration; (vi) the prosecutrix booking a MERU cab and cancelling the same; (vii) going to the restaurant at Hauz Khas; (viii) calling PW.12 after reaching Hauz Khas hotel; (ix) taking inordinately long time to register the FIR etc, could be and perhaps are manifestations of post-rape trauma and disorientation of the prosecutrix.

91. There could be explanation for each of such conduct of the prosecutrix. The explanation regarding the delay in lodging the FIR may be bleak but not totally unacceptable. A lady who is a foreign national and has been violated by a close acquaintance, would require support of the family and others for fighting litigation in India. The explanation that only after the prosecutrix could garner the support of her family and the people of the department, back in the US, gave her support for her to muster courage to come back to India to lodge the FIR, is not wholly unacceptable. There cannot be any gainsaying that if at all the prosecutrix was raped without her consent and will, she

would suffer trauma and in that event, her not immediately disclosing such facts to close acquaintances of the appellant and perhaps the wife of the appellant is also understandable. That the prosecutrix was advised by PW.10 not to remain alone, made her go to a restaurant at Hauz Khas as her roommate was not available in her flat that night, is also quite explicable. The prosecutrix booking a MERU cab and then cancelling it, can also not be read as if nothing had happened to her. Perhaps, for being violated/hurt by a close acquaintance and that also in his house, prosecutrix may have become disoriented. With the arrival of PW.12 and the brother of the appellant, the prosecutrix might have felt safe to stay in the house for some more time but not safe enough to tell them about the occurrence. She had been introduced to the aforesaid two persons only in the evening of 28.03.2015 and the prosecutrix cannot be expected to know how they would react to such fact situation.

92. This Court does not also deem it necessary to go into the details of the timings suggested by the parties regarding various happenings as those are only in the nature of guesstimates, though sought to be corroborated by admissible secondary evidence. Issues regarding

timing of the arrival of the prosecutrix in the house of the appellant; PW-12 leaving house for a brief period and then coming back; booking of MERU cab by the prosecutrix; timing of texting and calling PW-10 etc pale into insignificance when it is doubtful as to whether the appellant had the requisite mental intent of violating the prosecutrix and whether he had genuinely mistaken some verbal/non verbal communication as consent and whether the element of fear in the mind of the prosecutrix was made known or communicated to the appellant.

93. While saying so, this Court has taken into account that human memory cannot always be taken to be sacrosanct. Theories propounded about the concept of a *memory* indicate that memory does not work like a video recorder. If a person sees an event, he sees/receives only fragments of such information from the circumstance which is sighted. Those fragments are then mixed with other information from other sources viz any prior information, which is stored in memory, and some kind of an expectation as to what would happen, as also, inferences which could be derived from the set of circumstances or conclusions arrived at after the event has

occurred. All these conglomerate into an information which is then stored in a person‟s memory with respect to that event. It has been scientifically proved that sometimes, such memory could be accurate but it may not be necessary that under all circumstances it would be the same what was perceived by that person. There is no guarantee of any exactitude about the memory of an incident. Studies in the field has also revealed that when certain fact gets into the memory of a person, it does not remain unchangeable. It is highly fluid, which could change with the passage of time. Whenever a person would think about an event about which he has some memory or would revisit mentally the aforesaid circumstance, the stored memory in the mind changes in some measure. Such changes could take many forms. Many a times, the memory changes with the belief of the person having it in his mind and his inferences about the cause of the occurrence. So far as timings of particular happenings are concerned, it may not catch the attention of a witness and the memory which is stored in his mind is only a rough estimate of the time i.e. whether the occurrence had taken place in the morning, in the early afternoon, evening or night. There is also a possibility of remembering the

happening of a particular event if it is associated with another happening. As for example, a person having lunch in a restaurant sees somebody hitting at the waiter leading to his death. The witness may or may not remember the face of the person or the victim but would remember that the occurrence had taken place sometimes in the afternoon when he had visited the restaurant for lunch. However, it may not be possible for him to remember exactly that the timing of the occurrence was 1.30 pm or 1.45 pm. There can only be a rough assessment about the spacing of events which are associated with a particular happening.

94. The study of memory also tells us that the memory works under a variety of ways. If a circumstance is identified with a particular timing say lunch time or dinner time, the memory regarding an occurrence taking place at the lunch time, after the lunch time or before the dinner time can be accurate. However, the hunt for accuracy to the seconds and minutes is nothing but chasing illusion.

95. The Supreme Court in ***Pragan Singh vs. State of Punjab & Ors***.: ***(2014) 14 SCC 619*** had the occasion to examine as to how memory works and whether there should be complete reliance on such

human memory even after a lapse of time. In the aforesaid case, a plea was raised by the accused persons that the manner in which the narration was made gave an impression that guess work or conjectures were being resorted to. It was suggested that the witnesses could not have remembered the faces of the accused after 7½ years of the occurrence as memory fades by that time. Though, in that case, the Supreme Court was of the view that the memory of an eye witness who had seen the accused persons killing the deceased would not be easily erased or forgotten more so when the deceased was a friend and the witness himself had narrowly escaped from being killed. Under such circumstances, the Supreme Court was of the view that the memory regarding the face of the accused would be etched in the mind of the witness for a long time. However, while deciding the aforesaid case, the Supreme Court dealt with the manner in which the memory of a person works. In **Pragan Singh** (Supra), the Supreme Court has held as hereunder:-

> ***18.*** *Before entering upon the discussion on this aspect specific to this case, we would like to make some general observations on the theory of "memory". Scientific understanding of how memory works is described by*

Geoffrey R. Loftus while commenting upon the judgment dated 16-1-2002 rendered in Javier Suarez Medina v.Janie Cockrell [Case No. 01-10763, decided on 16-1-2002 (5th Cir 2002)] by the United States Court of Appeals. He has explained that a generally accepted theory of this process was first explicated in detail by Neisser (1967) and has been continually refined over the intervening quarter-century. The basic tenets of the theory are as follows:

18.1. *First, memory does not work like a video recorder. Instead, when a person witnesses some complex event, such as a crime, or an accident, or a wedding, or a basketball game, he or she acquires fragments of information from the environment. These fragments are then integrated with other information from other sources. Examples of such sources are: information previously stored in memory that leads to prior expectations about what will happen, and information—both information from external sources, and information generated internally in the form of inferences—that is acquired after the event has occurred. The result of this amalgamation of information is the person's memory for the event. Sometimes this memory is accurate, and other times it is inaccurate. An initial memory of some event, once formed, is not "cast in concrete". Rather, a memory is a highly fluid entity that changes, sometimes*

dramatically, with the passage of time. Every time a witness thinks about some event—revisits his or her memory of it—the memory changes in some fashion. Such changes take many forms. For instance, a witness can make inferences about how things probably happened, and these inferences become part of the memory. New information that is consistent with the witness's beliefs about what must have happened can be integrated into the memory. Details that do not seem to fit a coherent story of what happened can be stripped away. In short, the memory possessed by the witness at some later point (e.g. when the witness testifies in court) can be quite different from the memory that the witness originally formed at the time of the event.

18.2. *Memory researchers study how memory works using a variety of techniques. A common technique is to try to identify circumstances under which memory is inaccurate versus circumstances under which memory is accurate. These efforts have revealed four major sets of circumstances under which memory tends to be inaccurate. The first two sets of circumstances involve what is happening at the time the to-be-remembered event is originally experienced, while the second two sets of circumstances involve things that happen after the event has ended.*

18.3. *The first set of circumstances involves the state of the environment at the time the event is experienced. Examples of poor environmental conditions include poor lighting, obscured or interrupted vision, and long viewing distance. To the degree that environmental conditions are poor, there is relatively poor information on which to base an initial perception and the memory that it engenders to begin with. This will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.*

18.4. *The second set of circumstances involves the state of the observer at the time the event is experienced. Examples of sub-optimal observer states include high stress, perceived or directly inflicted violence, viewing members of different races, and diverted attention. As with poor environmental factors, this will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.*

The third set of circumstances involves what occurs during the retention interval that intervenes between the to-be-remembered event and the time the person tries to remember aspects of the event. Examples of memory- distorting problems include a lengthy retention interval,

which leads to forgetting, and inaccurate information learned by the person during the retention interval that can get incorporated into the person's memory for the original event.

The fourth set of circumstances involves errors introduced at the time of retrieval i.e. at the time the

person is trying to remember what he or she experienced. Such problems include biased tests and leading questions. They can lead to a biased report of the person's memory and can also potentially change and bias the memory itself."

96. The prosecutrix (PW5) can of course be called a sterling witness as, by and large, the sequence of events narrated/deposed by her, matches with the evidence of the PW.10 and PW.12. But whether the allegation of the prosecutrix that the appellant, without her consent and will, sexually abused her by use of force, is to be believed, is the question which this Court is beset with.

97. Ms.Vrinda Grover, learned advocate for the prosecutrix has submitted that the argument of the act being consensual was never raised by the appellant before the Trial Court and therefore, the

appellant would be precluded from advancing such argument at the stage of the appeal. In support of the aforesaid proposition, attention has been drawn to the case of **Pragan Singh** (Supra), which was a case of murder and the appellants had taken the plea that they had refused to participate in the TIP because one of the prosecution witnesses was shown the faces of the appellants in police station after their arrest. No reason had been assigned by them about their refusal to participate in the TIP before the Trial Court, either at the time of refusal or while the statement of the accused was being recorded under section 313 Cr.P.C., or before the High Court. The Supreme Court therefore did not permit the aforesaid ground to be taken.

98. The facts of the present case are absolutely different from the case cited by Ms.Grover.

99. It is well-settled proposition that from the attending circumstances and the evidence already collected, if it appears that some circumstance could be gleaned from such already collected evidence, which enures to the benefit of the accused, the same cannot be brushed aside on the slender ground that such plea was not taken before the Trial Court.

100. Similarly, the other case law cited by the prosecution viz. ***Afsal Ullah vs. State of Uttar Pradesh: AIR 1964 SC 264*** also does not apply to the facts of this case. In the aforesaid case, the Supreme Court was looking at the validity of bye-laws framed by the respondent/Municipal Board of Tanda. One of the arguments before the Supreme Court was that the relevant bye-laws had been passed malafidely, out of spite and enmity for the appellant. The contention was that the shop of the appellant was the only shop in the locality and the concerned bye-law had been passed maliciously in order to hit the appellant. Since that ground was not taken before the court below, the Supreme Court did not permit such a plea to be taken in the First Appeal. Thus, what was held, in the aforesaid case was that plea of malafides cannot be permitted to be raised afresh at the stage of appeal. No parallel can be drawn with the facts of the present case.

101. There is yet another aspect of the matter which has caught the attention of this Court. The wife of the appellant had a chance to read the communication between the prosecutrix and the appellant and after coming to know about the alleged incident, she had corresponded with the prosecutrix wherein she had informed her that the appellant had

been under a rehabilitation regimen for his bipolar mental condition. The prosecutrix had, but rubbished such an explanation by stating that the occurrence had to do more with the physical power of the appellant than the mental condition. However, it would be necessary to know as to what a bipolar disorder in a human being entails. Bipolar disorder is one of the most severe of the mental illness. It is a brain disorder which impairs a person‟s mood, energy and basic ability to function. Symptoms of the mania include increased energy or restlessness; extreme irritability; inability to concentrate; poor judgment and at times aggressive behavior. In some cases, impatience and volatility have also been noticed. There are symptoms of depression in a person suffering from bipolar disorder. Though no specific plea has been taken about the bipolar disorder of the appellant but from the evidence available on record, there appears to be some hint that the appellant suffered from the same. The appellant has been stated to be, on the day of the incident, crying and crying so loud and bitterly that nasal mucus was dripping down till his moustache. This is how the prosecutrix has described the state of the appellant sometimes prior to the alleged incident. On the asking of the prosecutrix about the

reason for his sadness, the appellant is said to have told her that it concerns his wife and mother. Though the mental makeup/condition of the appellant may not be a ground to justify any act which is prohibited under law, but the same can be taken into consideration while deciding as to whether the appellant had the correct cognitive perception to understand the exact import of any communication by the other person. Since no evidence has been led on this aspect, any foray into this field would only be fraught with speculative imagination, which this Court does not intend to undertake.

102. But, it remains in doubt as to whether such an incident, as has been narrated by the prosecutrix, took place and if at all it had taken place, it was without the consent/will of the prosecutrix and if it was without the consent of the prosecutrix, whether the appellant could discern/understand the same.

103. Under such circumstances, benefit of doubt is necessarily to be given to the appellant.

104. For the reasons afore-recorded, the judgment and order of conviction and sentence of the appellant is set aside and the appellant

is acquitted of all the charges. The appellant is ordered to be released forthwith, if not wanted in any other case.

105. The appeal stands allowed.

106. The Trial Court record be returned.

107. A copy of the judgment be transmitted to the Superintendent of the concerned jail for compliance and record.

Crl.M.B.528/2017 (Suspension of sentence)

1. In view of the appeal having been allowed, the application has become infructuous.

2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

SEPTEMBER 25, 2017
ns/ab