

30. Considering the facts and circumstances of the case, I find that order dated 01.05.2024 passed by Civil Judge (Senior Division), Gorakhpur allowing the Misc. Case No.292 of 2023, 293 of 2023, 294 of 2023, 295 of 2023 and 296 of 2023 arising out of Original Suit Nos. 316 of 1988, 318 of 1988, 323 of 1988, 324 of 1988 and 325 of 1988 are totally illegal and therefore set aside.

31. All the writ petitions stand allowed.

(2025) 5 ILRA 1715
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.05.2025

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE SANDEEP JAIN, J.

Criminal Appeal No. 7898 of 2017
 Connected With
 Criminal Appeal No. 243 of 2018

Shailendra Kushwaha **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri Amar Bahadur Maurya, Sri Jitendra Kumar, Sri Kamlesh Kumar Tripathi, Sri Laxmi Narayan Rathour, Sri Rajendra Kumar Pandey, Sri Ranjit Kumar Yadav, Sri Sushil Kumar, Sri Vinay Kumar Nigam, Sri Ashok Kummur Tripathi

Counsel for the Opposite Party:

G.A.

Criminal Law — Indian Penal Code, 1860 - Sections 363, 366 & 376-D — Protection of Children from Sexual Offences Act, 2012, Section 4 — Evidence — Sole testimony of prosecutrix — Contradictory St.ments under Section 164 Cr.P.C. — Absence of corroboration — Victim's first St.ment

exonerating the accused and second St.ment implicating them after 40 days — Unexplained delay, material improvements and improbabilities in prosecution case — Denial by informant of having lodged FIR — Held, conviction cannot rest on inconsistent, uncorroborated, and unreliable testimony of prosecutrix — Benefit of doubt — Accused acquitted. (Paras 28, 33, 34, 37, 39, and 41)

HELD:

Yet the informant 'M' P.W.-2 has simultaneously accepted that the Tehir paper No. 5Ka, does not bear her signature and she had also not submitted it to the police. It is pertinent to mention here that on the basis of informant's application (paper No. 5Ka) F.I.R regarding the incident has been registered on 08.04.2014 at 11:30 a.m. Since the informant has denied that the basis of F.I.R i.e. her purported application (paper No. 5Ka) was not given by her, as such the whole prosecution story becomes doubtful. It is true that F.I.R is not a substantive piece of evidence, but it's contents are required to be proved in accordance with law, which the prosecution has failed to prove beyond reasonable doubt in this case. This will become apparent from our subsequent analysis. (Para 28)

From the perusal of the first St.ment of the victim 'X' recorded under Section 164 Cr.P.C, proved by the accused as Ex. Kha-1, it is evident that she had gone with accused Malik Chandra of her own sweet will. She had thus eloped with him and gone to Gujarat, where she resided with him and no physical relations established between them. The victim has mentioned in her St.ment that the accused Malik Chandra had not raped her and she wanted to stay with him. The victim 'X' had also told the Doctor P.W.-3 at the time of her medical examination, (P.W.-3 has also proved in her examination-in-chief) that on 31.03.2014 at 05:00 a.m. she had left her house with a boy and gone by a truck to Auraiya, who had left her in the way, and then the son-in-law of her aunt had taken her to Gujarat, where she had solemnized marriage in a temple with him. Both the above St.ments have been proved in accordance with law, according to which, the accused Shailendra Kushwaha, Manvendra Singh

@ Jhamman Pal and Malik Chandra, neither were involved in the enticement nor they had committed rape upon the victim. In fact the victim has mentioned that she was not raped by anybody. (Para 33)

From the testimony of the victim 'X' P.W.-1 in Court, it is evident that all the three accused had forcibly kidnapped her from her house and taken her to Gujarat, Hyderabad, Delhi, but she could not tell the name of mohalla, city, name of landlord, who resided in that house, date and month of first rape, how many times she was raped. She has deposed that she had raised alarm but no person residing nearby ever came to help her. That is not reliable. She has also St.d that she, remained unconscious during her various journeys, which too is totally unreliable. The victim has also mentioned in her cross-examination that she had telephoned the police on No.100 from Gujarat, Har. and Delhi, but none came to her rescue, which is also improbable. The victim has been unable to tell whether she was taken by car, or bus, or train. It is highly improbable that from 31.3.2014 to 19.5.2014, a duration of 49 days, the victim remained unconscious, and was not in a physical and mental condition to resist the accused, moreso, when she was living in public place and travelling in public transport. (Para 37)

It is also evident that after recording the first St.ment under Section 164 Cr.P.C, the victim's custody was handed over to her mother P.W.-2 and thereafter about 40 days later, her second St.ment under Section 164 Cr.P.C (Ex.Ka-1) was recorded on 03.7.2014. S.I. Mohd. Sattar Beg, P.W.-5, has accepted in his crossexamination that he had not given any application for recording the second St.ment of the victim under Section 164 Cr.P.C and the Court has suo-motu ordered it. It is very surprising that in the absence of any application on behalf of the investigating officer, why second St.ment of the victim under Section 164 Cr.P.C has been recorded by the Court. All the improvements made by the victim in her subsequent St.ment under Section 164 Cr.P.C and in the testimony given in the Court, during trial, have been proved, in accordance with law by the accused, which makes the testimony of victim highly unreliable and in the absence of corroboration, it cannot be relied upon. (Para 39)

Application allowed. (E-14)

List of Cases cited:

1. Suresh N. Bhusare & ors. Vs St. of Mah., (1999) 1 SCC 220
2. Tameezuddin @ Tammu Vs St. (NCT of Delhi), (2009) 15 SCC 566
3. Narender Kumar Vs St. (NCT of Delhi), AIR 2012 SC 2281
4. Alamelu & anr. Vs State represented by Inspector of Police, (2011) 2 SCC 385

(Delivered by Hon'ble Sandeep Jain, J.)

1. Heard Sri Ashok Kumar Tripathi and Sri Gopal Khare (for the appellant no. 2 in Criminal Appeal No. 243 of 2018 and Sri Vikas Goswami, learned A.G.A for the State and perused the material available on record.

2. Both these Criminal Appeals arise from the common judgment and order dated 23.11.2017 passed by the Additional Sessions Judge, Court No. 2, Jalaun at Orai in Sessions Trial No. 22 of 2014 (*State Vs. Manvendra Singh @ Jhamman Pal, Malik Chandra and Shailendra Kushwaha*), in Case Crime No. 629 of 2014, Police Station Jalaun, District Jalaun, whereby, accused *Manvendra Singh @ Jhamman Pal, Malik Chandra and Shailendra Kushwaha* have been convicted under Section 363 I.P.C and sentenced to undergo three years simple imprisonment alongwith a fine of Rs.10,000/-, in default to undergo further simple imprisonment of six months, under Section 366 I.P.C for seven year's simple imprisonment alongwith a fine of Rs. 20,000/-, in default to undergo further simple imprisonment of one year and under Section 376-D I.P.C and $\frac{3}{4}$ POCSO Act for life imprisonment and a fine of Rs.

1,00,000/-, in default to undergo additional simple imprisonment of two years. All the sentences have been ordered to run concurrently.

3. The factual matrix is that the informant 'M' P.W-2 gave a typed written application on 05.04.2014 to the Circle Officer, Jalaun with the averments that her minor daughter 'X', who was a student of Class X was enticed to elope on 31.03.2014 at about 04:00 a.m. morning by accused Shailendra Kushwaha. In the morning 'M' went to accused Shailendra Kushwaha's house and called him, thereafter he had phoned 'X' and then 'X' told her that she was present at Auraiya Bus Stand, then 'M' and others went to Auraiya Bus Stand, but before she could reach the Bus Stand, accused Manvendra Singh reached there and then accused Shailendra Kushwaha passed 'X' to accused Manvendra Singh. Manvendra Singh told them that 'X' has been found and they would bring her back, but Manvendra did not bring 'X' back to her house and instead coaxed and made 'X' flee with his neighbour's son Manvendra Pal. When in the evening Manvendra Singh came to the house of 'M', then he was asked about 'X', then Manvendra Singh told her that 'X' had escaped. She had given information about this incident to the Police Station Kotwali, Jalaun on 01.04.2014, but no action has been taken yet. It has come to her notice that 'X' is staying with Manvendra Singh's relative (Mausa) Raju in Gujarat, in Mohalla Modarsa. Manvendra's mobile number is 9586435089.

4. On 05.04.2014, the Circle Officer, Jalaun, ordered the S.H.O to get the matter investigated and to initiate legal action. Thereafter, Case Crime No. 629 of 2014, under Sections 363 and 366 I.P.C

was registered on 08.04.2014 at 11:30 a.m. at P.S Kotwali, Jalaun against accused Shailendra Kushwaha, Manvendra Singh and Manvendra Pal. The check F.I.R. is Ex.Ka-8 is on record.

5. The victim 'X' (examined as P.W-1 in the trial court), was recovered on 19.05.2014. The Recovery Memo is Ex.Ka-6.

6. The first statement of victim 'X' P.W.-1, under Section 164 Cr.P.C. (Ex.Kha-1), was recorded on 22.05.2014, which is to the effect :

I had run away from home, of my own sweet will, with Malik Chandra and had gone to Gujarat, where I resided with him. in a rented house. No physical relations were established between me and Malik Chandra. He didn't do any wrong act with me. I want to stay with him.

7. The victim 'X' was examined on 19.05.2014 at 12:50 p.m. by Dr. Sandhya Gupta, P.W.-3. The Medical Examination Report of victim is Ex.Ka-2. The victim told the Doctor that one boy took her to Auraiya on 31.03.2014 at 05:00 a.m. by truck from her house and left her there. She was crying, then another boy, her aunt's son-in-law (Bua ka Damad) took her to Gujarat, where she solemnized marriage with him in a temple. During her examination no injury was found on her body or on her private parts, but her hymen was found torn at 3 'O' clock position. Her vagina admitted two fingers easily. Two slides were prepared to detect presence of spermatozoa in the vaginal smear. In the pathological examination report dated 23.05.2014 of victim 'X', out of two vaginal smear, one was found positive for spermatozoa.

8. The statement of victim 'X' P.W.-1, was again recorded under Section 164 Cr.P.C. (Ex. Ka-1) on 03.07.2014. It is to the effect:

"I passed class X from Mathura Devi Girls Inter College, Jalaun, District Jalaun. My date of birth is 10.05.1998. I was enticed by Manvendra, Shailendra and Malik Chandra with deception and bluff that they will treat her like a 'Queen', they also threatened her that if she did not accompany them, then they will kill her parents and her brother. The incident took place on 31.03.2014 at 04:00 a.m. Accused Malik Chandra and Shailendra caught her hands and legs and Manvendra made her smell something, which rendered her unconscious. She regained consciousness at 10:00 a.m. in Auraiya and then they took her from Auraiya to Gujarat, Haryana to a rented room, where she was raped by all the three persons. Her clothes got spoilt and she became unconscious. When she regained consciousness, then all the above named three persons, commanded her to undress. She refused. She was assaulted by them and kept for 10- 15 days and was repeatedly raped everyday by all these persons. She was rendered unconscious and then taken to Delhi, where she was kept in a rented room for 10 - 15 days and was raped every day. She was raped without her consent by these three persons at other places also. These people after intimidating her, forcibly and repeatedly raped her".

9. The initial investigation was handed over to S.I. Mohd. Sattar Beg, P.W.-5, who prepared the Site Plan Ex. Ka-5. In his presence, the victim 'X' was recovered on 19.05.2014. He also submitted Charge Sheet Ex.Ka-7 against accused Manvendra Singh @ Jhamman Pal

and Malik Chandra, under Section 363, 366 and 376 I.P.C. and Section ¾ POCSO Act. Thereafter, the investigation was concluded by S.I. Vikram Singh (P.W.-7), who submitted the Charge-Sheet against the accused-Shailendra Kushwaha, under Section 363, 366, 376 I.P.C. and Section ¾ POCSO Act, (Ex.Ka-10). Charges against the accused Manvendra Singh @ Jhamman Pal and Malik Chandra were framed on 20.08.2014, under Section 363, 366, 376D I.P.C. and Section 4 POCSO Act. Charge against the accused Shailendra Kushwaha was framed on 16.12.2015, under Sections 363, 366, 376D I.P.C. and ¾ POCSO Act, to which all the accused persons had pleaded not guilty and claimed trial.

10. The prosecution has examined the following witnesses, who have proved the following documents :-

Sl. No.	Witness	Docu ment proved.
1.	P.W.-1- Victim 'X'.	Proved her second statement recorded under Section 164 Cr.P.C. dated 03.07.2014, as Ex.Ka-1 during her examination-in-chief and her first statement under Section 164 Cr.P.C. during her cross-examination, as Ex.Kha-1.

2.	P.W.2- Informant 'M'.	She has not proved any document.
3.	P.W-3 Dr. Sandhya Gupta.	Proved the Medical examination report of victim as Ex.Ka-2.
4.	P.W.-4- Suman Devi, Principal, Mathura Devi Girls Inter College, Jalaun.	Scholar's Register & Transfer Certificate Form of victim as Ex. Ka-3. & High School Examination - 2014 Record/Mark-sheet of victim as Ex.Ka-4
5.	P.W.-5- S.I.Mohd. Sattar Beg. (The First I.O. of the case)	Proved the Site Plan as Ex.Ka-5, & The Recovery Memo of victim as Ex.Ka-6 & Charge-sheet filed against accused-Manvendra Singh @

		Jhamman Pal and Malik Chandra as Ex. Ka-7.
6.	P.W-6- Balram Prasad.	Proved the Check F.I.R as Ex.Ka-8 & G.D Entry No.18/11.30 hours as Ex.Ka-9.
7.	P.W.-7 S.I. Vikram Singh	Proved the Charge-sheet against accused-Shailendra Kushwaha as Ex. Ka-10.

11. The victim 'X' P.W.-1 in her examination-in-chief has mentioned that her date of birth is 10.05.1998. She has passed High School examination. On 31.03.2014 at 04:00 a.m., she got up to go to toilet. Then Manvendra called her, to save him. After that, she opened the door, to find Manvendra, Shailendra and Malik Chandra standing outside. Shailendra caught her hands, Malik Chandra caught her legs, Manvendra made her smell something, that rendered her unconscious. She regained consciousness at Auraiya. At that time, it was 10:00 a.m. Manvendra Singh used to live in front of her house in Jalaun. 'X' has identified the accused Manvendra, Malik Chandra and Shailendra in the Court. 'X' has further mentioned that after she became unconscious, all the

accused took her from Auraiya to Gujarat, to a place called Haryana Road, where all the three accused had committed rape upon her. She suffered bleeding. She was kept there for 10-15 days and all the three accused continuously raped her. Thereafter, she was taken to Badli Delhi where also all the three accused continued to commit rape upon her. She was kept there for 10-12 days. Thereafter, all the three accused took her to Mohalla Dharampuri in Hyderabad, where also, all the three accused committed rape upon her. Thereafter, Manvendra left for his home. Manvendra was arrested in Chhani. Then, the family members of Manvendra had informed Malik Chandra to return home. Thereafter, Malik Chandra and Shailendra took her along but she and Malik Chandra were caught at Jhansi Railway Station by the police on 19.05.2014. Shailendra fled. Thereafter, the police brought them to the Jalaun Police Station, where after about 3-4 days, her statement before the Magistrate was recorded and again after one month, her statement was recorded before the Magistrate. The victim 'X' has proved her subsequent statement under Section 164 Cr.P.C. recorded on 03.07.2014 as Ex. Ka-1. The victim deposed that her first statement made before the Magistrate is not correct, because the accused had threatened her and that statement was given under the pressure of the accused.

12. The victim 'X' in her cross-examination has mentioned that she has not read the report paper no. '5 Ka' lodged by her mother P.W.-2. She can not tell whether the report '5 Ka' lodged by her mother is correct or not? She has denied the suggestion that ten days prior to this incident, she had run away from her house and was caught in the wheat field of Harishchandra by her real brother 'J',

accused Manvendra @ Jhamman and others. Accused Manvendra @ Jhamman resides in front of her house, who is married and has children. He belongs to her community. 'X' has denied that two days prior to this incident, she was caught with accused Manvendra in Village Kafoond, District Auraiya. She knew all the accused from before the incident. She neither had love relationship with Malik Chandra and Shailendra prior to this incident, nor had friendship with them. At the time of incident, her younger brother and mother were present at her house when Manvendra came and called her. At that time, only she was awake. At the time of the incident, it was dark, she could not see whether they were armed or not. She could also not see whether they were on foot or had any vehicle. She could not tell the vehicle in which she was taken, because she was unconscious. She regained consciousness at 10:00 a.m. on the same day at Auraiya. Even then, she had not seen the vehicle, in which she had travelled. She denied the suggestion that she was fully conscious and had gone with accused Shailendra of her own sweet will. She was recovered at Jhansi Railway Station on 19.05.2014, by Jalaun police. At that time, none from her house was present. The police had not taken her statement. She remained with police personnel for three days but during this time, she had no talks regarding the incident, with the police personnel. The doctor had also not enquired from her, about the incident. She had not told the doctor, at the time of examination- that a boy took her to Auraiya on 31.03.2014 at 05:00 a.m. by truck from her home, and left her there. She was crying, then another boy, son-in-law of her aunt (Bua) took her to Gujarat. They resided there and had solemnized marriage in a temple in Gujarat. The victim admitted that she has got no

fight with the doctor and denied, that the doctor had correctly noted her statement. The victim also denied that her statement was recorded by the police on the day of her arrest. She had not told the I.O. that on 31.03.2014 at about 04:00 a.m. Shailendra Kushwaha came and took her to Auraiya. She could not tell why the I.O. had written so. She had not told the I.O. that- Malik Chandra is her distant relative, and she didn't want to go back and due to this Manvendra @ Jhamman assisted her to elope with Malik Chandra. She had not told the I.O. that Malik Chandra etc. committed rape upon her.

13. The victim 'X' P.W.-1 in her cross-examination has accepted that her statement was recorded by the Magistrate 2-3 days after she was apprehended and at that time, none was present, except her and the Magistrate. 'X' has accepted that the Magistrate had read over the statement written by him and then she had signed that statement. 'X' has identified her signature on her first statement recorded under Section 164 Cr.P.C., which is paper no.42-Ka on the record, and has acknowledged that this statement was recorded by the Magistrate, on her narration, which has been proved by the accused as Ex.Kha-1. She had neither given an application to the Magistrate nor to any police officer or the District Magistrate to record her statement under Section 164 Cr.P.C again. She had not complained to any officer, that her first statement had been wrongly recorded. The accused never forced her to accompany them or that they would treat her like a queen. Till the date of the incident, the accused did not ask her to marry or that they will treat her as a queen. She did not tell the Magistrate in her statement dated 3.07.2014 that the accused Manvendra, Shailendra and Malik Chandra had enticed

her with deception and bluffed her that they will treat her as a queen. She also did not tell the Magistrate that the accused threatened to kill her parents and brother, if she failed to accompany them. She could not tell the reason why such statement was recorded by the Magistrate. Her second statement was recorded under Section 164 Cr.P.C., by the Magistrate in camera. The Magistrate had read over her statement dated 03.07.2014, after writing it. She had not complained to the Magistrate as to how in her statement it has been incorrectly written that "the accused Manvendra, Shailendra and Malik Chandra had enticed her with deception and bluffed her that they would treat her as a queen, and threatened her, if she failed to accompany them, then her parents and brother will be killed".

14. The victim 'X' has further mentioned in her cross-examination that for the first time rape was committed upon her at a house in Gujarat. She could not tell the name of Mohalla, City, name of landlord, who resided in that house, date and month when rape was first committed on her. She could not tell as to how many times she was raped. But each time, she was raped by all three persons, one after the other. She had never told about rape to any person or police personnel because she was kept confined in a room. Lastly, she was raped in Hyderabad but she did not know its day, date, month and the name of Mohalla. She remained unconscious from the time she left home till she was caught, as such, she could not tell whether she went by car or bus or train. She was brought to Jhansi in an unconscious state. She was continuously raped. She could not tell the last time, she was raped, before she was recovered on 19.05.2014. But lastly, all the three persons had raped her. Shailendra and Malik Chandra had accompanied her to Jhansi,

but Manvendra came 3-4 days prior to her arrest. The victim 'X' denied that she had neither been enticed to elope nor raped by accused Malik Chandra and Manvendra. The victim 'X' has further mentioned in her cross-examination that she had gone to Gujarat, Hyderabad and Delhi. At Gujarat she resided at Haryana Road. She went to Gujarat from Delhi, yet she did not know whether she went to Gujarat from Delhi and from Delhi to Hyderabad by bus or train. She also did not know the house in which she resided, or if she went by tempo or on foot and where she resided, or the people who lived nearby. She had raised alarm in the house in which she resided, but people residing nearby did not respond. She had asked for help at all three places by coming out of the house but none came to help her. She remained unconscious during her journey. She was given sedatives. She had refused to take sedatives but the same were given to her mixed in water. She had not refused to drink water. She neither told this to the police nor to the Magistrate. She had telephoned the police from Gujarat, Hyderabad and Delhi on 100 number but none came. She could not tell the phone number from which she had phoned, the date and time, when she had called the police. She was unconscious at the Jhansi Station, but she had not told this to the police or the Magistrate. She was not treated at Jhansi Station. She regained consciousness at Orai hospital. Her second statement was recorded by the Magistrate, about one month after her first statement and during this period, she remained with her mother. In between, her father visited, for a week. The victim 'X' denied that prior to the incident, she had eloped 2-3 times with other person, due to which her reputation had been tarnished in her locality. To deal with that, she had got lodged a false case.

15. Informant 'M' has been examined as P.W.-2 at the trial. She stated in her examination-in-chief that the incident took place on 31.03.2014, when she woke up in the morning, she saw 'X' was not present in the house. She enquired from her neighbours. She learnt Shailendra, Manvendra and Malik Chandra had abducted her. She went to lodge a report at the Police Station Jalaun, but her report was not registered. Manvendra had his house in front of her house. She knew Manvendra prior to the incident. 'X' was recovered by the police after forty (40) days of the incident. She was caught with accused- Malik Chandra. 'X' had told her that she was taken to Delhi, Haryana and Gujarat and she was raped at all the places. 'X' was forcibly taken and raped. Yet the informant 'M' stated, she had not signed or submitted Tehrir paper no. '5 Ka' dated 05.04.2014.

16. Informant 'M'— P.W.-2, in her cross-examination, has stated that she is illiterate but she manages to sign, yet she could not tell the date, month and year of her marriage, since many days had elapsed. She did not remember, when she was married. She could not hazard a guess, if she was married 30 years or 40 years ago. She did not remember the date of birth of her children. She only states 'X' was born two years after the marriage. She is her first child. The victim had left her house at 04:00 a.m. in the morning and at that time, 'M' was sleeping. She woke up at 4:30 a.m. She had gone to sleep at 10:00 – 11:00 on the day of incident. She did not wake up prior to 4:30. a.m. At that time her husband was not present. She had informed her husband about the incident on phone, after about one or two days. She had searched 'X' in the neighbourhood till 10:00 – 11:00 hours. Thereafter, she went to police

station. She had reached the police station at 04:00 pm. Neither any neighbour nor any relative had accompanied her to the police station. Before going to the police station, she had enquired from her relatives. The informant had denied the suggestion that 'X' had previously eloped once-twice and because of this, she had not made any enquiry from her relatives. She also denied that 'X' had eloped due to her love relationship and because of this knowledge she had not gone straight-away to the police station. The police personnel at the police station had refused to accept her application. Thereafter she did not give any application to any higher officer. On receiving her information, her husband had come after three – four months. 'X' was found by the Jalaun Kotwali Police, after 1½ months. 'X' was got admitted to the school by her husband. The police has not enquired from her regarding the incident. She has got no fight with the police. The informant has denied her statement under Section 161 Cr.P.C. The informant has further admitted that she has not seen the victim going away. She had got information from neighbours that 'X' had gone. It is true that Manvendra Singh and Malik Chandra belong to her community. She had not given any application at the police station or to the Superintendent of Police, regarding elopement of her daughter.

17. The prosecution has examined Dr. Sandhya Gupta, at the trial court as P.W.-3, who has stated during her examination-in-chief that the victim had told her on enquiry, that a boy had taken her by truck to Auraiya on 31.03.2014 at 05:00 a.m and had left her in the way. She was crying. Then her aunt's son-in-law (*bua ka damad*) came and took her to Gujarat, where she resided and had

solemnized marriage in a temple. According to this witness, no external or internal injury was found on the body of victim. Her hymen was old torn at 3'O' clock position, but there was no bleeding or discharge. This witness has proved the medical examination report of 'X' dated 19.05.2014 as Ex.Ka-2. In the cross-examination, she stated that she has not prepared the supplementary report, because no one came to her. She had found hymen of victim torn, but she could opine about rape, only after seeing pathology report. At the time of medical examination, she had ensured that the victim was not under any pressure.

18. The prosecution has examined Suman Devi, as P.W.-4 at the trial court. She stated in her examination-in-chief that she is the Principal of Mathura Devi Girls Inter College, Jalaun since 2009. 'X' has been the student of this college. According to the Admission Register, the date of birth of 'X' is 10.05.1998 and she had taken admission in Class-IX on 21.07.2012 and after passing the High School Examination had got her name struck-off on 23.07.2014, with the consent of her guardian. This witness has proved the extract of the Scholar Register & Transfer Certificate of the above college as Ex.Ka-3 and the extract of High School Examination, 2014 cause list pertaining to her college and 'X' as Ex.Ka-4. In the above documents, the victim's date of birth is recorded as 10.05.1998. In the cross-examination she has stated that she could not tell whether the victim's birth certificate is available in the college record or not? The entries in Ex.Ka.3 are not in her hand writing. She could not tell on the basis of which document, the date of birth of 'X' has been recorded in Ex.Ka.3.

19. The prosecution examined S.I. Mohd. Sattar Beg as P.W.-5 at the trial

court. He conducted the initial investigation. This witness has proved the site plan as Ex. Ka-5 and arrest of the accused-Manvendra Singh @ Jhamman Pal on 10.05.2014. According to this witness accused- Malik Chandra was arrested on 19.05.2014 and victim was recovered. This witness has also proved the Recovery Memo of the victim as Ex. Ka-6. This witness had got recorded the statement of victim under Section 164 Cr.P.C. on 22.05.2014 and thereafter on 23.05.2014 had moved an application in the court for handing her custody to her mother, but the court had ordered to produce her on 27.06.2014. This witness has also mentioned that on 03.07.2014 another statement of victim under Section 164 Cr.P.C was got recorded. This witness has proved the charge-sheet against the accused Manvendra Singh @ Jhamman Pal and Malik Chandra as Ex. Ka-7.

20. In cross-examination P.W.-5 has accepted that statement of victim (under Section 164 Cr.P.C), was recorded twice, first on 22.05.2014 and again on 3.7.2014. Similarly, the victim's statement under Section 161 Cr.P.C was recorded twice, first on 19.05.2014 and again on 21.05.2014. He had not given any application for recording the second statement of victim. The court had suo motu ordered. This witness has accepted that in the first statement, the victim had not named accused Shailendra, or that Shailendra had caught her hands, Malik Chandra had caught her legs and Manvendra had made her smell something, and that she regained consciousness at Auraiya at 10:00 a.m. The victim told him that she had gone to Gujarat. The victim had also not told him that Shailendra had gone to Gujarat and they had resided in Gujarat. The victim had also not told that Shailendra had committed rape upon her. The victim was apprehended with Malik

Chandra. This witness has acknowledged that in the statement given to the Doctor, the victim had not named any accused, but had told that the son-in-law of her aunt (Bua) had taken her to Gujarat, where she had solemnized marriage in a temple. He had firstly recorded the statement of the victim on 19.05.2014, in which she had not disclosed that Malik Chandra and others had raped her. On perusal of the victim's first statement under Section 164 Cr.P.C, no offence was found to have been committed by any accused. The victim had not told him that her parents had deliberately shown her to be underage in the school records. After about 12 days, the victim's father had returned home.

21. The prosecution has examined Balram Prasad as P.W.-6, who has mentioned in his examination-in-chief that he had registered the F.I.R on 08.04.2014 at 11:30 hours, on the basis of typed application of informant, which is Case Crime No. 629 of 2014, under Sections 363, 366 I.P.C. This witness has proved the check F.I.R, as Ex.Ka-8 and the carbon copy of G.D. Entry No.18 at 11:30 hours as Ex.Ka-9.

22. The prosecution examined S.I. Vikram Singh as P.W.-7, who concluded the investigation of this case. He proved the charge sheet against accused Shailendra Kushwaha as Ex.Ka-10.

23. The accused in their statement recorded under Section 313 Cr.P.C have denied the prosecution story and have submitted that they have been falsely implicated in the case due to enmity.

24. The accused, Shailendra Kushwaha has examined Raja Ram as D.W.1, who has mentioned in his

examination-in-chief that since morning of 31.03.2014, Shailendra remained present in the village or in the adjoining village and had also told this, to the police on the date of incident, that he was present in the village, and had not kidnapped the victim.

25. Learned counsel for the appellants have submitted that the victim in her first statement under Section 161 Cr.P.C and 164 Cr.P.C has mentioned that she had eloped of her sweet will with the accused Malik Chandra, and had gone to Gujarat, where she had solemnized marriage with Malik Chandra but no physical relations were established between them. Subsequently, in her second statement under Section 164 Cr.P.C, she had implicated all the three accused-Shailendra Kushwaha, Manvendra Singh @ Jhamman Pal and Malik Chandra in the crime. Learned counsel has further submitted that there is material improvement between the first statement and the second statement of the victim, and her subsequent examination in the trial court, as such the evidence of victim is not trustworthy. The victim was major, who had gone of her own will, as such the trial court had committed illegality in convicting all the accused. Learned counsel has also submitted that the informant 'M' P.W.-2 is not an eye-witness. In her examination-in-chief she had said that she neither had signed the tehrir nor submitted it to the police for registration of F.I.R. In view of this statement of informant P.W.-2, the prosecution story has not been proved. Learned counsel have further submitted that the victim had also told the Doctor P.W.-3 that she went with the son-in-law of her aunt to Gujarat, where she had solemnized marriage with him. Learned counsel has submitted that since the victim had gone of her own sweet will from her

house, as such the offence of enticement, elopement and rape has not been proved beyond reasonable doubt against all the accused and further no medical evidence of rape is available on the record. Learned counsel have submitted that the victim's sole testimony has not been corroborated by any other witness, as such only on the basis of victim's inconsistent and untrustworthy testimony, the accused cannot be convicted. The trial court has erred in convicting the accused. With these submissions, it has been prayed that both the criminal appeals be allowed and all the accused be acquitted of the charges levelled against them.

26. Learned A.G.A for the State has submitted that the victim's testimony is trustworthy. In her second statement recorded under Section 164 Cr.P.C and examination-in-chief in the Court she named all the three accused persons, which has been believed by the trial court. Learned A.G.A has further submitted that the informant P.W.-2 is an illiterate lady and as such her evidence regarding First Information Report, should not be given undue importance. Learned A.G.A has further submitted that the victim's testimony is trustworthy, which does not require any corroboration. The victim was a minor at the time of the occurrence and as such her consent is immaterial. With these submissions, it has been prayed that this criminal appeal has got no merits and is liable to be rejected.

27. Having heard counsel for the parties, from the perusal of the evidence of informant 'M' P.W.-2, it is evident that she is not an eye-witness of the incident. On the day of incident, she woke up in the morning and found that victim 'X' was not present in her house. She had searched for

her in the neighbourhood, but 'X' could not be traced out. After about 40 days, 'X' was apprehended by the police, alongwith the accused Malik Chandra and then 'X' had told her that she was forcibly taken by all the three accused persons to Gujarat and was also forcibly raped by them

28. Yet the informant 'M' P.W.-2 has simultaneously accepted that the Tehrir paper No. 5Ka, does not bear her signature and she had also not submitted it to the police. It is pertinent to mention here that on the basis of informant's application (paper No. 5Ka) F.I.R regarding the incident has been registered on 08.04.2014 at 11:30 a.m. Since the informant has denied that the basis of F.I.R i.e. her purported application (paper No. 5Ka) was not given by her, as such the whole prosecution story becomes doubtful. It is true that F.I.R is not a substantive piece of evidence, but it's contents are required to be proved in accordance with law, which the prosecution has failed to prove beyond reasonable doubt in this case. This will become apparent from our subsequent analysis.

29. The Hon'ble Apex Court in the case of **Suresh N. Bhusare and others vs. State of Maharashtra (1999) 1 SCC 220**, has held that where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence.

30. The Hon'ble Apex Court in the case of **Tameezuddin @ Tammu vs State (NCT Of Delhi) (2009) 15 SCC 566**, has

held that 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.

31. The Hon'ble Apex Court in the case of **Narender Kumar vs. State (NCT of Delhi) AIR 2012 SC 2281**, has held that prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance to her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecution is found to be improbable, the prosecution case becomes liable to be rejected.

32. From the above principles laid down by Hon'ble Apex Court, it is evident that where the evidence of the 'X' prosecutrix is trustworthy, credible and inspires confidence then conviction can be based on her sole testimony, however in case, the Court has reason not to accept the version of the prosecutrix on its' face value, it may look for corroboration and in case, the evidence is read in it's totality and if the story projected by the prosecution is found to be improbable, then the prosecutrix's case becomes liable to be rejected.

33. From the perusal of the first statement of the victim 'X' recorded under Section 164 Cr.P.C, proved by the accused

as Ex. Kha-1, it is evident that she had gone with accused Malik Chandra of her own sweet will. She had thus eloped with him and gone to Gujarat, where she resided with him and no physical relations established between them. The victim has mentioned in her statement that the accused Malik Chandra had not raped her and she wanted to stay with him. The victim 'X' had also told the Doctor P.W.-3 at the time of her medical examination, (P.W.-3 has also proved in her examination-in-chief) that on 31.03.2014 at 05:00 a.m. she had left her house with a boy and gone by a truck to Auraiya, who had left her in the way, and then the son-in-law of her aunt had taken her to Gujarat, where she had solemnized marriage in a temple with him. Both the above statements have been proved in accordance with law, according to which, the accused Shailendra Kushwaha, Manvendra Singh @ Jhamman Pal and Malik Chandra, neither were involved in the enticement nor they had committed rape upon the victim. In fact the victim has mentioned that she was not raped by anybody.

34. The victim 'X' P.W.-1 in her subsequent second statement dated 03.07.2014 made under Section 164 Cr.P.C which has been proved by the prosecution as Ex.Ka-1 during trial, has taken a 'U' turn and has mentioned that all the three accused forcibly kidnapped her from her house on 31.03.2014 at 04:00 a.m. and took her to Gujarat, Delhi and several other places, where they forcibly and repeatedly raped her for 10-15 days. The victim has also reiterated the incident, as narrated by her in her second statement recorded under Section 164 Cr.P.C, during her examination-in-chief in the trial court, which is a material improvement from her first statement under Section 161 Cr.P.C

given to the police and recorded by the Magistrate under Section 164 Cr.P.C on 22.05.2014. In view of such material improvement, the victim cannot be relied upon and her evidence requires careful scrutiny and corroboration, which is absent in this case.

35. From the evidence of P.W.-4, Suman Devi, it is evident that in the High School Examination, 2014 record, the date of birth of the victim is recorded as 10.05.1998, which has been proved by this witness, according to which the victim was about 15 years and ten months old, on the date of incident. It is true that according to the educational record of the victim, she was minor on the date of the incident, but still in order to record conviction, the prosecution story must be trustworthy and the sole testimony of the victim should inspire confidence.

36. The Hon'ble Apex Court in the case of **Alamelu And Another Vs. State Represented By Inspector of Police (2011) 2 SCC 385** setting aside the trial court and High Court's conviction of appellants, has held that even though prosecutrix had several opportunities to protest and raise an alarm, she did not do so. Her behaviour of not complaining to anybody at any of the stages after being allegedly abducted is wholly unnatural hence, conviction on sole testimony of prosecutrix is not sustainable.

37. From the testimony of the victim 'X' P.W.-1 in Court, it is evident that all the three accused had forcibly kidnapped her from her house and taken her to Gujarat, Hyderabad, Delhi, but she could not tell the name of mohalla, city, name of landlord, who resided in that house, date and month of first rape, how

many times she was raped. She has deposed that she had raised alarm but no person residing nearby ever came to help her. That is not reliable. She has also stated that she, remained unconscious during her various journeys, which too is totally unreliable. The victim has also mentioned in her cross-examination that she had telephoned the police on No.100 from Gujarat, Haryana and Delhi, but none came to her rescue, which is also improbable. The victim has been unable to tell whether she was taken by car, or bus, or train. It is highly improbable that from 31.3.2014 to 19.5.2014, a duration of 49 days, the victim remained unconscious, and was not in a physical and mental condition to resist the accused, moreso, when she was living in public place and travelling in public transport.

38. The victim has accepted that her first statement under Section 164 Cr.P.C was read out to her by the Magistrate and only after that, she had signed it. The victim has also acknowledged that her first statement was recorded by the Magistrate on her narration and she had not complained to any officer, that her first statement under Section 164 Cr.P.C had been incorrectly recorded. In the second statement under Section 164 Cr.P.C the victim mentioned that the accused had enticed her with deception and bluffed that they will treat her as a queen, but the victim has denied that she told this to the Magistrate. The victim has also denied that she had told the doctor P.W.-3 that she went with the son-in-law of her aunt to Gujarat and had solemnized marriage with him in a temple. It is untrustworthy, that the Magistrate in the victim's first statement recorded under Section 164 Cr.P.C and the Doctor P.W.-3 have by themselves wrongly recorded the above facts.

39. It is also evident that after recording the first statement under Section 164 Cr.P.C, the victim's custody was handed over to her mother P.W.-2 and thereafter about 40 days later, her second statement under Section 164 Cr.P.C (Ex.Ka-1) was recorded on 03.7.2014. S.I. Mohd. Sattar Beg, P.W.-5, has accepted in his cross-examination that he had not given any application for recording the second statement of the victim under Section 164 Cr.P.C and the Court has suo-motu ordered it. It is very surprising that in the absence of any application on behalf of the investigating officer, why second statement of the victim under Section 164 Cr.P.C has been recorded by the Court. All the improvements made by the victim in her subsequent statement under Section 164 Cr.P.C and in the testimony given in the Court, during trial, have been proved, in accordance with law by the accused, which makes the testimony of victim highly unreliable and in the absence of corroboration, it cannot be relied upon.

40. We are conscious of this fact that according to educational record of the victim, particularly in absence of supplementary medical report regarding her age, she was minor on the date of the alleged incident, but, even then the prosecution has to prove its case beyond reasonable doubt, which it has utterly failed to prove. The testimony of the victim 'X' in the present case has failed to inspire confidence. The evidence of the victim given at the trial court that she remained unconscious in Gujarat, Hyderabad and Delhi, she raised alarm in these places, but no one came to help her, she telephoned the police at 100 number, but no one helped her, she remained unconscious throughout her journey, is totally improbable. Keeping in view, her first statement made under

