

IN THE HIGH COURT OF HIMACHAL PRADESH, AT SHIMLA

Cr. Appeal No. 369 of 2012

Judgment reserved on: 29th October 2014

Date of Decision: 6th January, 2015.

State of Himachal Pradesh

.....Appellant.

Vs.

Tilak Raj son of Shri Chancho Ram

...Respondent.

Coram:

Hon'ble Mr. Justice Sanjay Karol, Judge.

Hon'ble Mr. Justice P.S. Rana, Judge.

Whether approved for reporting1?. Yes.

For the Appellant:

Mr. Ashok Chaudhary Additional Advocate General with Mr. Vikram Thakur, and Mr. Puneet Rajta Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

For the Respondent:

Mr. Ashok Sharma, Advocate.

P.S.Rana, J.

JUDGMENT: Present appeal is filed against the judgment of acquittal passed by learned Sessions Judge Chamba in Sessions trial No. 40 of 2010 titled State of H.P. vs. Tilak Raj.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 1.1.2010 at Karian within the jurisdiction of Police Station Chamba during night time accused committed rape upon prosecutrix without her consent and on the aforesaid date time and place accused threatened the prosecutrix to kill her. It is alleged by prosecution that accused also physically assaulted the

Whether reporters of the Local papers are allowed to see the judgment?. Yes.

prosecutrix and also slapped her and also twisted her arms. It is alleged by prosecution that thereafter accused asked the prosecutrix to attend the office and accused also told the prosecutrix that in the meantime accused would return from Mehla after obtaining money and thereafter he would take the prosecutrix along with him to his home. It is further alleged by prosecution that thereafter accused did not take the prosecutrix along with him despite assurance. It is alleged by prosecution that thereafter prosecutrix approached police officials and on dated 5.1.2010 accused in the presence of Dy.S.P. and one Yoginder Mohan PW3 agreed to marry the prosecutrix. It is alleged by prosecution that on dated 6.1.2010 when family members of prosecutrix came to Chamba for performing marriage then accused refused to solemnize the marriage with prosecutrix. It is alleged by prosecution that accused also agreed in writing vide Ext.PW2/B that he would marry the prosecutrix. It is alleged that FIR Ext.PW10/A was recorded in police station Chamba. It is alleged by prosecution that medical examination of prosecutrix was conducted and MLC Ext.PW2/D was obtained. It is alleged by prosecution that medical officer took into possession clothes of prosecutrix, vaginal swab and pubic hair during the course of examination. It is alleged by prosecution that as per opinion of medical officer prosecutrix was subjected to sexual intercourse. It is alleged by prosecution that ASI Kuldeep Singh prepared site plan at the instance of prosecutrix. It is also alleged by prosecution that prosecutrix also handed over one letter Ext.P2 which was taken into possession vide seizure memo Ext.PW2/C. It is alleged by prosecution that

accused was also medically examined vide MLC Ext.PA. It is alleged by prosecution that accused also produced dairy Ext.P1 which was taken into possession vide seizure memo Ext.PW1/A and specimen signatures and hand writing of accused Ext.PB-1 to Ext.PB-23 also obtained before Additional Chief Judicial Magistrate. It is alleged by prosecution that prosecutrix had also handed over one letter Ext.PW2/A vide memo Ext.PW1/B. It is alleged by prosecution that during the course of investigation birth certificate of prosecutrix Ext.PB-24 also taken into possession and as per birth certificate of prosecutrix the date of birth of prosecutrix was 23.5.1970. It is alleged by prosecution that C. Ratto Devi PW7 had deposited the articles received from Dr. Anuradha Mahajan PW5 after conducting the MLC of prosecutrix i.e. clothes, vaginal swab and pubic hair and deposited the same with MHC PW10. It is alleged by prosecution that articles received from doctor were sent by MHC PW10 to FSL Junga vide RC No. 2/2010 through PW6 Guman Singh. It is alleged by prosecution that as per opinion of RFSL Dharamshala Ext.PD writings Mark S-1 to S-24 and A-1 to A-22 have been opined to have been written by one and same person.

3 Accused was charged by learned Sessions Judge Chamba on dated 8.11.2010 under Sections 376 and 506 of Indian Penal Code. Accused person did not plead guilty and claimed trial.

4. Prosecution examined the following witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	ASI Vijay Kumar
PW2	Dhanno Devi
PW3	Yoginder Mohan
PW4	Ashok Kumar
PW5	Dr. Anuradha Mahajan
PW6	C. Guman Singh
PW7	C. Ratto Devi
PW8	C. Raj Kumar
PW9	HC Joginder Singh
PW10	HC Pawan Kumar
PW11	SI Mukesh Kumar
PW12	ASI Kuldeep Singh

4.1

Prosecution also produced following piece of documentary evidence in support of its case:-

<i>Sr.No.</i>	<i>Description:</i>
<i>Ex.PW1/A.</i>	<i>Seizure memo of diary</i>
<i>Ex.PW1/B.</i>	<i>Seizure memo of writing</i>
<i>Ex.P1</i>	<i>Diary</i>
<i>Ext.P2</i>	<i>Writing of accused</i>
<i>Ex.P10</i>	<i>Copy of RC</i>
<i>Ext.P12</i>	<i>Abstract of RC No. 19</i>
<i>Ext.PB and Ext.PB-1 to Ext.PB-23</i>	<i>Specimen writing of accused</i>
<i>Ex.PB-24</i>	<i>Matriculation certificate of victim</i>
<i>Ex.PW2/A</i>	<i>Complaint</i>

<i>Ext.PW2/B</i>	<i>Writing of accused</i>
<i>Ext.PW2/C</i>	<i>Seizure memo</i>
<i>Ext.PW2/D</i>	<i>MLC of victim</i>
<i>Ex.PW5/A</i>	<i>Application to SMO</i>
<i>Ext.PW8/A</i>	<i>-do-</i>
<i>Ext.PW10/A</i>	<i>Copy of FIR</i>
<i>Ext.PW11A</i> <i>and</i> <i>Ext.PW11/B</i>	<i>Endorsements of police</i>
<i>Ext.PW12/A</i>	<i>Site plan</i>
<i>Ext.PA</i>	<i>MLC of accused</i>
<i>Ext.PC</i> & <i>Ext.PD</i>	<i>FSL reports</i>
<i>Ext.D1</i>	<i>Statement of PW3</i>

5. Statement of the accused recorded under Section 313 Cr.P.C. Accused has stated that witnesses have deposed falsely. No defence evidence was adduced by accused. Learned trial Court acquitted the accused of the charges framed against him.

6. Feeling aggrieved against the judgment passed by learned Trial Court State of H.P. filed present appeal under Section 378 of Code of Criminal Procedure.

7. We have heard learned Additional Advocate General appearing on behalf of the State of H.P. and learned Advocate appearing on behalf of the respondent and also perused the entire record carefully.

8. Question that arises in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice as mentioned in memorandum of grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1. PW1 ASI Vijay Kumar has stated that on dated 10.1.2010 he was posted in P.S. Sadar Chamba as HC and in his presence accused produced his diary before ASI Kuldeep Singh and words "NHPC-2004" were written thereon containing 75 pages. He has stated that accused disclosed that this diary is having his hand writing in English and further stated that diary was taken into possession by ASI Kuldeep Singh in his presence and in the presence of Raj Kumar vide seizure memo Ext.PW1/A which bears his signatures and signatures of Raj Kumar. He has stated that accused also signed the memo and diary Ext.P1. He has further stated that on dated 18.1.2010 prosecutrix handed over one letter to ASI Kuldeep Singh in police station which was taken into possession by ASI vide memo Ext.PW1/B which bears his signatures. He has stated that letter produced by prosecutrix is Ext.P2. He has denied suggestion that accused Tilak did not produce any diary. He has denied suggestion that complainant did not produce any letter to the police.

9.2 PW2 prosecutrix has stated that accused Tilak Raj is known to her. She has stated that he belongs to village Kaimli G.P. Uteep. She has stated that accused is known to her for the last two years. She has further stated that accused told her that he would marry her. She has stated that on dated 1.1.2010 accused had violated her person in her residential accommodation at Karian and accused also physically assaulted her during the night. She has stated that accused also slapped her and twisted her arms when she refused the accused not to stay in her premises. She has stated that accused left her house

at 6 AM on the next day on 2.1.2010. She has stated that thereafter she went to police station Chamba and when she reached near the gate of police station the accused called her on mobile and threatened her that in case she lodges the criminal report in police station against accused then he would kill himself and would also kill the prosecutrix. She has stated that due to fear she did not lodge the criminal report against accused. She has further stated that accused thereafter met her near the gate of regional hospital Chamba and offered to take her to his home on scooter. She has stated that accused persuaded her not to lodge the criminal report in police station and accused also told the prosecutrix that he would take the prosecutrix to his home immediately as his wife. She has stated that thereafter accused picked the prosecutrix on his scooter. She has further stated that thereafter accused did not take the prosecutrix to the house of accused but took the prosecutrix to residential quarter of prosecutrix. She has stated that thereafter accused asked her to get ready and thereafter he would take the prosecutrix to the house of accused as his wife. She has stated that she got ready but accused did not take her to his house. She has stated that thereafter accused told the prosecutrix to attend her office and also told the prosecutrix that he would return from Mehla after obtaining money and then he would take the prosecutrix with him as his wife. She has stated that she was working in ICDS. She has stated that on dated 2.1.2010 she had meeting in DPO office Mugla and accused left her at Mugla and thereafter he did not return back and she kept on waiting the accused but accused had switched off his mobile phone. She has stated that after

waiting till 5 PM she disclosed the entire incident to K.D. Sharma Dy.S.P. who also came at the meeting at Mugla on dated 3.1.2010. She has stated that on dated 3.1.2010 it was Sunday and Dy.S.P. called her in his office on dated 4.1.2010. She has stated that Dy.S.P. assured her that he would call the accused on dated 5.1.2010. She has further stated that on dated 5.1.2010 accused had agreed in presence of Dy.S.P. and one Yoginder Mohan and other police officials that he would marry the prosecutrix on the next day i.e. 6.1.2010. She has stated that on dated 6.1.2010 when her entire family came to solemnize the marriage accused ran away. She has further stated that thereafter she filed the complaint to Dy.S.P. which is Ext.PW2/A. She has stated that police came to her residence and she handed over the letter of accused to the police. She has stated that on dated 8.1.2010 she handed over another piece of letter written by accused which is Ext.PW2/B. She has stated that accused did not marry her and he kept on assuring her continuously for two years that he would marry her. She was medically examined by the doctor on dated 6.1.2010. She has stated that MLC Ext.PW2/D bears her signatures. She has stated that she is still unmarried and further stated that during the course of medical examination medical officer took her clothes into possession including shirt and salwar. She has stated that salwar Ext.P3 and shirt Ext.P4 are the same which were handed over by doctor during the course of her medical examination. She has stated that she had worn the said clothes at the time of incident. She has admitted that accused used to visit her residence many times prior to 1.1.2010. She has stated that

accused used to stay during the night period at her residence. She has denied suggestion that accused did not promise to marry her. She has denied suggestion that accused had not written the letter to her. She has admitted that she was in relationship with accused for the last two years. Self stated that accused assured the prosecutrix that he loves her. She has admitted that she is in service since 2005 and joined as Anganwadi worker since 1991. She has stated that accused came to her house in innumerable times. She has denied suggestion that accused had not sexually assaulted her. She has denied suggestion that because accused had refused to marry her thereafter she registered the false case against the accused in connivance with K.D. Sharma.

9.3 PW3 Yoginder Mohan has stated that he is APRO of Sant Nirankari Mandal Chamba and prosecutrix is known to him. He has stated that prosecutrix is daughter of one Roomi Ram and he is his God brother and they are on visiting terms. He has stated that on dated 1.1.2010 prosecutrix had called him by way of telephone at 11.30 PM and told that she was sexually assaulted by accused. He has stated that at about 9 AM on the next morning he had gone to the room of prosecutrix at Karian and prosecutrix was not found in the room. He has stated that on the next day i.e. 3.1.2010 prosecutrix met him at Nirankari Bhawan at Mugla and he told the prosecutrix that she should immediately report the matter to the police after the incident. He has stated that thereafter prosecutrix told him that accused assured the prosecutrix that he would marry the prosecutrix within 2/3 days. He has stated that on dated 6.1.2010

prosecutrix told him that accused had refused to marry her and further stated that prosecutrix told him to come to office of Dy.S.P. and thereafter he went to the office of Dy.S.P. and prosecutrix met him outside the office and they went to meet the Dy.S.P. and accused was also present in the office and Dy.S.P. asked the accused to marry the prosecutrix and accused agreed that he would marry the prosecutrix on the next day and also agreed that he would solemnize the marriage in the Court. He has stated that accused had also given in writing that he would marry the prosecutrix and his writing placed on record. He has stated that prosecutrix also called her parents on telephone to solemnize the marriage on the next day and her parents also came but on the next day accused did not turn up. He has stated that memo Ext.PW2/C bears his signatures. He has stated that he had seen the accused prior to the incident in the room of prosecutrix many times. He has stated that he had asked the accused about his frequent visits to the room of prosecutrix and accused told that accused and prosecutrix would marry. He has stated that he had confirmed the same fact from the prosecutrix and prosecutrix also expressed the same desire.

9.4 PW4 Ashok Kumar has stated that prosecutrix is known to him and she is his paternal aunt. He has stated that in the year 2010 prosecutrix had rented premises in Karian where prosecutrix was staying. He has stated that he also used to reside with prosecutrix in rented premises and accused Tilak Raj is known to him and he identified the accused in Court. He has stated that accused used to frequently visited the residence of prosecutrix for the last about two years. He has stated that

accused and prosecutrix also used to talk frequently on telephone. He has stated that on dated 1.1.2010 he had gone to his native house and returned on dated 5.1.2010 and when he came back prosecutrix told him that accused sexually assaulted prosecutrix on dated 1.1.2010.

9.5 PW5 Dr. Anuradha Mahajan has stated that she is posted at PHC Rajnagar for the last ten years and on dated 6.1.2010 prosecutrix was brought to her for medical examination. She has stated that on request of police vide Ext.PW5/A she had conducted the examination of prosecutrix and issued MLC Ext.PW2/D and same is in her hands and bears her signatures. She has stated that on local examination she had observed as follows. She has stated that labia majora and minora were well developed and pubic hair were black in colour and not matted. She has stated that hymen was not present and no redness and no injury was seen and cervix was normal and whitish coloured discharged was present in vagina. She has opined that prosecutrix was subjected to sexually intercourse. She has further stated that time of intercourse could not be disclosed from clinical as well as chemical analysis report. She has stated that after examination of prosecutrix she had sent the vaginal swab, pubic hair and clothes of prosecutrix for chemical analysis and handed over the same to police. She has stated that salwar Ext.P3 and shirt Ext.P4 are the same which were sent for chemical examination. She has stated that vaginal swab Ext.P5 is the same which was handed over by her to police. She has stated that parcel containing public hair Ext.P6 is also same which she handed over to police and parcel containing the

clothes of prosecutrix Ext.P7 is same which bears her signatures. She has stated that facsimile of seal took on the cloth piece Ext.P8 also bears her signatures. She has admitted that prosecutrix was grown up lady and she also admitted that prosecutrix could resist the sexual assault by way of using the finger nails and teeth bite as a mode of defence. She has stated that she did not find any marks of violence on the person of victim.

9.6 PW6 C. Guman Singh has stated that in the year 2010 he was posted at P.S. Sadar Chamba and on dated 14.1.2010 MHC Pawan Kumar had handed over to him two parcels which were duly sealed with three seals of RH Chamba along with RC No. 2/10 with direction to deposit the same in FSL Junga. He has stated that he deposited the parcels in the office of FSL Junga and handed over the receipt to MHC on dated 6.1.2010. He has stated that parcels remained intact in his possession and copy of RC is Ext.P10.

9.7 PW7 C. Ratto Devi has stated that she is posted in P.S. Sadar Chamba since the year 2008 and on dated 6.1.2010 she took the prosecutrix to Dr. Anuradha Mahajan through docket Ext.PW5/A and further stated that after conducting the MLC the doctor handed over one parcel bearing three seals of RH Chamba, one envelope and sample seal and she deposited the same with MHC Pawan Kumar on the same date. She has stated that articles remained intact in her custody.

9.8 PW8 C. Raj Kumar has stated that he is posted in P.S. Sadar Chamba since 2008 and on dated 8.1.2010 he took the accused Tilak Raj for medical examination to Dr. N.K. Bhardwaj

and after medical examination of accused medical officer handed over to him one parcel and thereafter he handed over the said parcel to MHC Pawan Kumar. He has stated that parcel remained intact in his custody.

9.9 PW9 HC Joginder Singh has stated that in the year 2010 he was posted at P.S. Sadar Chamba and on dated 29.1.2010 MHC Pawan Kumar had handed over to him one envelope which was sealed with three seals of impression 'K' to be deposited at RFSL Dharamshala along with RC No. 11/10. He has stated that he handed over the parcels in the office of RFSL Dharamshala and on his return he handed over the receipt to MHC.

9.10, PW10 HC Pawan Kumar has stated that he is posted as MHC P.S. Sadar Chamba since February 2009 and on dated 6.1.2010 LC Ratto Devi had deposited with him one parcel bearing three impressions of seal RH along with one envelope and sample seal and further stated that he had recorded the receipt of articles in Malkhana register at Sr. No. 419. He has stated that on dated 11.1.2010 HC Raj Kumar also deposited the parcels and he recorded the entry in Malkhana register at Sr. No. 420. He has stated that thereafter he handed over the aforesaid articles through C. Guman Singh to be carried to FSL Junga vide RC No. 2/2010. He has stated that photocopy of RC is Ext.P10 and extract of malakhana register is Ext.P12. He has stated that parcels remained intact in his custody. He has stated that on dated 29.1.2010 ASI Kuldeep Singh handed over to him one envelope sealed with three impressions of seal 'K' and he sent the aforesaid articles through LHC Joginder Singh vide RC No.

11/2010. He has stated that copy of FIR Ext.PW10/A is true and correct as per original record.

9.11 PW11 SI Mukesh Kumar has stated that in the year 2010 he was posted at P.S. Sadar Chamba and on dated 6.1.2010 he was officiating as SHO and he had received the complaint Ext.PW2/A on the basis of which he lodged FIR Ext.PW10/A. He has stated that case was handed over to ASI Kuldeep Singh for investigation and endorsement Ext.PW11/A was in his hand and bears his signatures. He has further stated that complaint has been received from Dy.S.P. Shri K.D. Sharma and further stated that endorsement of Dy.S.P. on the complaint is signed by Dy.S.P. He has stated that he is conversant with his signatures as he worked under him and further stated that after completion of investigation ASI Kuldeep Singh handed over the case file to him and he prepared challan and filed in Court. He has admitted that Dy.S.P. asked him to register the case under Sections 376 and 417 IPC. He has stated that he does not remember whether Dy.S.P. had also sent a copy of judgment along with complaint.

9.12 PW12 ASI Kuldeep Singh has stated that in the year 2010 he was posted as I.O. at P.S. Sadar Chamba and on dated 6.1.2010 ASI Mukesh Kumar officiating SHO had handed over the case file for investigation to him and on the same day he recorded statement of prosecutrix under Section 161 Cr.P.C. and sent the prosecutrix for medical examination. He has stated that application was filed to the medical officer vide memo Ext.PW5/A and MLC was obtained. He has stated that medical officer had handed over to him two parcels stated to be bearing the clothes

of prosecutrix, vaginal swab and pubic hair and said parcel bears the seal of RH Chamba. He has stated that he deposited the aforesaid articles with MHC and he also proceeded to the spot along with LHC Sunita and prepared site plan. He has stated that site plan is Ext.PW12/A. He has stated that he also recorded the statements of witnesses Ashok Kumar and Satya Devi as per their versions. He has stated that accused was also medically examined and MLC of accused was also obtained. He has stated that he recorded statements of prosecution witnesses as per their versions and further stated that nothing was added or deleted by him. He has stated that accused also produced diary Ext.P1. He has stated that he also moved application before Additional Chief Judicial Magistrate Chamba for taking specimen hand writing of accused and specimen signatures and hand writing of accused were obtained. He has stated that he also took into possession the photocopy of matriculation examination certificate of prosecutrix and as per certificate date of birth of prosecutrix was 23.5.1970. He has denied suggestion that letters Ext.P2 and Ext.PW2/B were forcibly got written from accused during the course of investigation.

10. Statement of accused recorded under Section 313 Cr.P.C. Accused has stated that he is innocent and false case has been filed against him. Accused did not lead any defence evidence.

11. Submission of learned Additional Advocate General appearing on behalf of the State that prosecution proved beyond reasonable doubt that accused had committed the criminal offence punishable under Section 376 IPC is rejecting being

devoid of any force for the reasons hereinafter mentioned. PW2 prosecutrix has specifically stated in positive manner that accused was known to her for the last two years and she has specifically stated that accused promised her that he would marry her. She has also stated that accused also used to stay in the night at her residence. She has stated in positive manner that she was in relationship with accused for the last two years. She has specifically stated in the complaint filed before the Superintendent of Police that since two years accused was performing the acting of love affairs with prosecutrix. The age of prosecutrix at the time of incident was about 30 years. Prosecutrix was matured at the time of incident. As per MLC Ext.PW2/D vagina orifice admits two fingers. As per medical certificate prosecutrix was subjected to sexually intercourse but time of intercourse could not be disclosed from clinical as well as chemical analysis report. As per MLC Ext.PW2/D no injury was found on the vagina of prosecutrix or any other part of body of prosecutrix. Even PW3 Yoginder Mohan has stated in positive manner that he had seen the accused in the room of prosecutrix many times. PW3 has specifically stated that he asked the accused about his frequent visits in the room of prosecutrix then accused told that he would marry the prosecutrix. Even PW4 Ashok Kumar who used to reside along with prosecutrix in rented house has specifically stated in positive manner that accused used to visit prosecutrix in her room for the last two years and has stated that accused and prosecutrix also used to talk with each other on telephone. There is no evidence on record that prosecutrix has resisted the sexual assault by way of finger nail

or teeth bite. It was held in case reported in *AIR 1996 SC 922 titled Bodhisattwa Gautam vs. Miss Subhra Chakraborty* that rape is not only a crime against a person of a woman but it is a crime against the entire society. It was held by Hon'ble Apex Court of India that it destroys the entire psychology of a woman and pushed her into deep emotional crises. It was further held by Hon'ble Apex Court of India that it is a crime against basic human rights and is also violative of the victim's most cherished Fundamental Rights granted under Article 21 of Constitution of India. In view of the fact that prosecutrix has herself accepted when she filed the complaint that accused used to visit her residential house and used to stay in her residential house on the false pretext of promise of marriage and in view of the fact that no injury was found on vagina of prosecutrix and other parts of body of prosecutrix and in view of the fact that age of prosecutrix at the time of incident was 30 years we hold that prosecution did not prove criminal offence of rape against accused beyond reasonable doubt. (*See 2005(1) SCC 88 titled Deelip Singh vs. State of Bihar*) We also hold that learned trial Court has rightly acquitted the accused qua offence punishable under Section 376 IPC.

12. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has illegally acquitted the accused under Section 506 IPC is accepted for the reasons hereinafter mentioned. We have carefully perused the testimony of PW2 prosecutrix. Prosecutrix has stated in positive manner that accused had slapped her and also twisted her arm when she refused the accused to stay in her room. Prosecutrix

has stated in positive manner that accused also threatened prosecutrix on phone that in case prosecutrix would report the matter to police then accused would kill himself and would also kill the prosecutrix. Above stated testimony of prosecutrix is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of prosecutrix. In order to attract the ingredient of Section 506 IPC the intention of accused must be to cause alarm to victim. To constitute an offence under Section 506 IPC it must be shown that person charged actually threatened another with injury to his person reputation or property. *(See 2007 Cri. L.J. 1204 titled Tammineedi Bhaskara Rao and others vs. State of A.P. and another)* Hence it is held that it is proved on record beyond reasonable doubt that accused had slapped the prosecutrix and also twisted her arm and accused had also threatened the prosecutrix that in case prosecutrix would report the matter to police then he would kill the complainant. There is no reason to disbelieve the testimony of PW2 prosecutrix qua above stated facts.

13. Submission of learned Additional Advocate General appearing on behalf of the State that minor offence against accused under Section 417 IPC of cheating is also proved beyond reasonable doubt is accepted for the reasons hereinafter mentioned. Prosecutrix has specifically stated in positive manner that accused had sexually exploited her on the pretext that he would marry her. Even version of PW2 is corroborated by PW3 who has specifically stated that accused had agreed in his presence that he would marry the prosecutrix and PW3 has also stated that accused had also agreed to solemnize the marriage

with prosecutrix in Court. PW2 has stated in positive manner that accused had given writing Ext.PW2/B that he would marry the prosecutrix. There is no evidence on record in order to prove that writing Ext.PW2/B was given by accused by way of coercion or undue influence. Accused did not adduce any positive cogent and reliable evidence on record that writing Ext.PW2/B was obtained from him by way of coercion or undue influence. PW3 has stated in positive manner that he had seen the accused prior to the incident in room of prosecutrix and when he inquired from accused about his frequent visits in residential room of prosecutrix then accused told that accused and prosecutrix would marry. Even PW4 Ashok Kumar has stated in positive manner that he used to reside with prosecutrix in rented premises at Karian and he has specifically stated in positive manner that accused used to frequently visit to residential house of prosecutrix in Karian since two years and PW4 has also specifically stated that accused used to stay in residential house of prosecutrix in night and they also frequently used to talk with each other on telephone. We are of the opinion that prosecutrix has surrendered her body to accused on the promise that accused would marry her. It is well settled law that no woman would surrender to any strange person without any promise of marriage. It is proved on record beyond reasonable doubt that accused promised to marry prosecutrix and thereafter accused stayed in residential house of prosecutrix continuously for two years after short intervals and thereafter accused sexually exploited prosecutrix. It is proved on record beyond reasonable doubt that accused had promised the prosecutrix that he would

marry and thereafter prosecutrix called her parents for solemnization of marriage but accused did not turn up at the place of marriage. It is also proved on record that prosecutrix was unmarried woman and we are of the opinion that practice of alluring the unmarried woman to commit sexual intercourse on the pretext of marriage and after exploiting the woman sexually and after fulfillment of sexual desire unmarried boys are violating their oral agreement of marriage. We are of the opinion that such practice should be stopped from the society otherwise anarchy will prevail in the society. It was held in case reported in *AIR 1954 SC 724 titled Mahadeo Prasad vs. State of West Bengal* that offence of cheating is established when accused person induces the complainant to do something which he would otherwise never do. We are of the opinion that in present case accused induced prosecutrix to surrender before him in order to satisfy his sexual desire on the pretext that accused would marry her. We are of the opinion that prosecutrix would otherwise have not surrendered before sexual desire of accused in case accused did not give the offer of marriage. We are of the opinion that from the very beginning accused had dishonest and fraudulent intention to exploit the prosecutrix sexually. It was held in case reported in *1997 Criminal Law Journal 715 (Gauhati High Court) titled Maran Chanra Paul vs. State of Tripura* that if dishonest intention of promise of marriage given by accused to prosecutrix is proved from the beginning of agreement then accused would be liable to be convicted for offence of cheating. We are of the opinion that minor offence of cheating under Section 417 IPC is proved against the accused in present case beyond reasonable doubt.

We are of the opinion that in present case accused is liable to be convicted for minor offence under Section 417 IPC even he is not charged as per provision of Section 222 of Code of Criminal Procedure 1973. It was held in case reported in *AIR 2000 SC 297 titled State of H.P. vs. Tara Dutt and another* that if accused is charged for major offence but he is not found guilty there then he could be convicted for minor offence if the facts would have been indicate that such minor offence was committed. It was held in case reported in *1997 (4)Supreme 214 titled Sangaraboina Sreenu vs State of Andhra Pradesh* that Court is entitled to convict the person of an offence which is minor in comparison to the once for which he is tried.

14. Submission of learned defence Advocate appearing on behalf of accused that in view of the fact that offence under Section 376 IPC is not proved against the accused the accused cannot be convicted under Section 506 and 417 IPC is rejected being devoid of any force for the reasons hereinafter mentioned.

It is well settled law that concept of *falsus in uno falsus in omnibus* is not applicable in criminal law. (*See: AIR 1980 S.C.957 Bhe Ram Vs. State of Haryana, AIR 1971 S.C. 2505 Rai Singh Vs. The State of Haryana.*) In present case it is proved on record beyond reasonable doubt that from the very inception of making of promise the accused did not really entertain the intention of marrying the prosecutrix and promise to marry the prosecutrix was a mere hoax. There is no evidence on record that accused took any positive action to marry the prosecutrix. There is no evidence on record that accused was stopped by circumstances from marrying the prosecutrix which were beyond the control of

accused. On the contrary it is proved on record that the date was fixed for solemnization of marriage by accused but accused intentionally and voluntarily did not come to the place where marriage was to be solemnized between the accused and prosecutrix. Under Section 417 IPC there should be dishonest intention in the beginning at the time of making contract. It is well settled law that dishonest intention at the beginning of contract would be ascertained from previous and subsequent conduct of accused. It is well settled law that contract can be executed in two modes: (1) Written contract. (2) Oral contract. In the present case accused executed oral contract with prosecutrix to marry her which is proved as per testimonies of PW3 and PW4 which are trustworthy and inspire confidence of Court. There is no reason to disbelieve the testimonies of PW3 and PW4. Thereafter accused committed sexual intercourse with prosecutrix several times and resided in the room of prosecutrix during night period several times. Thereafter accused did not take any step for solemnizing marriage with prosecutrix. As per Section 8 of Indian Evidence Act 1872 previous or subsequent conduct of accused is relevant fact. It is proved on record beyond reasonable doubt that accused had dishonest intention from the beginning at the time of making oral contract of marriage with prosecutrix. It is proved on record beyond reasonable doubt that accused had made dishonest intention of offer of marriage just to satisfy his lust of sexual intercourse with prosecutrix. It was held in case reported in *1979 Criminal Law Journal 715 titled Mohan Chandra Paul vs. State of Tripura (Gauhati High Court)* that matter of dishonest intention of marriage from the beginning and

inducement of prosecutrix to have sexual intercourse by false promise of marriage would fall under Section 417 IPC. In the present case dishonest intention of accused from the beginning qua marriage is proved on record beyond reasonable doubt as per previous and subsequent conduct of accused. We hold that minor offence of cheating under Section 417 IPC is proved against the accused beyond reasonable doubt.

15. Another submission of learned defence Advocate appearing on behalf of accused that there is material contradiction in present case and on this ground appeal filed by State be dismissed is rejected being devoid of any force. We have carefully perused the entire oral as well documentary evidence examined by prosecution. There is no material contradiction in present case which goes to the root of case. It is well settled law that minor contradiction is bound to come in criminal case when evidence of criminal case is recorded after a gap of sufficient time. In present case incident took place on dated 1.1.2010 and statements of prosecution witnesses were recorded on 23.1.2012, 12.3.2012, 13.3.2012 and 14.3.2012 after a gap of two years.

16. Another submission of learned defence Advocate appearing on behalf of accused that there is delay in lodging the FIR and on this ground appeal filed by State be dismissed is rejected being devoid of any force. It is proved on record that incident took place on dated 1.1.2010 and on dated 2.1.2010 immediately after the incident prosecutrix went to police station Sadar Chamba and when prosecutrix reached near the gate of P.S. Sadar Chamba accused called the prosecutrix by way of

mobile phone and threatened on phone that in case prosecutrix would lodge the report in police station the accused would kill himself and would also kill the prosecutrix. It is also proved on record that thereafter prosecutrix did not lodge the report and thereafter accused met the prosecutrix near the gate of Regional Hospital Chamba and offered to take prosecutrix on scooter to his residential house and also offered to marry her. It is proved on record that thereafter accused did not marry the prosecutrix and thereafter prosecutrix filed FIR on dated 6.1.2010. We are of the opinion that delay in lodging the FIR is satisfactory explained by prosecution because when prosecutrix went to lodge FIR the accused personally contacted the prosecutrix through mobile phone and persuaded the prosecutrix not to lodge the FIR and also assured that he would marry her. It is proved on record that thereafter intimation was given by prosecutrix to her parents for solemnization of marriage and date and place of marriage was also fixed but accused did not come to place of marriage. Hence it is held that dishonest intention of accused to deceive the prosecutrix from the very beginning is proved in present case beyond reasonable doubt qua promise of marriage.

17. Another submission of learned defence Advocate appearing on behalf of accused that as per medical certificate of prosecutrix placed on record no injury was found upon the vaginal orifice of prosecutrix and other parts of body of prosecutrix and on this ground accused could not be convicted under Sections 417 IPC and 506 Part-I IPC is rejected being devoid of any force. We are of the opinion that for convicting the accused under Section 417 IPC injuries on vagina or other parts

of body of prosecutrix are not essential. We are of the opinion that to convict the accused under Section 417 IPC there should be dishonest intention from the very beginning of oral contract of marriage. It is held that dishonest intention from the very beginning on the part of accused is proved in present case beyond reasonable doubt. It is proved on record that accused has no intention to marry the prosecutrix from the very beginning when oral contract of marriage was executed between accused and prosecutrix. Dishonest intention to deceit on the part of accused is proved as per prior and subsequent conduct of accused in present case from the very beginning of oral contract of marriage. It is proved on record that motive of accused from the very beginning was to satisfy his sexual desire only from prosecutrix without any motive or intention to marry in future. It is well settled law that Section 417 IPC comprised of two parts. (1) First part contemplates whereby deception is practiced upon a complainant when accused dishonestly or fraudulently induces the complainant to deliver property to any person or to consent that any person shall retain property. (2) Second part of Section 417 IPC envisages when by deception practiced upon complainant accused intentionally induces the complainant to do anything which complainant would not do if complainant was not so induced. In the present case also accused from the very beginning with dishonest intention induces the prosecutrix to surrender for sexual intercourse on the false promise of marriage otherwise prosecutrix would not have surrendered before the accused for sexual intercourse. It is well settled law that deceit is

one of essential element of offence of cheating. It is also well settled law that deception may be by words or by conduct.

18. Submission of learned Advocate appearing on behalf of accused that writing obtained on document Ext.PW2/B was obtained by prosecution by way of coercion and undue influence and on this ground accused be acquitted is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the document Ext.PW2/B. In document Ext.PW2/B the accused has specifically written that prosecutrix is his wife and she has the right upon accused and accused agreed to take prosecutrix in his life. Above said writing of accused was sent for chemical examination with admitted specimen hand writing of accused obtained before the Additional Chief Judicial Magistrate to the office of RFSL Dharamshala and Assistant Director Document and Photo Division Regional Forensic Science Laboratory Northern Range Dharamshala has submitted his report that documents S-1 to S-24 and A-1 to A-22 have written by one and same person. There is no reason to disbelieve the report submitted by Assistant Director Document and Photo Division Regional Forensic Science Laboratory Northern Range Dharamshala.

19. Another submission of learned defence Advocate appearing on behalf of accused that above said evidence is not sufficient to convict the accused qua offence punishable under Sections 417 and 506 Part I IPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that conviction could be based on testimony of a single witness in the criminal case if testimony of single witness inspires

confidence of Court. (*See: AIR 1973 SC 944 Jose Vs. The State of Kerla (Full Bench)*)

20. Another submission of learned Advocate appearing on behalf of accused that dispute inter se prosecutrix and accused is of oral agreement of promise of marriage which at the most would attract the civil liability and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that when dishonest intention of accused to cheat is not from the beginning of agreement of marriage then provisions of Section 417 IPC are not attracted and only civil proceedings can be initiated. It is also well settled law that when dishonest intention of cheating exists from the stage of beginning of oral agreement of marriage on the part of accused then provisions of criminal offence under Section 417 IPC are attracted. In the present case dishonest intention of accused to deceit the prosecutrix is proved on record from the beginning of oral contract of marriage as per testimonies of PW2, PW3 PW4 and as per former and subsequent conduct of accused.

21. In view of above stated facts and case law cited supra appeal is partly allowed. We affirmed the acquittal of accused under Section 376 IPC. However, we convict the accused qua minor offence punishable under Sections 417 IPC as per provision of Section 222 of Code of Criminal Procedure 1973 and we also convict accused under section 506 Part-I IPC. We modify the judgment passed by learned trial Court to this extent only. Now convict be heard on quantum of sentence qua offence punishable under Sections 417 and 506 Part I IPC. Bailable

warrants be issued against convict Tilak Raj in the sum of ₹ 50,000/- with one surety in the like amount and he be produced before us on 24.2.2015 for hearing on quantum of sentence.

(Sanjay Karol),
Judge

January 06, 2015
(ms).

(P.S. Rana)
Judge

Cr. Appeal No. 369 of 2012

QUANTUM OF SENTENCE

17.03.2015

Present:- Mr. Ashok Chaudhary and Mr. V.S. Chauhan,
Additional Advocate General with Mr. J.S.Guleria,
Assistant Advocate General for appellant-State.

Mr. Ashok Sharma, Advocate, for the convicted person.

22. On dated 24.02.2015 report of District Welfare-cum-Probation Officer Chamba (H.P.) was sought. We have heard learned Additional Advocate General appearing on behalf of the State and learned defence counsel appearing on behalf of the convicted person upon quantum of sentence and we have also perused report of District Welfare-cum-Probation Officer Chamba carefully.

23. Learned Additional Advocate General appearing on behalf of the State submitted that deterrent punishment be

awarded to convicted in order to maintain majesty of law. On the contrary learned defence Advocate appearing on behalf of the convicted submitted that convicted is first offender and he has large family to support and he be released under Probation of Offenders Act 1958. We have carefully considered submissions of learned Additional Advocate General appearing on behalf of State and learned defence Advocate appearing on behalf of the convicted person. Convicted was sentenced under Sections 417 and 506 Part-1 IPC on dated 6.1.2015 in Criminal Appeal No. 369 of 2012 titled State of H.P. vs. Tilak Raj. District Welfare-cum-Probation Officer Chamba (H.P.) has specifically mentioned in his report that convicted is presently working as forest guard in Forest Department and he has one father aged 61 years, one mother aged 57 years, one wife, one son and one daughter to support. The Probation Officer has also submitted in his report that behaviour of convicted is good in home as well as in society. Even as per reports of Pardhan Gram Panchayat Uteep, Ward Member Gram Panchayat Uteep, Chairman Panchayat Samiti Uteep convicted bears good impression in area. District Welfare-cum-Probation Officer Chamba has further submitted in his recommendation that order be passed as Hon'ble Court deems fit. District Welfare-cum-Probation Officer has not submitted in his report that benefit of Probation of Offenders Act 1958 should not be given to convicted. Keeping in view the fact that convicted is further offender and keeping in view the fact that convicted has one father, one mother, one wife, one son and one daughter to support we are of the opinion that chance of reformation should be given to convicted person. (*See AIR 2000 SC*

1677 titled Dalbir Singh vs. State of Haryana). Keeping in view the circumstances of case including the nature of offence and character of offender we are of the opinion that it is expedient in the ends of justice to release convicted under Section 4 of Probation of Offenders Act 1958 on his entering into a personal bond in the sum of ` 25,000/- (Rupees twenty five thousand only) with two local sureties in the like amount to appear and receive sentence when called upon during three years and during three years convicted will also keep peace and will also maintain good behaviour. The personal and surety bonds will be attested by learned Registrar (Judicial) of H.P. High Court. We also further direct that convicted will remain under the supervision of District Welfare-cum-Probation Officer Chamba (H.P.) for three years. Certified copy of judgment and quantum of sentence will be supplied to the convicted, sureties and to the concerned District Welfare-cum-Probation Officer Chamba (H.P.) forthwith in accordance with law as mentioned under Section 4 of Probation of Offenders Act 1958. Case property will be confiscated to State of H.P. after expiry of limitation for filing of further criminal proceedings. File of learned trial Court along with certified copy of this judgment and sentence be sent back forthwith for compliance. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

(Sanjay Karol),
Judge

March 17, 2015
(ms).

(P.S. Rana)
Judge

High Court of H.P. ◊