

Prosecutrix/PW-2 'AG' [*name withheld to protect the identity of prosecutrix*] and recorded her complaint, wherein she stated that she has been working as an Analyst in a Finance Company at Gurgaon for the last three years and that her duty hours are 10:30 AM to 7 PM and that she has been commuting to her office by a cab provided by the company.

2. On 05.02.2014, she left her office at the usual time i.e. 7 PM. Thereafter, she along with her friends went out for dinner in a restaurant at Cyber Hub, Gurgaon and that after dinner, she left the restaurant at 9:30 AM and came to Vasant Vihar along with her friends, where at about 10.15 PM, a cab was called from 'UBER Cab Mobile Application' at Vasant Vihar. Accordingly, a 'Swift Dezire cab bearing registration No. DL1Y-D-7910' having mobile number of the driver as 9999868777 reached there and she sat on the rear seat of the car.

3. Complainant 'AG' further alleged in her complaint that after some time, she fell asleep on the way and realized that cab driver is sitting with her on the rear seat and molesting her and car was found parked at an isolated place. Complainant tried to push away the driver, however, the car was locked and she was unable to open the door. When

she tried to raise an alarm, Accused slapped her and while strangulating, threatened her that in case she would raise an alarm, he would insert a 'saria' inside her. The complainant got scared. Accused overpowered her and committed rape upon her. She also alleged that Accused took her phone and gave a call from his mobile phone in order to obtain her mobile number. She further stated that while leaving the taxi, she sent a message to her fiancée stating that she was raped, but by mistake, it reached the mobile of Accused, after reading the same he again threatened her. Complainant also stated in her complaint that when Accused dropped her to her house, she took photographs of the vehicle in question wherein registration number was clearly visible and thereafter, made a call at 100 number.

4. On the basis of the aforesaid complaint, the case in hand was registered and thereafter the Prosecutrix was got medically examined at Hindu Rao Hospital vide MLC No.8401/14 (Ex.PW-3/A). The sealed exhibits were collected from the HRH Hospital after the medical examination of the victim and were deposited in the Malkhana. On inquiry from the Prosecutrix/victim, it was revealed that upon

reaching her home, when she entered the mobile No.9999868777 of the driver on the Mobile Application viz., 'Truecaller', it was showing the name of user as 'Gaurav' and so she told the name of the driver as 'Gaurav' in her complaint. Whereas, when the ownership of the offending vehicle No.DL-1YD-7910 was checked by the police from a software 'Automatch', it showed the name of the registered owner as Shiv Kumar Yadav S/o Ram Nath Yadav R/o H.No.120, Block-C-II, Raju Park, Devli Road, Delhi.

5. Upon reaching the aforesaid address of the owner of the offending vehicle it was revealed that Shiv Kumar Yadav was earlier residing as a tenant in that premises and the landlord gave the current address of Shiv Kumar Yadav as B-18, Chanderpuri Colony, Dholipyau, Mathura, Uttar Pradesh.

6. SI Sandeep (PW-14) along with police team went to the aforesaid address at Mathura on 06.12.2014 and took into custody the offending vehicle i.e. white coloured Swift Dezire bearing registration No.DL1YD 7910 which was found parked outside the aforesaid premises. The offending vehicle was thereafter towed and was Parked in

the campus of PS Highway Mathura. Search for Accused Shiv Kumar Yadav was made but he could not be traced despite best efforts. The offending vehicle was loaded in a hired Truck No.DL1M1049 and was later on brought to Delhi and was deposited vide separate seizure memo in the Malkhana.

7. During the course of further investigation, on 07.12.2014 on the direction of Sr. officials, a team was constituted comprising of Sh.Sunil Tanwar, SI Devender Pranav (PW-13) and Ct.Rajpal, who reached Mathura in a private car and upon receipt of secret information, Accused Shiv Kumar Yadav was arrested near Meera Magam Paradise Marriage Home at Anandwan Phaze-I, Mathura, UP and his face was muffled as his TIP was to be done. Personal search of Accused Shiv Kumar was also got conducted and the articles so recovered at his instance were seized and were deposited in the Malkhana at PS Sarai Rohilla.

8. Accused Shiv Kumar Yadav was got medically examined at Hindu Rao Hospital vide MLC No.8477/14 (Ex.PW-4/A) and his potency test was got conducted. The exhibits so received from the

hospital were seized by the police and were deposited into malkhana lateron and his disclosure statement of Accused was also recorded.

9. Statement of Prosecutrix 'AG' was got recorded under Section 164 Cr.PC (Ex.PW-2/B1). Accused Shiv Kumar Yadav was also produced before the court of Ms.Ambika Singh for his TIP. However, Accused refused for his TIP. Accused thereafter unmuffled his face while coming out of the court of learned MM by saying that as he was feeling suffocated he had done so. At that moment, the Complainant who was coming out from another court of Id. MM after recording her statement under Section 164 Cr.PC identified him to be the same who had raped her in the intervening night of 05-06.12.2014.

10. During the course of further investigation keys of vehicle No.DL1YD7910 were taken from Malkhana and the offending vehicle was got inspected by the team of CFSL experts, who had taken black hair recovered from the rear seat area of the offending vehicle, cutting of suspected stain taken from the back of the driver seat of the offending and suspected stained brake light taken from the offending vehicle and got prepared three envelopes which were seized and sealed by the police

and were deposited in the malkhana. Site plan was also prepared at the instance of the complainant. The mobile phone of the complainant was seized during the course of investigation and was deposited with the malkhana thereafter.

11. On 09.12.2011, the mobile phone make 'Apple' which was being provided to the Accused Shiv Kumar Yadav from his company Uber was also seized from his residence at Mathura, UP. Mobile phone of Ayush Dabas from which the Cab was booked was also seized during the course of investigation.

12. Gaurav Thakral (PW-7) was also joined in the investigation, who informed that he had given over his old mobile phone make Nokia bearing Mobile No.9999868777 for use to Accused Shiv Kumar Yadav as his mobile phone was stolen and that he had given the same to Accused Shiv Kumar Yadav. He had also asked Accused Shiv Kumar to return his mobile phone however Accused Shiv Kumar Yadav did not return the same to him.

13. It was revealed during investigation that Accused Shiv Kumar was also involved in various cases and a list to that effect was

also obtained from PS Alau, Distt.Mainpuri, UP. It is further the case of the Prosecution that as Accused Shiv Kumar Yadav diverted the route while carrying the complainant in his cab and had taken her at a secluded place instead of taking her Inderlok, Section 366 IPC was added. Exhibits were also deposited at CFSL, Lodhi Road, CGO Complex, Delhi for examination. After completion of investigation, charge sheet was filed against the Accused under Sections 376(2)(m)/323/366/506 IPC.

B. CHARGES :

14. Accused Shiv Kumar Yadav was heard on the point of charge and was thereafter charged for the offence under Section 376(2)(m)/323/366/506 IPC vide order dated 13.01.2015. He pleaded not guilty and claimed trial when the charges were read over and explained to him.

C. PROSECUTION EVIDENCE :

15. Prosecution examined 28 witnesses in all in order to prove its case which may be categorized as under :

(i) **Public Witnesses** :

16. Prosecutrix 'AG' was examined as PW-2. Her testimony would be discussed later in the course of the judgment in order to avoid repetition and for the sake of brevity.

17. Gaurav Thakral PW-7 deposed that he was working as Senior executive in V-Link Fleet Solutions Pvt. Ltd. where Accused Shiv Kumar Yadav was also working as a driver. On the request of Accused, he had provided him one old Nokia mobile phone handset and one SIM card of mobile No.9999868777 for his use. PW-7 also deposed that Accused Shiv Kumar Yadav has not returned the phone to him till date.

18. The fact that mobile No.9999868777 was registered in name of PW-7, was also proved by the Nodal Officer from Vodafone PW-8, by way of Customer Application Form (CAF) and Call Detail Record (CDR) of this mobile phone.

19. Ayush Dabas PW-23 deposed that in the night of 05.12.2014, he, Prosecutrix 'AG', who is his childhood friend and his other friends had gone to Cyber Hub, Gurgaon for dinner and after having their dinner by 9.30 pm, he came to Vasant Vihar with

Prosecutrix 'A' in his car. Thereafter, he booked a Cab through Uber Application by using his mobile phone no.9873072388.

20. PW-11, Nodal Officer Airtel, produced the relevant record to prove that Mobile No. 9873072388, which was subscribed in the name of PW-23 Ayush Dabas.

21. PW-23 also deposed that he received information on the Uber application about name of the driver, registration number of the car, photograph of the driver and make of the car i.e 'Swift Dezire'. After some time, one cab make Swift Dezire bearing registration no. DL 1YD 7910 came there. He verified the face of the driver who had come with the car from the photographs which had come on Uber application on his mobile phone and thereafter at about 10.55 pm, Prosecutrix 'A' sat in the car and the car went away.

22. Sometime between 12-12.30 am, he received a message about journey completion on the Uber application on my mobile phone. He further deposed that on 15.12.2014, he went to the police station and handed over his mobile phone i.e 'Apple I phone' which was seized vide seizure memo Ex.PW23/A. PW-23 also correctly identified the Accused

Shiv Kumar Yadav in the court when shown to him and also deposed that he had verified his photograph from Uber application before Prosecutrix 'A' sat in the cab.

23. Eric Alexander, Head of Business for UBER Asia was examined as PW-28. He deposed that Accused Shiv Kumar Yadav is the registered owner of Maruti Swift Dezire bearing registration No. DL1-YD-7910 and was operating the said cab as driver partner with their Company and as per their record, the aforesaid cab was booked by one Mr. Ayush Dabas by using UBER application on his mobile phone on 05.12.2014 at about 11 PM and that the driver of the said cab was Accused Shiv Kumar Yadav for which an automatic confirmation of booking of cab was sent on the mobile of Mr. Ayush Dabas.

24. PW-28 further deposed that as per their records, the cab started from F-3/11, Munirka Marg, Block-F, Vasant Vihar, Delhi at 11 PM on 05.12.2014 and journey ended at 12.13 AM at Veer Banda Baragi Marg, Zakhira, New Delhi. This witness also proved his reply to the notice under Section 91 Cr.PC (Ex.PW-27/L) issued by the Investigation Agency as Ex. PW28/A [running into 02 pages]. He also

deposed that he provided the scanned copy of the driving license, registration certificate, authorization certificate and insurance cover note from their record and the same are Ex.PW28/B (Colly.).

25. PW-28 also exhibited the representative data of the confirmation of trip booked by Mr. Ayush Dabas (Ex.PW28/C) and the trip receipt of the said trip by Mr. Ayush Dabas (Ex PW28/C1). He also proved the details regarding the cab booked by one Mr. Kumar Akash prior to the booking by Ayush Dabas on the same day i.e. 05.12.2014 as Ex. PW28/D and the trip receipt of the said trip booked by Mr. Kumar Akash as Ex. PW28/D1.

26. The Satellite Imagery of the GPS route followed by the Accused during the journey on 05.12.2014 booked by Ayush Dabas of cab bearing registration No. DL-1YD-7910 were also exhibited by him as Ex.PW-28/C. He deposed that the red line indicates the route which was actually taken by the driver during the journey and the yellow line represents the path of the vehicle taken post journey. The map showing the detail of the location of the cab in question during the journey which was booked by Ayush Dabas is Ex PW28/F.

27. This witness also proved the details of the Satellite Imagery of GPS route followed by Accused during the journey booked just prior to journey booked by Ayush Dabas i.e. by their previous customer Mr. Akash Kumar and the detailed map showing the said locations are collectively Ex. PW28/G.

28. PW-28 also deposed regarding having provided two other maps; one showing the satellite imagery and the other showing the partial route of the journey undertaken prior to journey booked by Ayush Dabas. The said two maps are collectively Ex. PW28/H.

29. PW-28 further deposed that he had explained the maps also in his reply Ex.PW28/A given to the police and that the documents mentioned above were retrieved from their hard disk by using their official computer system which is under lawful control of their Company and that he got the same printed personally under his supervision. PW-28 also proved the certificate under Section 65 B Indian Evidence Act issued by him bearing his signatures and proved the same as Ex. PW28/I.

(ii) Doctors :

30. Dr. Neelam Saraswat PW-12 deposed that on 06.12.14 while she was working as SR [Obs and Gynae] at Hindu Rao Hospital, Prosecutrix 'AG' was produced before her for her medical examination by the police officials and she was accompanied by her mother. She recorded the alleged history, as told by the Prosecutrix and after obtaining consent from the patient as well as her mother, she examined the patient. On local examination, PW-12 found swelling on Prosecutrix 'A' lower lip along with cut mark linear, scratch mark on both the breasts, scratch on right and left side of the back and opined that all these injuries were fresh. PW-12 also collected all the clothes including undergarments of the victim and all the samples including nail clipping, swab from in between the fingers, swab from both the breasts, oral swab, anal swab, pubic hair combing, pubic hair clipping, cervical swab, vaginal swab, washing from vagina, blood culture, urine sample etc. as per sexual assault kit, converted the clothings of the victim girl into parcel and affixed the hospital seal i.e. HRH. Sexual assault kit was also sealed with the seal of hospital i.e 'HRH'. PW-12 also deposed that she handed over the parcel and sexual assault kit to the police officer. This

witness also identified her handwriting on the remaining part of the MLC (Ex.PW-3/A) bearing her signatures at points X.

31. Dr.Kaveri PW-3 deposed that on 06.12.2014, at about 7.30 pm Prosecutrix 'A' was brought before her for second opinion by the police officials along with MLC. Upon examination she found the patient to be conscious, oriented and responding to commands. Scratch marks were found present on her neck. She further deposed that on local examination, hymen of the patient was found intact with redness present over introitus and there was no bleeding per vaginum (BPV). No visible sign of injury was present in the perrineum. PW-3 examined her and recorded her observations in her own handwriting at point X encircled in red colour vide MLC Ex.PW3/A. Pertinently, in her cross-examination upon being questioned by learned defence counsel regarding nature of scratch marks on the neck of the victim, PW-3 replied that the said scratch marks were suggestive of strangulation.

32. Dr.Jitendra Nigotia PW-4 examined Accused Shiv Kumar Yadav vide MLC Ex.PW-4/A on 08.12.2014. He deposed that on local examination he had found multiple abrasions (scratches) on the face of

Accused and after primary examination, he referred the Accused to EMO (Surgery) and EMO (Forensic Department) for further evaluation and expert opinion. PW-4 also collected the blood of the patient on gauze and the clothes i.e. pant, shirt and underwear of the patient, converted the same in a cloth parcel and sealed the same with the seal of the hospital i.e. HRH and also signed the same and handed over the said parcel to the police along with sample seal.

33. Dr.Alok Kumar PW-20 deposed that on 08.12.2014, Accused Shiv Kumar Yadav was brought for further examination by the police official at the Department of Surgery (Emergency) where he was working on that day with MLC (Ex.PW-4/A). Accused was preliminary examined by Dr.Jitender. PW-20 further deposed that he had examined the Accused Shiv Kumar Yadav and on his local examination, he found the following injuries :

1. Multiple small abrasion on his face with largest one was measuring 6 X 0.4 cms.
2. Abrasion of size 3 X 1 cm, 2 cm medial to the right ASIS (Anterior superior iliac spine i.e. near the pubic bone).
3. 5 X 2 cm abrasion on right waist, 8 cm from the 5th lumbar vertebra surrounded by bruise of size 10 X 5 cm.
4. Bruise over both the glutial (buttock) of size 15 X 15 cm on the right side and 15 X 12 cm on the left side.

34. PW-20 also collected the sample of his pubic hair and nails. However, the Accused refused to give his semen sample. PW-20 also deposed that after examination he referred the Accused to Forensic Department for expert opinion qua potency report. This witness further identified his handwriting on the back side of MLC (Ex.PW-4/A), bearing his signatures at point X.

(iii) **Scientific/Expert Witnesses:**

35. PW-17 Sh.U.S.Thakur, Scientific Assistant, CFSL, CBI, New Delhi deposed that on 08.12.2014, on the request of the police official of this case, he had joined a team headed by Dr.B.K.Mahapatra (PW-26), Senior Scientific Officer, CFSL along with Sh.A.H.Ganvir (PW-18), Scientific Assistant (Photo), Dr.Harinder Prasad (PW-19), Senior Scientific Officer (Finger Prints) and they reached the office of Operation Cell, North District, Delhi Police and inspected one vehicle i.e Swift Dzire of white colour bearing registration No.DL-1YD-7910.

36. PW-17 further deposed that the following four samples which were collected from the aforesaid car :

1. Few long black hair from the rear seat of the car.
2. Cutting of one suspected stain from the back of the driver's seat of

the car.

3. Flaky material from rear seat of the car.
4. One suspected stain from the brake light of the car.

37. Thereafter all these things were handed over to the IO, W/SI Renu in an envelope who sealed the same with the seal of RS.

38. PW-18 Sh.A.H.Ganvir, Scientific Assistant [Photo Division], CBI, CFSL deposed that on 08.12.2014, he took photographs of the five chance prints from the car No.DL-1YD-7910 and the same were numbered as Q1 to Q5 by fingerprint expert who was part of their team namely Dr. Harinder Prasad. This witness also proved the same after seeing the court record as Ex. PW18/A-1 to Ex. PW18/A-5 [the photographs are in two sets i.e. total 10 photographs.] PW-18 also deposed that he used his official camera i.e. DSLR-600D to take the said photographs and that the printouts were later taken by him in my office.

39. PW-19 Sh. Harinder Prasad Sr. Scientific Officer, GR-II, Fingerprints, CFSL, CBI, Delhi deposed that on 08.12.2014, he developed Five chance prints during inspection of the aforesaid car. He also prepared the report in his office on 11.12.2014 which is Ex.

PW19/A bearing his signatures at points A and seal at point B.

40. PW-19 further deposed that on 17.12.2014 he received two sealed parcels with a forwarding letter of SHO, PS Sarai Rohilla for comparison of chance prints taken from the vehicle with specimens already Ex. PW2/P-1 to Ex. PW2/P-5 supplied to him through Investigation Agency. PW-19 also deposed that he had also compared the chance prints taken from the vehicle with another set of specimen finger prints also supplied by Investigating Agency. This witness also correctly identified the said specimen finger prints in the court.

41. PW-19 further deposed that again on 07.01.2015, two sealed envelopes containing five sheets of the palm prints of Accused Shiv Kumar Yadav and another set of the specimen palm prints six in numbers whereof the victim, were received containing the specimen palm print slip for examination and comparison with the above stated chance prints lifted on 08.12.2014 by him. PW-19 had numbered the specimen palm prints of Accused as S-1 to S-6 (exhibited as Ex. PW19/D-1 to Ex. PW19/D-6) and also marked the specimen palm prints of victim as S-7 to S-12 (exhibited as Ex. PW19/E-1 to Ex. PW19/E-6).

42. PW-19 deposed that on examination, he found that the chance palm print Q-1 [Ex. 18/A-2] taken by him on 08.12.2014 was identical to the left palm print of the victim marked by him as S-11 [Ex. PW19/E-5], for the reasons as mentioned in his report Ex. PW19/F [running into 04 sheets, including the enlarged photographs of Q-1 [Ex. PW18/A-2] and specimen palm print S-11 [Ex. PW19/E-5] and that his report bears his signatures at points A and stamp at point B.

43. PW-26 Dr. B.K.Mahapatra, Sr. Scientific Officer Grade-I [Biology], CFSL, CBI, New Delhi deposed that on 08.12.2014, he along with PWs 17, 18 and 19 inspected the vehicle bearing registration No.DL-1YD-7910 and collected samples/clue materials from the vehicle.

44. All the clue materials were handed over to the IO. He also prepared crime scene inspection report (Ex.PW-26/A). PW-26 further deposed that on 12.12.2014, 10 sealed parcels were received duly tallied with the specimen seal impression were forwarded to them. He examined the exhibits and submitted the details of the said exhibits and parcels vide report No.CFSL-2014/B-1731 dated 22.12.2014 which is

Ex.PW-26/B.

45. PW-26 deposed that the result of examination of the said exhibits as per the report Ex.PW-26/B are as follows:

- i. Blood was detected on the exhibits 1f [breast swab], 1o [oral swab], 1p [blood sample], 1q [blood sample], 2d [brassier], 3b [shirt], 3c [underwear], 4 [blood stained gauze] and 8 [flaky material].
- ii. Blood in traces was detected on the exhibits 1b [nail scrapping], 1e [in between finger swab], 1j [vaginal swab], 1k [cervical mucus swab], 1m [washing from vagina], 1n [rectal swab], 2a [jeans pant] and 10 [nail clippings].
- iii. Semen was detected on exhibits 1j [vaginal swab of vaginal secretion], 1k [swab of cervical mucus], 1n [swab of rectal examination], 2a [jeans pant] and 2c [underwear].
- iv. DNA profile generated from the male fraction DNA obtained from the source of exhibits: 1j [vaginal swab and smear], 1k [cervical mucus swab], 1n [rectal swab and smear], 2a [jeans pant], 2c [underwear], 3b [shirt], 3c [underwear], 5 [pubic hair],

and 10 [nail clippings] was found to be human male in origin and consistent with the DNA profile of Shiv Kumar Yadav [source of exhibit-4: Blood stained gauze].

- v. DNA profile generated from the female fraction DNA obtained from the source of exhibits:1b [nail clippings], 1e [in between finger swab], 1f [breast swab], 1j [vaginal swab], 1k [cervical mucus swab], 1m [vaginal washing], 1n [rectal swab and smear], 1o [oral swab], 2c [underwear], 2d [brassier], 6 [hair] and 8 [flaky material] was found to be human female in origin and consistent with the DNA profile of complainant [source of exhibits-1p and 1q: blood sample].

(iv) **Police Witnesses:**

46. PW-1 ASI Jaimal Singh, Duty Officer deposed regarding registration of the FIR of this case by him upon receipt of rukka from Ct.Tejpgal sent by ASI Alma Minz in the intervening night of 05-06.12.2014 and proved the computerized copy of the same as Ex.PW-1/A and his endorsement on the rukka as Ex.PW-1/B. He also deposed regarding issuance of a certificate under Section 65B Evidence

Act (Ex.PW-1/C).

47. HC Veer Sain, MHC(M) was examined as PW-9. He deposed regarding receiving of different sealed exhibits seized during the investigation from the Investigation Officers viz., as well as other police officials on different dates and making of their respective entries thereto in register No.19 thereafter vide separate respective entry numbers against each entry. PW-9 also deposed regarding handing of the various sealed parcels to Ct.Arvind on different dates for depositing the same at CFSL, CBI, CGO Complex, New Delhi as per direction of IO vide separate RC entries and also collection of their receiving thereto on different dates.

48. PW-10 Ct. Arvind deposed that on 12.12.14 on the direction of IO, MHC[M] handed over to him one Micromax mobile phone, which was recovered in the personal search of Accused and it was seized by the IO vide seizure memo Ex. PW10/A. He further deposed regarding deposit of various sealed case property in the office of CFSL (CBI), Lodhi Road, Delhi.

49. PW25 Ct. Pushpendra Singh produced the record regarding

previous involvements of Accused in various FIRs, which fact was also not disputed by Accused.

50. PW15 HC Manoj Kumar proved record of case FIR No. 521/11 u/s.376/506 IPC, PS Mehrauli registered against Accused Shiv Kumar Yadav.

51. As per PW16 ASI Shrinivasan, in the intervening night of 05-06.12.2014, while he was posted as HC at CPCR, PHQ, at about 01:11 AM (night) one call was received from a mobile phone no. 9711360362, which was registered in the name of one Akshay Kumar however the call was made by one lady and that he had heard the voice of the lady. The call was transmitted to the concerned PCR official. PW-16 also brought the copy of PCR Form duly attested by concerned ACP, CPCR and proved the same as Ex.PW-16/A.

52. As per PW-21 Ct. Rahul, on 06.12.2014, he was working as DD Writer at PP Inderlok. At about 01:20 AM, on receipt of information regarding rape committed by a car driver, he recorded DD No.2 PP, which was marked to W/SI Alma Minj for necessary action who left for spot along with Ct.Tejpal. This witness also brought the

original DD register and proved the copy of the said DD entry duly verified, attested by ACP, Sub Division Sarai Rohilla as Ex.PW-21/A.

53. PW-13 SI Devender Pranav deposed that on 07.12.2014, as per directions of Senior Officers, one team was constituted consisting of ACP Devesh Mahla of Kotwali, Inspector Sunil Tanwar of PS Lahori Gate, Ct.Rajpal and himself. They went to Mathura and reached PS Highway where SI Surender Kumar of PS Highway (PW-24) was briefed about the case and purpose of their reaching there and he was associated. PW-24 also corroborated the testimony of PW-13 SI Devender Pranav.

54. PW-13 further deposed that upon receipt of secret information that Accused is hiding himself somewhere near Meera Magan Paradise Marriage Home, a raid was conducted at the above place and Accused Shiv Kumar Yadav was apprehended from there. On his search, two driving licence issued in his name, one issued from Mathura, UP and another from Delhi, one RC of his vehicle and one key on which UBER was written on the keyring, one phone make MICROMAX having two sims were recovered, besides other articles as

mentioned in the personal search memo. Accused Shiv Kumar Yadav was arrested in this case after interrogation vide arrest memo Ex.PW-13/A and his personal search was conducted vide memo Ex.PW-13/B. PW-13 also deposed regarding having recorded the statement of SI Surender of PS Highway, Mathura and thereafter they left for Delhi via PS Highway and came to Delhi and handed over the custody of Accused to IOW/SI Alma Minz.

55. PW-13 further deposed that the face of Accused was got muffled soon immediately after his arrest and he was given instructions to keep his face muffled as his TIP was to be conducted and it was also so recorded in the arrest memo itself. Till Accused remained in their custody, he was kept in muffled face even at the time of producing him before the IO of the case.

56. PW-14 SI Sandeep also deposed that on 06.12.2014 on the instructions of senior officers, he was deputed to search for the vehicle involved in this case i.e. DL-IYD-7910 Swift Dezire and the Accused. He confirmed the address of the owner of the above vehicle through Auto Match and the Owner's name of the vehicle was revealed as Shiv

Kumar Yadav S/o.Sh.Ram Nath Yadav R/o.Block C-2, House no.120, Raju Park, Delhi Road, Delhi. PW-14 along with Ct.Sant Ram reached the above stated address but he came to know on local enquiry that Accused is a permanent resident of B-18, Chander Puri, Mathura, UP. He discussed the above development with SHO and on his instructions, he immediately left for Mathura. SI Prakash was also associated.

57. PW-14 further deposed that he reached PS Highway Mathura and got associated the local staff and reached B-18, Chander Puri, Mathura, UP and found one vehicle Maruti Swift Dzire bearing No.DL 1Y D 7910 was parked outside this address. He searched for the Accused Shiv Kumar Yadav but he was not available there. PW-14 thereafter took the vehicle into police possession vide seizure memo Ex.PW-14/A. The vehicle was locked from outside. He did not try to open the vehicle and passed the information about the seizure of vehicle to the PS including by sending the copy of seizure memo. PW-14 was instructed to bring the vehicle with the help of crane and parked it at the office of Operation Cell, North District.

58. PW-14 further deposed that on 07.12.2014, he hired one

vehicle from Sohna Roadways bearing No. DL 1M 1049 for towing the above stated vehicle for bringing it to Delhi, as instructed. The payment receipt issued by Sohna Roadways (two in numbers) which they had given to him in lieu of the payment made by him as towing charges is Ex.PW-14/B and that the name of the driver who brought the cab to Delhi by towing it was Adesh. They reached Delhi and PW-14 informed to the MHC(M) about bringing the vehicle physically as information qua seizure was given to him on 06.12.2014. Till the vehicle was brought to Delhi from Mathura, it was not tampered in any manner. PW-14 also deposed that Ct.Sant Ram was with him in the above proceedings and he recorded the statement of Ct.Sant Ram and driver Adesh.

59. W/SI Alma Minj stepped into the witness box as PW-22. She deposed that in the intervening night of 05-06.12.2014, while she was on night emergency duty at PS Sarai Rohilla, at about 1.30 am (i.e. of 06.12.2014) on receipt of DD No.2PP Inder Lok (Ex.PW-21/A), she along with Ct.Teupal and L/Ct.Indu reached to the house of the complainant at House no.313/36, C-1, Main Road, Inder Lok, Delhi where complainant A.G. met her along with her mother. PW-22 recorded

the statement of complainant/victim (Ex.PW-2/A). Thereafter, PW-22 accompanied the victim to Hindu Rao Hospital for her medical examination and that she was also accompanied by L/Ct. Indu and Ct.Tejpal. Mother of victim also accompanied them to the hospital. The victim was examined by the doctor at HRH vide MLC already Ex.PW-3/A after taking consent from the victim and her mother.

60. PW-22 further deposed regarding collection of two sealed parcels i.e. one sexual assault kit and another stated to be the clothings of the victim with the seal of HRH along with the sample seal from the examining doctor which was taken into police possession through seizure memo Ex.PW-2/B which was also signed by L/Ct.Indu in her presence at point C and by victim at point A. PW-22 also deposed regarding preparation of rukka (Ex.PW-22/A) which she handed over to Ct.Tejpal at about 5.30 am with direction to get the FIR registered. PW-22 also deposed regarding writing of the FIR number and other particulars on the top of the seizure memo Ex.PW-2/B at the PS after registration of the FIR and also depositing the case property with MHC(M), HC Veer Sain.

61. PW-22 also deposed regarding visit of the place where the complainant boarded the taxi and moving of the application (being part of Ex.PW-2/B-1) before Ld.MM with a request to record the statement of victim girl under Section 164 Cr.P.C. This witness also got the complainant counselled through NGO, Counsellor and collected the Counselling Report. PW-22 also recorded the supplementary statements of complainant, L/Ct.Indu, Ct.Tejpgal, Duty Officer ASI Jagmal Singh and HC Veer Sain, MHC(M).

62. PW-22 further deposed that on 07.12.2014 Accused was produced by SI Devender Pranav of PS Lahori Gate at about 10:30/11:00 PM in the PS Sarai Rohilla alongwith the personal search articles of the Accused besides the documents pertaining to arrest i.e. arrest memo and personal search memo, CD. She deposited the personal search items in the Malkhana alongwith copy of memo and while she was interrogating the Accused, she received instructions from Senior Officers that further investigation of this case would be taken by W/SI Renu. Accordingly, she handed over the custody of the Accused and case file to W/SI Renu.

63. PW-27 IO/SI Renu is the second IO of the case to whom further investigation was transferred on the intervening night of 07-08.12.2014. She deposed that the first IO W/SI Alma Minz handed over the custody of the Accused to her. She interrogated the Accused and recorded his disclosure statement (Ex.PW-27/A) and also got the Accused medically examined at Hindu Rao Hospital vide MLC Ex.PW-4/A, where doctor handed over two sealed parcels sealed with the seal of 'HRH' and two sample seals which she seized through seizure memo Ex.PW-27/B. The Accused was referred for further examination at the Department of Surgery where Dr.Alok Kumar, who also handed over the exhibits and the sample seal which were seized vide seizure memo Ex.PW-27/C. PW-27 deposed that she deposited the case property at the Malkhana.

64. PW-27 further deposed that she sent a letter to CFSL, Lodhi Colony with a request to inspect the offending vehicle. The Accused had pointed out the place where he committed rape upon the victim girl and she prepared the pointing out memo Ex.PW-27/D. Incidentally, this arrest memo and the pointing of the place of incident by the Accused has

been admitted by the Accused in his statement recorded under Section 313 Cr.PC.

65. IO further deposed that she also prepared pointing out memo of the said spot at the instance of victim girl. She also testified that the Accused was taken to Hindu Rao Hospital, Forensic Department for his potency test which was conducted vide report Ex.PW-27/F. (not disputed by Accused.) Thereafter, Accused was produced before Ms.Ambika Singh, learned MM in muffled face where he refused to participate in the TIP proceedings. PW-27 then made a request to learned MM for three days Police Custody Remand of Accused, which was allowed. Thereafter, while coming out of the court room, Accused removed the cloth from his face and got himself un-muffled. In the meantime, victim girl 'AG' came there and she identified the Accused as the person who had committed rape upon her on the intervening night of 05-06.12.2014 at 56 Bigha Park in Cab. She further deposed that came back to the police station and took the key of the vehicle from MHCM and went to the office of Operation Cell, North District, where the car was opened and got inspected by the expert witnesses. After inspection,

three envelopes and one plastic polythene were handed over to her. She affixed her seal of 'RS' on each envelopes and took the envelopes into police possession vide seizure memo Ex.PW-27/H and which were deposited in the Malkhana.

66. PW-27 went to the house of victim who took them to the place of occurrence i.e. near 56 Bhiga Park and got prepared the site plan with her assistance, which is Ex.PW-27/I. She seized the mobile phone of the victim and took the same into police possession vide seizure memo Ex.PW-27/C and deposited the same at the Malkhana.

67. On 09.12.2014, Accused took them to his house at Mathura and handed over one mobile phone containing one Uninor Sim card, which was also seized vide seizure memo Ex.PW-27/J. They returned to Delhi on the same day. Accused pointed out the place from where he had picked up the victim in his cab vide pointing out memo Ex.PW-27/K.

68. On 12.12.2014, with the permission of the court, fingerprints of the victim were obtained. Mobile phone of the Accused was seized vide seizure memo Ex.PW-10/A. On 13.12.2014, IO got

summoned the list of criminal cases in which Accused was found involved from PS Alau, Mainpuri, UP, which is Ex.PW-25/D. She thereafter served notice under Section 91 Cr.PC to the representative of Uber Cab Services (PW-28).

69. On 15.12.2014, Ayush Dabas joined the investigation. His statement was recorded and his mobile phone was seized vide seizure memo Ex.PW-3/A. IO/PW-27 also deposed that on 18.12.2014. She recorded the statement of Gaurav Thakral (PW-7) and on 23.12.2014, she got prepared scaled site plan (Ex.PW-6/A) with the help of Insp.Mahesh (PW-6) and on the same day, she received the report from the Expert, CFSL and Scene of Crime (SOC) Report i.e. Ex.PW-26/A and Ex.PW-26/B respectively.

70. As per PW-27, she got verified the Registration Certificate of the vehicle of the Accused vide report Ex.PW-27/M (not disputed by the Accused) and his Driving Licence, issued from Delhi Transport Authority, Sheikh Sarai vide report Ex.PW-27/N (not disputed by Accused) from the Delhi Transport Authority vide report of the concerned official Ex.PW-5/A.

71. The palm prints of the Accused were obtained on 02.01.2015 and of the victim on 03.01.2015 after seeking permission of the court and were sent to CFSL through Ct.Arvind on 07.01.2015. She collected the report of Expert (Ex.PW-19/F). On the basis of material collected during investigation, charge sheet was prepared and got filed the same in the concerned court.

D. STATEMENT OF ACCUSED & DEFENCE EVIDENCE:

72. In his statement recorded under Section 313 CrPC, Accused pleaded not guilty and claimed his false implication. He stated that after sitting in the car, Prosecutrix started crying after telling him the destination i.e. Inderlok via Daula Kuan and Punjabi Bagh. When he asked her as to why she is crying, she told him that it is not his business to ask her. Thereafter, he kept quiet.

73. Accused further stated that he overheard her talking to someone on her mobile phone. She was saying that though she will marry her fiancée Akshay, but “*Ayush ne mere saath achhaa nahi kiya*”. As there was traffic jam at Punjabi Bagh, he took a detour and reached her house through Rampura. He dropped her outside her house and

thereafter, he parked his car near Chhapan Bhiga Park as there was probability of getting passengers from that place. After sometime, he noticed that mobile phone of prosecutrix was lying on the rear seat of the car. He received her call on her mobile and she requested him to return her mobile and accordingly he went to her house and handed back her mobile to her. She asked him for his mobile number and he gave her his mobile number and left. Accused lastly pleaded that he did not commit rape upon the Prosecutrix 'AG' and that the case against him is false.

74. Accused did not lead any evidence in his defence despite being granted opportunity for the same.

E. ARGUMENTS:

75. Before dealing with the rival submissions of the Defence and Prosecution, it may be mentioned that on 13.02.2015 when the case was at the stage of final arguments, Accused moved an application under Section 311 CrPC, seeking permission to recall all the twenty eight [28] prosecution witnesses examined in the course of trial. The said application was dismissed vide order dated 18.02.2015.

76. Accused challenged the said order before Hon'ble High

Court and vide order dated 04.03.2015 passed in Criminal Misc. No. 725/2015 & Criminal M.A. No. 2765/2015, the order dated 18.02.2015 was set aside and the Accused was accordingly permitted to recall and cross-examine thirteen [13] prosecution witnesses.

77. The prosecutrix as well as the State challenged the said order of Hon'ble High Court before Hon'ble Supreme Court. Vide order dated 10.09.2015, Hon'ble Supreme Court allowed the said appeals and dismissed the application of the Accused for recall of prosecution witnesses.

78. Pursuant to said order of Hon'ble Supreme Court, Ld. Defence Counsel and Ld. Addl. PP advanced detailed arguments. I have considered the said submissions and also gone through the evidence on record, both oral and documentary.

79. For the sake of convenience, the respective submissions of the Defence and the Prosecution, and the evidence on record may be categorized and dealt with under the following heads:-

Testimony of the Prosecutrix PW2:-

80. It would be relevant to firstly deal with the testimony of the

star witness of Prosecution i.e. PW2 Prosecutrix.

81. Upon stepping into the witness box, prosecutrix 'AG' deposed that she has been working in a Finance Company at Gurgaon since last 03 years and has been commuting from her house to her office by office cab. Her working hours are from 10:30 AM to 7 PM. She further deposed that on the day of the alleged incident i.e. on 05.12.2014, she left her office at 7 PM and went out for dinner with her friends at Cyber Hub, Gurgaon. After dinner, she left the restaurant at 9:30 PM and came to Vasant Vihar with her friend Ayush Dabas [PW23]. He booked a cab for her from his mobile phone by using the application of UBER in his mobile phone [Admitted fact].

82. One Swift Dezire car of white car bearing registration No. DL-1YD 7910 reached there. The mobile number of the cab driver was 9999868777 and she sat on the rear seat of the cab and driver started driving the car. It may be pertinent to note that the fact that Accused is registered owner of the aforesaid cab and that prosecutrix sat on the rear seat of the car are also admitted facts.

83. She fell asleep while sitting on the rear seat of the cab.

When she woke up after sometime, she realized that the cab had been parked at an isolated spot and the cab driver i.e. Accused was upon her and doing 'cherkhani' with her. She tried to push him away and also tried to open the door of the car, but since the doors were locked, she was unable to open the same despite best efforts. When she raised alarm, Accused slapped her 3-4 times and pressed her neck stating that '*agar mujhe nahi karne degi to saria ghusa dunga*'. She deposed that she got frightened due to the threat extended by the Accused as she was reminded of the gang rape case of 16th December, 2012. Accused gave her beatings and caused injuries on her lower lip, neck, breast, shoulder and back by scratching [nocha]. She further deposed that Accused lowered her jeans and underwear. He also lifted her top and her brassier and overpowered her and committed sexual intercourse with her and also tried to do unnatural sex i.e. anal sex with her.

84. She further testified that Accused had already taken away her mobile phone while she was asleep. After he had committed rape upon her, he gave a missed call from her mobile phone which was with him upon his mobile phone. She pleaded with the Accused to let her go

and also assured him that she will not reveal about the incident to anyone. 85. Thereafter, Accused started driving the car and on the way they crossed Inderlok Metro Station and she realized that Accused had taken her much ahead of her house at an isolated spot where he rape her brutally. On the way, she sent a SMS to her finacee namely Akshay saying 'I was raped.' However, by mistake the said SMS was sent to the mobile phone of the Accused as his mobile number was the last dialed number from her mobile.

86. PW2 'AG' also deposed that Accused stopped the car near her house. She got down from the car and immediately clicked two photographs of the number plates of cab and then she made a call at 100 number from her mobile phone No. 9711360362. PCR van reached within 5-10 minutes followed, by police officials and after making enquiries from her, her statement Ex. PW2/A was recorded. She was, thereafter, taken to Hindu Rao Hospital and got medically examined, after obtaining her consent and the consent of her mother.

87. Doctor collected her samples and clothing during her medical examination vide seizure memo Ex. PW2/B. Thereafter, she

led the police to the point from where she had boarded the cab of the Accused i.e. in front of Priya Cinema and showed the said spot to the police. She also correctly identified her signatures on her statement which had been recorded under Section 164 CrPC in the course of investigation and proved the same Ex. PW2/B-1 [colly]. PW2 also deposed before the court that while she was coming out from the court after recording of her said statement, she saw the Accused in custody of the police in the corridor and immediately identified him and told the police officers that he is the same person, who had committed rape upon her in the intervening night of 05/06.12.2014.

88. PW-2 further deposed that she had mentioned the name of the assailant as Gaurav in her complaint Ex. PW2/A as she had searched for the name of Accused by using Application 'True Caller' and that is why she had stated that the name of cab driver was Gaurav in her complaint Ex. PW2/A.

89. On 08.12.2014, she led the police to the spot where the Accused had committed rape upon her and police prepared site plan at her instance. Thereafter, her mobile phone was seized vide seizure

memo Ex. PW2/C at the police station. She also stated that the SIM card of mobile phone 9711360362 was registered in the name of her fiancée Akshay.

90. On 12.12.2014, she again came to the court of Ld. MM and her fingerprints were obtained by the IO after seeking permission of the court and identified the same as Ex. PW2/P-1 [colly]. PW-2 'AG' also correctly identified the clothes which she was wearing at the time of the incident and which were taken by the examining doctor. In the course of trial, her clothes i.e. one multi coloured brassier, one blue colour jeans, one top and one panty are exhibited as Ex.PW2/PA to Ex.PW2/PD respectively. She also correctly identified cab in question and the clothes which were worn by the Accused at the time of the incident in question. The same are Ex. PW2/PF and Ex. PW2/PH respectively.

91. It was submitted by learned Addl. PP that Prosecutrix/PW-2 is a trustworthy and truthful witness, and not only has she correctly identified the Accused, but also given a vivid account of the entire incident during her testimony in court. Further, if found

credible and trustworthy, conviction of an Accused can be recorded under Section 376 IPC on the sole testimony of the Prosecutrix, without looking for any corroboration.

92. *Per contra*, defence vehemently assailed the testimony of the Prosecutrix stating that she is an unreliable witness and that her testimony is full of embellishments and improvements and it cannot be relied upon.

93. Ld. Defence Counsel contended that PW2 'AG' has improved upon her earlier statements upon stepping into the witness box and testified in court so as to suit the documents fabricated by the Investigating Agency during the course of investigation of the case.

94. It was submitted that as per PCR form Ex. PW16/A, Prosecutrix sat in the cab of the Accused at about 9:30 PM whereas in her cross-examination, she stated that she sat in the car at 11 PM. It was further pointed out that as per the said PCR form Ex. PW16/A, she made a call at 100 number 01:11:18, though as per the said PCR form till 1:42 AM, PCR officials were not able to find the spot. However, when she testified before the court, Prosecutrix claimed that PCR

officials reached her house within 5-10 minutes of her calling.

95. Ld. Defence Counsel further argued that the name of the Accused is not mentioned in the PCR form Ex. PW16/A despite the fact that the name of the Accused had already been revealed to PW23 Ayush as per the prosecution's own document Ex. PW28/C and Ex. PW28/C-1.

Ld. Defence Counsel questioned as to why prosecutrix did not ask her friend i.e. PW23 Ayush about the name of the cab driver and why she resorted to seek help of mobile application 'True Caller', which revealed the name of user of said mobile phone as Gaurav.

96. The next contention of the Defence is that as per the PCR form Ex. PW16/A as well as FIR, the place of incident is mentioned as 'unknown'. Ld. Defence Counsel submitted that there is nothing on record to show as to how the prosecutrix then led the police to the alleged place of incident.

97. Ld. Defence Counsel also pointed out that although she claimed to be in her office during day time on 05.12.2014, yet her CDR Ex. PW-8/E shows changes/variations in her cell ID tower numbers, indicating thereby that she was on the move and she is thus not a

truthful witness.

98. He further submitted that though Prosecutrix testified in court that she was given beatings by the Accused, who also pressed her neck forcibly, PCR form Ex. PW16/A does not find mention of any such allegation. It was further submitted in order to bring the case within the ambit of Section 376 (2) (m) IPC, the prosecutrix testified before the court that Accused pressed her neck forcefully, though in her complaint Ex. PW2/A, she only mentioned that Accused had pressed her neck and did not use the word 'forcefully' in her complaint.

99. Further, in her statement recorded under Section 164 Cr.PC Ex. PW2/B-1 she stated that Accused had pressed her neck 'very forcefully'. Ld. Defence Counsel contended that apparently the statement of the prosecutrix was recorded under Section 164 CrPC on 08.12.2014 i.e. after her medical examination, which was done on 06.12.2014, and only in order to bring the case within the ambit of Section 376 (2) (m) IPC and in consonance with the observations of Doctor on MLC Ex. PW3/A, the prosecutrix improved her version, both in her statement recorded under Section 164 CrPC and again while

testifying in court.

100. The claim of the prosecutrix that Accused had pressed her neck forcefully during the alleged incident is also stated to be false in much as when she was first examined by PW12 Dr. Neelam in the morning of 06.12.2014, no injury was found on her neck, whereas during her second medical examination by Dr. Kaveri on the same day at 7.30 PM, scratch marks were found over her neck. Ld. Defence Counsel thus contended that the said injury/scratch marks were also self inflicted and were fabricated in the intervening period between the two medical examinations, only to ensure that case is covered under provisions of Section 376 [2] [m] IPC.

101. While challenging the veracity of prosecutrix, Ld. Defence Counsel also pointed out that prosecutrix did not even whisper about the alleged threat of the Accused that he would insert 'saria' inside her body when she made PCR call Ex. PW16/A and this allegation is nothing but an afterthought since in Ex. PW16/A she only stated about being threatened by the Accused.

102. Ld. Defence Counsel also contended that prosecutrix gave

three different versions of the alleged taking of her mobile phone by the Accused in the course of the alleged incident. He pointed out that in her complaint Ex. PW2/A, prosecutrix 'AG' claimed that Accused took her phone while she was getting down from the car, in her statement recorded under Section 164 CrPC Ex. PW2/B-1 she stated that Accused snatched her mobile phone and during her deposition in court, she stated that Accused had already taken away her mobile phone while she was asleep. It was contended by contended by Ld. Defence Counsel that these three different versions of prosecutrix further make her an unreliable witness.

103. The veracity of the statement of prosecutrix was also challenged by Ld. Defence Counsel on the ground that in her statement recorded under Section 164 CrPC Ex. PW2/B-1 she stated about slight penetration by the Accused for the first time only to bring the case within the definition of rape under Section 375 IPC. He pointed out that while deposing before the court, prosecutrix used the term 'sexual intercourse', while in her complaint Ex. PW2/A, she used word 'rape'.

104. Ld. Defence Counsel further contended that neither in her

complaint Ex. PW2/A nor in her statement recorded under Section 164 Cr.PC did the prosecutrix PW2 mention anything about the Accused having committed unnatural sex with her and it is only for the first time while testifying before the court that she alleged that Accused also tried to do unnatural sex i.e. anal sex. Ld. Defence Counsel submitted that prosecutrix thus moulded her testimony as per the report of CFSL, CBI Ex. [PW26/B] wherein the semen of the Accused was found in her anal swab.

105. It was further pointed out that in both her medical examinations, first by PW-12 Dr. Neelam and second by PW-3 Dr. Kaveri, vide MLC Ex. PW3/A, no anal examination of prosecutrix was done, which also indicates that she did not make any complaint to the doctors of any such act, having been committed by the Accused.

106. Ld. Defence Counsel further contended that as per the report of PW12 Dr. Neelam no injury was found on the private part of prosecutrix as per MLC Ex. PW3/A. However, when she was examined again on the same day by PW3 Dr. Kaveri, 'redness' was found present over introitus of the prosecutrix. It was argued that the prosecutrix

fabricated this evidence during the intervening period between her two medical examinations, only to bring her case within the definition of rape under Section 375 IPC, in as much as her hymen was found to be intact during both her medical examinations.

107. It was thus the argument of the Defence that prosecutrix is not a credible witness and her testimony cannot be relied upon.

Medical Evidence:

108. The medical evidence brought on record during trial has also been assailed by the Defence on various scores.

109. At the outset, it was submitted by learned defence counsel that it is the case of the Prosecution that Prosecutrix 'AG' was examined twice i.e. once at 3:25 AM and secondly at 7:30 PM on 06.12.2014. He submitted that the entire charge sheet and Prosecution witnesses are silent as to the need for this second medical examination. Although, PW-22 W/SI Alma Minz deposed before the court that the Prosecutrix was taken for second medical examination as certain clarification was required, however, no application to the doctor, containing any such request was produced during the entire length of trial to establish as to

what clarification is required or what was the scope of this clarification for which the Prosecutrix was again got examined by PW-3 Dr.Kaveri at 7:30 PM on 06.12.2014.

110. It was further contended that the MLC Ex. PW3/A is completely silent with regard to the handing over of the exhibits of the Prosecutrix to the IO by the examining doctor. It is only upon being examined in court that PW-12 Dr.Neelam Saraswat deposed for the first time that she handed over the exhibits which were lifted by her during medical examination of the Prosecutrix/PW-2.

111. Learned Defence counsel vehemently argued that since the MLC of the Prosecutrix is silent with regard to the taking of her exhibits, unlike MLC of the Accused (Ex.PW-4/A), no exhibits were lifted/collected at the time of medical examination of the Prosecutrix 'AG', and that the same were planted and later on sent to CFSL, that too after arrest of the Accused. Hence, the report of CFSL (CBI) Ex.PW26/B showing the presence of DNA of Accused in the various exhibits allegedly lifted at the time of medical examination of the Prosecutrix, is a fabricated report.

112. While assailing the testimony of PW-3 Dr.Kaveri and the report regarding second medical examination of the Prosecutrix, learned defence counsel further submitted that PW-3 Dr. Kaveri found scratch marks on the neck of the Prosecutrix and redness present over her introitus, which were not seen by Dr.Neelam at 3:25 AM at the time of her first medical examination. Further, the other injuries noted by PW-12 Dr.Neelam Saraswat were not mentioned by PW-3 Dr.Kaveri when she examined the Prosecutrix at 7:30 PM on 06.12.2014. He submitted that the doctors examined by the Prosecution are thus not truthful witnesses and the evidence has been fabricated and manipulated only to falsely rope in the Accused in this case.

The 'Malkhana' Controversy:-

113. During the course of arguments, learned defence counsel also raised, what may be termed as 'The Malkhana Controversy', which is in fact, two-fold.

114. Firstly, it was argued that there were in fact two cars, one which was deposited in Malkhana of PS Sarai Rohilla on 06.12.2014 and the other which was brought to Delhi on 07.12.2014, but never

deposited in the Malkhana.

115. It was contended that as per the testimony of PW-9 MHC(M) HC Veer Sain, the car No. DL-1YD 7910 was deposited in the Malkhana on 06.12.2014 vide entry No.3806 of Malkhana Register Ex. PW9/A. It was argued that the car could not have been deposited in the Malkhana of PS Sarai Rohilla on 06.12.2014 when it is the own case of the Prosecution that it was brought to Delhi only on 07.12.2014 from Mathura, UP.

116. As per the testimony of PW-14 SI Sandeep, he brought the cab of the Accused from Mathura to Delhi only on 07.12.2014, regarding which there is no entry in the register of Malkhana of PS Sarai Rohilla. Hence, learned defence counsel put forth the theory of there being two cars.

117. The next limb of the 'The Malkhana Controversy' is that as per IO SI Renu's application for Police Custody Remand of the Accused dated 08.12.2014, the car bearing No.DL-1YD-7910 make Swift Desire was lying deposited in the Malkhana of PS Sarai Rohilla on 08.12.2014. There is no entry in the register of Malkhana Ex.PW-9/A regarding the

movement of the car bearing No.DL-IYD-7910 from the 'Malkhana' to the premises of the Operation Cell, North District, where it is stated to have been inspected by the CFSL Experts i.e. Sh.U.S.Thakur (PW-17), Sh.A.H. Ganvir (PW-18), Sh.Harinder Prasad (PW-19) and Dr.B.K.Mahapatra (PW-26).

118. In support of this contention, it was submitted that PW-14 SI Sandeep nowhere testified as to where he parked the car after bringing it from Mathura to Delhi. It was argued that PW-14 SI Sandeep had only received instructions to park the car in the office of the Operation Cell and there is no evidence to establish as to whether he in fact parked the car there or not. Further, neither SI Renu nor SI Alma Minz deposed anything with respect to the arrival of the car from Mathura.

119. It is submitted that in fact, some other car which was apparently inspected by the CFSL Experts and the Accused cannot be connected with the said other car. As per the claim of the learned defence counsel the car bearing registration No.DL-1YD-7910 was never moved from the 'Malkhana' to PS Sarai Rohilla to the premises of

Operation Cell of North District as there is no entry of the movement of the car and thus it could not have been inspected by the CFSL Experts in the complex of Operation Cell of North District.

120. There is also no evidence that the car was towed to the office of Operation Cell. It was further submitted that though PW-27 SI Renu deposed before the court that she took the keys of the car from the MHC(M) Veer Singh on 08.12.2014 for its inspection by officials of CFSL (CBI), however, the MHC(M) register Ex.PW-9/A does not contain any entry to this effect.

121. It was further contended that vide order dated 07.01.2015, on an application filed on behalf of Accused, he was permitted to inspect the car bearing No.DL-1YD-7910. The keys of the car was handed over to Sh.Alok Kumar, Advocate who was then representing the Accused, and an entry to this effect was duly made in the register of the Malkhana Ex. PW9/A on 13.01.2015.

122. However, there is no similar entry regarding the movement of either the key or the vehicle No. DL-1YD 7910 on 08.12.2014 in the entire Malkhana register Ex.PW-9/A, which clearly establishes that the

car inspected by the team of CFSL was not the car in question.

123. Extending the said argument further, Learned defence counsel also submitted that it thus naturally follows that the exhibits allegedly lifted by the CFSL Experts were not lifted from the cab of the Accused and thus not only is the lifting of the exhibits planted and manipulated, but the same are also not been connected in any manner to the Accused. The reports of CFSL (CBI) are thus fabricated and must be discarded.

Process of Investigation:-

124. The Defence also severely attacked the investigative process in this case.

125. It was contended that the entire investigation of the case has been manipulated and evidence has been fabricated in order to falsely implicate the Accused.

126. At the outset, learned defence counsel argued that as per PCR Form Ex.PW-16/A and the FIR, the place of incident is 'Unknown'. He submitted that if the place of incident was not within the knowledge of the Prosecutrix, as per the Prosecution's own documents, then how

that is it that she led the police team to the alleged place of incident in the course of investigation. It was submitted that the Investigation Agency did not deliberately seize the SIM of the mobile phones of the Prosecutrix and Ayush and only seized their respective mobile phones. It was submitted that the relevant data has thus been withheld and thus the investigation has been most unfair.

127. Further, as per the PCR Form Ex.PW-16/A, the place of incident could not be found by the police till 1:42 AM. Learned defence counsel argued that how is it that PW-22 W/SI Alma Minz reached at the house of Prosecutrix at 1:30 AM, as per her testimony. He further argued that PW-22 W/SI Alma Minz deposed that she had sent rukka through Ct.Tejpgal for registration of FIR. However, the Prosecution did not examine Ct.Tejpgal and so the factum of sending the rukka has not been proved.

128. It is further contended that there is no explanation as to why the mobile phone of the PW-23 Aayush Dabas was seized on 15.12.2014 i.e. after 10 days of the alleged incident. Similarly, as per the Prosecution case the Accused was arrested on 07.12.2014 while his

mobile phone was seized only on 12.12.2014.

F. ANALYSIS, FINDINGS & REASONS:

129. Before analyzing the evidence on record in the light of the submissions made by the Prosecution and the Defence, it would be necessary, in my view, to note the admitted facts of the case. A conjoint reading of the statement of Accused recorded on 13.01.2015 before framing of charges, and his statement recorded under Section 313 CrPC, the following admitted position emerges, which may be enumerated as under:-

- a) The Accused admitted the factum of recording of statement of prosecutrix under Section 164 CrPC Ex. PW2/B-1 by Ms Riya Guha, Ld. MM/Delhi.
- b) Accused does not dispute the fact that he refused to participate in the TIP proceedings conducted by Ms Ambika Singh, Ld. MM/Delhi [Ex. PW27/G].
- c) Accused does not dispute his potency test report prepared by Dr. Ashish Tyagi [PW27/F]. [Reference may be made to his response to question No. 89 of his statement under Section 313 Cr.PC].

- d) Accused further admitted that he is registered owner of the car in question i.e. Swift Dezire bearing No. DL-1YD-7910 [Ex. PW2/E] and the report of the concerned authority in this regard Ex. PW27/M. [Reference to Question No. 1 of statement of Accused recorded under Section 313 Cr.PC].
- e) Accused further admitted in response to question No. 46 of his statement recorded under Section 313 CrPC that he was issued Driving Licence from Delhi vide licence No. DL0320110264678 and the report to this effect is Ex. PW5/A.
- f) Accused further admitted that he was operating Swift Dezire bearing No. DL1YD 7910 cab as driver/partner with UBER India System Pvt. Ltd. [Reference to question No. 2 of statement of Accused recorded under Section 313 CrPC.]
- g) Accused further admitted that on 05.12.2014 PW23 Ayush Dabas booked a cab by using UBER Mobile Application from his mobile No. 9873072388 after reaching near Priya Cinema, Vasant Vihar. [Reference to question No. 5 of statement of Accused 313 CrPC.]
- h) While responding to question No. 7 in his statement recorded

under Section 313 CrPC, Accused Shiv Kumar Yadav also admitted that on 05.12.2014, Prosecutrix PW2 'AG' sat in the rear seat of his car near Priya Cinema, Vasant Vihar, Delhi and told him to take her to Inderlok.

i) While responding to question No. 33 of his statement recorded under Section 313 CrPC, Accused also admitted that he was using mobile No. 9999868777 which was registered in the name of PW7 Gaurav Thakral, who has given his old Nokia mobile phone along with SIM card of the aforesaid number to him when both of them were working in the same company earlier and that Accused had not returned the said mobile phone to PW7.

j) In his statement recorded under Section 313 CrPC, in response to question No. 42, Accused Shiv Kumar Yadav also admitted that his blood sample had been taken by Doctor, who medically examined him at Hindu Rao Hospital.

k) Accused also admitted that case FIR No. 521/11 under Section 376/506 IPC PS Mehrauli was registered against him. He, however, added that he has been acquitted in the said case.

l) Accused Shiv Kumar Yadav also admitted that he found involved at other cases at U.P. as mentioned in report Ex. PW25/D. He, however, added that these are false cases.

m) While responding to question No. 91 of his statement recorded under Section 313 CrPC, Accused Shiv Kumar Yadav admitted that he had also pointed out the pick up point from where he picked up the victim on 05.12.2014 vide pointing out memo Ex. PW27/K.

130. As per Section 58 of the Indian Evidence Act, the facts which are admitted are not required to be proved.

Prosecutrix/PW-2 : A truthful witness

131. Upon a careful analysis of evidence on record, I am of the opinion that PW-2/Prosecutrix is a reliable and truthful witness. The reasons for this finding are as under:

(i) It is apparent on going through the evidence on record and the admission of the Accused, as discussed herein above that admittedly the prosecutrix sat on the rear seat of the cab of the Accused bearing registration No. DL-1YD 7910 on the night of the incident i.e. 05.12.2014, after the cab had been booked by PW23 by using UBER

Mobile Application from his mobile phone. Prosecutrix PW2 testified that Accused committed rape upon her by overpowering her in the said car. Prosecutrix/PW-2 was cross-examined at length, but despite her lengthy cross-examination, her testimony to this effect remained unimpeached.

(ii) I find myself unable to subscribe to the arguments of Ld. Defence Counsel that the use of word 'sexual intercourse' by prosecutrix in her testimony, and word 'rape' in her complaint Ex. PW2/A implies that she improved upon her statement in any manner whatsoever.

(iii) Further, the claim of the Defence that prosecutrix mentioned about the Accused trying to do anal sex with her for the first time while testifying before the court, is also apparently contrary to the record. A careful reading of the statement of the prosecutrix under Section 164 CrPC Ex. PW2/B-1 would reveal that in the said statement, the prosecutrix clearly stated before Ld. MM that the *male private part of the accused had entered her 'private parts'* to some extent. The use of the word "*private parts*" by the prosecutrix in her statement under Section 164 Cr.PC Ex. PW2/B-1 is sufficient to show that it is not for

the first time before the court, that she mentioned about the Accused committing anal sex with her.

(iv) As per Biological Examination and DNA Profiling Report Ex.PW-26/B, semen was detected on exhibits 1j (vaginal swab of Prosecutrix), 1k (cervical mucus of Prosecutrix), 1n (swab of rectal examination of Prosecutrix), 2a (Jeans Part of Prosecutrix) and 2c (Underwear of Prosecutrix). Further, as per Report Ex.PW-26/B, the DNA profile generated from male fraction DNA obtained from the source of exhibits: 1j (vaginal swab and smear), 1k (Cervical mucus swab), 1n (Rectal swab & smear), 2a (Jeans pants), 2c (Underwear), 3b (Shirt), 3c (Underwear), 5 (Pubic hair) and 10 (Nail Clippings) was found to be human male in origin and consistent with the DNA profile of Shiv Kumar Yadav (Source of exhibit-4 : Blood stained Gauze). Thus, as per report Ex.PW-26/B, semen of Accused was found in vaginal swab, cervical mucus, swab of rectal, jeans part and underwear of the Prosecutrix.

132. It is relevant to note that the DNA profile of the Accused was generated from his blood sample taken on a gauze [Ex. 4 of the

report Ex. PW26/B]. It is the case of the prosecution that Accused refused to give his semen sample at the time of his medical examination and thus there can be no other reason for the presence of his semen in the vaginal swab, cervical mucus swab and rectal swab of the prosecutrix, nor any explanation for the same was offered by the Accused at any time during trial.

133. It may also be reiterated even at the cost of repetition, that while responding to question No. 42 in his statement recorded under Section 313 Cr.PC, Accused admitted that his blood sample had been taken by Doctor. Further, though he denied that he had refused to give his semen sample, however, there is not even an iota of evidence on record to establish that semen of the Accused was taken by Investigating Agency forcibly at any point of time nor was this contention even raised on behalf of Accused either during the course of trial or even at the time of arguments. Moreover, there is unrebutted testimony of PW20 Dr. Alok Kumar, to the effect that Accused had refused to give his semen sample.

134. Thus, to my mind, the testimony of the prosecutrix that

Accused forcibly committed sexual intercourse with her and even attempted to do unnatural sex i.e. anal sex with her is completely fortified by the scientific evidence by way of DNA examination report Ex. PW26/B. I may add that in all fairness, learned Defence counsel did not raise the argument that since the hymen of Prosecutrix was intact, rape could not have been committed upon her.

135. I find absolutely no force in the submissions that since the exhibits of the prosecutrix and the Accused were sent to CFSL (CBI), Lodhi Colony, Delhi only after the arrest of the Accused, it is sufficient to imply that the report of the CFSL is manipulated report or tampered piece of evidence.

136. Moreover, PW-27 SI Renu was questioned in this regard during her cross-examination and she clarified that she sent exhibits to CFSL on 12.12.2014 as prior to that she was busy in investigation as Accused was on police remand. Moreover, all the samples were not collected by that time. She further stated that though samples of victim had been collected by 08.12.2014 and however, on 06.12.2014 and 07.12.2014, CFSL was closed as it was Saturday and Sunday

respectively. Thus, the mere fact that exhibits of the Accused and prosecutrix were sent to CFSL (CBI) only on 12.12.2014 cannot be said to imply that there has been any tampering or manipulation, at the hands of the Investigation Agency.

137. In this regard, reference may also be made to the report of CFSL Ex. PW26/B and the testimony of PW26 Dr. B. K. Mahapatra. As per the report Ex. PW26/B, the exhibits received in CFSL were duly sealed with the seal of 'HRH' and as per testimony of PW26 Dr. B. K. Mahapatra *“The seals on the parcels were intact while receiving the case and tallied with the specimen seal impression forwarded to us.”*

138. In the light of the aforesaid evidence, I also find no force in the submissions of the Defence that since PW12 Dr Neelam did not mention in the MLC Ex. PW3/A that she had collected the exhibits or sealed the same, the exhibits were either planted or tampered with.

139. It is noteworthy that not only PW12 Dr. Neelam, but also prosecutrix PW2 and first IO PW22 Alma Minz consistently testified that sexual kit and clothes of the victim were handed over by the examination Doctor and that they were sealed with the seal of 'HRH'.

This is coupled with the testimony of PW26 Dr. B.K.Mahapatra to the effect that the samples, when received, in CFSL were having their seals intact. From the testimony of PW-10 Ct.Arvind, it has also been established that the sealed parcels were deposited by him in the office of CFSL (CBI), CGO Complex, New Delhi against receipt and that the same were not tampered with till they remained with him. It is necessary to keep in mind that PW-26 is a Senior Officer of CFSL (CBI), which is an independent Agency and there is no reason to doubt his testimony.

140. His testimony to this effect remained unimpeached despite his lengthy cross-examination, conducted on two dates. It is noteworthy that in his cross-examination also PW26 reiterated that exhibits were received as per laid down procedure of CFSL, CBI. There is thus no reason to doubt the testimony and the report of expert witness PW26 Dr. B. K. Mahapatra and the submissions of the Defence in this regard must be rejected outrightly.

v) It must also be kept in mind that admittedly the MLC Ex. PW3/A was in possession of the Investigating Officer after the first medical

examination of the prosecutrix and till her second medical examination on 06.12.2014. Had there been any intention to manipulate the evidence, it was easy for the Investigating Officer to manipulate or alter the MLC during this intervening period. The very fact that no such manipulation was done in the MLC also reflects the genuineness of the case of the Prosecution and the fairness of Investigation conducted by the police officials.

141. Upon considering the evidence on record in the light of the submissions made, I find myself unable to agree with arguments of learned Defence counsel that only in order to bring the case within ambit of Section 376 [2] [m] IPC, the Prosecutrix PW2 testified that Accused had pressed her neck forcefully, though in her statement recorded under Section 161 CrPC Ex. PW2/A, she only mentioned that Accused had pressed her neck and not used the word 'forcefully' or that PCR form Ex. PW16/A does not find mention of any such allegation. It is pertinent to note that in her statement recorded under Section 164 CrPC, prosecutrix clearly stated that '*accused ne bahut jor se mera gala ghota*'. The testimony of the prosecutrix to this extent thus, cannot be termed as an

improvement under any circumstances.

142. I am also unable to agree with the submissions that since prosecutrix did not state about the alleged threat of Accused that he would insert 'saria' inside her body when she made PCR call Ex. PW16/A, so this allegation is an afterthought. It is noteworthy that not only in her statement recorded under Section 164 CrPC Ex. PW2/B-1, but also in her complaint Ex.PW2/A, the prosecutrix mentioned about this threat extended to her by the Accused during the course of alleged incident. Moreover, the PCR form Ex. PW16/A can certainly not be expected accepted to contain the entire and complete account of the incident as the purpose of PCR call is only to provide information regarding commission of offence.

143. Ld. Defence Counsel also contended that prosecutrix gave three different versions to the alleged taking of her mobile phone by the Accused in the course of incident.

144. However, this can certainly not be termed as a “material” improvement, since the underlying factor still remains the same that Accused had taken away the mobile phone of prosecutrix PW2 from her

in the cab.

vi) In the light of the testimony of the Prosecutrix coupled with the DNA analysis report Ex.PW-26/B, there is no room for doubt that Accused Shiv Kumar Yadav committed rape upon the Prosecutrix, as alleged.

145. To my mind, the non mentioning of redness on introitus of Prosecutrix, which as per PW-3 was due to attempt to penetrate, in the report of PW-12 Dr.Neelam, is not sufficient to discard the scientific evidence by way of DNA Report Ex.PW-26/B and the testimony of the Prosecutrix which remained unimpeached and consistent despite her lengthy cross-examination.

vii) During the course of arguments, much reliance was also placed by Ld. Defence Counsel on the fact that CDR of the mobile phone No.9711360362 of the Prosecutrix Ex.PW8/E reflects that there was an incoming call on her mobile phone from the mobile phone of her mother bearing No. 9211764804 at 00:50:08 hrs and the duration of the call is 16 seconds. It was submitted by Ld. Defence Counsel that apparently prosecutrix had talked to her mother at 12:50 AM though

she deposed before the court that she fell asleep after sitting in the cab. Further, the prosecutrix nowhere mentioned the fact that she had talked to her mother at 12:50 AM and this concealment on her part raises doubt about veracity of the Prosecutrix.

146. I have considered this submission of the Defence. However, I find that there is no substance in this argument. Firstly, there is not an iota of evidence on record to show that prosecutrix in fact talked to her mother for 16 seconds at 12:50 AM. The mere fact that an incoming call of 16 seconds duration is reflected in CDR is not sufficient *per se* to hold that prosecutrix talked to her mother at this point of time. It has already been held hereinabove that the mobile phone of the prosecutrix had been taken away by the Accused. In these circumstances the possibility of Accused having disconnected the phone after receiving the said call cannot be ruled out.

147. Even otherwise, a careful reading of testimony of prosecutrix PW2 would reveal that she did not mention the exact point of time when she fell asleep. Similarly, she has nowhere testified the exact point of time when Accused committed rape upon her. Thus, the

mere fact that incoming call of 16 seconds duration is reflected from her CDR cannot be said wash away the entire evidence on record or to disbelieve the prosecutrix or to hold that no such incident occurred.

148. The truthfulness of testimony of Prosecutrix and falsity of claim of Accused is also established from the CDR of Prosecutrix Ex.PW-8/E and that of Accused Ex.PW-8/B.

149. It is the plea of Prosecutrix PW-2 that Accused gave a missed call from her mobile phone on his mobile phone after committing rape upon her. Her CDR Ex.PW-8/E and that of Accused Ex.PW-8/B do not reflect this missed call. PW-11 Nodal Officer, Airtel deposed on being cross-examined, that unless a call is matured, it is not reflected in the CDR and there is no record of missed calls.

150. Accused in his statement under Section 313 Cr.PC claimed that in fact Prosecutrix had left her mobile in his cab when he dropped her home. She called on her mobile and he went to her house and returned her mobile. However, there is no truth in this plea as is evidence from CDRs Ex.PW-8/B and Ex.PW-8/E. In CDR of Ex.PW-8/E, there is only one call from a landline No. at 1:24:35, but it

certainly cannot be her call for asking Accused to return her mobile phone, since she had already made a call at 100 number from her mobile phone at 1:09:54 after reaching home and thus her mobile was very much with her.

151. In the light of the above observations, I have no hesitation in holding that Prosecutrix PW-2 is a credible, truthful and trustworthy witness. It may also be mentioned that minor variations pointed out by learned defence counsel during the course of arguments do not fall in the category of “material contradictions” and cannot be said to affect the case of the Prosecution fatally. For instance, the contention of the Defence that Prosecution did not bring on record the photographs of number plate of cab of Accused though Prosecutrix is stated to have clicked them on de-boarding the cab, makes no difference to the Prosecution case. The Accused, discussed above, admitted being the registered owner of cab No.DL-1YD-7910. He also admitted that he picked up Prosecutrix on 05.12.2014 in the said cab and thus thereby admitted, both his, as well as presence of Prosecutrix in the cab in question.

152. Similarly, the fact that MLC Ex.PW-3/A shows presence of smell of alcohol in the breath of Prosecutrix cannot be said to have any bearing on merits of the case.

153. Further, the contention of defence as to why PW-2 used 'true caller' mobile Application to find out the name of Cab Driver and did not ask Ayush PW-23 about it, must also be discarded, in view of the admitted fact that Accused had picked up Prosecutrix in his cab on the night of incident from the pick-up point, as per the case of the Prosecution.

154. I also find no force in the argument of the defence that there were changes in the Cell ID Tower numbers during office hours i.e. in day time on 05.12.2014, i.e. prior to the incident, of Prosecutrix as per CDR Ex.PW-8/E. This contention is wholly irrelevant inasmuch, as her presence in the cab of Accused at the time of incident is an admitted fact.

155. Next, the non-filing of mechanical inspection report by the Prosecution to prove that there was central/child lock system in the cab of the Accused is also not relevant, in view of testimony of Prosecutrix

that Accused had overpowered her during the incident, and she was unable to escape despite best efforts.

156. I am also supported in my view by a judgment of the Hon'ble Apex Court titled as *State of Punjab vs. Gurmit Singh, AIR 1996 SC 1393(1)*, where the duty of a court while appreciating the evidence of a rape victim was discussed and it was observed by the Hon'ble Apex Court as under :-

“Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's right in all spheres, we show little or no concern for her honour. It is sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of crime of sex...

“... The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies

in the statement of the Prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case...

.. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

157. In yet another judgment of Hon'ble Supreme Court, titled as *Vinod Kumar vs. State of Haryana, in Crl. Appeal No.1401/2008,* *decided on 08.01.2015* it has been held as under:

“... It is well settled in law that minor discrepancies on trivial matters not touching the core of the case or not going to the root of the matter could not result in rejection of the evidence as a whole...

...It is expected of the Courts to ignore the discrepancies which do not shed the basic version of the prosecution, for the Court has to call into aid its vast experience of men and matters in different cases to evaluate the entire material on record.”

The 'Malkhana' Controversy: A misplaced theory:-

158. From the testimony of PW14 SI Sandeep, it stands proved that cab of Accused bearing No. DL-1YD-7910 was seized on 06.12.2014 from outside the house of Accused at Mathura, UP, vide seizure memo Ex. PW14/A.

159. PW14 further deposed that he passed on the information about seizure of the vehicle to the PS, including by sending the copy of the seizure memo.

160 PW9 MHC[M] HC Veer Sain, while responding to a court question clarified that he inadvertently put the entry dated as 06.12.2014 in the Malkhana Register Ex. PW9/A, on seeing the said date of seizure memo, and in fact the car had come to the Malkhana on 07.12.2014 only.

161. A conjoint reading of testimony of PW9 and PW14 thus clarifies that entry No. 3806 in respect of car No. DL-1YD 7910 was made on 06.12.2014 itself i.e. on the date of seizure of the car, as per seizure memo Ex.PW14/A, whereas it was physically brought to Delhi only on 07.12.2014.

162. It must also be borne in mind that though the car was

physically brought to Delhi on 07.12.2014, however, strictly speaking, it was in custody of officials of PS Sarai Rohilla upon it being seized on 06.12.2014.

163. It can also be taken judicial note of that generally the 'Malkhana' of a Police Station is not large enough to physically accommodate all the case property, which may be seized in all cases registered at that particular PS. In most cases, it is not practically possible to park vehicles inside that malkhana and the vehicles seized by the police are often parked else where, even outside the four-walls of that PS, although they are in possession/custody of the police officials of that PS and 'entered' in the Malkhana register of that particular PS.

164. In view of above, the arguments of the Defence that there were two cars, one seized on 06.12.2014 against entry No. 3806 of Malkhana Register Ex. PW9/A and the other brought to Delhi on 07.12.2014 and parked in premises of Operation Cell [North], is liable to be rejected.

165. There is thus no substance in the theory of there being two cars. The contention of the Defence that SI Sandeep nowhere deposed

where he parked the car after bringing it to Delhi, and that he only deposed that he was instructed to bring it to Delhi, is also devoid of merits. A complete reading of testimony of PW14 SI Sandeep reveals that he deposed that *“I was further instructed to bring the vehicle with the help of crane and park it at the Office of Operation Cell, North District.On 07.12.2014, I hired one vehicle from Sohna Roadways bearing No. DL-1M-1049 for towing the above stated vehicle for bringing it to Delhi as instructed.”* [Emphasis added]. He further deposed *“We reached Delhi and I informed to MHC(M) about bringing the vehicle physically as information qua seizure was given to him on 06.12.2014.”*

166. It was submitted by learned Addl. PP that as per common practice, no entry was made in Malkhana regarding handing over the key of car to IO/SI Renu on 08.12.2014 as it was not given to any outside person, and that entry was only made on 13.01.2015 when key was given to Sh.Alok Kumar, Advocate, who inspected the vehicle after seeking permission of the court.

167. Moreover, the testimony of PW-27 SI Renu to the effect that

she took the key of the vehicle from MHC(M) and went to the office of Operation Cell, North District, where the vehicle was inspected by experts from CFSL (CBI), viz., PW-17, PW-18, PW-19 & PW-26, is un rebutted, despite her lengthy cross-examination of Prosecutrix, conducted on three dates of hearing.

168. In the light of the above discussion, I have no hesitation in holding that the 'Malkhana' Controversy, as raised by the Defence is undoubtedly, a misplaced theory and thus liable to be rejected.

Investigation: Whether Defective? Effect thereof?

169. Although the role of the Investigating Agency is of much importance in a given case, yet at the same time, it must also be borne in mind that any fault in the investigation cannot throw out an otherwise good Prosecution case.

170. I am supported in my view by the observations of Hon'ble Supreme Court in the case of *Hema vs. State, thr. Inspector of Police, Madras, Criminal Appeal No. 31 of 2013 (Arising out of S.L.P. (Crl.) No. 9190 of 2011), decided on 7th January, 2013* wherein the Hon'ble Supreme Court held:

“It is clear that merely because of some defect in the investigation, lapse on the part of the I.O., it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions etc., it is the obligation on the part of the Court to scrutinize the prosecution evidence de hors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth.” [Para 13]

171. Similar view was also taken in the case of *C. Muniappan and Others vs. State of Tamil Nadu, 2010 (9) SCC 567*, where the Hon'ble Apex Court observed:

“.....The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency

or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.”

172. In the totality of facts and circumstances of the instant case and the non-seizure of SIM cards of mobile phones of PW2 and PW23 cannot be said to be damaging to the case of the Prosecution, particularly in view of the fact that their Call Detail Records were very much part of the record and duly proved.

173. Similarly, the time of reaching of IO at the house of prosecutrix on receipt of information regarding the incident, also cannot be said to be of much relevance.

174. The Defence has also not been able to show as to how the

delay in seizure of mobile phones of PW-23 and Accused could be a result of any manipulation or an attempt to fabricate any evidence, or in any manner damaging to the Prosecution case.

175. I have also considered arguments of the Defence that the Prosecution did not examine the persons from whom they inquired about the address of the Accused after they reached at his address which was revealed upon search by using the software 'Automatch'. It was pointed out that as per PW-14 SI Sandeep after confirming the address of the owner of the vehicle bearing No.DL-1YC-7910 through 'Automatch', he along with Ct.Sant Ram reached at the address i.e., Block C-2, House No.120, Raju Park, Devli Road, Delhi and came to know upon local inquiries that the Accused is permanent resident of B-18, Chander Puri, Mathura, UP. However, the person from whom such inquiry was made has neither been cited nor examined as a Prosecution witness.

176. To my mind, the non-examination of such public person does not affect the case of the Prosecution, inasmuch as the Accused, while responding to question No.58 of his statement recorded under Section 313 Cr.PC himself admitted that vehicle No. DL-1YD-7910 was

seized near his house. Thus, it is not the plea of the Accused that the vehicle was not seized from near his house at Mathura and thus the mere fact that the person who revealed his Mathura address was not examined as a witness cannot be said to be fatal to the case of the Prosecution.

177. In its recent pronouncement titled as *State of Karnataka Vs Suvarnnamma & Anr. in Criminal Appeal No. 785 of 2010 D.O.D. 14.10.2014* , Hon'ble Supreme Court relied upon *Shivaji Sahabao Bobade Vs State of Maharashtra 2 SCC 793* where it has been laid down as under:

“The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt.”

178. Similar approach was also adopted in case of *State of Punjab Vs Jagir Singh (1974) 3 SCC 277* where it was held as under:-

“A criminal trial is not like a fairy tale wherein one is free to give flight to ones imagination and phantasy. It concerns itself

with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged.

.....In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the [pic] courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures. The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hyper technicalities or figment

of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth.”

179. The above mentioned contentions of the Defence have thus, in my view, failed to create any dent in the case of the Prosecution.

G. CONCLUSION:

Charge under Section 376 [2] [m] IPC:

180. From the above discussion and the evidence on record, particularly testimony of Prosecutrix PW2, which has been found to be credible, coupled with Reports of fingerprint expert Ex.PW19/F, DNA examination [Ex. PW26/B] and the admissions of Accused himself, it

stands proved on record that:-

i) Prosecutrix was picked up by Accused in his car bearing No. DL-1YD 7910 on the night of 05.12.2014.

ii) Accused committed rape upon the prosecutrix on the rear seat of the said cab, while pressing her neck forcefully and also threatened to insert 'saria' inside her.

181. Now, in so far as the charge under Section 376 [2] [m] IPC is concerned, it is the plea of the Defence that the Prosecution has failed to establish that Accused had endangered her life within the meaning of Section 376[2][m] IPC, while committing rape upon her.

182. Ld. Defence Counsel contended that in order to bring home the charge under Section 376 [2] [m] IPC, Prosecution must establish, as a matter of fact, that the life of prosecutrix was endangered, and it cannot depend solely on her own state of mind that she was in danger. It was submitted that Prosecution failed to establish by way of any cogent evidence that life of prosecutrix was "endangered' within the meaning of Section 376 [2] [m] IPC.

183. Ld. Defence Counsel also submitted that though it is claim

of the prosecutrix that Accused pressed her neck forcefully, no marks of fingers were found on her neck during her medical examination and only scratch marks, as per report of PW-3, were found and that too, in her second medical examination.

184. Learned defence counsel further argued that although PW3 Dr. Kaveri deposed during cross-examination that the scratch marks found on the neck of prosecutrix were suggestive of strangulation, not much reliance can be placed on this statement. It was argued that a 'scratch' is a superficial injury where skin of a person is superficially damaged and such injury is not possible in case of strangulation, where pressure is exerted with fingers. Moreover, at the time of her first medical examination by PW12 Dr. Neelam, no such scratch marks were seen on the neck of the prosecutrix.

185. Before dealing with the contentions, it would be necessary to re-visit the provisions of Section 376 [2] [m] IPC.

186. Section 376 [2] [m] was incorporated in the Indian Penal Code by The Criminal Law (Amendment) Act, 2013 (13 of 2013), which came into force w.e.f. 03.02.2013 and which reads as under:

Section 376 (2) : “Whoever -

...(m) While committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman..

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.”

187. Though, the term 'Endanger' has not been defined in the Indian Penal Code, however, it does feature in various provisions of Chapter-XIV of the Code, which is titled as “Of offences affecting the Public Health, Safety, Convenience, Decency and Morals”.

188. The word “endangers life” is used in Sections 279, 280, 282, 284, 285, 286 and 287 IPC. A perusal of these provisions indicate that they stipulate for a penal provision for any person who, by his act, endangers the life of another person, by rash or negligent driving of a

vehicle (Section 279 IPC), or by rash navigation of a vessel (Section 280 IPC), conveys a person by water for hire in unsafe or overloaded vessel (Section 282 IPC), by his negligent conduct with respect to poisonous substance (Section 284 IPC), by his negligent conduct with respect to fire or combustible matter (Section 285 IPC), by his negligent conduct with respect to explosive substance (Section 286 IPC) or by his negligent conduct with respect to machinery (Section 287 IPC).

189. At this juncture, reference may also be made to the dictionary meaning of the word "Endanger". As per '**THE NEW LEXICON WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE**' (*Deluxe Encyclopedic Edition*) 1988 Edition, 'the word **'Endanger'** means to cause danger or constitute a cause of danger to'.

190. Further, as per **ADVANCED LAW LEXICON (The Encyclopaedic Law Dictionary)**, 3rd Edition (Volume 2, D-1), the word '**Endanger**' means '*to bring into danger or peril; to create a dangerous situation*'.

191. The facts of the case and the arguments may now be dealt

with in the backdrop of the said import of the term “endangering life”.

192. From the testimony of Prosecutrix, it stands proved that Accused had overpowered her and confined her in a cramped space i.e. on the rear seat of the cab. In the course of being cross-examined, PW-2 clarified that “Overpowered *ka matlab ki accused mere upar haavi ho gaya tha*” and I was helpless. “*Wo mere upar chada hua tha*”. PW-2 also stated that she was not able to push him away. In her examination-in-chief, PW-2 deposed that “*When I raised alarm, accused slapped me 3-4 times and then he pressed my neck forcefully.*”

193. Upon visualizing the situation of PW2 at that point of time, it is apparent that the Accused was atop her (*Chadha hua tha*), her legs were bent from knee and Accused while committing rape was also pressing her neck forcefully in that sexual excitement, within the cramped space of rear seat of the car.

194. Besides this, there is testimony of PW-3 Dr. Kaveri, who in her cross-examination deposed that the scratch marks, on the neck of the Prosecutrix were “suggestive of strangulation”.

195. There is no reason to hold that scratch marks could not

have been caused during the process of strangulation or that neck of a person can only be pressed, without the use of nails and no scratch marks can be caused while doing so.

196. In view of the aforesaid evidence, there is thus no room for doubt that Accused, by forcefully pressing the neck of the prosecutrix while committing rape upon her in the aforesaid manner, endangered her life and thereby committed offence punishable under Section 376 [2] [m] IPC.

Charge under Section 366 IPC:-

197. In so far as charge for offence under Section 366 IPC is concerned, it is necessary to mention at the very outset that it is not disputed by the Accused himself that when the prosecutrix sat in his cab, she told him her destination as Inderlok.

198. It was submitted by Ld. Addl. PP that from the testimony of PW28 Sh. Eric Alexander and the satellite imagery of GPS Map regarding the route followed by Accused during the said journey on 05.12.2014 Ex. PW28/E and Ex. PW28/F clearly indicates that Accused did not take her to her destination and after parking the cab at the said

isolated spot i.e. Tapakna Bridge, T-Point near Chhapan Bhigha Park, Sarai Rohilla, Delhi, he committed rape upon her.

199. PW-2 Prosecutrix also deposed before the court that when she woke up from her sleep, she realized that the cab had been parked at an isolated spot and the cab driver i.e. Accused was upon her and doing 'cherkhani' with her. It is thus evident from the material on record that Accused did not drop her at her destination i.e. Inderlok and rather took her to an isolated spot where he committed rape upon her inside his cab, which fact stands duly established on record.

200. Learned Defence Counsel strongly argued that the prosecutrix, as per own case of the Prosecution, was not aware of the exact spot where Accused has parked his cab, then how she could have led the police party to that spot on 08.12.2014 and how site plan Ex. PW27/I could have been prepared at her instance.

201. The Defence also contended that GPS maps Ex.PW-28/E & Ex.PW-28/F, do not indicate the place of alleged incident. Moreover, PW-28 was not the competent witness to prove these Maps and Prosecution should have summoned the concerned official from

'Google' to prove the same.

202. I find force in the submissions of the Defence that PW-28, representative of Uber Company was not the competent witness to prove the GPS Maps Ex.PW-28/E & Ex.PW-28/F and thus the same have not been proved as per law.

203. However, at the same time, from the testimony of Prosecutrix/PW-2, read with the admission of the Accused himself, it stands proved beyond any doubt that when PW-2 sat in the cab of Accused, she told him to take her to Inderlok. She also deposed that when she woke up she found the cab parked at an isolated spot. She also deposed that *“I pleaded with the Accused to let me go and also assured him that I will not reveal about the incident to anyone. Accused started driving the car and on the way we cross Inderlok Metro Station and I realized that accused had taken me much ahead of my house at an isolated spot where he raped me brutally.”*

204. Thus, it is established on record that Accused took her to an isolated spot, instead of her destination Inderlok, while she had dozed off while sitting on the rear seat of his cab. Although in her

cross-examination, PW-2 deposed that she does not know the spot where the cab was parked when she woke up, however, it is important that as per her testimony referred to hereinabove, PW-2 had realized that they had crossed Inderlok Metro Station and that the Accused had taken the cab much ahead of her house, at an isolated spot. The Prosecutrix is an educated girl, aged about 25 years. She is a resident of the area of Inderlok. The fact that she saw that the Accused had taken her ahead of her house and that they had crossed Inderlok Metro Station, it cannot be doubted that she led the police party to the place of incident on 08.12.2014, as deposed by her.

205. Incidentally, Accused while responding to Question No.94 of his statement recorded under Section 313 Cr.PC also admitted his presence at 56 Bigha Park, i.e. the place of incident.

206. In the light of the aforesaid, it stands proved that the Accused took her to the isolated spot i.e. at the aforesaid place of incident, in order to sexually assault her and thus thereby committed offence punishable under Section 366 IPC.

Charges under Section 323/506 IPC

207. The testimony of the prosecutrix PW2 also clearly establishes that the Accused gave beatings to her and caused injuries on her lower lip, neck, breast, shoulder and back by scratching [nocha]. MLC Ex. PW3/A also corroborates the testimony of Prosecutrix. The observations of PW3 Dr. Kaveri further proves the presence of scratch marks over her neck. Prosecution has thus strongly relied upon the medical examination report of the prosecutrix stating that it lends credence to her testimony, though the Defence is termed it as fabricated piece of evidence.

208. To my mind, the testimony of the prosecutrix to the effect that she was given beatings by the Accused and that he caused injuries on various parts of her body by scratching, is credible and trustworthy and sufficient to conclude the commission of offence punishable under Section 323 IPC by the Accused. It is also noteworthy that PW-3 clarified in court during her cross-examination by stating that *'other injuries found on the person of the patient were already mentioned in the MLC prepared by Dr. Neelam, who had earlier examined the prosecutrix'*. It is precisely because of this reason that PW3 Dr. Kaveri

mentioned only those injuries which were not mentioned by Dr. Neelam on the MLC prepared by her earlier. Hence, the fact that Dr. Kaveri found presence of scratch marks over neck of the prosecutrix, cannot be said to be an improvement or manipulation in any manner.

209. I also find myself unable to agree with the submissions of the Defence that these injuries were either self inflicted or fabricated by the prosecutrix during the intervening period between two medical examinations. There is sufficient material to hold that the Accused gave beatings and caused injuries on the person of prosecutrix during the commission of alleged offence and thus committed an offence punishable under Section 323 IPC.

210. With regard to charge under Section 506 IPC, the testimony of the prosecutrix clearly establishes that Accused while committing the aforesaid offences threatened to insert a 'saria' inside her body while pressing her neck forcefully and thus criminally intimidated the prosecutrix in order to commit the offence of rape. It has already been discussed herein above that this threat of inserting of 'saria' finds mention not only in the complaint Ex. PW3/A, but also in

statement of the prosecutrix recorded under Section 164 CrPC Ex. PW2/B-1.

211. There is no substance in the argument of the Defence that since Accused did not show in fact any 'saria' to the prosecutrix while extending this threat, the offence under Section 506 IPC cannot be said to be made out against him. It must be borne in mind that when the Accused threatened PW-2 by saying that he will insert 'saria' inside her body, she was reminded of gang rape of 16th December, 2012 and thus the threat perception was very much real in the mind of the prosecutrix at that point of time and offence under Section 506 IPC thus stands duly proved against Accused.

212. Considering the above discussion and the evidence on record, Accused *Shiv Kumar Yadav S/o Sh.Ram Nath Yadav* is convicted for the offences under Sections 323/366/376[2][m]/506 IPC. Let him be heard on the point of sentence.

**Announced in the Open Court
on 20.10.2015**

(Kaveri Baweja)

Additional Sessions Judge- Special FTC-2 (Central)

Tis Hazari Courts: Delhi.