Supreme Court on rape trials

(a manual of best practices of the supreme court)

researched, compiled and edited
aparna bhat

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Preface

One of my first cases of child sexual abuse was relating to the rape of a four year old girl. The accused had been acquitted due to lack of evidence. The father of this child came to me for assistance. He was a construction worker and was just about *literate. The child was in a home and was undergoing therapy. She was shy and was not comfortable to talk about her experience. Her father said, she had begun to develop high fever frequently and he was not sure if that harrowing incident had anything to do with it. Obviously, the child was fighting to get over it.*

As I went through the documents, I noticed that he had signed a statement wherein he had declared that he does not want his daughter to go through the medical examination. I was surprised and asked him for an explanation. He was shocked to realize what he had signed. He was not told at the time of signing. The child had described in her statement before the Magistrate what had happened to her in a way a four year child would describe.

At the time of trial, she was two years older. She knew to express better. Her explanation which was more articulate was termed tutoring and the prosecutor declared her hostile. Probably, she was declared hostile in order to enable the prosecutor to cross-examine her. However, this decision of the prosecutor turned fatal to the case. As there was no medical evidence, the principal witness had been declared hostile, the accused got acquitted on the benefit of the doubt.

Since the State had not filed an appeal, I filed a revision before the High Court. The hearing in the High Court was quite shocking. I was told if the medical examination was not conducted, it is not the fault of the accused. True. But is it the fault of the victim? The judge remarked that if a 25 year old man lay on top of a four year old girl, the girl would get crushed and die and dismissed my petition. He scoffed at my attempt to refer to State of Haryana versus Lekhraj. He said I should try using that judgement some other time.

Strangely when I was preparing to file an appeal before the Supreme Court, the accused died. Divine justice?

Most judges do not realize that a prosecutrix has no control over the preparation of her case. After she files the complaint and the initial

investigation like the MLC etc. take place, the next time the police get in touch with her for the case is when it is time for evidence. Sometimes, it may take as long as a year or more. Since she is totally out of touch, she may not recall the incident as she had remembered at the time she had made her first statement. Isn't it normal for her to generally remember the incident and not remember the exact time and the chronology? Can a slight variation in her version at the time of her evidence be taken as contradicting from her original statement? Can any normal human being remember every word of what has been said on a particular day even the next day? Is it fair to confront the victim then with her original statement made a year or more earlier, and thrive on her minor contradictions especially, when she had not seen what was written in her statement?

I witnessed many such experiences working with children who have been subjected to sexual abuse. Having been practicing in the Supreme Court, where mere technicalities are not given undue importance, I was intrigued at the manner in which the judges at the lower court were passing judgements. In one of the training sessions for judges and prosecutors on rape laws, the judges expressed to me that they are bound by the law and they are not in a position to alter rules which perhaps a judge in the Supreme Court or a High Court can do.

It was then that I thought of this manual. I had come across a large number of judgements of the Supreme Court where the Court had held that a statement of a victim cannot be brushed aside on mere technicalities and a radical, pro-victim approach was taken. Perhaps, the judges in lower courts do not have access to these judgements. Or there may be other reasons. I believe it is the former. So this manual, which contains about 40 judgements of the Supreme Court of India passed in 50 years which has laid down some of most spectacular guidelines on the manner in which a case of rape ought to be tried.

I hope it is found useful.

Aparna Bhat
New Delhi
November 2003

Acknowledgements

When I first thought of bringing out this manual, I had thought, I could do it single handedly. I was wrong. As I started researching, I realized, there is so much that has to be done even for a simple manual which is a compilation of judgements. A lot of people have helped me in putting this manual together. I do not think a simple thank you would be adequate at all. However, this is a small token of my appreciation to the Netherlands Embassy for supporting the project; Mrs. Joke Muylwijk for having trusted me to compile this manual; Mrs.Rita Moulick to have given the freedom and support to finish it in a way I wanted to; my colleague and friend Ramesh for having facilitated the whole process; Anjana Manoja for having type-set the whole manual; Maneesh Manoja for having designed, printed and tolerated my tantrums; my dearest friend Shruti Pandey for having critiqued the manual; Ajay for having proof read the book; Preeti for giving me some valuable suggestions; Combat Law Publications (p) Ltd. for publishing the book; and last but not the least, to Anindya, my husband for being his ever supportive self.

Thank you.

Aparna Bhat.
New Delhi
November 2003.

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MEDICAL EVIDENCE

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SENTENCE

1
General Principles

"A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female"[1]

Rape is the worst form of violence on women. Perhaps worse than killing her. Unfortunately, a victim goes through the trauma all over again during the trial of her case. In most cases, she feels as if she is on trial for the crime. Many parents do not come forward to file complaints of rape and sexual abuse due to the double trauma that the victim goes through in the trial.

The criminal justice system reform is perhaps slowest when it comes to dealing with protection of victims. While it is true that there are serious human rights violation of the accused persons in various cases, in a rape trial, as in most cases of offences against women and children, the system makes a complete turn and the victim is subject to extreme stress and trauma before and during the trial.

The Supreme Court of India has over a period of time laid down guidelines to be followed by the Session Judges in cases of rape. These guidelines have taken into consideration the fact that any victim of rape would not make a false allegation when accusing of rape. It has been held in many cases that when a woman complains of rape and identifies the accused, it would be sufficient to convict the accused on the basis of her statement alone even if the medical evidence is not conclusive.

The traditional conservative approach attaching undue importance to the antecedents of the woman, previous animosity between the two parties has now been set aside and is being strongly disapproved. The Supreme Court has also given adequate rights to the complainant. The Complainant today is entitled to:

- ❑ Right to representation;
- ❑ Right to counselling;
- ❑ Compensation;

[1] Quote from State of Punjab versus Gurmit Singh and others 1996 (2) SCC 384

VICTIM'S ANTECEDENTS:

In *Sheikh Zakir versus State of Bihar*[2], the Supreme Court set aside the practice of looking at the antecedents of the victim and held that the same has no consequence. This was followed in *State of Haryana versus Premchand and others.* Infact, in this case, the Supreme Court reconfirmed that although it had reduced the sentence in the facts of the case, it was upholding the view that the conduct of the victim is irrelevant.[3] Similar was the view taken in *State of Maharashtra and another versus Madhukar Narayan Mardikar.*[4]

One of the landmark judgements in the history of Supreme Court relating to rape is the case of *Delhi Domestic Working Women's Forum versus Union of India and others.*[5] This case laid down parameters under which a case of rape has to be tried. It took into consideration the plight of the victims during and after the trial. The parameters suggested by the Court at paragraph 15 of the judgement are:

1. The Complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case;

2. Legal assistance will have to be provided at the police station since the victim of sexual assault might a very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her;

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[2] 1983 (4) SCC 10
[3] 1990(1) SCC 249
[4] 1991 (1) SCC 57
[5] 1995 (1) SCC 14

3. The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed;

4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have particular lawyer in mind or whose own lawyer was unavailable;

5. The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorized to act at the police station before leave of the court was sought or obtained;

6. In rape trials anonymity of the victim must be maintained, as far as necessary.

7. It is necessary , having regard to the Directive Principles contained under 38 (1) of the Constitution of India to set up Criminal Injuries Compensation Board, Rape victims frequently incur substantial substantial financial loss. Some, for example, are too traumatized to continue in employment.

8. Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."

COMPENSATION

The principle of compensation was also applied in In *P.Rathinam versus Union of India and others*[6], the Supreme Court granted interim compensation to the victim while the trial was pending. The Court also held that the victim can apply for more compensation if required.

[6] 1989 Supp (2) SCC 716

ROLE OF THE JUDGES

An important case in this regard is the judgement in ***State of Punjab versus Gurmit Singh***[10] where the Supreme Court set aside the acquittal and convicted the accused. It was in this case that the Supreme Court held that holding of trials in camera in these cases are mandatory. It also held that it was desirable that these cases are heard by lady judges as far as possible.

The Supreme Court further held that the court (judge) should not be a silent spectator while the victim of the crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. The court must ensure that through cross examination the victim is not further harassed, humiliated and traumatized.

Surprised and distressed by the manner in which the High Court had held in favour of the accused in a case, in ***State of Andhra Pradesh versus Gangula Satya Murthy***[11] the Supreme Court held that:

" .....Courts are expected to show 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 witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more important because of late crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasise that the courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation".

In ***State of Rajasthan versus NK***[12], the Court held that even the High Court while acquitting the accused on benefit of doubt should be cautious

[7] 1983 (4) SCC 10
[8] 1990(1) SCC 249
[9] 1991 (1) SCC 57
[10] Supra (1)
[11] JT 1996 (10) SC 550
[12] 2000 (5) SCC 30

to see that the doubt should be a reasonable doubt. It should not reverse the findings of guilt on the basis of irrelevant circumstances or mere technicalities.

TORTS-VICARIOUS LIABILITY

In 2000, following rape by railway officials in the Howrah railway station, the Supreme Court held that compensation can be paid on a petition filed by a third party in public interest. The Court appreciated the fact that rape is an offence which violates the fundamental right guaranteed under Article 21 and held that the railway board was vicariously liable to pay compensation for the rape which took place in the premises which is under its control. By this judgement, the Supreme Court extended the "tort" principle of vicarious liability even to a case of rape.[13]

DELAY IN F.I.R.

One of the standard defences used by the accused in rape cases especially cases relating to rape of the child is the delay in the lodging of the FIR. The Supreme Court has held in many such cases that delay is not fatal to the case. In ***Harpal Singh and another versus State of Himachal Pradesh***[14], the Supreme Court held:

"..... The occurrence according to the prosecutrix took place on the night intervening August 20 and 21,1972. The first information report was lodged on August 31,1972. The complainant had given reasonable explanation for lodging it after ten days of the occurrence. She stated that as honour of the family was involved, its members had to decide whether to take the matter to the court or not. It is not uncommon that such considerations delay action on the part of the near relations of a young girl who is raped."

ROLE OF THE DOCTORS

Medical evidence is crucial for a rape trial. Doctors have to be sensitive as well in handling these cases. In ***State of Karnataka versus Manjanna***[15] the court disapproved refusal of government hospital doctors to conduct

[13] Chairman, Railway Board and other versus Chandrima Das and other 2000 (2) SCC 465
[14] 1981 (1) SCC 560
[15] 2000 (6) SCC 188

the medical examination of rape victims unless they are referred by the police.

LOCUS STANDI

The standard objection taken whenever the Complainant tries to intervene in the Court proceedings directly is of her locus standi. It appears as if she is not important at all to the trial. She is very rarely consulted. In most cases, she is not given the papers. She is not advised of the basic information relating to her case. She does not even know the Court where the cases are tried and what stage the case is.

The *Delhi Domestic Workers' Forum*[16] case laid down the principle of providing legal aid to the victim. However, this is not followed in most cases. While the role of the prosecutor assumes importance in these cases, the Complainant also has rights to be able to represent herself through her lawyer.

AGE OF CONSENT

Child according to accepted standards and the main legislation related to children in the country is any person upto the age of 18 years. However, the age of consent in the Indian Penal Code is 16 years. In most cases, this becomes a strong ground for the defence.

There are cases where this has been explained and it has also been held that in case of doubt it should be held in favour of the victim. However, even the police do not use it in favour of the victim. There are cases in which bail has been granted on this account.

In *State of Karnataka versus Manjanna*[17], the defence was that the prosecution had not proved that the victim was below 16 years. The sessions judge did not accept this argument and convicted the accused. The High Court on appeal reversed the same. The Supreme Court held on the basis of the statement of the victim about her date of birth, the age could not have been disbelieved.

[16] supra
[17] supra

Delhi Domestic Working Women's Forum ... Petitioner

Versus

Union of India and Others ... Respondents

This public interest litigation invokes the benign provision of Article 32 of the Constitution of India, at the instance of the petitioner Delhi Domestic Working Women's forum to espouse the pathetic plight of four domestic servants who were subject to indecent sexual assault by seven army personnel.

2. The incident, with a filmy background, has outclassed even the movies. On 10-2-1993, six women, by name, Usha Minz, Shanti, Josphine Kerketta, Rosy Kerketta, Nilli and Lili, domestic servants, were travelling by the Muri Express. The journey was from Ranch to Delhi. One of the victims Miss Lili described the incidence graphically as follows :

> "I was coming from my home town to Delhi by the Muri Express. On 10-2-1993 at about 11.00 p.m., the Muri Express was at Khurja Railway Station. At that time, I along with my village girls (1) Usha Minz D/0 John Minz (2) Shanti D/o Siri Anuas Minz (3) Josphine Kerketta D/o Junus Kerketta (4) Rosy Kerketta D/ o Remis Kerketta (5) Nilli Ross D/o Boas Minz was travelling in SHI Coach. I slept on Berth No. 50. Our friend, Shanti, woke up and told that some persons were teasing her. When I and my remaining friends got up, we saw that about 7/8 army 'jawans' had come near us. Then we all friends got up and sat on our respective seats. Then all those army men began to molest us. First they — two Sikhs and 6 clean-shaved men made me and my five friends sit on lower seats and then kissed and hugged us and lured on our body and breasts. On our objection they caught us from our hair and began to beat us. When we tried to cry, they shut out mouths. Then they threatened me and my friends that in case we will make any hue and cry they will throw us out of the running train and will kill us. On this we got frightened and sat there. From these 8 army men — two Sikhs and 6 clean-shaved, one

Sardar and one clean-shaved man forcibly made me to lie down on the lower berth and on the other adjacent lower berth another Sardar took another girl and one clean-shaved fauji took Rosy to bathroom. Two other army men made Shanti to lie down on the nearby seat. Another two men tried to take Usha and Nilli but both sat under the seat to hide themselves. Thereafter, first Sardar fauji (whose name has been disclosed in the court as Dhir singh S/o Puran singh, PO : Dostpur, PS : Kalanaur, District Gurdaspur, Punjab) forcibly put off my clothes and removed underwear, raped me. After him, another clean-shaved fauji, whose face is round and height is about 5'8" raped me. My friends, Shanti and Rosy were also forcibly raped by remaining army men. Thereafter, we tried to lodge a report with the police on the way, but nobody listened to us. When the train stopped at New Delhi Railway Station, then I and my friends attempted to catch these persons. They all got down and ran here and there. However, I and my friends could catch hold of aforesaid Sardar Dhir Singh, who had raped me. We all caught him. In the meanwhile, some persons gathered there. Some army officers and policemen overpowered him and took him to MCO office. Then after a while they came in Station and handed over Sardar Dhir Singh to you. Sardar Dhir Singh has raped me and his colleagues have raped my friends."

3. This formed the basis of the first information report for offences under Section 376-B read with Section 341 IPC which was registered at the Police Station, New Delhi Railway Station (Crime & Railways) as No. 049 of 1993 at 6.35 a.m. on 11-2-1993. It appears after registering the FIR the six rape victims were sent for medical check-up.

4. The members of the petioner-forum went in groups to all the addresses given by the police to meet the victims In none of the places they were allowed to meet the victims though the employers admitted gaining knowledge about the rape and the victims were with them. The petioner-forum is very much concerned as the victims are its members, to get the needed social, cultural and legal protection. Further, the victims are helpless

tribal women belonging to the State of Bihar at the mercy of the employers and the police. They are vulnerable to intimidation. Notwithstanding the occurrence of such barbaric assault on the person and dignity of women neither the Central government nor the State Government has bestowed any serious attention as to the need for provision of rehabilitatory and compensatory justice for women. In such matters this court has been affording relief. It is in this context the writ petition under Article 32 of the Constitution of India is moved. The grounds urged in support of the writ petition are as follows :

5. Speedy trial is one of the essential requisites of law. In a case of this character such a trial cannot be frustrated by prolongation of investigation. Therefore, this Court has to spell out the parameters of expeditious conduct and investigation of trial; otherwise the rights guaranteed under Articles 14 and 21 of the Constitution will be meaningless.

6. This Court ordered notice to respondents on 18-11-1993.

7. A counter-affidavit was filed on behalf of Respondents 2 and 4 stating, on the statement of Kumari Lili, FIR No. 042/93 under Section 376-B read with Section 34, Indian Penal code, was registered. Accused Dhir Singh was arrested and sent to judicial custody. The case-report under Section 173 CrPC had been filed in the Court of the Chief Judicial Magistrate, Aligarh on 13-8-1993 against the accused persons, namely Dhir Singh and Mikhail Heranj. The case is pending trial before the District and Sessions Court, Aligarh.

8. It appears, apart from these two accused, others could not be identified. Two other accused, Pharsem Singh and B. Kajoor were discharged. Three other police personnel, namely, Head Constable Ranjeet, constable Naresh Singh and constable Shiv Sarup singh were arrested as they were on guard duty in the Muri Express train at the time of incident and failed to provide necessary protection to the tribal women/victims. The prosecution is in progress and it is stated that the case is likely to be committed.

9. At one stage of the case, the Court was informed that the victims could not be traced. This statement caused dismay in us. Therefore, a direction was issued to the State of Uttar Pradesh to trace the victims. This Court doubted whether the

police were at all serious in this case. On our part, we could not tolerate this nonchalant attitude. Fortunately, the victims have been traced. As such we think the prosecution will go on with due diligence and the law be allowed to take its course.

10. While the matter stands thus, as to the prayer of the petitioner that Respondents 1 to 3 will have to engage themselves in framing an appropriate scheme to provide inter alia compensation and rehabilitation to the victims of such crimes of violence, the submissions are as under :

11. The National Commission for Women is rightly engaged in the evaluation and suggestion of changes in various legislations pertaining to women. Yet steps are to be taken as regards framing of scheme for compensation and rehabilitation to ensure justice to victims of such crimes of violence. Victims of such violence, by and large belong to weaker sections of the society. They are not in a position to secure justice through civil courts. No doubt, the Indian Penal Code and the Indian Evidence Act have been amended. In spite of it, victims of such violence are not able to get adequate remedy in securing justice. Therefore, the first (sic third) respondent — National Commission for Women must be called upon to engage itself in the exercise of drafting such a scheme and impress upon the Union of India to frame a scheme as early as possible.

12. This stand is opposed by the third respondent. It is stated that the National Commission for Women was constituted by the National Commission for Women Act, 1990 (hereinafter referred to as 'the Act'). This Act came into force on 31-1-1992, as per Notification No. SO 99(E)_ dated 31-1-1992. The functions of the Commission are set out in Chapter III of the Act. The prayer that the Commission must engage itself in framing appropriate schemes and measures is beyond the mandate given to the National Commission for Women.

13. We have given our careful consideration to the above. It is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape does indeed pose a series of problems for the criminal justice system. There are cries for harshest penalties, but often times such cries eclipse the real plight of the victim. Rape is an experience which shakes the

foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings.

14. We will only point out the defects of the existing system. Firstly, complaints are handled roughly and are not given such attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had to suffer as a result of the rape itself. As stated in *Modern Legal Studies — Rape and the Legal Process* by Jennifer Temkin, 1987 Edition, page 7:

> "It would appear that a radical change in the attitude of defence counsel and judges to sexual assault is also required. Continuing education programmes for judges should include re-education about sexual assault. Changes in the substantive law might also be helpful in producing new ways of thinking about this type of crime."

Kelly writes :

> "The most common cries were for more compensation and personal treatment from police officers. Victims remarked that, while they recognised officers had many cases to handle, they felt the officers did not seem sufficiently concerned with their particular case and trauma."

Shapland concludes :

> "The changes in the criminal justice system necessary to approximate more closely to the present expectations of victims are not major or structural. They are primarily attitudinal, they involve training the professional participants in the criminal justice system that the victim is to be treated courteously, kept informed and consulted about all the stages of the process. They involve treating

the victim as a more equal partner ... this might include a shift in working practices of the professional participants that might initially appear to involve more work, more difficulty and more effort, but paradoxically may result in easier detection, a higher standard of prosecution evidence and fewer cases thrown out at court."

O'Reilly stress the attitudinal training thus :

> "We are no Victim-oriented and have taken an active role in getting the entire helping network — lawyers, doctors, nurses, social workers, rape crises centre workers — to talk and to interact together ... We are then in a position to concentrate fully on the primary goal that unites us all — helping victims of sexual assault to get their lives back together."

15. In this background, we think it necessary to indicate the broad parameters in assisting the victims of rape.

(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent he till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any question were asked from her and that the police

report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the constitution of India to set up Criminal Injuries compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.

(8) compensation for victims shall be awarded by the court on the conviction of the offender and by the Criminal Injuries compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

16. On this aspect of the matter we can usefully refer to the following passage from The Oxford Handbook of Criminology (1994 Edn.) at pages 1237-38 as to the position in England :

> "compensation payable by the offender was introduced in the Criminal Justice Act, 1972 which gave the Courts powers to make an ancillary order for compensation in addition to the main penalty in cases where 'injury, loss, or damage' had resulted. The Criminal Justice Act, 1982 made it possible for the first time to make a compensation order as the sole penalty. It also required that in cases where fines and compensation orders were given together, the payment of compensation should take

priority over the fine. These developments signified a major shift in penological thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment. The Criminal Justice Act, 1988 furthered this shift. It required courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, impose duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons. Where reasons are given, the victim may apply for these to be subject to judicial review ...

The 1991 Criminal Justice Act contains a number of provisions which directly or indirectly encourage an even greater role for compensation."

17. Section 10 of the Act states that the National commission for Women shall perform all or any of the following functions, namely

(a) Investigate the examine all matters relating to the safeguards provided for women under the Constitution and other laws.

(b) Call for special studies or investigation into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal.

18. Having regard to the above provisions, the third respondent will have to evolve such scheme as to wipe out the tears of such unfortunate victims. Such a scheme shall be prepared within six months from the date of this judgment. Thereupon, the Union of India, will examine the same and shall take necessary steps for the implementation of the scheme at the earliest.

19. The writ petition is disposed of subject to above directions.

❖ ❖ ❖

(Also reported in 1995 (1) SCC 14)

P. Rathinam ... Appellant

Versus

Union of India and Others --- Respondents

1. The State has filed an affidavit pursuant to the notice indicating therein that four of the police officers of the different grades said to be involved in the incident of rape have since been suspended from service, taken into custody and are being proceeded against. The matter is under investigation and learned counsel assures us that as soon as investigation is over if a prima facie case is found, charge-sheet shall be submitted without delay. We find that the accused persons are in custody, their bail having been cancelled by the High Court.

2. The victim Kalpana Sumanthi in our view has become entitled to reasonable compensation. She has undergone treatment for a long period away from house and at a place out of the State; she has undergone a lot of suffering — physical and mental. An interim compensation of Rs 20,000 is directed to be paid to her by the State within two weeks hence. Whether she would be entitled to any further sum of compensation is left open to be decided and leave is granted to the petitioner to apply to this Court after the criminal trial reaches finality at the trial stage. The payment to Kalpana shall be made by the District Magistrate of Dharampura either personally or through a competent officer to ensure actual payment and a report of compliance shall be made to the Registry of this Court. Writ petition is disposed of accordingly.

❖ ❖ ❖

(Also reported in 1989 Supp. (2) SCC 7168)

State of Haryana ... Petitioner

Versus

Prem Chand and Others ... Respondents

1. It is very unfortunate that a controversy has arisen following the judgment sought to be reviewed in Criminal Appeal Nos. 544-45 of 1986 rendered by this bench on January 31, 1989[1] whereby this Court while confirming the conviction of both the respondents/ accused reduced the sentence of imprisonment in respect of each of the respondents from 10 years to 5 years by invoking the proviso to Section 376(2) of the Indian Penal Code observing "the peculiar facts and circumstances of this case coupled with the conduct of the victim girl, in our view do not call for the minimum sentence as prescribed under Section 376(2)." The State of Haryana has filed the above petitions seeking review of the judgment and to "pass such other or further order(s) as may be necessary in the circumstances of the case."

11. At this juncture, we would like to point out that the very confirmation of the conviction accepting the sole testimony of the victim Suman Rani rejecting the arguments of the defence counsel is itself a clear indication that this Court was of the view that the character or reputation of the victim has no bearing or relevance either in the matter of adjudging the guilt of the accused or imposing punishment under Section 376 IPC. We would like to state with all emphasis that such factors are wholly alien to the very scope and object of Section 376 and can never serve either as mitigating or extenuating circumstances for imposing the sub-minimum sentence with the aid of the proviso to Section 376(2) of the IPC. In fact, we have expressed our views in the judgment itself stating "No doubt an offence of this nature has to be viewed very seriously and has to be dealt with condign punishment."

12. We have neither characterised the victim, Suman Rani as a woman of questionable character and easy virtue nor made any reference to her character or reputation in any part of our judgment but used the expression "conduct" in the lexigraphical meaning for the limited purpose of showing as to how Suman Rani had behaved or conducted herself in not

telling anyone for about 5 days about the sexual assault perpetrated on her till she was examined on March 28 1984 by the Sub Inspector of Police (PW 20) in connection with the complaint given by Ram Lal (PW 14) on March 22, 1984 against Ravi Shankar. In this connection, we make it further clear that we have not used the word "conduct" with reference to the character or reputation of the victim — Suman Rani.

13. Before parting with this matter, we would like to express that this court is second to none in upholding the decency and dignity of womanhood and we have not expressed any view in our judgment that character, reputation or status of a raped victim is a relevant factor for consideration by the court while awarding the sentence to a rapist.

14. With the above observations, we dismiss the review petitions.

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(Also reported in (1990) (1) SCC 249)

State of Maharashtra Others ... Appellant

Versus

Madhukar Narayan Mardikar ... Respondent

The respondent, Madhukar Narayan Mardikar, was serving as a Police Inspector, Bhiwandi town Police Station in District Thana of Maharashtra State in November 1965. On November 13, 1965, between 8.15 and 8.45 p.m. he allegedly visited the hutment of one Banubi w/o Babu Sheikh in uniform and demanded to have sexual intercourse with her. On her refusing he tried to have her by force. She resisted his attempt and raised a hue and cry. Her husband and neighbours collected outside the hutment. the hutment was about a furlong away from the police station and about 100 yards from Kuwari's bunglow. After people from the vicinity collected at the place of occurrence the respondent pushed to Kuwari's bungalow and telephoned the police station to rush police aid. PSI Ghosalkar who received the phone call rushed to the place of occurrence in a police jeep accompanied by PSI Wadekar and other policemen. On reaching the scene of occurrence they found the respondent in uniform standing at some distance from the hutment of Banubi. They also saw an agitated Banubi near her hutment. The respondent directed that the woman be taken to the police station by Head Constable Kulkarni and Police Constable Desale. The respondent and others returned to the police station in the jeep.

2. It appers that on Novermber 15 1965 Banubi made a written complaint about the incident to the District Superintendent of Police. A preliminary enquiry was instituted. In the course of the preliminary enquiry detailed statements of several witnesses including Banubi were recorded. The statement of the respondent was also recorded. On the conclusion of the preliminary enquiry the respondent was charge-sheeted. The charge of perverse conduct was levelled against him on the following two grounds, namely:

"(1) On November 13, 1965 between 20.15 to 20.45 hours, you, Police Inspector Shri M.N. Mardikar, then attached to Bhiwandi Town Police Station (Thana District) visited alone the house of the one Banubi w/o Babu Sheikh for the purpose of having illicit intercourse with her.

(2) In order to suppress the above fact, you prepared false documents and made entries in the Station Diary with the help of your suboridinates to show that you had carried out a prohibition raid in and near her house around that time."

The Superintendent of Police, Thana was appointed an Inquiry Officer to conduct the Departmental Enquiry. The respondent filed a detailed written statement in answer to the charges levelled against him. Oral as well as documentary evidence was adduced by the department as well as the respondent. On the conclusion of the said proceedings the Inquiry Office submitted a detailed report holding both the charges as proved and recommended the dismissal of the respondent. The Inspector General of Police on an examination of the report prima facie concurred with the findings recorded by the Inquiry Officer and directed notice to issue to the respondent to show cause why he should not be dismissed from service. The respondent filed a detailed reply to the second show cause notice. After taking the same into consideration the Inspector General of Police ordered his dismissal. The respondent filed an appeal against the said order of dismissal which was partly allowed. It was held that having regard to the length of service put in by the respondent, the punishment of dismissal from service should be replaced by removal from service. It was also stated that if the respondent so desired he could apply for compassionate pension. Feeling aggrieved by this order the respondent approached the High court of Bombay, Nagpur Bench, Nagpur with a Writ Petition, Special Civil Application No. 300 of 1968, under Articles 226/227 of the Constitution. The Division Benach of the High court quashed the impunged order of removal on the ground that the respondent was denied a reasonable opportunity to meet the charges levelled against him as the department had failed to supply him with copies of certain important documents having a bearing on the charges levelled against him. The Division Bench also observed: "...on the material on record it does not appear to us that reasonably a finding of guilt in respect of the charges framed against the petitioner could be arrived at." The impunged order of removal was thus quashed. The State of Maharashtra feeling aggrived by the said order has approached this Court by way of special leave under Article 136 of the Constitution.

3. As stated earlier the case against the respondent was that he had visited the hutment of Banubi on the night of November 13, 1965 all alone in police uniform and had tried to ravish her. The respondent's version was that he had raided her hutment on receipt of information that she was dealing in illicit liquor and although nothing incriminating was found from her house, some articles like a rubber tube, a bottle, etc. containing country liquor were found from a nearby place which were attached as unclaimed property. In the course of evidence recorded at the departmental enquiry it was also brought out that Banubi was a woman of easy virtue and was having extra-marital relationship with one Behram Irani, the Manager of Bhiwandi Talkies. She admitted that she was the mistress of that person. Evidence was also led to show that she was known as an 'awara' (vagrant) in the locality. The find of liquor from near her hutment had upset her and in order to escape from the clutches of law she had filed a false complaint against him on November 15, 1965. The respondent further contended that a woman with such antecedents could stoop to any level and it would be hazardous to rely on her version.

4. At the departmental enquiry several witnesses including Banubi and her husband were examined. Banubi and her husband stuck to their version and no serious infirmity could be brought out in their cross-examination. The Inquiry Officer was of the view that there was no reason or motive for Banubi to falsely involve the respondent. Since Banubi was a woman of questionable repute she would be slow to falsely implicate a police officer and thereby incur the wrath of the entire police force of the Bhiwandi Town Police Station within whose jurisdiction she resided. If she and her husband were bootleggers as alleged by the respondent we find it difficult to believe that she would falsely involve a police officer who had not made out any case against her. If nothing incriminating was found from her hutment during the raid there was no reason for her to abuse the respondent and create a scene attracting a crowd. It, therefore, does not appeal to reason to hold that Banubi had falsely implicated the respondnt. The learned counsel for the appellant State was, therefore, right in contendng that this was not a case of no evidence and the High Court ought not to have interfered with the finding as if it were a court of appeal.

5. The evidence tendered at the enquiry also shows that PSI Wadekar was on patrolling duty between 7 p.m. and 8 p.m. with Police constables Desale, Kadam, Kumbhar, Jadhao and Sakpal. They had raided the house of one Jagdambaprashad Ramadhar Pande on Kalyan Road at about 7.30 p.m. and had attached two bottles of liquor. After completing the formalities of that case they returned to the Bhiwandi Police Station at about 8 or 8.15 p.m. PSI Ghosalkar was sitting outside the police station while the roll call was being taken when he received a phone call from the respondent asking him to rush with a police party to Kuwari's bungalow as there was "some serious trouble". He along with PSI Wadekar and others, namely, Patil, Kulkarni, Desale, Bahiram and Sakpal left in a jeep for the scene of occurrence. On reaching there they found a crowd with Banubi abusing the respondent who was standing at some distance all alone. On seeing the police party the respondent directed that Banubi be taken to the police station. She was taken to the police station on foot by head Constable Kulkarni and Police Constable Desale. Two things clearly emerge from the above evidence, namely, (i) that the police jeep was not available for use by the respondent till it returned from Kalyan at about 8.15 p.m., and (ii) when the police party comprising PSI Ghosalkar and others reached the scene of occurrence they found a crowd near the hutment of Banubi with the respondent standing at some distance all alone. This is clear from the evidence of Sub-Inspectors Ghosalkar and Wadekar and their subordinates Patil, Kulkarni, Desale, Bahiram, Sakpal and jeep driver Shinde. It is also clear from their version that Police Constables Desale, Kadam and others had accompanied PSI Ghosalkar in the jeep towards Kalyan road and had returned to the police station at about 8.00 p.m. or 8.15 p.m. by which time the respondent had left. They could not have, therefore, accompanied the respondent to raid the hutment of Banubi. This evidence rules out the defence version that the respondent had gone to the hutment of Banubi at about 8.15 p.m. to carry out a prohibition raid. An officer of the rank of a Police Inspector would not ordinarily go all alone to carry out a petty prohibtion raid. It is also difficult to believe that Banubi who was her self living in a glass house would abuse the respondent knowing fully well that she would thereby antagonise the entire police force which could make her life miserable. If this part of the

evidence is believed, and we see no reason to doubt it, the respondent's version must be ruled out as a concoction put forward to cover his misdeed. In that case the panchanama and the entries in the Station Diary become suspect.

6. It is true that initially Police Constables Desale and Kadam supported the respondent in their statements recorded on November 26, 1965 during the preliminary enquiry. However, on their realising that they would be in trouble if they supported a false version they subsequently made a clear breast and stuck to that version in their evidence recorded during the formal enquiry. We have persued their evidence and we are inclined to think that they disclosed the truth in their evidence. The evidence also discloses that when the jeep returned to the police station from Kuwari's bungalow it did not carry any prohibition articles therein. This also clear from the evidence of Head Constable Jadhao who was at the police station when the jeep arrived. Therefore, the story that certain articles containing liquor were attached from near the hutment of Banubi under the panchanama does not appear to be correct. In view of all this evidence the Inquirty Officer was right in upholding Banubi's version and in concluding that the panchnama and the entries made in the Station Diary were intended to cover up the misdeed of the respondent and were made by his subordinates at his behest. We, therefore, find it difficult to agree with the High Court that on the material on record a finding of guilt could not reasonably be arrived at.

7. The High Court, while conceding that it has no jurisidiction to sit in appeal over the decision of a domestic tribunal and is not entitled to reapprise the evidence, fell into an error in doing just that under the guise of examining the evidence to ascertain if the respondent was prejudiced on account of the failure of the department to provide him with the notebooks of Desale, Wadekar, Kadam and Sakpal dated November 13, 1965 and the Logbook of the jeep of even date. It is indeed true that the respondent had asked for the aforesaid documents since the commencement of the departmental enquiry and also in the course thereof. He was, however, informed that the original notebooks of the said four policemen as well as the logbook of the jeep were not traced. However, copies of the extracts from the notebooks of the said four

policemen taken out earlier and sent to the Anti-Corruption Bureau during the preliminary enquiry were supplied to him. As far as the logbook is concerned evidence of the jeep driver was tendered to show that no entry about the visit from the police station to Kuwari's bungalow was actually made on account of the distance being short. Be that as it may, the fact remains that the respondent was furnished with copies of extracts from the notebooks of the said policemen and they were also offered for further cross-examination. In the course of cross-examination of Police Constable Desale, the witness evaded a certain question by stating that "without seeing my original notebook I cannot say if I have made the entries regarding the duties performed on November 13, 1965 and November 14, 1965 in the notebook". He, however, admitted that the transcript from his notebook was correct but he could not say if the respondent had countersigned the entry of November 13, 1965. The High Court has attached too much importance to this evasive reply given by Police Constable Desale and has come to the conclusion that non supply of the original notebooks had prejudiced the defence. If the original notebooks are missing and if the transcripts prepared by the witnesses earlier are supplied, the department cannot be accused of deliberately suppressing evidence. In such a situation the evidence has to be evaluated bearing in mind the fact that the original notebooks and the logbook of the jeep are missing. The non-supply of the original notebooks and the logbook cannot, in the circumstances, efface the overwhelming evidence, both direct and circumstantial, tendered during the departmental enquiry. We are of the view that there is sufficient evidence on record to return a finding of guilt against the respondent.

8. The High Court observes that since Banubi is an unchaste woman it would be extremely unsafe to allow the fortune and career of a government official to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person. She was honest enough to admit the dark side of her life. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is

equally entitled to the protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the officer called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence. But in the present case we find that her evidence is not only corroborated in material particulars by the evidence of her husband but also by the evidence of PSI Ghosalkar and other members of the police party who had accompanied him on receipt of a phone call from the respondent. As pointed out earlier Banubi who was herself living in a glass house considering her antecedents could never have behaved in the manner she is alleged to have behaved if the respondent had merely raided her house and drawn up a nil panchname. In that case she would not have approached the District Superintendent of Police at the earliest opportunity and would not have lodged a complaint of misbehaviour against the respondent. We, therefore, find it difficult to agree with the High Court that merely becasue Banubi is a woman of doubtful reputation it is unsafe to rely on her testimony. We have carefully examined the evidence tendered befoe the Inquiry Officer and we are satisfied that the High Court was completely wrong in concluding that here evidence was not corroborated in material particulars by independent evidence. We are afraid that the High Court embarked upon a reappreciation of the evidence as if it were sitting in appeal against the decision of the departmental authorities. Its reappreciation of the evidence is also unsustainable.

9. For the above reasons we set aside the order of the High Court and restore the order of removal from servce passed by the appellate authority and direct that it be given effect to in accordance with law. We however, make it clear that if in the meantime the respondent was reinstated in service pursuant to the High Court's order, the salary and allowances paid for actual duty rendered on such reinstatment shall not be liable to be refunded. Except for the same the rest of the consequences of the removal order will fall on the respondent. The appeal is allowed accordingly with costs.

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(Also reported in 1991 SCC 57)

State of Punjab ... **Appellant;**

Versus

Gurmit Singh and Others ... **Respondents**

This appeal under Section 14 of the Terrorist Affected Areas (Special Courts) Act, 1984 is directed against the judgment and order of Additional Judge, Special Court, Ludhiana dated 1-6-1985 by which the respondents were acquitted of the charge of abduction and rape. From what follows, the judgment impugned in this appeal presents a rather disquieting and a disturbing feature. It demonstrates lack of sensitivity on the part of the court by casting unjustified stigmas on a prosecutrix aged below 16 years in a rape case, by overlooking human psychology and behavioural probabilities. An intrinsically wrong approach while appreciating the testimonial potency of the evidence of the prosecutrix has resulted in miscarriage of justice. First a brief reference to the prosecution case.

2. The prosecutrix (name withheld by us), a young girl below 16 years of age, was studying in the 10th class at the relevant time in Government High School, Pakhowal. The matriculation examinations were going on at the material time. The examination centre of the prosecutrix was located in the Boys' High School, Pakhowal. On 30-3-1984 at about 12.30 p.m. after taking her test in Geography, the prosecutrix was going to the house of her maternal uncle, Darshan Singh, and when she had covered a distance of about 100 karmas from the school, a blue Ambassador car being driven by a Sikh youth aged 20/25 years came from behind. In that car Gurmit Singh, Jagjit Singh @ Bawa and Ranjit Singh accused were sitting. The car stopped near her. Ranjit Singh accused came out of the car and caught hold of the prosecutrix from her arm and pushed her inside the car. Accused Jagjit Singh @ Bawa put his hand on the mouth of the prosecutrix, while Gurmit Singh accused threatened the prosecutrix, that in case she raised an alarm she would be done to death. All the three accused (respondents herein) drove her to the tubewell of Ranjit Singh accused. She was taken to the 'kotha' of the tubewell. The driver of the car after leaving the prosecutrix and three accused persons there went away with the

car. In the said kotha Gurmit Singh compelled the prosecutrix to take liquor, misrepresenting to her that it was juice. Her refusal did not have any effect and she reluctantly consumed liquor. Gurmit Singh then got removed her salwar and also opened her shirt. She was made to lie on a cot in the kotha while his companions guarded the kotha from outside. Gurmit Singh committed rape upon her. She raised alarm (roula) as she was suffering pain but Gurmit Singh threatened to kill her if she persisted in raising alarm. Due to that threat, she kept quiet. After Gurmit Singh had committed rape upon her, the other two accused, who were earlier guarding the kotha from outside, came in one by one and committed rape upon her. Jagjit Singh alias Bawa committed rape on her after Gurmit Singh and thereafter Ranjit Singh committed rape on her. Each one of the accused committed sexual intercourse with the prosecutrix forcibly and against her will. They all subjected her to sexual intercourse once again during the night against her will. Next morning at about 6.00 a.m., the same car arrived at the tubewell kotha of Ranjit Singh and three accused made her sit in that car and left her near the Boys' High School, Pakhowal nearabout the place from where she had been abducted. The prosecutrix had to take her examination in the subject of Hygiene on that date. She, after taking her examination in Hygiene, reached her Village Nangal-Kalan, about noon time and narrated the entire story to her mother, Smt. Gurdev Kaur PW 7. Her father Tirlok Singh PW 6 was not present in the house at that time. He returned from his work late in the evening. The mother of the prosecutrix, Smt. Gurdev Kaur PW 7, narrated the episode to her husband Tirlok Singh PW 6 on his arrival. Her father straightaway contacted Sarpanch Joginder Singh of the village. A panchayat was convened. Matter was brought to the notice of the Sarpanch of Village Pakhowal also. Both the Sarpanches tried to effect a compromise on 1-4-1984 but since the panchayat could not give any justice or relief to the prosecutrix, she along with her father proceeded to the Police Station Raikot to lodge a report about the occurrence with the police. When they reached the bus adda of Village Pakhowal, the police met them and she made her statement, Ex. PD, before ASI Raghubir Chand PW who made an endorsement, Ex. PD/1 and sent the statement Ex. PD of the

prosecutrix to the Police Station Raikot for registration of the case on the basis of which formal FIR Ex. PD/2 was registered by SI Malkiat Singh. ASI Raghubir Chand then took the prosecutrix and her mother to the primary health centre Pakhowal for medical examination of the prosecutrix. She was medically examined by lady doctor, Dr. Sukhwinder Kaur, PW 1, on 2-4-1984, who found that the hymen of the prosecutrix was lacerated with fine radiate tears, swollen and painful. Her pubic hair were also found matted. According to PW 1 intercourse with the prosecutrix could be "one of the reasons for laceration which I found in her hymen". She went on to say that the possibility could not be ruled out that the prosecutrix "was not habitual of intercourse earlier".

3. During the course of investigation, the police took into possession a sealed parcel handed over by the lady doctor containing the salwar of the prosecutrix along with 5 slides of vaginal smears and one sealed .parcel containing pubic hair of the prosecutrix, vide memo Ex. PK. On the pointing out of the prosecutrix, the investigating officer prepared the rough site plan Ex. PF, of the place from where she had been abducted. The prosecutrix also led the investigating officer to the tubewell kotha of Ranjit Singh where she had been wrongfully confined and raped. The investigating officer prepared a rough site plan of the kotha Ex. PM. A search was made for the accused on 2-4-1984 but they were not found. They were also not traceable on 3-4-1984, in spite of a raid being conducted at their houses by the ASI. On 5-4-1984 Jagjit Singh alias Bawa and Ranjit Singh were produced before the investigating officer by Gurbachan Singh PW 8 and were placed under arrest. Both Ranjit Singh and Jagjit Singh on the same day were produced before Dr. B.L. Bansal PW 3 for medical examination. The doctor opined that both the accused were fit to perform sexual intercourse. Gurmit Singh respondent was arrested on 9-4-1984 by SI Malkiat Singh. He was also got medically examined on 9-4-1984 by Dr. B.L. Bansal PW 3 who opined that Gurmit Singh was also fit to perform sexual intercourse. The sealed parcels containing the slides of vaginal smears, the pubic hair and the salwar of the prosecutrix, were sent to the chemical examiner. The report of the chemical examiner revealed that semen was found on

the slides of vaginal smear though no spermatozoa was found either on the pubic hair or the salwar of the prosecutrix. On completion of the investigation respondents were challaned and were charged for offences under Section 363, 366, 368 and 376 IPC.

4. With a view to connect the respondents with the crime, the prosecution examined Dr. Sukhwinder Kaur, PW 1; prosecutrix, PW 2; Dr B.L. Bansal, PW 3; Tirlok Singh, father of the prosecutrix, PW 6; Gurdev Kaur, mother of the prosecutrix, PW 7; Gurbachan Singh, PW 8; Malkiat Singh; PW 9 and SI Raghubir Chand, PW 10, besides, some formal witnesses like the draftsman etc. The prosecution tendered in evidence affidavits of some of the constables, whose evidence was of a formal nature as also the report of the chemical examiner Ex. PM. In their statements recorded under Section 313 CrPC the respondents denied the prosecution allegations against them. Jagjit Singh respondent stated that it was a false case foisted on him on account of his enmity with the Sarpanch of Village Pakhowal. He stated that he had married a Canadian girl in the village gurdwara, which was not liked by the Sarpanch and therefore, the Sarpanch was hostile to him and has got him falsely implicated in this case. Gurmit Singh respondent took the stand that he had been falsely implicated in the case on account of enmity between his father and Tirlok Singh, PW 6, father of the prosecutrix. He stated that there was long-standing litigation going on between his father and the father of the prosecutrix and their family members were not even on speaking terms with each other. He went on to add that on 1-4-1984 he was given a beating by Tirlok Singh, PW 6, on grounds of suspicion that he might have instigated some persons to abduct his daughter and in retaliation he and his elder brother on the next day had given a beating to Tirlok singh, PW 6 and also abused him and on that account Tirlok Singh PW, in consultation with the police had got him falsely implicated in the case. Ranjit Singh respondent also alleged false implication but gave no reasons for having been falsely implicated. Jagjit Singh alias Bawa produced DW 1 Kuldip Singh and DW 2 MHC, Amarjit Singh in defence and tendered in evidence Ex. DC, a photostat copy of his passport and Ex. DD copy of a certificate of his marriage with the Canadian girl. He also tendered

into evidence photographs marked 'C' and 'D', evidencing his marriage with the Canadian girl. The other two accused however did not lead any defence evidence.

5. The trial court first dealt with the prosecution case relating to the abduction of the prosecutrix by the respondents and observed :

> "The first point for appreciation before me would arise whether this part of the prosecution story stands fortified by any cogent or reliable evidence or not. There is a bald allegation only of (prosecutrix - name omitted) that she was forcibly abducted in a car. In the FIR she stated that she was abducted in an Ambassador car of blue colour. After going through the evidence, I am of the view that this thing has been introduced by the prosecutrix or by her father or by the thanedar just to give the gravity of offence. (prosecutrix - name omitted) was tested about the particulars of the car and she is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful. She stated in her cross-examination at page 8 that the make of the car was Master. She was pertinently asked whether the make of the Car was Ambassador or Fiat. The witness replied that she cannot tell the make of the car but when she was asked as to the difference between Fiat, Ambassador or Master car she was unable to explain the difference amongst these vehicles. So, it appears that the allegations that she was abducted in a Fiat car by all the three accused and the driver is an imaginary story which has been given either by the thanedar or by the father of the prosecutrix.

* *

If the three known accused are in the clutches of the police, it is not difficult for the IO to come to know about the car, the name of its driver etc., but strange enough, SI Raghubir Chand has shown pitiable negligence when he could not find out the car driver in spite of the fact that he directed the investigation on these lines. He had to admit that he made search for taking the car into possession allegedly used in the occurrence. He could not find out the name of the driver nor

could he find out which car was used. In these circumstances, it looks to be improbable that any car was also used in the alleged abduction. (Omission of name of the prosecutrix —ours)

The trial court further commented :

"On 30-3-1984 she was forcibly abducted by four desperate persons who were out and out to molest her honour. It has been admitted by the prosecutrix that she was taken through the bus adda of Pakhowal via metalled road. It has come in the evidence that it is a busy centre. In spite of that fact she had not raised any alarm, so as to attract persons that she was being forcibly taken. The height of her own unnatural conduct is that she was left by the accused at the same point on the next morning. The accused would be the last persons to extend sympathy to the prosecutrix. Had it been so, the natural conduct of the prosecutrix would have been first to rush to the house of her maternal uncle to apprise him that she had been forcibly abducted on the previous day. The witness after being left at the place of abduction lightly takes her examination. She does not complain to the lady teachers who were deployed to keep a watch on the girl students because these students were to appear in the centre of Boys' School. She does not complain to anybody nor her friend that she was raped during the previous night. She prefers her examination rather than go to the house of her parents or relations. Thereafter, she goes to her Village Nagal-Kalan and informs for the first time her mother that she was raped on the previous night. This part of the prosecution story does not look to be probable."

6. The trial court, thus, disbelieved the version of the prosecutrix basically for the reasons: (*i*)"She is so ignorant about the make etc. of the car that entire story that she was abducted in the car becomes doubtful' particularly because she could not explain the difference between a Fiat Car, Ambassador car or a Master car; (*ii*) the investigating officer had "shown pitiable negligence" during the investigation by not tracing out the car and the driver; (*iii*) that the prosecutrix did not raise any alarm while being abducted even though she had passed through the bus adda of Village Pakhowal; (*iv*) that the story of the abduction " has been introduced by the prosecutrix or by her father or by the thanedar just to give the gravity of offence" and (*v*) that no corroboration of the

statement of the prosecutrix was available on the record and that the story that the accused had left her near the school next morning was not believable because the accused could have no 'sympathy' for her.

7. The trial court also disbelieved the version of the prosecutrix regarding rape. It found that the testimony of the prosecutrix did not inspire confidence for the reasons (*i*) that there had been delay in lodging the FIR and as such the changes of false implication of the accused could not be ruled out. According to the trial court, Tirlok Singh PW 6 became certain on 1-4-1984 that there was no outcome of the meeting between the panchayats of Nagal-Kalan and Pakhowal, therefore, there was no justification for him not to have lodged the report on 1-4-1984 itself and since Tirlok Singh had "entered into consultations with his wife as to whether to lodge the report or not, it rendered the matter doubtful"; (*ii*) that the medical evidence did not help the prosecution case. The trial court observed that in her cross-examination PW 1 lady doctor had admitted that whereas intercourse with the prosecutrix could be one of the reasons for the laceration of the hymen "there could be other reasons also for that laceration". The trial court noticed that the lady doctor had inserted a vaginal speculum for taking swabs from the posterior vaginal fornix of the prosecutrix for preparing slides and since the width of the speculum was about two fingers, the possibility that the prosecutrix was habituated to sexual intercourse could not be ruled out". The trial court observed that the prosecutrix was "flighting her imagination in order to rope in the accused persons" and that implicit reliance could not be placed on the testimony "of such a girl"; (*iii*) there was no independent corroboration of her testimony and (*iv*) that the accused had been implicated on account of enmity as alleged by the accused in their statements recorded under Section 313 CrPC.

8. The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was a student of Xth class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again

the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quite and not to raise any alarm, otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the bus adda is a travesty of justice. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix ? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The trial court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Tirlok Singh PW 6, father of the prosecutrix came to know from his wife, PW 7 about the incident he went to the village Sarpanch and complained to him. The Sarpanch of the village also got in touch with the Sarpanch of Village Pakhowal, where in the tubewell kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was

only when the Panchayats failed to provide any relief or render any justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter. Tirlok Singh PW 6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Tirlok singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial court that the story of the prosecutrix that she was left near the examination centre next morning at about 6 a.m. was "not believable" as "the accused would be the last persons to extend sympathy to the prosecutrix" are not at all intelligible. The accused were not showing "any sympathy" to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been abducted but on the other hand were removing her from the Kotha of Ranjit Singh and leaving her near the examination centre so to avoid being detected. The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the centre and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course

of human conduct, this unmarried minor girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy. Therefore her informing her mother only on return to the parental house and no one else at the examination centre prior thereto is in accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the

occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of a law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In *State of Maharashatra* v. *Chandraprakash Kewalchand Jain*[1] Ahmadi, J. (As the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16).

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

in the Evidence Act similar to Illustration (*b*) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the reliance on the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

9. We are in respectful agreement with the above exposition of law. In the instant case our careful analysis of the statement of the prosecutrix has created an impression on our minds that she is a reliable and truthful witness. Her testimony suffers from no infirmity or blemish whatsoever. We have no hesitation in acting upon her testimony alone without looking for any 'corroboration'. However, in this case there is ample corroboration available on the record to lend further credence to the testimony of the prosecutrix.

10. The medical evidence has lent full corroboration to the testimony of the prosecutrix. According to PW1 lady doctor Sukhwinder Kaur she had examined the prosecutrix on 2-4-1984 at about 7.45 .m. at the Primary Health Centre, Pakhowal, and had found that "her hymen was lacerated with fine radiate tears, swollen and painful". The pubic hair were also matted. She opined that intercourse with the prosecutrix could be "one of the reasons for the laceration of the hymen" of the prosecutrix. She also opined that the possibility cannot be ruled out that (prosecutrix) was not habitual to intercourse earlier to her examination by her on 2-4-1984". During her cross-examination, the lady doctor admitted that she had not inserted her fingers inside the vagina of the prosecutrix during the medico-legal

examination but that she had put a vaginal speculum for taking the swabs from the posterior vaginal fornix for preparing the slides. She disclosed that the size of the speculum was about two fingers and agreed with the suggestion made to her during her cross-examination that "if the hymen of a girl admits two fingers easily, the possibility that such a girl was habitual to sexual intercourse cannot be ruled out". However, no direct and specific question was put by the defence to the lady doctor whether the prosecutrix in the present case could be said to be habituated to sexual intercourse and there was no challenge to her statement that the prosecutrix "may not have been subjected to sexual intercourse earlier". No enquiry was made from the lady doctor about the tear of the hymen being old. Yet, the trial court interpreted the statement of PW 1 Dr. Sukhwinder Kaur to hold that the prosecutrix was habituated to sexual intercourse since the speculum could enter her vagina easily and as such she was "a girl of loose character". There was no warrant for such a finding and the finding if we may say so with respect, is a wholly irresponsible finding. In the case of the evidence of PW 1, the trial court wrongly concluded that the medical evidence had not supported the version of the prosecutrix.

11. The trial court totally ignored the report of the chemical examiner Ex. PM, according to which semen had been found on the slides which had been prepared by the lady doctor from the vaginal secretions from the posterior of the vaginal fornix of the prosecutrix. The presence of semen on the slides lent authentic corroboration to the testimony of the prosecutrix. This vital evidence was forsaken by the trial court and as a result wholly erroneous conclusions were arrived at. Thus, even though no corroboration is necessary to rely upon the testimony of the prosecutrix, yet sufficient corroboration from the medical evidence and the report of the chemical examiner is available on the record. Besides, her statement has been fully supported by the evidence of her father, Tirlok Singh, PW 6 and her mother Gurdev Kaur, PW 7, to whom she had narrated the occurrence soon after her arrival at her house. Moreover, the unchallenged fact that it was the prosecutrix who had led the investigating officer to the kotha of the tubewell of Ranjit singh, where she had been raped, lent a built-in

assurance that the charge levied by her was 'genuine' rather than 'fabricated' because it is no one's case that she knew Ranjit Singh earlier or had ever seen or visited the kotha at his tubewell. The trial court completely overlooked this aspect. The trial court did not disbelieve that the prosecutrix had been subjected to sexual intercourse but without any sound basis, observed that the prosecutrix might have spent the 'night' in the company of some 'persons' and concocted the story on being asked by her mother as to where she had spent the night after her maternal uncle, Darshan Singh, came to Nangal-Kalan to enquire about the prosecutrix. There is no basis for the finding that the prosecutrix had spent the night in the company of some "persons" and had indulged in sexual intercourse with them of her own free will. The observations were made on surmises and conjectures — the prosecutrix was condemned unheard.

12. The trial court was of the opinion that it was a 'false' case and that the accused had been implicated on account of enmity. In that connection is observed that since Tirlok Singh PW 6 had given a beating to Gurmit Singh on 1-4-1984 suspecting his hand in the abduction of his daughter and Gurmit Singh accused and his elder brother had abused Tirlok Singh and given a beating to Tirlok Singh PW 6 on 2-4-1984, "it was very easy on the part of Tirlok Singh to persuade his daughter to name Gurmit Singh so as to take revenge". Indeed, Gurmit Singh accused in his statement under Section 313 CrPC did raise such a plea but that plea has remained unsubstantiated. Tirlok Singh PW 6 categorically denied that he had any litigation with the father of Gurmit Singh at all and went on to say that no litigation had ever taken place between him and Mukand Singh, father of Gurmit Singh, over a piece of land or otherwise. To the similar effect is the statement of Gurdev Kaur PW 7 who also categorically stated that there had been no litigation between her husband and Mukand Singh, father of Gurmit Singh. The trial court ignored this evidence and found support for the plea of the accused from the statement of the prosecutrix in which during the first sentence of her cross-examination she admitted that litigation was going on between Mukand Singh, father of Gurmit Singh, and her father for the last 8/9 years over a piece of land. In what context the statement was

made is not clear. Moreover, the positive evidence of PW 6 and PW 7 that there was no litigation pending between PW 6 and the father of Gurmit Singh completely believed the plea of the accused. If there was any civil litigation pending between the parties as alleged by Gurmit Singh, he could have produced some documentary proof in support thereof but none was produced. Even Mukand Singh, father of Gurmit Singh did not appear in the witness-box to support the plea taken by Gurmit Singh. The allegation regarding any beating given to Gurmit Singh by PW 6 and to PW 6 by Gurmit Singh and his brother was denied by PW 6 and no material was brought forth in support of that plea either and yet the trial court for undisclosed reasons assumed that the story regarding the beating was correct. Some stray sentences in the statement of the prosecutrix appear to have been unnecessarily blown out of all proportion to hold that 'admittedly' PW 6 had been given a beating by Gurmit Singh accused and that there was civil litigation pending between the father of the prosecutrix and the father of Gurmit Singh to show that the relations between the parties were inimical. There is no acceptable material on the record to hold that there was any such civil litigation pending between the parties. Even if it be assumed for the sake of argument that there was some such litigation, it could hardly be a ground for a father to put forth his daughter to make a wild allegation of rape against the son of the opposite party, with a view to take revenge. It defies human probabilities. No father could stoop so low as to bring forth a false charge of rape on his unmarried minor daughter with a view to take revenge from the father of an accused on account of pending civil litigation. Again, if the accused could be falsely involved on account of that enmity, it was equally possible that the accused could have sexually assaulted the prosecutrix to take revenge from her father, for after all, enmity is a double-edged weapon, which may be used for false implication as well as to take revenge. In any case, there is no proof of the existence of such enmity between PW 6 and the father of Gurmit Singh which could have prompted PW 6 to put up his daughter to falsely implicate Gurmit Singh on a charge of rape. The trial court was in error to hold that Gurmit Singh had been implicated on account of enmity between the two families and for the beating given by Gurmit Singh and his

brother to PW 6, in retaliation of the beating given by PW 6 to Gurmit Singh on 1-4-1984. Similarly, so far as Jagjit Singh respondent is concerned, the trial court opined that he could have been got implicated at the instance of the Sarpanch of Village Pakhowal who was hostile to Jagjit Singh. The ground of hostility as given by Jagjit Singh against the Sarpanch of Village Pakhowal stems out of the fact that the Sarpanch was annoyed with him for marrying a Canadian girl in the village gurdwara. There is no evidence whatsoever on the record to show that the Sarpanch of Village Pakhowal had any relationship or connection with the prosecutrix or her father or was in any way in a position to exert so much of influence on the prosecutrix or her family, that to settle his score Tirlok Singh PW 6 would put forward his daughter to make a false allegation of rape and thereby jeopardise her own honour and future prospects of her marriage etc. The plea of Jagjit Singh, accused was a plea of despair not worthy of any credence. Ranjit Singh, apart from stating that he had been falsely implicated in the case did not offer any reasons for his false implication. It was at his tubewell kotha that rape had been committed on the prosecutrix. She had pointed out that kotha to the police during investigation. No ostensible reason has been suggested as to why the prosecutrix would falsely involve Ranjit Singh in the commission of such a heinous crime and nominate his kotha as the place where she had been subjected to sexual molestation by the respondents. The trial court ignored that it is almost inconceivable that an unmarried girl and her parents would go to the extent of staking their reputation and future in order to falsely set up a case of rape to settle petty scores as alleged by Jagjit Singh and Gurmit Singh -- respondents.

13. From the statement of the prosecutrix, it clearly emerges that she was abducted and forcibly subjected to sexual intercourse by the three respondents without her consent and against her will. In this factual situation the question of age of the prosecutrix would pale into insignificance. However, in the present case, there is evidence on the record to establish that on the date of the occurrence, the prosecutrix was below 16 years of age. The prosecutrix herself and her parents deposed at the trial that her age was less than 16 years on the date of the occurrence. Their evidence is supported by the birth

certificate Ex. PJ. Both Tirlok Singh PW 6 and Gurdev Kaur PW 7, the father and mother of the prosecutrix respectively, explained that initially they had named their daughter, the prosecutrix, as Mahinder Kaur but her name was changed to... (name omitted), as according to the Holy Guru Granth Sahib her name was required to start with the word 'chacha' and therefore in the school-leaving certificate her name was correctly given. There was nothing to disbelieve the explanation given by Tirlok Singh and Gurdev Kaur in that behalf. The trial court ignored the explanation given by the parents observing that "it could not be swallowed being a belated one". The trial court was in error. The first occasion for inquiring from Tirlok Singh PW 6 about the change of the name of the prosecutrix was only at the trial when he was asked about Ex. PJ and there had been no earlier occasion for him to have made any such statement. It was, therefore, not a belated explanation. That apart, even according to the lady doctor PW 1, the clinical examination of the prosecutrix established that she was less than 16 years of age on the date of the occurrence. The birth certificate Ex. PJ was not only supported by the oral testimony of Tirlok Singh PW 6 and Gurdev Kaur PW 7 but also by that of the school-leaving certificate marked 'B'. With a view to do complete justice, the trial court could have summoned the official concerned from the school to prove various entries in the school-leaving certificate. From the material on the record, we have come to an unhesitating conclusion that the prosecutrix was less than 16 years of age when she was made a victim of the lust of the respondents in the manner deposed to by her against her will and without her consent. The trial court did not return any positive finding as to whether or not the prosecutrix was below 16 years of age on 30-3-1984 and instead went on to observe that "even assuming for the sake of argument that the prosecutrix was less than 16 years of age on 30-3-1984, it could still not help the case as she was not a reliable witness and was attempting to shield her own conduct by indulging in falsehood to implicate the respondents". The entire approach of the trial court in appreciating the prosecution evidence and drawing inferences therefrom was erroneous.

14 The trial court not only erroneously disbelieved the

prosecutrix, but quite uncharitably and unjustifiably even characterised her as "a girl of loose morals" or "such type of a girl".

15. What has shocked our judicial conscience all the more is the inference drawn by the court, based on no evidence and not even on a denied suggestion, to the effect:

> "The more probability is that (prosecutrix) was a girl of loose character. She wanted to dupe her parents that she resided for one night at the house of her maternal uncle, but for reasons best know to her, she did not do so and she preferred to give company to some persons."

16. We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Like such stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole — where the victim of crime is discouraged — the criminal encouraged and in turn crime gets rewarded ! Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the courts, for after all it is the accused and not the victim of sex crime who is on trial in the court.

17. As a result of the aforesaid discussion, we find that the prosecutrix has made a truthful statement and the prosecution has established the case against the respondents beyond every reasonable doubt. The trial court fell in error in acquitting them of

the charges levelled against them. The appreciation of evidence by the trial court is not only unreasonable but perverse. The conclusions arrived at by the trial court are untenable and in the established facts and circumstances of the case, the view expressed by it is not a possible view. We, accordingly, set aside the judgment of the trial court and convict all the three respondents for offences under Section 363/366/368 and 376 IPC. So far as the sentence is concerned, the court has to strike a just balance. In this case the occurrence took place on 30-3-1984 (more than 11 years ago). The respondents were aged between 21-24 years of age at the time when the offence was committed. We are informed that the respondents have not been involved in any other offence after they were acquitted by the trial court on 1-6-1985, more than a decade ago. All the respondents as well as the prosecutrix must have by now got married and settled down in life. These are some of the factors which we need to take into consideration while imposing an appropriate sentence on the respondents. We accordingly sentence the respondents for the offence under Section 376 IPC to undergo five years' RI each and to pay a fine of Rs. 5000 each and in default of payment of fine to 1 years's RI each. For the offence under Section 363 IPC we sentence them to undergo three years' RI each but impose no separate sentence for the offence under Sections 366/368 IPC. The substantive sentences of imprisonment shall, however, run concurrently.

18. This Court , in *Delhi Domestic Working Women's Forum* v. *Union of India*', had suggested, on the formulation of a scheme, that at the time of conviction of a person found guilty of having committed the offence or rape the court shall award compensation.

19. In this case, we have, while convicting the respondents, imposed, for reasons already set out above, the sentence of 5 years, RI with fine of Rs. 5000 and in default of payment of fine further RI for one year on each of the respondents for the offence under Section 376 IPC. Therefore, we do not, in the instant case, for those very reasons, consider it desirable to award any compensation, in addition to the fine already imposed, particularly as no scheme also appears to have been drawn up as yet.

20. Before parting with the case, there is one other aspect which we would like to advert to.

21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a said reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. 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. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroborating of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. 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.

22. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the

victims of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.

23. The alarming frequency of crime against women led Parliament to enact Criminal Law (Amendment) Act, 1983 (Act 43 of 1983) to make the law or rape more realistic. By the Amendment Act, Sections 375 and 376 were amended and certain more penal provisions were incorporated for punishing such custodians who molest a woman under their custody or care. Section 114-A was also added in the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians. Section 327 of the Code of Criminal Procedure which deals with the right of an accused to an open trial was also amended by addition of sub-sections 2 and 3 after renumbering the old section as sub-section (1). Sub-section 2 and 3 of Section 327 CrPC provide as follows :

> "327. *Court to be open.*—
>
> * * *
>
> (2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in *camera*;
>
> Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the from or building used by the court.

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court."

24. These two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape "shall be conducted in camera" as occurring in sub-section (2) of Section 327 CrPC is not only significant but very important. It casts a *duty* on the court to conduct the trial of rape cases etc. invariably "in camera". The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) CrPC and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an *open court*, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and shifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 CrPC and to impress upon the Presiding Officers to invariably hold the trial of rape cases in camera, rather than in the open court as envisaged by Section 327(2) CrPC. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) CrPC. This would save any further embarrassment being caused to the victim of sex crime. Whereever possible, it may also be worth considering whether it would not be more desirable that the cases of

sexual assaults on the females are tried by lady Judges, whenever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) CrPC liberally. Trial of rape cases in *camera* should be the rule and an open trial in such cases an exception.

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(Also reported in 1996 (2) SCC 384)

State of Andhra Pradesh ... Appellant;

Versus

Gangula Satya Murthy ... Respondents

1. A girl of sixteen (Satya Vani) was raped and throttled to death. This was the gravamen of the charge put against respondent Gangula Satya Murthy alias Babu. Sessions court convicted him under Sections 302 and 376 of the Indian Penal Code and sentenced him to imprisonment for life and rigorous imprisonment for 7 years respectively under the two counts. But on appeal, a Division Bench of the High court of Andhra Pradesh acquitted him. This appeal by special leave has been filed by the State of Andhra Pradesh in challenge of the said order of acquittal.

2. We shall state the facts of the case as put forth by the prosecution:

Satya Vani was a student of 10th Standard. She was residing with her parents in the village Talluru (East Godavari District). Respondent Babu, a married youngman, was residing with his mother in their house situated near the house of the deceased. Satya Vani used to visit respondent's house to see television programmes as there was no television set available in her house. Respondent developed, in course of time, an infatuation for Satya Vani, but the overtures made by him were not favourably reciprocated by her.

3. On the evening of 26-11-1991 Satya Vani was sent by her parents to the house where her grand-parents lived with some errand. While returning from there she stepped into respondent's house for seeing the telecast programmes. Respondent was all alone then in that house as his mother had gone to the town to see a cinema show. Taking advantage of the absence of anyone else in the house, respondent subjected Satya Vani to sexual intercourse by forcibly putting her on the cot. When she threatened that she would complain it to her parents respondents caught hold of her neck and throttled her to death. A little later respondent went out of the house bolting it from outside.

4. As Satya Vani did not return home even after a long time her parents became panicky and they made hectic enquiries for her.

When respondent's mother reached home by about 10 p.m., she found Satya Vani's dead body lying on the cot in her house, and she immediately conveyed the frightening news to her anxious parents.

5. Police was informed of the matter and an FIR under Section 174 of the Code of Criminal Procedure was prepared, and the inquest on the dead body was held by the Sub Inspector of Police. During autopsy it was revealed that Satya Vani was subjected to sexual intercourse and her death was due to throttling.

6. On 2-12-1991, respondent was physically produced before the police by two residents of the locality (PW-6 and PW-7) on the premise that respondent had admitted his guilt to them. A letter which Satya Vani had addressed to the respondent was also delivered to the police. After completing the investigation respondent was challanged.

7. Sessions court found on evidence, which is entirely circumstantial, that respondent had raped the deceased girl and killed her by throttling. Accordingly the respondent was convicted and sentenced as aforesaid.

8. The following circumstances were found by the sessions court as established firmly by the prosecution : (1) Satya Vani was seen entering the house of the respondent by about 5.30 p.m.; (2) After some time respondent was seen going out of the house bolting the door from outside; (3) Death of Satya Vani took place inside the house of the respondent some time between 6 p.m. and 10 p.m.; (4) She was subjected to sexual intercourse before her death and she died due to throttling; (5) Respondent alone was present in the house during the relevant time besides the deceased; (6) Extrajudicial confession was made by the respondent to PW-6 and PW-7.

9. The Division Bench of the High court of Andhra Pradesh, however, expressed the view that possibility of deceased's death due to consumption of poison, could not be ruled out in this case. Learned Judges entertained the doubt that the injuries on the neck including the fracture of the hyoid bone could have been post-mortem injuries. Further, the extra judicial confession spoken to by PW-6 and PW-7 was not acted on by the High Court due to certain infirmities pointed out in the judgment.

Resultantly, the High Court reversed the judgment of the sessions court and passed the order of acquittal.....

11. Dr. K. Trinadhrao (PW-10) of the Government Hospital who conducted the post-mortem examination has recorded his observations in the certificate as follows :

> "Injuries are ante-mortem in nature. Two finger pressure abrasions were present on the right as well as on the left side of the neck placed anteriorly, which continued up to the root level on the back of the neck. A fresh vaginal tear on the inner vaginal walls posterior to labia minora, fracture of the right hyoid bone and extravagation of blood on both sides of the neck were found. Both lungs were congested. Emphysematoas bullae were present on the surface of both the lungs."

When the vaginal swabs collected from the deceased were examined under microscope, presence of dead non-motile spermatozoa were observed by the doctor....

13. We cannot resist expressing our distress that the High Court has chosen to advance fragile reasons to upset a well reasoned conclusion reached by the trial court that the deceased was throttled to death. The mere fact that witnesses present at the inquest had escaped noticing the small abrasions on the neck of the dead body is too tenuous a ground for holding that such abrasions would have come into existence after the inquest was held overruling the definite opinion of the medical man (who saw the injuries) that they were ante-mortem injuries. It is totally incorrect to say that no abrasion would be caused if pressure is applied with fingers. It is only common sense that if such fingers have projecting nails, pressure application with such fingers would quite possibly cause abrasions as well. Similarly the observation of the High court that no bleeding was noticed at the site of the fracture of the hyoid bone is not factually correct as PW-10 had noted in the post-mortem certificate that there was extravagation of blood on both sides of the neck.

14. The High Court has adverted to yet another reason for holding that death might not have been caused due to throttling. The vomited material found on the cot and mouth of the dead body was

not sent for chemical examination, and hence the High Court concluded that "it is also possible that death might have been caused due to asphyxia by poisoning." We are disturbed very much as the High Court has overlooked, if not ignored, the evidence of Dr. Trinadharao (PW-10) that viscera comprising of stomach contents, intestine, piece of lever and also a kidney had been forwarded to the chemical laboratory for analysis and PW-10 had reserved his final opinion till he got the result of such analysis. When he later received the chemical examination report he pronounced his final opinion that the death was due to asphyxia as no poison was detected in the viscera. The report of the chemical examiner is available in the records. Section 293 of the Code would enable the court to use the said document in evidence. Inspite of such unassailable materials the High Court has arrived at the finding that "in the facts and circumstances of the case it cannot be ruled out in its entirety that death was not caused due to poisoning."

15. One of the circumstances relied on by the prosecution is that respondent had confessed the guilt to PW-6 and PW-7. In other words, prosecution relied on the extra judicial confession of the respondent spoken to by the said two witnesses. In their deposition they said that on 2.12.1991, they buttonholed the respondent and confronted him with certain questions pertaining to the death of the deceased and then respondent had blurted out to them of what happened. Witnesses further deposed that respondent took out a letter and showed it to them. Witnesses thereupon took him to the police station where that letter was also produced. PW-14 - Sub Inspector of Police confirmed that those two witnesses brought the respondent to the police station and produced Ext. P-13 letter.

16. Truth of the evidence of PW-6 and PW-7 stands vouchsafed by Ext. P-13 letter as the same was proved to be a letter written by the deceased to the respondent. PW-12 Assistant Director Forensic Science Laboratory, who was also a Handwriting Expert examined the handwriting on the letter with the admitted handwriting of the deceased found in some answer sheets (which police collected from the Principal of the School where Satya Vani studied - PW-13) PW-12 gave cogent reasons for his conclusion that both were written

by the same person. A reading of the contents in that letter admits of no doubt that it was addressed to the respondent in this case.

17. The aforesaid extra judicial confession was relied on by the trial court by the High Court did not act on it for two reasons. First is a seeming disparity between the time of making the confession as spoken to by the witnesses and the time mentioned by the police on the strength of station records. The second reason is that the said extra judicial confession was reduced to writing as Ext. P-7, inside the police station and hence it is hit by Section 26 of the Evidence Act.

18. It is true that in the deposition PW-6 and PW-7 have said that it was at 7 a.m. that the respondent made the confession to them. But the Sub Inspector said that accused was produced in the police station at 7.30 p.m. We think that much should not have been made out of that disparity as there could be a possibility of making an error in recording the time a.m. for p.m. We say this because both PW-6 and PW-7 uniformly said that they took the respondent to the police station situated about 3 kilometers away. As the police records show that they produced him at 7.30 p.m. it is only inferential that respondent would have made the confession on the evening and not during morning hours. At any rate it is not proper to jettison on otherwise sturdy piece of evidence of extra judicial confession on the ground of such a rickety premise.

19. The other reasoning based on Section 26 of the Evidence Act is also fallacious. It is true any confession made to a police officer is inadmissible under Section 25 of the Act and that ban is further stretched through Section 26 to the confession made to any other person also if the confessor was then in police custody. Such "custody" need not necessarily be post arrest custody. The word "custody" used in Section 26 is to be understood in a pragmatic sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of the Section. If he makes any confession during that period to any person be he not a police officer, such confession would also be hedged within the banned contours outlined in Section 26 of the Evidence Act.

20. But the confession made by the respondent to PW-6 and PW-7

was not made while he was anywhere near the precincts of the police station or during the surveillance of the police. Though Ext. P-7 would have been recorded inside the police station its contents were disclosed long before they were reduced to writing. We are only concerned with the inculpatory statement which respondent had made to PW-6 and PW-7 before they took him to the police station. So the mere fact that the confession spoken to those witnesses was later put in black and white is no reason to cover it with the wrapper of inadmissibility. We find that the High Court has wrongly sidelined the extra judicial confession.

21. The fact that body of (Satya Vani) was found on the cot inside the house of the respondent is a very telling circumstance against him. Respondent owed a duty to explain as to how a dead body which was resultant of a homicide happened to be in his house. In the absence of any such explanation from him the implication of the said circumstances is definitely adverse to the respondent.

22. High Court has extricated the appellant from the indictment of rape on the erroneous assumption that it would have been a consented copulation. Learned Judges have relied on two circumstances in support of the said assumption. One is that there was no nail mark on the breast or face or thigh or private parts of the deceased for indicating resistance offered by her. Second is that PW-10 doctor did not notice any hymen for the deceased. In that realm also the High court committed serious error in skipping the contents of Ext. P-13 letter and also the injury on the right side of the posterior labia minora, (we have mentioned it supra). Of course that injury by itself is not conclusive proof of resistance but it cannot be ignored altogether. In Ext. P-13 letter, she cautioned the respondent not to have a leering on her. She deprecated in her letter the idea of a married man enjoying another lady by terming it an act of "grave sin". Further, in his extra judicial confession made to PW-6 and PW-7, respondent had said that he took the girl by force and kept her on the cot as he was long nurturing the lust to enjoy her. The doctor had found fresh vaginal tear on the right side of the inner vaginal wall posterior. This injury is indicative of forcible sexual intercourse. According to the medical opinion also the presence of fresh vaginal tear showed that the deceased had been subjected to sexual intercourse

prior to her death. The very fact that the sexual intercourse was soon followed, if not contemporaneous with, by the act of throttling is strongly suggestive of a vehement resistance offered by the female victim.

23. We have absolutely no doubt that the above circumstances are sufficient to reach the irresistible inference that she was ravished by the respondent despite her refusal.

24. The High court after considering the medical evidence, while dealing with the question of rape opined :

> "There is no direct evidence to show that the accused alone had sexual intercourse with her. The deceased was aged 16 years."

25. We are rather distressed on this comment. But using the word "alone" the High Court almost cast a stigma on the prosecutrix as if, apart from the appellant, there were other persons also who had sexual intercourse with her. There is no basis at all for such an assumption. There was no warrant for recording such a finding and if we may say so, with respect, the finding is an irresponsible finding. We express our strong disapproval of the approach of the High Court and its casting a stigma on the character of the deceased prosecutrix. Even if the Court formed an opinion, from the absence of hymen, that the victim had sexual intercourse prior to the time when she was subjected to rape by the appellant, she had every right to refuse to submit herself to sexual intercourse by the appellant, as she certainly was not a vulnerable object or prey for being sexually assaulted by anyone and this position becomes all the more clear from the contents of the letter Ex. P-13, as already noticed.

26. We, therefore, conclude that the High Court erred substantially in upsetting the conviction and sentence passed by the Sessions Judge supported by sound and sturdy reasons. We, therefore, allow this appeal and set aside the order of acquittal. We restore the conviction and sentence passed on the respondent/accused by the trial court. The bail bond shall stand cancelled. The respondent shall be taken into custody forthwith to undergo the remaining part of the sentence.

27. Before parting with the case, we would like to point out that the Courts are expected to show 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 witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more important because of late crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasise that the courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation. One of us (Dr. Anand J.) has observed in *State of Punjab* v. *Gurmit Singh and others* (1996) 2 SCC 384 thus:

> "The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity."

28. We think it is appropriate to reiterate those observations in this case.

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(Also reported in JT 1996 (10) SCC 550)

Chairman, Railway Board and Others ... Appellants;

Versus

Chandrima Das (Mrs) and Others ... Respondents

2. Mrs Chandrima Das, a practising advocate of the Calcutta High Court filed a petition under Article 226 of the Constitution against the Chairman of Railway Board; General Manager, Eastern Railway; Divisional Railway and State of West Bengal through the Chief Secretary; Home Secretary, Government of West Bengal; Superintendent of Police (Railways), Howrah; Superintendent of Police, Howrah; Director General of Police, West Bengal and many other officers including the Deputy High Commissioner, Republic of Bangladesh; claiming compensation for the victim, Smt Hanuffa Khatoon, a Bangladesh national who was gang-raped by many including employess of the Railways in a room at Yatri Niwas at Howrah Station of the Eastern Railway regarding which GRPS Case No. 19 of 1998 was registered on 27-2-1998. Mrs Chandrima Das also claimed several other reliefs including a direction to the respondents to eradicate anti-social and criminal activities at Howrah Railway Station.

3. The facts as noticed by the High Court in the impugned judgment are as follows :

"Respondents Railways and the Union of India have admitted that amongst the main accused you are employees of the Railways and if the prosecution version is proved in accordance with law, they are perpetrators of the heinous crime of gang-rape repeatedly committed upon the hapless victim Hanuffa Khatoon. It is not in dispute that Hanuffa came from Bangladesh. She at the relevant time was the elected representative of the Union Board. She arrived at Howrah Railway Station on 26th February, 1998 at about 1400 hours to avail Jodhpur Express at 2300 hours for paying a visit to Ajmer Sharif. With that intent in mind, she arrived at Calcutta on 24th February, 1998 and stayed at a hotel at 10, Sudder Street, Police Station Taltola and came to Howrah Station on the date and time aforementioned. She had, however, a wait-listed ticket and so she approached a Train Ticket Examiner at the station for confirmation of berth against her

ticket. The Train Ticket Examiner asked her to wait in the Ladies' Waiting Room. She accordingly came to the Ladies Waiting room and rested there.

At about 1700 hours on 26th February, 1998 two unknown persons (later identified as one Ashoke Singh, a tout who posed himself as a very influential person of the Railways and Siya Ram Singh, a railway ticket broker having good acquaintance with some of the railway staff of Howrah Station) approached her, took her ticket and returned the same after confirming reservation in Coach No. S-3 (Berth No. 17) of Jodhpur Express. At about 2000 hours Siya Ram Singh came again to her with a boy named Kashi and told her to accompany the boy to a restaurant if she wanted to have food for the night. Accordingly at about 2100 hours she went to a nearby eating house with Kashi and had her meal there. Soon after she had taken her meal, she vomited and came back to the Ladies Waiting Room. At about 2100 hours Ashoke Singh along with Rafi Ahmed, a Parcel Supervisor at Howrah Station came to the Ladies Niwas before boarding the train. She appeared to have some doubt initially but on being certified by the lady attendants engaged on duty at the Ladies' Waiting Room about their credentials she accompanied them to Yatri Niwas. Sita Ram Singh, a khalasi of Electric Department of Howrah Station joined them on the way to Yatri Niwas. She was taken to Room No. 102 on the first floor of Yatri Niwas. The room was booked in the name of Ashok Singh against Railway Card Pass No. 3638 since 25th February, 1998. In Room No. 102 two other persons viz. one Lalan Singh, Parcel Clerk of Howrah Railway Station and Awdesh Singh, Parcel Clearing Agent were waiting. Hanuffa Khatoon suspected something amiss when Ashok Singh forced her into the room. Awdesh Singh bolted the room from outside and stood on guard outside the room. The remaining four persons viz. Ashoke, Lalan, Rafi and Sita Ram took liquor inside the room and also forcibly compelled her to consume liquor. All the four persons who were present inside the room brutally violated Hanuffa Khatoon, who, it is said, was in a state of shock and daze. When she could recover she managed to escape from the room of Yatri Niwas and came back to the platform where again she Siya Ram Singh and found him talking to Ashoke Singh. Seeing her plight

Siya Ram Singh pretended to be her saviour and also abused and slapped Ashoke Singh. Since it was well past midnight and Jodhpur Express already departed, Siya Ram requested Hanuffa Khatoon to accompany him to his residence to rest for the night with his wife and children. He assured her to help entrain Poorva Express on the following morning. Thereafter Siya Ram accompanied by Ram Samiran Sharma a friend Siya Ram took her to the rented flat of Ram Samiran Sharma at 66, Pathuriaghata Street, Police Station Jorabagan, Calcutta. There Siya Ram raped Hanuffa and when she protested and resisted violently Siya Ram and Ram Samiran Sharma gagged her mouth and nostrils intending to kill her, as a result Hanuffa bled profusely. On being informed by the landlord of the building following the hue and cry raised by Hanuffa Khatoon, she was rescued by Jorabagan Police."

4. It was on the basis of the above facts that the High Court had awarded a sum of Rs 10 lakhs as compensation for Smt Hanuffa Khatoon as the High Court was of the opinion that the rape was committed at the building (Railway Yatri Niwas) belonging to the Railways and was perpetrated by the railways employees.

5. In the present appeal, we are not concerned with the many direction issued by the High Court. The only question argued before us was that the Railways would not be liable to pay compensation to Smt Hanuffa Khatoon who was a foreigner and was not an Indian national. It is also contended that commission of the offence by the person concerned would not make the Railways or the Union of India liable to pay compensation to the victim of persons, they along would be prosecuted and on being found guilty would be punished and may also be liable to pay fine or compensation, but having regard to the facts of this case, the Railways, or, for that matter, the Union of India would not even be vicariously liable. It is also contended that the remedy lay in the domain of private law and not under public law and therefore, no compensation could have been legally awarded by the High Court in proceedings under Article 226 of the Constitution and, that too at the instance of a practising advocate who, in no way, was concerned or connected with the victim.

6. We may first dispose of the contention raised on behalf of appellants that proceedings under Article 226 of the Constitution

could have been legally initiated for claiming damages from the Railways for the offence of rape committed on Smt Hanuffa Khatoon and that Smt Hanuffa Khatoon herself should have approached the court in the realm of private law so that all the questions of fact could have been considered on the basis of the evidence adduced by the parties to record a finding whether all the ingredients of the commission of "tort" against the person of Smt Hanuffa Khatoon were made out, so as to be entitled to the relief of damages. We may also consider the question of locus standi as it is contended on behalf of the appellants that Mrs Chandrima Das, who is a practising advocate of the High Court of Calcutta, could not have legally instituted these proceedings.

9. Various aspects of the public law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was notified that even though the petition may relate essentially to contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The public law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Government...

11. Having regard to what has been stated above, the contention that Smt Hanuffa Khatoon should have approached the civil court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law.

12. In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of fundamental rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. This court in *Bodhisattwa Gautam* v. *Subhra Chakraborty*[21] has held "rape" as an offence which is violative of the fundamental right

of a person guaranteed under Article 21 of the Constitution. The Court observed as under (SCC p. 500, para 10)

Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is violative of the victim's most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.

13. Rejecting, therefore, the contention of the learned counsel for the appellant that the petition under public law was not maintainable, we now proceed to his next contention relating to the locus standi of the respondent, Mrs Chandrima Das, in filing the petition.

14. The main contention of the learned counsel for the appellants is that Mrs Chandrima Das was only a practising advocate of the Calcutta High court and was, in no way, connected or related to the victim, Smt Hanuffa Khatoon and, therefore, she could not have filed a petition under Article 226 for damages or compensation being awarded to Smt Hanuffa Khatoon on account of the rape committed on her. This contention is based on a misconception. Learned counsel for the appellants is under the impression that the petition filed before the Calcutta Court was only a petition for damages or compensation for Smt Hanuffa Khatoon. As a matter of fact, the reliefs which were claimed in the petition included the relief for compensation. But many other reliefs, as, for example, relief for eradicating anti-social and criminal activities of various kinds at Howrah Railway Station were also claimed. The true nature of the petition, therefore, was that of a petition filed in public interest.

15. The existence of a legal right, no doubt, is the foundation for a petition under Article 226 and a bare interest, may be of a minimum nature may give locus standi to a person to file a writ petition, but the concept of "locus standi" has undergone a sea change, as we shall presently notice. In *Satyanarayana Sinha (Dr) v. S. Lal & Co. (P) Ltd*,[22] it was held that the foundation for exercising jurisdiction under Article 32 or Article 226 is ordinarily the personal or individual right of the petitioner himself. In writs like habeas corpus and quo warranto,

the rule has been relaxed and modified.

17. In the context of public interest litigation, however, the Court in its various judgments has given the widest amplitude and meaning to the concept of locus standi. In *People's Union for Democratic Rights v. Union of India*[24] it was laid down that public interest litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to court. (See also *Bandhua Mukti Morcha* v. *Union of India*[25] and *State of H.P.* v. *A Parent of a Student of Medical College*[26] on the right to approach the court in the realm of public interest litigation). In *Bangalore Medical Trust* v. *B.S. Muddappa*[27] the Court held that the restricted meaning of aggrieved person and the narrow outlook of a specific injury has yielded in favour of a broad and wide construction in the wake of public interest litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on a technical or conservative yardstick of the rule of locus standi or the absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere "busybody".

18. Having regard to the nature of the petition filed by respondent Mrs Chandrima Das and the relief claimed therein it cannot be doubted that this petition was filed in public interest which could legally be filed by the respondent and the argument that she could not file that petition as there was nothing personal to her involved in that petition must be rejected.

19. It was next contended by the learned counsel appearing on behalf of the appellants that Smt Hanuffa Khatoon was a foreign national and, therefore, no relief under public law could be granted to her as there was no violation of the fundamental rights available under the Constitution. It was contended that the fundamental rights in Part III of the Constitution are available only to citizens of this country and since Smt Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of fundamental rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons: first, on the ground of

domestic jurisprudence based on constitutional provisions and secondly, on the ground of human rights jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the "Moral Code of Conduct" having been adopted by the General Assembly of the United Nations.

20. We will come to the question of domestic jurisprudence a little later as we intend to first consider the principles and objects behind the Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations General Assembly Resolution of 10-12-1948. The Preamble, inter alia, sets out as under :

"WHEREAS recognition of INHERENT DIGNITY and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

WHEREAS disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

21. Thereafter, the declaration sets out, inter alia, in various articles, the following :

"1. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex language, religion, political or other opinion, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS.

Furthermore, NO DISTINCTION SHALL BE MADE ON THE BASIS OF THE POLITICAL, JURISDICTIONAL OR INTERNATIONAL STATUS OF THE COUNTRY OR TERRITORY to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

3. Everyone has the right to life, liberty and security of person.

* * *

5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

* * *

7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

* * *

9. No one Shall be subjected to arbitrary arrest, detention or exile."

22. Apart from the above, the General Assembly also while adopting the Declaration on the Elimination of Violence against Women, by its resolution dated 20-12-1993, observed in Article 1 that:

" 'violence against women' means any act of gender-based violence that results in, or is likely to result, in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion of arbitrary deprivation of liberty, wherher occurring in public or in private life".

In Article 2, it was specified that:

"... violence against women shall be understood to encompass, but not be limited to :

(a) physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) physical, sexual and psychological violence occuring within the general community, including rape, sexual abuse, sexual harassments and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) physical sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

23. In Article 3, it was specified that :

"... women are entitled to the equal enjoyment and protection of all human rights, which would include, inter alia:

(a) the right to life,

(b) the right to equality, and

(c) The right to liberty and security of person."

24. The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and the principles thereof may have to be read, if need be, into the domestic jurisprudence.

25. Lord Diplock in *Salomon* v. *Commr. of Customs and Excise*[28] said that there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. So also, Lord Bridge in *'Brind* v. *Secy. of State for the Home Deptt.*'[29] observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

26. The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national Constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights specially in relation to women, was considered. The Zimbabwe Declaration 1994, inter alia, stated :

" Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women."

But this situation may not really arise in our country.

27. Our Constitution guarantees all the basic and fundamental

human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the fundamental rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Government at the Centre or in the State.

28. The fundamental rights are available to all the "citizens" of the country but a few of them are also available to "persons". While Article 14, which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non-citizen", both, Article 15 speaks only of "citizen" and it is specifically provided therein that there shall be no discrimination against any "citizen" on the ground only of religion, race caste, sex, place of birth or any of them nor shall any citizen be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort on the aforesaid grounds. Fundamental right guaranteed under Article 15 is, therefore, restricted to "citizens". So also, Article 16 which guarantees equality of opportunity in matters of public employment is applicable only to "citizens". The fundamental rights contained in Article 19, which contains the right to "basic freedoms", namely, freedom of speech and expression; freedom to assemble peacefully and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and settle in any part of the territory of India and freedom to practise any profession, or to carry on any occupation, trade or business, are available only to "citizens" of the country...

31. Article 20 guarantees right to protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty while Article 22 guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with Article 3, Article 7 and Article 9 of the Universal Declaration of Human Rights, 1948.

32. The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948 (See Article 3 quoted above.) The fundamental rights under the Constitution are almost in consonance with the rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this court in *Kubic Darusz* v. *Union of India*[36]. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country.

34. On this principle, even those who are not citizens of this country and come here merely as tourists or in any other capacity will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have a right to "life" in this country. Thus, they also have the right to live, so long as they are here, with human dignity. Just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens.

36. It has already been pointed out above that this Court in *Bodhisattwa case* has already held that "rape" amounts to violation of the fundamental right guaranteed to a woman under Article 21 of the Constitution.

37. Now, Smt Hanuffa Khatoon, who was not the citizen of this country but came here as a citizen of Bangladesh was, nevertheless, entitled to all the constitutional rights available to a citizen so far as "right to life" was concerned. She was entitled to be protected with dignity and was also entitled to the protection of her person as guaranteed under Article 21 of the Constitution. As a national of another country, she could not be subjected to a treatment which was below dignity nor could she be

subjected to physical violence at the hands of government employees who outraged her modesty. The right available to her under Article 21 was thus violated. Consequently, the State was under a constitutional liability to pay compensation to her. The judgement passed by the Calcutta High court, therefore, allowing compensation to her for having been gang-raped, cannot be said to suffer from any infirmity.

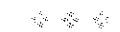
38. Learned counsel for the appellants then contended that the Central Government cannot be held vicariously liable for the offence of rape committed by the employees of the Railways. It was contended that the liability under the law of torts would arise only when the act complained of was performed in the course of official duty and since rape cannot be said to be an official act, the Central Government would not be liable even under the law of torts. The argument is wholly bad and is contrary to the law settled by this Court on the question of vicarious liability in its various decisions....

41. The theory of sovereign power which was propounded in *Kasturi Lal case*[16] has yielded to new theories and is no longer available in a welfare State. It may be pointed out that functions of the Government in a welfare State are manifold, all of which cannot be said to be the activities relating to exercise of sovereign powers. The functions of the State not only relate to the defence of the country or the administration of justice, but they extend to many other spheres as, for example, education, commercial, social, economic, political and even marital. These activities cannot be said to be related to sovereign power.

42. Running of the Railways is a commercial activity. Establishing the Yatri Niwas at various railway stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in

damages to the person wronged by those employees. *Kasturi Lal decision*[16] therefore, cannot be pressed into aid. Moreover, we are dealing with this case under the public law domain and not in a suit instituted under the private law domain against persons who utilising their official position, got a room in the Yatri Niwas booked in their own name when the act complained of was committed.

43. No other point was raised before us. The appeal having no merit is dismissed with the observation that the amount of compensation shall be made over to the High Commissioner for Bangladesh in India for payment to the victim, Smt Hanuffa Khatoon. The payment to the High commissioner shall be made within three months. There will be no order as to costs.



(Also reported in (2000) 2 SCC 465)

Harpal Singh and Another .... Appellants

Versus

State of Himachal Pradesh .... Respondent

This appeal by special leave is directed against the judgment of the High Court of Himachal Pradesh. The appellants have been convicted under Section 376 of the Indian Penal Code and sentenced to rigorous imprisonment for four years each. The central evidence in the case consists of the testimony of Saroj Kumari, the girl who is said to have been raped by the appellants and another who was acquitted by the trial Court. The occurrence, according to the prosecutrix, took place on the night intervening August 20 and 21, 1972. The first information report was lodged on August 31, 1972. The complainant had given reasonable explanation for lodging it after ten days of the occurrence. She stated that as honour of the family was involved, its members had to decide whether to take the matter to the court or not. It is not uncommon that such considerations delay action on the part of the near relations of a young girl who is raped. The prosecutrix has narrated her story before the Committing Magistrate as well as Sessions Judge. Leaving aside minor contradictions here and there her testimony is consistent. Both the High Court and the Sessions Judge have believed it and it is corroborated by the evidence of her own brother and father to whom she had related the details of the occurrence without delay after she was rescued.

2. Mr. Hardy laid emphasis on the circumstances that no injury was detected on the private parts of the girl and that she was found to have been used to sexual intercourse and argued that it was a case of sexual intercourse by consent. This argument will be of no avail to the appellants if once it is proved that the girl was below 16 years of age, because in that case the question of consent becomes wholly irrelevant.

3. In the instant case the prosecution has proved the age of the girl by overwhelming evidence. To begin with, there is the evidence of Dr. Jagdish Rai (PW 14) who is a radiologist and who, after X-ray examination of the girl found that she was about 15 years of age. This is corroborated by Ex. PF, which is an entry in the admission register

maintained at the Government Girls' High School, Samnoli (wherein the girl was a student) and which is proved by the Headmaster. That entry states the date of birth of the girl as October 13, 1957. There is yet another document, viz., Ex. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti wife of Daulat Ram on Novermber 11, 1957. Mr. Hardy submitted that in the absence of the examination of the officer/ Chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author. From whatever angle we view the evidence, the conclusion is inescapable that Saroj Kumari was below 16 years of age at the time of the occurrence. Accordingly we agree with judgments of the courts below and see no merit in this appeal which is dismissed.

❖ ❖ ❖

(Also reported in 1989 (1) SCC 560)

State of Karnataka ... Appellant;

Versus

Manjanna ... Respondent

1. This appeal has been preferred from the decision of the Karnataka High Court reversing the conviction and sentence of the respondent under Section 376(1) of the Indian Penal code (IPC).

2. The case of the prosecution was that the prosecutrix, a school girl, was raped by the respondent on 6-4-1988 at about 12 noon. The prosecutrix (PW1) was residing with her parents at Hosahatti. The school was at Belagur. She had taken the IXth standard examination in March 1988. The results were to be announced in April 1988.

3. During the 1st week of April 1988 there was jatra at a village called Kabbala. The prosecutrix's mother, Gowaramma (PW 10), her father Ramaiah (PW 12) and her brother had opened a shop in that jatra. On 6-4-1988, the prosecutrix and her sister Shardamma (PW 11) were in their house at Hosahatti. At about 12 noon, the prosecutrix left Hosahatti to go to Kabbala so as to get her bus fare from her parents because she wanted to go to Belagur to ascertain her examination results. While she was on the road from Hosahatti to Kabbala, the accused started following her. Suddenly, the accused caught hold of the prosecutrix's left shoulder and dragged her into a ditch next to the road. The ditch was situated on the right side of the road. The accused threw the prosecutrix down, gagged her with his towel, raised her lehnga and raped her. When she struggled to release herself, the accused slapped her on her cheeks and tried to throttle her. She sustained scratches on the right cheek, on her chin and on her buttocks. After raping her the accused removed the towel from the prosecutrix's mouth. She immediately screamed loudly. Yellabovi (PW 16) was going along the road when he heard the screaming of the prosecutrix. He went to the spot and found the accused on top of the prosecutrix in the ditch. He raised hue and cry and the accused ran away from the spot. Yellabove took the prosecutrix out of the ditch and made her sit under a tamarind tree. There was a cactus-like bush locally called *"antarikey mullu"* in the ditch. The thorns from the bush had caught in the hair of the prosecutrix. Yellabove started removing the

thorns from her hair. By this time Kumara (PW 4) was returning from the jatra at Kabbala and was on his way to Hosahatti. Kumara saw Yellabovi removing the thorns from the hair of the prosecutrix and asked him what had happened. Yellabove told him what had happened but that he did not know who the girl was. The prosecutrix who was weeping raised her head, Kumara recognized her as the prosecutrix. Kumar told Yellabovi that the prosecutrix's father had opened a shop in the jatra at Kabbala and asked him to inform her parents. Yellabovi went to Kabbala. The prosecutrix's father (PW 12) was not available. Yellabovi however, informed Gowramma and her son about the incident. Gowramma and her son went to the place described by Yellabovi and found the prosecutrix sitting under a tamarind tree. They brought the prosecutrix to the shop in the Kabbala jatra. Gowramma did not question the prosecutrix about the incident then. It was only when her husband (PW 12) returned in the evening that she asked the prosecutrix what had happened. The prosecutrix narrated the incident to her. The accused was known to the victim and her family as he used to come to their shop at Kabbala. Gowramma immediately told her husband what the prosecutrix had said. The parents debated as to what they should do as the prosecutrix was unmarried and the question of her reputation was involved. On the next day, i.e., 7-4-1988, their elder daughter, Shardamma (PW 11) and her husband came to Kabbala in the morning. The prosecutrix again told her sister about the incident naming the accused. The prosecutrix's father decided to inform the Pradhan, Govindappa (PW 14) of Belagur Mandal Panchayat and asked Shardamma and her husband to take the prosecutrix to him. At about 9 to 10 a.m. Shardamma and her husband took the prosecutrix to Govindappa. The prosecutrix again told Govindappa about the entire incident. Govindappa took them to Belagur Hospital where the prosecutrix was seen by Dr Chidananda (PW 2), the Medical Officer. The prosecutrix narrated the incident to Dr Chidananda. Dr Chidananda asked the Staff Nurse, Sheela Meri (PW 3) to enquire into the matter. The Staff Nurse asked the prosecutrix what had happened. The prosecutrix narrated the incident again to her. This was recounted by the Staff Nurse to Dr. Chidananda. As there was no lady Medical Officer at Belagur Hospital, Dr Chidananda referred the prosecutrix to the lady Medical Officer at Hosadurga Hospital. Shardamma and her husband took the prosecutrix to Hosadurga

Hospital and gave Dr Chidananda's letter to Dr Thripulamba (PW 5). Dr Thripulamba however declined to examine the prosecutrix because she had not been referred by the police. Shardamma, her husband and the prosecutrix then returned to Hosahatti and informed Ramaiah of Dr Thripulamba's refusal to examine the prosecutrix. The next day, on 8-4-1988, PW 12 took his daughter to Srirampura Police Station. The prosecutrix's oral complaint to the SHO (PW 8) of Srirampura Police Station was recorded in writing (Ext. P-1). The writing was affirmed by the prosecutrix by signing it. A case was registered against the accused under Section 376 IPC and FIR (Ext. P-5) was sent through a constable (PW 9) to the Magistrate at 8.00 p.m. After dispatching the FIR, PW 8 sent the prosecutrix to Hosadurga Hospital escorted by a police constable. But the lady Medical Officer at Hosadurga Hospital was on leave. The prosecutrix was brought back. Whereupon the Circle Inspector (PW 18) sent the prosecutrix to the lady Medical Officer of the District Hospital at Chitradurga escorted by the same constable. The prosecutrix was ultimately examined by Dr Shantabai (PW 13) and a report (Ex. P-6) was prepared in which it was stated that the prosecutrix had a ½ inch abrasion on the left side of he face, a ½ inch abrasion over the right side of her chin and 2½ inch abrasion over the right side of her right hip. It was also recorded :

> "I conducted pelvic examination and found white discharge. No external injuries were seen around the external genitalia. No injuries over the thighs. The vaginal orifice admits one finger easily. Tenderness was present in lower abdomen. Vagina is warm and tender."

4. The final opinion was withheld until the chemical analysis report was obtained of the clothes of the prosecutrix. The prosecutrix's clothes were chemically examined (Ext.P-7) and it was found that the lehnga worn by the prosecutrix during the incident had semen stains. Dr Shantabai gave her opinion in a separate report (Ext. P-8) in which she opined after examining the prosecutrix internally that the prosecutrix had sexual intercourse about four days prior to her examination. On the next day the investigating officer (PW 18) visited the place of occurrence as indicated by Yellabove (PW 16) and prepared a spot mahazar (Ext. P-9) in the presence of panchayatdars. The accused could not be found till 29-4-1988 when

he was produced before the investigating officer. The accused was thereupon arrested. The accused produced his clothes from his house. These were seized (Ext. p-3). The accused himself was referred to Dr. Neminatha (PW 17) of Srirampur Hospital. Dr Neminatha after examining the accused found that the accused was capable of sexual intercourse (Ext. P-11). After this, as the accused had obtained anticipatory bail, he was released. His clothes which had been seized were sent to the chemical examiner. Bangalore. The chemical examiner's report (Ext. P-7) was to the effect that no bloodstains or semen were found on the clothes sent.

5. In the meantime the charge-sheet was filed. The accused in his statement under Section313 of the Code of Criminal Procedure (Cr PC) denied his involvement and said that he had been falsely implicated because there was a quarrel between the accused and the father of the prosecutrix over setting up of the shop at the Kabbala jatra.

6. In finding the accused guilty under Section 376(1) IPC, the trial court in a carefully reasoned judgement found that there was no reason to disbelieve the evidence of the prosecutrix. The enmity alleged by the accused for falsely implicating him was rejected, in our view correctly, on the ground that given the present social ethos in this country, it was improbable that either the girl or her parents would set up such a case. Additionally, the evidence given by the prosecutrix was not only corroborated by the several prosecution witnesses but also by the medical evidence. The prosecutrix herself has stated that she had sustained scratches on the right side of her cheeks, on her chin and on the left side of the hip which was swollen. Her mother (PW 10) also said that the prosecutrix had scratches on her cheeks and on her buttocks. These statements are corroborated not only by Exts. P-7 and P-8 but also by the oral testimony of PW 13 Dr K.M. Shantabai. According to PW 13, the injuries found on the prosecutrix's face could be caused while she was struggling to extricate herself from the clutches of the person committing rape and the injury to her hip when she was forcibly thrown on the ground.

7. The chemical examiner's report (Ext. 7) to the effect that there were seminal stains on the blue lehnga worn by the prosecutrix also supported the prosecution case. The lack of semen stains on the clothes of the accused is natural

when the accused was examined more than 23 days after the incident. The narration of the incident to so many independent witnesses, without any discrepancy soon after the incident was also, in our view correctly, admitted by the trial court under Section 157 of the Evidence Act as corroborative of the prosecutrix's testimony :

8. The Sessions Judge, Chitradurga negatived the submission on behalf of the accused that the prosecution had not proved that the prosecutrix was below 16 years of age when the offence was committed on the ground that the prosecutrix had stated in her evidence her date of birth as 8-10-1972, an assertion which was not in her cross-examination. There was also no challenge to Ramaiah's statement that his daughter was aged 15 years at the time of the incident. The Sessions Judge noted that the X-ray report to the effect that the prosecutrix was aged above 16 years and below 18 years was given by Dr Shantabai who admitted that she was not a specialist in radiology and that only a radiologist would be able to furnish the approximate age.

9. Having held the accused guilty under Section 376(1) IPC, because the accused had committed rape on a girl below the age of 16 years the learned Sessions Judge sentenced the accused to rigorous imprisonment for seven years and also to pay a fine of Rs 1000, in default to undergo simple imprisonment for three months.

10. On appeal, a learned Single Judge of the High Court of Karnataka reversed the findings of the Sessions Judge. The High court disbelieved the prosecutrix's testimony on the following grounds:

> "1. If PW 1 was subjected to rape by the appellant in a ditch full of thorns certainly there would be injuries on the person of PW 1 and on the private parts of PW 1. But such injuries were not found in this case... It is significant to note here that the evidence of PW 1 is to the effect that her legs had come in contact with thorns but PW 13 had deposed that there were no injuries around the external genitalia and on the thighs.
>
> 2. ... It looks highly improbable that a culprit will choose such a place for committing rape on a woman and if rape is committed at such a place the persons walking on that road which was situated just at a distance of 15 feet would be attracted to the spot due to the screaming.

3. In the wound certificate issued by this witness at Ext. P-6 there is no mention of the rupture of the hymen.

4. PW 13 has made a material improvement in her evidence by stating that there was a rupture of hymen. It will not be safe to act upon this version as she has not mentioned in Ext. P-6. For reasons best known to her she has lied on this point and her evidence that there was rupture of hymen will have to be excluded from consideration.

5. ... The very conduct of PWs 1, 10, 11, 12 and 14 appears to be highly improbable and unnatural... The natural reaction of a mother is to find out what had happened to the girl and as to what were the injuries sustained by her. None of these things had been done by PW 10.. The conduct of PW 1 in not telling her mother immediately on seeing her when she came near the tamarind tree under which she was sitting, PW 10, the mother not enquiring as to what had happened on that day and keeping quite till late evening.

6. PW 1 has given her date of birth as 8-10-1972. Even if this date of birth is taken as correct, she will be 16 years of age on the date of the offence... The evidence of PW 13 goes to show that she was aged 16 years and below 18 years and the birth certificate alleged to have been produced by PW 1 before the police has not been produced.

7. There is inordinate delay in filing the complaint. The offence had taken place on 6-4-1988 at 12 noon. But, the complaint is filed by PW 1 on 8-4-1988."

11. We find the reasoning of the High Court entirely unacceptable. The first ground mentions a "ditch full of thorns" where the incident took place. There was no evidence that the ditch was full of thorns. The evidence was that the ditch had sand and thorns which got entangled in PW 1's hair. PW 15, a witness to the site mahazar (PW 9) had said that the ditch was 7 feet deep and 15 feet wide. To have drawn an inference from this that the entire ditch was gathered (*sic*) by thorns was fallacious. The "contradiction" between the evidence of Dr. Shantabai, PW 13, with regard to the thorns coming in contact with her legs shows a singular lack of anatomical knowledge.

12. The second ground for rejecting the evidence of the victim

is equally unacceptable. According to the IO (PW 18), the site had been identified by Yellabovi (PW 16). It was never put to the prosecutrix by the defence that the place of the occurrence was not what she had described. In saying that the victim's screams would have attracted attention, the High Court ignored the fact that the accused had gagged the victim with his towel while raping her.

13. Third ground for rejection of the trial court's findings ignores Ext. P-8 altogether where it was specifically mentioned that the victim had been subjected to sexual intercourse. To have concluded that the doctor, PW 13 had lied without at all confronting her with any alleged contradiction with Ext. P-8 was wholly erroneous.

14. In holding that, the High Court has also ignored the unshaken unassailed evidence of the lady doctor, M.S. Thripulamba (PW 5), the Staff Nurse (PW 3), Gowramma (PW 10), Ramaiah (PW 12), Shardamma (PW 11) and the IO (PW 18) all of whom independently gave evidence of the steps taken by the parents of the victim after they came to know of the incident.

15. On what basis the High Court came to the conclusion about what the natural reaction of a rape victim and her mother would be is not explained. This finding as well as the finding regarding the delay in lodging of the FIR apart from being contrary to the evidence has taken no account of the nature of the offence in the social context of this country. This aspect of the matter has been dealt with by this Court in *State of Punjab* v. *Gurmit Singh*[1]:(SCC pp. 394 & 395, para 8)

"In our opinion, three was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged... the conduct of the prosecutrix in this regard appears to us to be most natural. The trial court overlooked that a girl, in a tradition-bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is

likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down upon by the society. Her not informing the teachers of her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others overpowered by a felling of shame and her natural inclination would be to avoid talking about it to anyone, lest the family name and honour is brought into controversy."

16. On the question of the prosecutrix's date of birth, the High Court ignored the admission by PW 13 herself that she was not competent to determine the age of the victim from the X-ray report nor did the High Court give any reason for disbelieving the express statement of the victim as to the date of her birth particularly in the absence of any challenge to the same in her cross-examination. Besides the High Court has made an error in calculation when it held that if the date of birth was taken as 8-10-1972, she would be 16 years old at the time of the incident. The incident took place on 6-4-1988. this would mean that the victim was fifteen-and-ahalf years old when she was raped.

17. In the circumstances, we allow the appeal of the State, set aside the order of the High court and restore the conviction and sentence as imposed by the Sessions Judge. If the accused is on bail, he shall surrender to serve out the sentence.

18. Before parting with the case, we wish to put on record our disapproval of the refusal of some government hospital doctors, particularly in rural areas, where hospitals are few and far between, to conduct any medical examination

of a rape victim unless the case of rape is referred to them by the police. Such a refusal to conduct the medical examination necessarily results in a delay in the ultimate examination of the victim, by which time the evidence of the rape may have been washed away by the complainant herself or be otherwise lost. It is expected that the appellant State will ensure that such a situation does not recur in future.

* * *

(Also reported in 2000(6) 2 SCC 188)

2
Appreciation of Evidence

Evidence is extremely important in all criminal trials. In cases relating to sexual assaults which normally have no eye witnesses, appreciation of evidence gets complex. In cases of child sexual abuse, it is even more complicated. When very young children are the victims, their ability to express at the time of the incident and at the time of the trial would vary. The Child in many cases would be able articulate better at the time of the trial. Many prosecutors and session judges interpret this as changing the police version which may not have been recorded properly in the first instance. They also declare these witnesses as hostile when in reality the child has only learnt to express the same in a better way.

Many accused are also acquitted on the basis of mere technicalities. One of the most frustrating experiences for a complainant is the fact that the acquittals take place for no fault of hers especially in view of the fact that she does not play any role in the preparation of the case. In most cases she has no knowledge of what has been placed on record. She is not aware of the medical reports. She also does not know what has been recorded by the police in her statement made under Section 161 of the Code of Criminal Procedure. Interestingly, the accused invariably has all these papers.

One of the earliest cases of the Supreme Court on this aspect was ***Rameshwar Kalyan Singh versus State of Rajasthan***[18]. In this case the question raised was whether failure to administer oath to a child of seven years of age and the non-recording of the fact that the child was in a position to depose was fatal to the evidence of the child. The Supreme Court held that although it is necessary to record that the child was in a position to understand the questions and also depose before the Court, non-recording of the same does not render the evidence inadmissible.

FRAMING OF CHARGES:

Not mentioning the exact time and date of the occurrence of an offence in the charge sheet is not fatal for the prosecution was the principle upheld in ***Chittaranjan Das versus State of West Bengal*** [19] (also see State of Maharashtra versus Priya Sharan Maharaj and others.[20])

[18] AIR 1952 SC 54
[19] 1964 (3) SCR 237
[20] infra

CORROBORATION:

On corroboration it was held in Rameshwar's [21] case that

i. It is not necessary that there should be independent confirmation of every material circumstance in the sense that independent evidence in the case, apart from the testimony of the complainant or the accomplice should in itself be sufficient to sustain conviction;

ii. The independent evidence must make it safe to believe and connect the accused to the same;

iii. Corroboration must come from an independent source. However, the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would no be illegal;

iv. Corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime;

In the case of *Sidheswar Ganguly versus State of West Bengal*[22] it was held that a victim of rape is not an accomplice to the crime. It was also held that while corroboration is desirable, it is not mandatory.

The Supreme Court went a step further in the case of *Janardhan Tewary versus State of Bihar*[23] where the Court, after finding that a witness had narrated the entire incident to the grand mother of the victim and the medical evidence which had found that rape had been committed even though the test was conducted two days later, upheld the conviction of the accused by the Sessions Court. The Court overruled the argument that the doctor ought to have smear from the vagina to see if spermatozoa could be found. The Court held that:

"5. In this case, the first thing to see is that whether rape has been committed or not. There is no doubt that the girl was criminally assaulted

[21] supra
[22] AIR 1958 SC 143
[23] 1971 (3) SCC 927

and suffered severe injuries as a result. She was examined 40 hours after later and the injuries were found on her person. .... The witnesses found that clothes were stained with semen and she had suffered injuries. We are satisfied that the girl was raped and we have only to find out who the culprits were. In this connection, the law is that the evidence of the prosecutrix must be corroborated in some measure to connect the accused. Enough corroboration is available in this case from the evidence of Bir Kumar who gave the information to his grand mother immediately after the incident and also deposed on oath. Bir Kumar Singh is a young boy aged 12 years and therefore, we have to be cautious about accepting his testimony. We have read his evidence. Bir Kumar Singh was closely questioned to find out whether he understood nature of evidence and whether he was capable of giving answers to the questions put to him. The sessions judge was satisfied that Bir Kumar was a competent witness and his statement struck us as being true"

It went a step further in the case of ***Rafiq versus State of U.P***[24]. Rafiq's case followed Krishan Lal's[25] case. In this case the accused counsel argued that there was absence of corroboration of testimony of the prosecutrix and also of injuries on the person of the woman and therefore the conviction was unsustainable. Rejecting these contentions, the Court held that:

"5. ..... We cannot accept the argument that regardless of the specific circumstances of a crime and criminal millieu, some stands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying lifestyles and behavioural complexes, inference from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedental tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed."

[24] 1980 (4) SCC 262

[25] infra note 15

Perhaps the case which had laid down guidelines with respect to the treatment of the victim's evidence in a rape in a most direct and practical way is the judgement in ***Bharwada Bhoginbhai Hirjibhai versus State of Gujarat***[26]. The court held:

" (1) By an large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purpose of the conversation. It is unrealistic to expect a witness to be a human tape-recorded.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. and, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

[26] 1983(3) SCC 217

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him – Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

The court further held,

" 9..... Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile."

This judgement was followed in ***State of Maharshtra versus Chandraprakash Kewal chand Jain***[27]. The facts are stark and reflect the manner in which police can misuse power vested with them. At paragraphs 15 and 16, of the judgement while dealing with the aspect of necessity of corroboration, the Court has held:

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

[27] 1990 (1) SCC 550

totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted."

The same principle was reiterated in ***State of Himachal Pradesh versus Raghubir Singh***[28] where the Court , after disagreeing with the High Court for reversing the verdict of conviction passed by the sessions judge due to lack of corroboration, held:

" There is no legal compulsion to look for corroboration of evidence of the prosecutrix before recording an order order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity"

In Gurmit Singh's case, the Supreme Court held that:

" If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. 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."

This view was upheld in ***State of Sikkim versus Padam Lall Pradhan.***[29]

The court reiterated this in ***State of Rajasthan versus N.K***[30]

[28] 1993 (2) SCC 622
[29] 2000 (10) SCC 112
[30] 2000 (5) SCC 30

FAULTY INVESTIGATION:

Faulty investigation, refusal to register a complaint, wrongful recording of the complaint are essentially problems of the police. It is not proper for the victim to suffer for the same. In ***Sheikh Zakir versus State of Bihar***[31], the Supreme Court upheld a conviction on the basis of a complaint filed by the victim. In this case, the police had refused to register her complaint. By the time the medical examination could be conducted, the Complainant had bathed herself, and being an adult and a married woman was accustomed to sexual intercourse. All the courts below (trial, High Court) as well as the Supreme Court came to the conclusion that absence of medical evidence is not to be held against the victim, given the circumstances. The court also held that if a conviction is solely based on the evidence of the prosecutrix without any corroboration, it will not be illegal on that sole ground. The Court also held that the statement made by the victim to her family member (in this case, the husband) immediately after the incident is admissible under section 157[32] of the Indian Evidence Act.

Similar is the case of ***Balwant Singh versus State of Punjab***[33] where despite conclusive medical report of the doctor, the police had refused to register the case. The victim had filed a private complaint on the basis of which the trial started. Since the investigation was lax, as the police were disinterested, the samples had not been sent for chemical analysis. The Court based on the testimony of the victim, her father and the doctors medical report, found that rape had been committed by the named accused and upheld the conviction. The arguments about the absence of injury on the body of the victim was not accepted by the Court.

In the case of Chandraprakash Kewal Jain[34], the FIR was not recorded properly. A proper statement was recorded subsequently. The Court said that the subsequent details can be accepted.

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[31] 1983 (4) SCC 10

[32]

[33] 1987(2)SCC 27

[34] Supra

INDEPENDENT WITNESSES:

In Rameshwar's case[35], the mother was held to be an independent witness. Following Rameshwar's case on the aspect of the victim being an accomplice, the Supreme Court in the case of **Krishan Lal versus State of Haryana**[36], while reiterating the principle that the oral testimony of the victim ought to be given due importance held:

" 4. .....What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts has corroborative value..... And if rape has been committed, as counsel more or less conceded, why, of all persons in the world, should the victim hunt up the petitioner and point at him the accusing finger? To foresake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called 'Judicial' probability. Indeed, the court loses its credibility if it rebels against realism. The law court is not an unnatural world"

In Rafiq' case,[37] the court held:

"7. Hardly a sensitized judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against its veracity. None we see in this case and confirmation of the conviction by the courts below must. There be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry"

The statement of the father of a victim is admissible in evidence and relevant under Section 157 (Evidence Act) as her former statement corroborating her testimony as also under Section 8 of the Evidence Act as evidence of her conduct.[38]

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[35] supra
[36] 1980 (3) SCC 159
[37] supra
[38] State of Rajasthan versus NK

USE OF FORCE:

There are many cases which result in acquittals merely because the prosecutrix did not shout for help, there were no injuries on her body to indicate resistance and that there was no evidence to indicate use of force. In almost all the cases mentioned above, the Supreme Court has held that it not necessary as the victim may be overpowered due to various reasons. In *State of Maharashtra versus Prakash*[39], the Court held :

"For the offence of rape, it is not necessary that there should be actual use of force. A threat of use of force is sufficient."

The judgement of the Court in State of Maharashtra versus Priya Sharan Maharj and others[40] also follows the same principle.

Even in the case of NK[41], the Court held that absence of injuries on the body of the victim at the time of medical evidence is not fatal to the case of the prosecution.

CIRCUMSTANTIAL EVIDENCE:

An important judgement of the Supreme Court on circumstantial evidence is the case of *Laxman Naik versus State of Orissa*[42] where the Supreme Court upheld the verdict passed by the sessions court and the High Court relying totally on circumstantial evidence.

[39] 1993 Sup.(1) SCC 653
[40] 1997 (4) scc 393
[41] supra
[42] 1994 (3) SCC 381

Rameshwar Kalyan Singh ... Appellant

Versus

State of Rajasthan ... Respondent

The appellant Rameshwar was charged with committing rape on a young girl Mt. Purni, eight years of age. He was committed to sessions and was convicted by the Assistant Sessions Judge Sawai Jaipur, and sentenced to one year's rigorous imprisonment and a fine of Rs. 250.

(2) An appeal was made to the Sessions Judge at Jaipur, that being the appropriate appellate tribunal in that area. The learned Sessions Judge held that the evidence was sufficient for moral conviction but fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecution in such cases as a matter of precaution and the corroborative evidence, in so far as it sought to connect the appellant with the crime, was legally insufficient though morally enough. He was satisfied however that the girl had been raped by somebody. Accordingly, he acquitted the accused giving him the benefit of the doubt.

(3) The State of Sawai Jaipur and Gangapur appealed against the acquittal to the High Court at Jaipur. The learned High Court Judges held that the law requires corroboration in such cases but held that the girl's statement made to her mother was legally admissible as corroboration and considering that sufficient they set aside the acquittal and restored the conviction and sentence.

(4) The High Court later granted leave to appeal under Art. 134(1) (c) of the Constitution as the case involved question of law of general importance.

(5) The first point taken before us related to the admissibility of the evidence of the girl herself. Her age was stated to be seven or eight years at the time of the examination by the learned Assistant Sessions Judge who recorded her testimony. He certified that she did not understand the sanctity of an oath and accordingly did not administer one to her. He did not certify that the child understood the duty of speaking the truth....

(15) The first question is whether the law requires corroboration in

these cases. Now the Evidence Act nowhere says so. On the other hand, when dealing with the testimony of an accomplice, though it says in S.114 (b) that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, it makes it clear in S.133 that :

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

(16) Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case question of adultery may arise. But adultery presupposes consent and so is not on the same footing as rape. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offence.

But in all these cases a large volume of case law has been grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely differing reasons and the position now reached is that the rule about corroboration has hardened into one of law....

(19) The rule, which accordingly has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained.

The tender years of the child, *coupled with other circumstances appearing in the case,* such as, for example, as its demeanor, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be

corroboration before a conviction can be allowed to stand....

(21) First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimonyof the complainant or the accomplice, should in itself be sufficient to sustain conviction.

(22) Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness story that the accused was the one, or among those, who committed the offence.

(23) Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source.

(24) Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

(25) Next, I turn to another aspect of the case. The learned High Court Judges have used Mt. Purni's statement to her mother as corroboration of her statement. The question arises, can the previous statement of an accomplice, or a complainant, be accepted as corroboration ?

(26) That the evidence is legally admissible as evidence of conduct is indisputable because of Illustration (j) to S. S. Evidence Act which is in these terms :

"The question is, whether A was ravished. The facts that shortly after

the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant."

But that is not the whole problem, for we are concerned here not only with its legal admissibility and relevancy as to conduct but as to its admissability for a particular purpose, namely *corroboration*. The answer to that is to be found in S 157, Evidence Act, which lays down the law for India....

(29) The first question is whether this delay fulfils the "at or about" condition. In my opinion here also there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction.

(30) The next question is whether the mother can be regarded as an 'independent' witness. So far as this case is concerned, I have no doubt on that score. It may be that all mothers may not be sufficiently independent to fulfil the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their reltionship. Independent merely means independent of source which are likely to be tainted. In the absence of enmity against the accused there is no reason why she should implicate him falsely.

(31) The third question is whether there is independent corroboration connecting the accused with the crime. The only corroboration relied on for that is the previous statement of the child to her mother. That might not always be enough but this rule can be waived in a given case just as much as the necessity for any corroboration at all.

In the present case the learned High Court Judges would have acted on the uncorroborated testimony of the girl had they not felt pressed by the corroboration rule. Viewing all the circumstances I am satisfied that the High Court was right. I am satisfied that *in this case*, considering the conduct of the girl and her mother from start to finish, no corroboration beyond that statement of the child to her mother was necessary.

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(Also reported in AIR 1964 SCC 54)

Chittaranjan Das ... Appellant

Versus

State of West Bengal ... Respondent

The appellant Chittaranjan Das was charged with having committed an offence punishable under section 376 I.P.C. This charge was framed against him on three counts. It was alleged that between November 18, 1958 and November 21, 1958 at 29A and B, Kailash Bose Street, Calcutta, he committed rape on Sandhyarani Das Gupta alias Nirmala. The second count was that he committed the same offence at the same place and in respect of the same girl between December 1, 1958 and December 6, 1958; and the third count related to the commission of the said offence between December 9, 1958 and December 15, 1958 at the same place and in respect of the same girl. Along with the appellant, Ganesh De was charged with having abetted the appellant in the commission of the said offence, the charge framed against Ganesh De being under section 376 read with s.109 of the Indian Penal Code. The learned Presidency Magistrate, 8th Court, Calcutta, held the commitment proceedings, and was satisfied that the evidence adduced by the prosecution before him made out a *prima facie* case against both the accused persons. Since the offence in questions was triable exclusively by the Court of Sessions, the learned Magistrate committed them to the Sessions on May 4, 1960.

In granting certificate to the appellant, the High Court has held that the point which the appellant sought to raise in regard to the invalidity and illegality of the charge was a point of substance. In fact, it has observed that the scheme of section 222 of the Criminal Procedure Code seems to suggest that the charge framed in the present case contravened the requirement of s.222(1), and was therefore, invalid. The High Court also appears to have thought that this contention received support from a decision of the Calcutta High Court in *Ali Hyder v. Emperor*[1]. It is, therefore, necessary to examine this argument at the outset. We have already set out the 3 counts of the charge formed against the appellant and we have noticed that in the three counts

periods were mentioned within which the appellant was alleged to have committed rape on Sandhya. The first period was between 18.11.1958 to 21.11.1958, second was 1.12.1958 to 6.12.1958 and the third was 9.12.1958 to 15.12.1958. The argument is that s. 212(1) Cr. P.C. requires that the charge must specify, *inter alia*, the particulars as to the time when the offence was committed, and this means that the precise date on which and the time at which the offence was committed must be stated in the charge. Before dealing with this argument, it is necessary to read s.22.

> "(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.
>
> (2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234 :
>
> Provided that the time included between the first and last of such dates shall not exceed one year."

The appellant's contention is that it is only in cases under s. 222(2) where the prosecution is not required to specify the precise date and time at which the offence is committed; and that means that it is only in respect of the offences of criminal breach of trust or dishonest misappropriation of money to which the said subsection applies that liberty may be claimed by the prosecution not to mention the date and time of the offence. In all other cases to which s.222 (1) applies, particulars as to the time and place of the alleged offence must be specifically mentioned. In our opinion, this contention is not well founded. In fact, Mr. Chari who appeared for the appellant himself fairly conceded

that in almost every charge to which s. 222 (1) applies, it is usual to state that the particular offence was committed on or about a certain date. In other words, it is not suggested by Mr. Chari that the specific date and the specific time must necessarily be stated in the charge in every case. If it is permissible to say in a charge that a particular offence was committed on or about a specified date, without specifying the particular time, it is difficult to hold that because a period of four or five or six days is indicated in the charge within which the offence is alleged to have been committed s. 222 (1) has been contravened. It is true that subsection (2) specifically deals with two kinds of offences and makes a provision in respect of them, but that is not to say that in every other case, the time must be so specifically mentioned as to indicate precisely the date and the time at which the offence was committed.

It is quite clear that if the charge mentions an unduly long period during which an offence is alleged to have been committed, it would be open to the criticism that it is too vague and general, because there can be no dispute that the requirement of s. 222(1) is that the accused person must have a reasonably sufficient notice as to the case against him. The basic requirement in every criminal trial therefore, is that the charge must be so framed as to give the accused person a fairly reasonable idea as to the case which he is to face, and that validity of the charge must in each case be determined by the application of the test, *viz.*, had the accused a reasonably sufficient notice of the matter with which he was charged ? It is quite conceivable that in some cases by making the charge too vague in the matter of the time of the commission of the offence an accused person may substantially be deprived of an opportunity to make a defence of alibi, and so, the criminal courts naturally take the precaution of framing charges with sufficient precision and particularity in order to ensure a fair trial; but we do not think it would be right to hold that a charge is invalid solely for the reason that it does not specify the particular date and time at which any offence is alleged to have been committed. In this connection, it may be relevant to bear in mind that the requirements of procedure are generally intended to subserve the ends of justice, and so, undue emphasis on mere technicalities in respect of matters which are not of

vital or important significance in a criminal trial, may sometimes frustrate the ends of justice. Where the provisions prescribed by the law of procedure are intended to be mandatory, the legislature indicates its intention in that behalf clearly and contravention of such mandatory provisions may introduce a serious infirmity in the proceedings themselves; but where the provisions made by the law of procedure are not of vital importance, but are, nevertheless, intended to be observed, their breach may not necessarily vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused. This position is made clear by sections 535 and 537 Cr. P.C.

Take, for instance, the case of murder where the prosecution seeks to prove its case against an accused person mainly on circumstantial evidence. In such a case, investigation would generally begin with an certainly gather momentum after the discovery of the dead body. In cases of circumstantial evidence of this character, it would be idle to expect the prosecution to frame a charge specifying the date on which the offence of murder was committed. All that the prosecution can do in such cases is to indicate broadly the period during which the murder must have been committed. That means the precision of the charge in respect of the date on which the offence is alleged to have been committed will depend upon the nature of the information available to the prosecution in a given case. Where it is possible to specify precisely the necessary particulars required by s. 222(1), the prosecution ought to mention the said particulars in the charge, but where the said particulars cannot be precisely specified in the charge of having regard to the nature of the information available to the prosecution, failure to mention such particulars may not invalidate the charge.

In this connection, it may be useful to refer to the facts in the present case. The evidence of Sandhya shows that she and the members of her family had to face the terrible problems posed before the refugees in that part of the country, and in her anxiety to help her destitute family in its hour of need Sandhya was very easily persuaded by Manibala to adopt the course of earning money by selling her body. In such a case, if the minor girl has been exposed to the risk of having sexual intercourse

with several people from time to time, it is unreasonable to expect that she would be able to specify the precise dates on which particular individuals had intercourse with her. If it is insisted that in a case of this kind, the charge of rape framed against the appellant must specify the date on which the offence was committed by him, it would really mean that the appellant cannot be charged with the offence because the unfortunate victim would, in the ordinary course of things, not be able to state precisely the dates on which she was made to submit to the appellant. Therefore, in dealing with the question as to whether the charge framed in a criminal trial has contravened s. 222 (1), the Court will have to examine all the relevant facts and if it appears to the Court that having regard to them, the charge could and ought to have been framed more precisely, the Court may reach that conclusion and then enquire whether the defective charge has led to the prejudice of the accused. That, in our opinion, is the reasonable course to adopt in dealing with contentions like the one raised by the appellant before us. The question of prejudice did not impress the High Court, because it has summarily dismissed the appeal. It is not a matter on which the appellant can be permitted successfully to challenge the view taken by the High Court. In this connection we ought to add that the decision in the case of Ali Hyder (1) to which the High Court has referred in granting a certificate on this point does not support the contention in question

The next ground on which the High Court has granted certificate to the appellant is that the Division Bench should not have summarily dismissed his appeal, and in coming to the conclusion that this argument amounted to a substantial point of law, the High Court has referred to two decisions of this Court in *Mushtak Hussein* v. *The State of Bombay* (2) and *Shreekuntiah Ramayya Municipali* v. *State of Bombay* (3). In Mushtak Hussein's case, this Court has no doubt observed that it is not right for the High Court to dismiss an appeal preferred by the accused to that Court summarily where it raises some arguable points which require consideration. It was also added that in cases which *prima facie* raise no arguable issue, that course is, of course, justified. It is in the light of this conclusion that this Court stated that it would appreciate it if

in arguable cases the summary rejection orders give some indications of the views of the High Court on the points raised.

In the case of *Shreekantiah Ramayya* (3) it appeared that out of the two appeals field separately by two different accused persons against the same judgment, one was summarily dismissed by one Bench of the High Court and the other was admitted by another Bench. It is in the light of this somewhat anomalous position that this Court repeated its observation made in the case of *Mushtak Hussein* (4), that summary rejection of appeals which raise issues of substance and importance are to be disapproved.

With respect, there can be no doubt whatever that in dealing with criminal appeals brought before them the High Courts should not summarily reject them if they raise arguable and substantial points and it would be stating the obvious if we were to add that no High Court summarily dismisses a criminal appeal if it is satisfied that it raises an arguable or substantial question either of fact or law. In this connection, it is, however, necessary to bear in mind that it is for the High Court which deals with the criminal appeal preferred before it to consider whether it raises any arguable or substantial question of fact or law, or not. Section 421 (1) of the Code provides that on receiving the petition and copy under s. 419 or s. 420, the appellate court shall persue the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. The proviso to this section requires that no appeal presented under s. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same. Subsection (2) empowers the appellate court to call for the record of the case before dismissing the appeal under subsection (1) but it does not make it obligatory on the court to do so. Therefore, the position under s. 421 is clear and unambiguous. When a criminal appeal is brought before the High Court, the High Court has to be satisfied that it raises an arguable or substantial question; if it is so satisfied, the appeal should be admitted; if on the other hand, the High Court is satisfied that there is no substance in the appeal and that the view taken by the Trial Court is substantially correct, it can summarily dismiss the appeal. It is necessary to emphasis that the summary dismissal of the appeal

does not mean that before summarily dismissing the appeal, the High Court has not applied its mind to all the points raised by the appellant. Summary dismissal only means that having considered the merits of the appeal, the High Court does not think it advisable to admit the appeal because in its opinion, the decision appealed against is right. Therefore, we do not think the High Court was right in granting certificate to the appellant on the ground that his appeal should not have been summarily dismissed by another Division Bench of the said High Court. If the High Court in dealing with criminal appeals takes the view that there is no substance in the appeal, it is not necessary that it should record reasons for its conclusion in summarily dismissing it.

The third ground on which the certificate has been granted by the High Court is in regard to an alleged misdirection in the charge delivered by the learned Sessions Judge to the Jury. It appears that in dealing with the argument of the defence that the charge was vague and that the dates specified in the charge did not correspond to the dates given by Sandhya in her evidence, the learned Judge told the Jury that if the statement of the girl in her cross-examination is taken as the basis, the dates on which the girl was ravished by the appellant would not be covered by the three sets of dates mentioned in the charge, and then he add that "in case you hold that the charges are in order, in that case you shall proceed to consider the evidence." It was urged by the appellant before the Division Bench of the High Court which granted the certificate that the last statement constituted a misdirection. The argument was that whether or not a charge is valid is a question of law which the learned Judge should have decided himself and given a direction to the jury in accordance with his decision; inasmuch as he left that question to the jury, he failed to exercise his jurisdiction and to discharge his duty, and as such the charge must be held to suffer from a serious misdirection. This argument appears to have appealed to the Division Bench which granted the certificate and has been pressed before us by Mr. Chari. In our opinion, there is no substance in this argument. We should have stated earlier that after the committal order was passed by the presidency Magistrate the appellant moved the High Court in its revisional jurisdiction and urged

that the charge framed against him was defective and invalid and should be quashed. The High Court rejected this contention and held that the charge was valid within the meaning of s. 222 and s. 234 of the Code. Therefore, the true position is that at the time when the learned Sessions Judge delivered his charge to the jury, the question about the validity of the charge had been considered by the High Court and so far as the learned Sessions Judge was concerned, the finding of the High Court was binding on him, so that when the learned Session Judge told the jury that they may consider whether the charges were in order, he was really leaving it open to the jury to consider the matter which had been decided against the appellant and in favour of the prosecution. If there can be any grievance against this part of the charge, it would be on the side of the prosecution and not on the side of the appellant.

That leaves to be considered certain other alleged misdirection to which Mr. Chari has referred. Mr. Chari contends that in explaining the true legal position with regard to the evidence of a prosecutrix in cases of rape, the learned Judge did not tell the jury that in view of the contradictions brought out in the evidence of Sandhya and in view of her past career and record, her evidence should not be believed. Mr. Chari argues that when criminal courts require corroboration to the evidence of the prosecutrix in such cases, as a matter of prudence, it necessarily means that in the first instance, the prosecutrix must appear to the court to be a reliable witness. If the prosecutrix does not appear to be a reliable witness, or if her evidence suffers from serious informities, corroborations in some particulars would not help the prosecution, and according to Mr. Chari, this aspect of the matter was not properly brought to the notice of the jury by the learned Sessions Judge.We do not think there is any substance in this contention. We have carefully read the charge and we are satisfied that on the whole, the charge has not only been fair, but has been more in favour of the appellant than in favour of the prosecution. In fact, the whole tone of the charge indicates that the learned Sessions Judge was not satisfied that the prosecution had really made out a case against the appellant beyond a reasonable doubt. But in delivering charge to the jury, the learned Sessions Judge can never usurp the function of the jury. He cannot pronounce on the

reliability or otherwise of any witness. The requirement as to corroboration in regard to the evidence of a prosecutrix like Sandhya has been elaborately explained by the Sessions Judge to the jury. He told them that the most important witness in the case was Sandhya and that there was hardly any corroborative evidence to her story. He also warned them that though it was not illegal to act upon the evidence of a prosecutrix, it was unsafe to adopt that course and he said that before convicting the appellant on the uncorroborated testimony of Sandhya, the members of the jury should ask themselves whether they were so much convinced about the truthfulness of the girl as to accept her evidence in its entirety. He referred to the broad and material contradictions brought out in her evidence and asked them to bear that fact in mind in deciding whether they should accept her testimony or not. Having regard to the several statements made by the learned Judge in his charge on this topic we find it difficult to accept Mr. Chari's grievance that the charge was materially defective in this matter.

The next misdirection on which Mr. Chari has relied is in regard to the prosecution evidence about the age of the girl. The prosecution alleged that the girl was below 16 years of age, whereas the defence contended that she was above 16 and was consenting party. As usual, evidence was given by the prosecution in support of its case as to the girl's age. This evidence consisted of the testimony of the girl's mother Saudamini and of Dr. Nag as well as Dr. Saha. Having summarised the material evidence fairly and accurately, the learned Judge told the jury that the said evidence was no doubt some what conflicting and he warned them that they have to decide as a question of fact whether the age of the girl at the relevant time was above or below 16. Mr. Chari contends that at this stage, the learned Judge should have told the jury that the onus to prove the fact that the girl was below 16 was on the prosecution and that if there was any doubt about her age, the benefit of the doubt must go to the appellant. We do not think there is any substance in this argument. In the first part of his charge, the learned Judge explained to the jury the essential requirements which had to be proved by the prosecution in support of its charge under s. 376, and there the learned Judge had made it clear to the jury that the prosecution had to show that

the girl was below 16. That being so, we do not think that his failure to mention the point about onus once again when he dealt with the actual relevant evidence, can be said to constitute a misdirection, much less a material misdirection which may have led to the prejudice of the appellant.

The last misdirection on which Mr. Chari has relied is the statement of the learned Judge that the previous statements made by the girls which had been brought on the record do not constitute substantive evidence but are intended only to contradict the actual evidence given by her in court. It appears that on behalf of the appellant the evidence given by the girl on a previous occasion had been brought out under s.145 of the Indian Evidence Act. In that statement the girl had sworn that Anil Chatterjee had sexual relations with her day after day and that she had sexual relation with others also. The girl admitted in her cross-examination that her statement had been recorded on a previous occasion by the Magistrate, Alipore, but when the contents of the statement were put to her, she said she did not remember whether she had made those statements or not. Now, it is clear that when a previous statement is put to a witness in cross-examination under s. 145 of Indian Evidence Act, its primary purpose is to contradict the witness by reference to the evidence he gives at the trial, and so, it cannot be said that the learned Judge was wrong in law in telling the jury that the previous statement on which the defence relied may help the defence to contend that the girl was not a straightforward witness and was changing here story from time to time, but the said previous statement cannot be treated as susbstantive evidence at the trial. That is the true legal position and no grievance can be made against the charge for stating the said position in the terms adopted by the learned Session Judge. Therefore, we do not think that the grievance made by Mr. Chari that the charge suffered from serious misdirection is well founded.

There is one more point which we may mention before we part with this appeal. After the verdict was returned by the jury, the learned Sessions Judge considered the question as to whether he should accept the said verdict, or should make a reference. In that connection, he observed that the verdict that the jury had returned against the appellant, was practically

based on the uncorroborated testimony of the prosecutrix but he thought that the said course adopted by the jury cannot be said to be illegal and he was not prepared to take the view that the verdict of the jury was in any way perverse.

Mr. Chari contends that having regard to the general tone of the charge delivered by the learned Judge to the jury, the learned Judge should have treated the verdict as perverse and not acted upon it. We do not think that this contention can be accepted. In his charge, the learned Judge no doubt indicated that the evidence of the girl was not satisfactory, that it was not corroborated and that there were other circumstances which showed that the prosecution case might be improbable, but having done his duty, the learned Judge had to leave it to the jury to consider whether the prosecution had established its charge against the appellant beyond reasonable doubt or not. The jury apparently considered the matter for an hour and half and returned the unanimous verdict of guilty. In the circumstances of this case, we cannot accede to Mr. Chari's argument that the Sessions Judge was required by law to treat the said verdict as perverse. In a jury trial where questions of fact are left to the verdict of the jury, sometimes the verdicts returned by the jury may cause a disagreeable surprise to the Judge, but that itself can be no justification for characterising the verdict as perverse.

In the result, the appeal fails and is dismissed, the appellant to surrender to his bail bond.

Appeal dismissed.

(Also reported in 1964 (3) SCC 237)

Sideshwar Ganguly ... Appelant

Versus

State of West Bengal ... Respondent

This appeal on a certificate granted by the High Court at Calcutta under Art. 134(1)(d) of the Constitution, is directed against the order of a Division Bench of that Court, dated February 15, 1955, summarily dismissing an appeal from the judgment and order dated January 22, 1955, passed by the learned Second Additional Sessions Judge of Alipore, accepting the unanimous verdict of guilty returned by the jury, holding the appellant guilty under S. 376 of the Indian Penal Code, for having committed rape on a young girl, named Sudharani Roy said to be about 14-15 years of age. The learned trial judge, accepting the unanimous verdict of the jury and agreeing with it, imposed a "deterrent punishment" of rigorous imprisonment for 5 years, in view of the fact that he was in local parentis to the large number of girls who were the inmates of the Nari Kalyan Ashram of which the appellant had been the secretary for a pretty long time....

(4) In order to appreciate the grounds raised in support of the appeal by the learned counsel for the appellant, it is necessary to state the following facts: The appellant was the honorary secretary of a large institution for receiving and looking after young girls and women who had no homes of their own or had gone astray. It is called the 'Nari Kalyan Ashram' and is located in one of the quarters of the city of Calcutta. The appellant in his capacity as the secretary, used to come to the Ashram daily in the evening at about 7 p.m., & stay there till midnight or past midnight. In his office room, there was a bedstead with a bedding spread thereon. He used to occupy the bed and requisition the services of girls to massage his body. Between January and April, 1954, the accused who was in the habit of calling the girls named Sudharani, Narmaya, Kalyani and others, for that purpose, is said to have committed rape on those girls. The subject-matter of the charge in this case is the offence of rape said to have been committed on the two girls Narmaya and Sudharani, one after the other, on the night of April 20, 1954. On April 29, 1954 at

about 10 p.m., the officer-in-charge of the Maniktala police station accompanied by Sub-Inspector Nirmal Chandra Kar, went to the Ashram in connection with collecting information regarding the escape of some girls from the Ashram. Narmaya and Sudharani are said to have given information to the said officer-in-charge of the police station, alleging rape on them. They also pointed out a steel locker in the room of the secretary, where, it was alleged, he used to keep rubber sheaths used by him before he had sexual intercourse with each of them. The police officers aforesaid obtained the key from the appellant, with which the steel locker was opened and a leather bag inside the locker was pointed out by the girls. The bag was found to have contained a rubber sheath along with other articles. After recording the information, the police officer-in-charge of the Maniktala police station, investigated the case and submitted a charge-sheet against the appellant. After the preliminary inquiry by a Magistrate, the appellant was committed for trial to the Court of Session on a charge of rape upon the two girls, under S. 376, Indian Penal Code.

(5) The defence of the appellant was that the case against him was completely false and had been concocted by the police with the help of the inmates of the Ashram and the Assistant Secretary, Tarun Kumar Sarkar who was one of the prosecution witnesses. At the trial the prosecution examined 23 witnesses, in support of the case against the accused. The two victims of the alleged outrage by the appellant were examined, namely, Sudharani Roy, P.W. 2 and Narmaya, P.W. 5 who both deposed that the appellant used to come to the Ashram in the evening about 7 p.m., and used to stay there till after midnight in his special room which contained a bedstead and a bedding and a steel almirah and other pieces of furniture. On the date of the occurrence in question, first Narmaya was called in by the appellant and then Sudharani, and the appellant is said to have committed rape first on Narmaya and then on Sudharani, in the presence of both of them against their will and without their consent. They further deposed that the appellant had intercourse with them after putting on the sheath. In between the two acts, he had a cup of tea with which he swallowed a black pill which is suggested to have been an aphrodisiac. The accused paid them each eight annas and warned them not to divulge those

acts on pain of being severely dealt with, if they disclosed the same. Kalyani, P.W. 19, is another young girl who was an inmate of the Ashram on the material dates. She is a girl who was both deaf and dumb, and her intelligence was below normal. As she was feebleminded, she was not allowed to continue her studies at the school. She has given evidence by signs which were interpreted by the Principal of the Deaf and Dumb School, who had taught her at that school. Her evidence, if accepted, would be a corroboration of the testimony of the victims aforesaid of the outrageous act of the appellant....

..It will be noticed that if the learned Judge has made any mistake, the mistake is in favour of the accused and not against him in so far as the learned Judge refers to the evidence of the two girl victims as that of accomplices. A girl who is a victim of an outrageous act is, generally speaking, not an accomplice though the rule of prudence requires that the evidence of a prosecutrix should be corroborated before a conviction can be based upon it. Hence, the learned Sessions, Judge was fully justified in telling the Jury that there was no rule of law or practice that there must be corroboration in every case before conviction for rape. If the jury had been apprised of the necessity, ordinarily speaking, of corroboration of the evidence of the prosecutrix, it is for the jury to decide whether or not it will convict on the uncorroborated testimony of a prosecutrix in the particular circumstances of the case before it. In other words, insistence on corroboration is, advisable but is not compulsory in the eye of law. In the instant case, apart from the evidence, of the two victims aforesaid, there was the evidence of the two victims aforesaid, there was the evidence of the deaf and dumb girl, Kalyani, and the other circumstantial evidence in support of the prosecution case. It is well established that the nature and extent of corroboration, necessary, vary with the circumstances of case. The nature of the corroborative evidence should be such as to lend assurance that the evidence of the prosecutrix can be safely acted upon....

(11) In our opinion, there is no merit in the appeal. It is accordingly dismissed.

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(Also reported in AIR 1958 SCC 143)

Janardan Tiwary ... Appellant

Versus

State of Bihar ... Respondent

The two appellants, Janardan Tiwary and Bishwanath Singh have been convicted under Section 376, Indian Penal Code and each of them has been sentenced to six years rigorous imprisonment and Rs. 500/- fine, in default to undergo further rigorous imprisonment for one year each. They were originally tried with two others (Chandrama singh and Rameshwar Singh) who were also convicted by the Court of Sessions but were acquitted in the High Court.

2. The facts of the case are simple. The prosecutrix is a young girl aged between 14 and 16 years. She was residing with her mother in village Babura, which is six miles from Barhara Police Station. The occurrence is said to have taken place on January 8, 1962, between the hours 6 and 7 in the evening. That evening, Ram Pyari in the company of her nephew Bir Kumar Singh, P.W. 2, a boy aged 12 years went to a temple for the purpose of lighting agarbatties and performing pooja. They were returning home after having lighted the deyas and the agarbatties and were passing along the village footpath when the four accused that is to say the two appellants and other two who have since been acquitted suddenly appeared on the scene and caught hold of Ram Pyari. One of them (Rameshwar Singh) thrust an angochhi into here mouth. She was bodily lifted and carried to a field called Chanka Bagicha. She was first thrown down under a mango tree but was later picked up again and taken to a place which was more smooth and there while the others held the girl down, each of the accused in turn raped her. Her nephew Bir Kumar was shown a dagger, and fled to his own house and informed his grand mother that Ram Pyari had been caught by four persons whom he named except one whom he described with reference to his village. The mother immediately went towards the Bagicha taking a lantern with her. She met Ram Pyari on the way and found that her clothes were blood stained and there were stains of semen upon them. Ram Pyari narrated the incident to her. They wanted to get the help of Mukhia but he was not

..s house. So they went to a Sub-Inspector (Krishna Singh P.W.11) who was in the village on leave. Ram Pyari narrated her story to him. He also saw that the clothes of the girl were torn and wet and that she was bleeding. He advised them to make a report to the Mukhia but the Mukhia was not available. Hence the report was made on the next day, at about 5. p.m. The girl was examined on January 10, 1962, by a Lady Doctor (P.W.3) Pushpa Mehra. The Lady Doctor found evidence of rape upon the person of the girl and from her physical appearance and other conditions she was of the opinion that the girl was aged between 14 and 16. After the necessary investigation, the four accused in the case were prosecuted with the result already stated....

5. In this case the first thing to see is whether rape had been committed or not. There is no doubt that the girl was criminally assaulted and suffered severe injuries as a result. She was examined 40 hours later and the injuries were found on her person. Mr. O.P. Verma argued that the lady doctor ought to have smear from the vagina to see if spermatozoa could be found. There was hardly any need. The witnesses found the clothes stained with semen and she had suffered injuries. We are satisfied that this girl was raped and we have only to find out who the culprits were. In this connection, the law is that the evidence of the prosecutrix must be corroborated in some measure to connect the accused. Enough corroboration is available in this case from the evidence of Bir Kumar who gave the information to his grand mother immediately after the incident and also deposed on oath in Court. Bir Kumar Singh is a young boy aged 12 years and therefore, we have to be cautious about accepting his testimony. We have read his evidence. Bir Kumar Singh was closely questioned to find out whether he understood nature of evidence and whether he was capable of giving answers to the questions put to him. The Sessions Judge was satisfied that Bir Kumar was a competent witness and his statement struck us as being true.

6. It was argued that the girl had gone away in the company of one Jamuna Sonar to Poona for 15 to 16 days but there is no evidence to prove it and the High Court and the Sessions Judge have rightly rejected this suggestion. It was also said that this is a low family. The

mother of the girl had kept a dancer in their house and he lived there with his mistress. The girl admitted that one dancer did live with them one year ago but was not then living with them. These suggestions have no bearing on the truth or falseness of the girl's story. They were made to prejudice the Court against the girl's character. These false accusations do not appeal to us. On the whole we accept the evidence in case and do not think that there is any merit in this appeal at all and the other two accused must consider themselves fortunate that they were acquitted. The appeal fails and will be dismissed.

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(Also reported in 1971 (3) SCC 927)

Krishan Lal ..... Petitioner

Versus

State of Haryana ..... Respondent

A rapist — if the concurrent findings of the court below were correct — has chosen to seek special leave to challenge his crime and punishment, and his counsel has attacked the verdict of culpability and wholly unfounded. Indeed, it is redundant, and absent exceptional circumstances, out of bounds, for this Court, exercising its jurisdiction under Article 136, to launch upon an exploration and reappreciation of the evidence, its strengths and weaknesses with a view to sit in judgment over the holdings of the High Court in affirmance of those of the trial Court.

2. Briefly, we will touch upon one or two circumstances without claiming to be exhaustive in any manner. One Shashi Bala of Ambala was sleeping, with her mother and other children, outside her house in hot July (1975).

3. Counsel for the petitioner persistently urged that the evidence of the prosecutrix, without substantial corroboration, was inadequate to rest a conviction under Section 376, IPC. He relied on observations of this Court in *Gurcharan Singh* v. *State of Haryana*[1] for the proposition that although a prosecutrix is not an accomplice, her evidence, as a rule of prudence, is viewed by courts unfavorably unless reinforced by corroboration "so as to satisfy its conscience that she is telling the truth and that the person accused of rape on her has not been falsely implicated". It is true that old English cases, followed in British-Indian courts, had led to a tendency on the part of the judge-made law that the advisability of corroboration should be present to the mind of the Judge "except where the circumstances make it safe to dispense with it". Case-law, even in those days, had clearly spelt out the following propositions

The tender years of child, coupled with other circumstances appearing in the case, such, for example as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule or practice that there must, in every case, be

corroboration before a conviction can be allowed, to stand.

It would be impossible, indeed it would be dangerous to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged.

Observations on probative force of circumstances are not universal laws of nature but guidelines and good counsel.

4. We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out ? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilities the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence. More than all, it baffles belief in human nature that a girl sleeping with her mother and other children in the open will come by blood on her garments and injury in her private parts unless she has been subjected to the torture of rape. And if rape has been committed, as counsel more or less conceded, why of all persons in the world, should the victim hunt up the petioner and point at him the accusing finger ? To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called 'Judicial' probability. Indeed, the court loses its credibility if it rebels against realism. The law court is not an unnatural world.

5. We are not satisfied that merely because the trial Court has ultracautiously acquitted someone, the higher court must, for that reason, acquit everyone. Reflecting on this case we feel convinced that a socially sensitized judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protections writ into it.

(Also reported in 1980 (3) SCC 159)

Rafiq .... **Petitioner**

Versus

State of U.P. .... **Respondent**

This special leave petition relates to a conviction and sentence for an offence of rape. The escalation of such crimes has reached proportions to a degree that exposes the pretensions of the nation's spiritual leadership and celluloid censorship, puts to shame our ancient cultural heritage and humane claims and betrays a vulgar masculine outrage on human rights of which woman's personal dignity is a scared component. We refuse special leave and briefly state a few reasons for doing so.

2. Draupadi, a middle-aged *bal sewika* in a village welfare organization, was sleeping in a girls' school where she was allegedly raped by Rafiq, the petitioner, and three others. The offence took place around 2.30 a.m. on August 22/23, 1971, and the next morning the victim related the incident to the *mukhya sewika* of the village. A report was made to the police station on August 23, 1971 at midday. The investigation that followed resulted in a charge-sheet, a trial, and, eventually, in a conviction based substantially on the testimony of the victim. Although some of the witnesses, in tell-tale fashion, shifted their loyalties and betrayed the prosecution case, the trial Court entered a finding of guilt against the appellant, giving the benefit of doubt to the other three oscurely. A 7-year sentence of rigorous imprisonment was awarded as justly merited, having regard to the circumstances. The appeal carried to the High Court proved unsuccessful but, undaunted, the petioner has sought leave to appeal to this Court....

4. Counsel contended that there was absence of corroboration of the testimony of the prosecutrix, that there was absence of injuries on the person of the woman and so the conviction was unsustainable, tested on the touch-stone of case-law. None of these submissions has any sustenance and we should, in the ordinary course, have desisted from making even a speaking order but counsel cited a decision of this Court in *Pratap Misra* v. *State of Orissa*[1] and urged that absence of injuries on the person of the victim

was fatal to the prosecution and that corroborative evidence was an imperative component of judicial credence in rape cases.

5. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precendential tyranny. The same observation holds good regarding the presence or absence of injuries on the person on the aggressor or the aggressed.

7. Hardly a sensitized judge who sees the conspectus of circumstances its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against its veracity. None we see in this case, a confirmation of the conviction by the courts below must, therefore be matter of course. Judicial response to human rights cannot be blunted legal bigotry....

9. Counsel submitted that a 7-year sentence was too severe. *No* because, as we have stated earlier, rape for a woman is deathless shame and must be dealt with as the gravest crime against human dignity. No interference on the score of culpability or quantum of punishment is called for in the circumstances.

10. We refuse special leave.

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(Also reported in 1980 (4) SCC 262)

Bharwada Bhoginbhai Hirjibhai ..... Appellant

Versus

State of Gujrat .... Respondent

2. The need of the hour is to mould and evolve the laws so as to make it more sensitive and responsive to the demands of the time in order to resolve the basic problem : "Whether, when, and to what extent corroboration to the testimony of a victim of rape is essential to establish the charge." And the problem has special significance for the women in India, for, while they have often been idolized, adored, and even worshipped, for ages they have also been exploited and denied even handed justice — sixty crores anxious eyes of Indian women are therefore focussed on this problem. And to that problem we will presently address ourselves.

3. The learned Sessions Judge, Mehsana found the appellant, a government servant employed in the Sachivalaya at Gandhinagar, guilty of serious charges of sexual misbehavior with two young girls (aged about 10 or 12) and convicted the appellant for the offence of rape, outraging the modesty of women, and wrongful confinement. The appeal carried to the High Court substantially failed. The High Court affirmed the order of conviction under Section 342 of the Indian Penal Code for wrongfully confining the girls. The High court also sustained the order of conviction under Section 354 of the Indian Penal Code for outraging the modesty of the two girls. With regard to the more serious charge of rape on one of the girls, the High Court came to the conclusion that what was established by evidence was an offence of attempt to commit rape and not of rape. Accordingly the conviction under Section 376 was altered into one under Section 376 read with Section 511 of the Indian Penal Code. The appellant has preferred the present appeal with special leave.

The medical examination disclosed that there was evidence to show that an attempt to commit rape on her had been made a few days back. The Sessions Court as well as the High Court have accepted the evidence and concluded that the appellant was guilty of sexual misbehaviour with PW 1 and PW 2 in the manner

alleged by the prosecution and established by the evidence of PW 1 and PW 2. Their evidence has been considered to be worthy of acceptance. It is a pure finding of fact recorded by the Sessions Court and affirmed by the High Court. Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established : (1) that the finding is based on no evidence or (2) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (3) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision would negate the prosecution case or substantially discredit or impair it or (4) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded. Over much importance cannot be attached to minor discrepancies. The reasons are obvious :

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of the another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make

very precise or reliable estimates in such matters. Again it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of evetns which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a physiological defence mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shape the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important 'probabilities factor' echoes in favour of the version narrated by the witness.

7. It is now time to tackle the pivotal issue as regards the need for insisting on corroboration to the testimony of the prosecutrix in sex offences.

9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the

Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile.

10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) a Girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives. and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an

unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) the fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the fact of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eyewitness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the courts in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification:Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities factor' is found to be out of tune.

13. The only question that now remains to be considered is as regards the sentence. The appellant has behaved in a shockingly indecent manner. The magnitude of his offence cannot be over emphasised in the context of the fact that he misused his position as a father of a girl friend of PW 1 and PW 2. PW 1 and PW 2 were visiting his house unhesitatingly because of the fact that his daughter was their friend. To have misused this position and to have tricked them into entering the house, and to have taken undue advantage of the situation by subjecting them to sexual harassment, is a crime of which a serious view must be taken.

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(Also reported in 1983 (3) SCC 217)

Sheikh Zakir .... **Appellant**

Versus

State of Bihar .... **Respondent**

This appeal by special leave is filed against the judgment dated September 17, 1974 passed in Criminal Appeal No. 579 of 1969 on the file of the High Court of Patna confirming the conviction of the appellant of the offence punishable under Section 376 of the Indian Penal Code and the sentence of rigorous imprisonment for five years imposed on him on December 20, 1969 in Sessions Trial No. 107 of 1968 on the file of the Assistant Sessions Judge at Purnea in the State of Bihar.

That on August 7, 1968 at about 5 p.m. the complainant, who was a married woman of about 25 years, was engaged in the work of uprooting of the paddy seedlings on her field situated on the southern side of her house in Dhumra Badh situated in Mouza Dhamdaha, Police Station Dhamdaha, District Purnea. There was a canal to the east of the field and there were no houses nearby. When she was working on her field the appellant came near her and started cutting jokes and suggested that she should have sexual intercourse with him. On the complainant protesting at his suggestion, the appellant suddenly caught hold of her, threw her down on the ground, removed her clothes and committed rape on her. On hearing her cry for help, some persons arrived at the place. The appellant immediately ran away. Thereafter the complainant went to her house and narrated the incident to her husband, Jitrai (PW 4). The complainant and her husband then went to the local Mukhiya who asked them to file a complaint in the court. Then they went to the police thana to give information about the crime but the police officer declined to record the information as the appellant was an influential person. Then the complainant went to the court on August 8, 1968 to lodge a complaint but as the time for lodging complaint was over by the time the complaint was drafted, she filed it on August 9, 1968 in the court. The complaint contained the names of some witnesses.

5. The trial court on a consideration of the material before it found that the appellant was guilty of rape and accordingly convicted the appellant of the offence punishable under Section 376 of the Indian Penal Code and imposed on

him a sentence of rigorous imprisonment for five years. The High Court dismissed the appeal filed by the appellant. This appeal by special leave is filed against the judgment of the High Court. When the appeal was heard by this court on March 6, 1980, it was ordered that the trial court should record the evidence of the Mukhiya, Makbool and Chanda Kishku and to submit the record to this court. The evidence of the Mukhiya and of Makbool was accordingly recorded and has been submitted to this court. Chanda Kishku is reported to be dead. The other two witnesses have not supported the prosecution case. It is not quite strange that some witnesses do turn hostile but that by itself would not prevent a court from finding an accused guilty if there is otherwise acceptable evidence in support of the prosecution. In the instant case, both the trial court and the High Court have believed evidence of the prosecutrix and the evidence of the other prosecution witnesses who had been examined at the trial.

7. The non-examination of the Mukhiya and the police officer who had declined to record the information alleged to have been given by the complainant and her husband is stated to be fatal to the prosecution. It is further stated that in the absence of a medical examination report given by a doctor after examining the person of the complainant immediately after the occurrence it was not possible to conclude whether the complainant had been raped.

8. How many police officers who have in fact not performed their duty would come before court as witness and admit that they had failed to discharge their duty ? The court may safely presume that notwithstanding the allegation of the complainant being true she would not have been able to secure the evidence of such a negligent police official. The fact remains that the complainant has referred to this in her complaint on the very next day and she and her husband ran a grave risk in making such an allegation of dereliction of duty against the police in the complaint. Nothing however turns on the non-examination of the said police official in this case. Insofar as nonproduction of a medical examination report and the clothes which contained semen, the trial court has observed that the complainant being a woman who had given birth to four children it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the

Santhal tribe living in a remote area could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the nonproduction of a medical report would not be of much consequence if the other evidence on record is believable. It is, however, nobody's case that there was such a report and it had been withheld.

9. A reading of the deposition of the complainant shows that it has a ring of truth around it. Section 133 of the Indian Evidence Act says that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But the rule of practice is that it is prudent to look for corroboration of the evidence of an accomplice by other independent evidence. This rule of practice is based on human experience and is incorporated in Illustration (b) to Section 114 of the Indian Evidence Act which says that an accomplice is unworthy of credit unless he is corroborated in material particulars. Even though a victim of rape cannot be treated as an accomplice, on account of a long line of judicial decisions rendered in our country over a number of years, the evidence of the victim in a rape case is treated almost like the evidence of an accomplice requiring corroboration. It is accepted by the Indian courts that the rule of corroboration in such cases ought to be as enunciated by Lord Reading, C.J. in *King* v. *Baskerville*[1]. Where the case is tried with the aid of a jury as in England it is necessary that a Judge should draw the attention of the jury to the above rule of practice regarding corroboration wherever such corroboration is needed. But where a case is tried by a judge alone, as it is now being done in India, there must be an indication in the course of the judgment that the judge had this rule in his mind when he prepared the judgment and if in a given case the judge finds that there is no need for such corroboration he should give reasons for dispensing with the necessity for such corroboration. '**But if a conviction is based on the evidence of a prosecutrix without any corroboration it will not be illegal on that sole ground.**' (emphasis

added) In the case of a grown up and married woman it is always safe to insist on such corroboration. Wherever corroboration is necessary it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both. The trial court has in the case before us found that the evidence of the complainant had been corroborated in material particulars by the evidence of Sheikh Lafid (PW 1), Juman Nadaf (PW 2) and Jitrai (PW 4) the husband of the complainant. The High Court also has acted on the evidence of these witnesses. Sheikh Lafid (PW 1) has stated that he saw the appellant on the body of the complainant and that the complainant had also told him about the crime. Juman Nadaf (PW 2) has stated that when he heard the cry of the complainant at the time of occurrence, he saw the appellant fleeing away from that place. The trial court and the High Court have not found any good ground to discard their testimony. Jitrai (PW 4) has told the court that the complainant had mentioned to him all the details of the incident within a short while after it took place. Rama Kant Thakur (PW 5), the lawyer who drafted the complaint has stated that he had prepared the complaint which contains all the particulars of the offence under the instructions of the complainant. Apart from the evidence of Sheikh Lafid (PW 1) and Juman Nadaf (PW 2) about what they saw, the statement made by the complainant to her husband immediately after the incident is admissible under Section 157 of the Indian Evidence Act and has a corroborative value. After considering carefully the entire material before us including the evidence of the witnesses examined pursuant to the order made by this court earlier in the light of the submissions made at the Bar we are of the view that the judgment of the High Court does not call for any interference under Article 136 of the Constitution.

10. The appeal, therefore, fails and it is dismissed. The appellant who is on bail is directed to surrender and to undergo the remaining part of the sentence imposed on him.

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(Also reported in 1983 (4) SCC 10)

State of Maharashtra ... Appellant

Versus

Chandraprakash Kewalchand Jain ... Respondent

This appeal by special leave is brought by the State of Maharashtra against the judgment of acquittal recorded by the Nagpur Bench of the High Court of Bombay (Maharashtra) reversing the conviction of the respondent Chandraprakash Kewalchand Jain, a Sub Inspector of Police, under Section 376, IPC for having committed rape on Shamimbanu a girl aged about 19 or 20 years on August 22, 1981. The learned Additional Sessions Judge, Nagpur, came to the conclusion that the prosecution had brought home the charge under Section 376, IPC and sentenced the respondent to suffer rigorous imprisonment for 5 years and to pay a fine of Rs 1000, in default to suffer rigorous imprisonment for 6 months. He was, however, acquitted of the charge under Section 342, IPC. The respondent challenged his conviction in appeal to the High Court. The High Court set aside the order of conviction and sentence imposed by the trial court and acquitted the respondent. The State feeling aggrieved sought special leave to appeal. On the same being granted this appeal is before us....

12. The trial court found that the respondent had visited room No. 204 at an odd hour and had taken the couple to the police station where he had misbehaved with the girl. It also found that he had booked the boy on a false charge and had lodged the girl in room. No. 36 after their parents disowned them. It lastly held that the evidence of the prosecutrix clearly established that the respondent had raped her twice in that room. The trial court convicted the respondent under Section 376, IPC....

15. It is necessary at the outset to state what the approach of the court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex offence. It is essential that the evidence of the prosecutrix should be corroborated in material particulars before the court bases a conviction on her testimony ? Does the rule of prudence demand that in all cases save the rarest of rare the court should look for corroboration before acting on the evidence of the prosecutrix ? Let us see if the Evidence Act provides the clue. Under the said statute

'Evidence' means and includes all statements which the court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts except the content of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (*b*) to Section 114, which lays down a rule of practice, says that the court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (*b*).

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

the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness. For the above reasons we think that exception has rightly been taken to the approach of the High Court as is reflected in the following passage:

> "It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary."

With respect, the law is not correctly stated. If we may say so, it is just the reverse. Ordinarily the evidence of a prosecutrix must carry the same weight as is attached to an injured person who is a victim of violence, unless there are special circumstances which call for greater caution, in which case it would be safe to act on her testimony if there is independent evidence lending assurance to her accusation.

17. We think it proper, having regard to the increase in the number of sex violation cases in the recent past, particularly cases of molestation and rape in custody, to remove the notion, if it persists, that the testimony of a woman who is a victim of sexual violence must ordinarily be corroborated in material particulars except in the rarest of rare cases. To insist on corroboration except in the rarest of rare cases is to equate a woman who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her story of woe will not be believed unless it is corroborated in material

particulars as in the case of an accomplice to a crime. Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the western and European countries. Our standard of decency and morality in public life is not the same as in those countries. It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity.

18. But when such a crime is committed by a person in authority, e.g. a police officer, should the court's approach be the same as in any other case involving a private citizen ? By our criminal laws wide powers are conferred on the police officers investigating cognizable offences. The infrastructure of our criminal investigation system recognises and indeed protects the right of a woman to decent and dignified treatment at the hands of the investigating agency. This is evident from the proviso to sub-section (2) of Section 47 of the Code which obliges the police officer desiring to effect entry to give an opportunity to the woman in occupation to withdraw from the building. So also sub-section (2) of Section 53 requires that whenever a female accused is to be medically examined such examination must be under the supervision of a female medical practitioner. The proviso to Section 160 stipulates that whenever the presence of a woman is required as a witness the investigating officer will record her statement at her own residence. These are just a few provisions which reflect the concern of the legislature to prevent harassments and exploitation of women and preserve their dignity. Notwithstanding this concern, if a police officer misuses his authority and power while dealing with a young helpless girl aged about 19 and 20 years, her conduct and

behaviour must be judged in the backdrop of the situation in which she was placed. The purpose and setting, the person and his position, the misuse or abuse of office and the despair of the victim which led to her surrender are all relevant factors which must be present in the mind of the court while evaluating the conduct evidence of the prosecutrix. A person in authority, such as a police officer, carries with him the awe of office which is bound to condition the behaviour of his victim. The court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffers a tremendous sense of shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often then not, treated as a sinner and shunned. It must therefore, be realised that a woman who is subjected to sex violence would always be slow and hesitant about disclosing her plight. The court must, therefore, evaluate her evidence in the above background.

19. It is time to recall the observations of this Court made not so far back in *Bharwada Bhoginbhai Hirjibhai*[1] : (SCC p. 224, para 9)

> "In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion ? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to

establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical."

Proceeding further this Court said : (SCC pp. 225-26, para 10)

"Without the fear of making too wide a statement, or overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault .... The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because (1) A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. (2) She would be conscious of the danger of being ostracised by the society or being looked down by the society including by her own family members, relatives, friends and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo. (9) The natural

inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

20. We are in complete agreement with these observations.

21. We now proceed to examine if the High Court was justified in upturning the order of conviction passed by the trial court. The High Court refused to confirm the conviction of the respondent as it gpimf the evidence of the prosecutrix full of contradictions and not consistent with medical evidence as well as the findings recorded by the Chemical Analyst. We may first indicate the contradictions which prompted the High Court to look for corroboration. They are :

(i) the version that the respondent had misbehaved with her in the police station and had molested her could not be believed because she did not complain about the same to the other police officers who were present in the police station main hall on the ground floor or to her relatives who were called to the police station;

(ii) the conduct of the respondent in calling her parents and giving them an opportunity to take her with them does not smack of an evil mind;

(iii) the evidence of the prosecutrix that the respondent was instrumental lodging her in Anand Mahal Hotel room is not supported by any evidence;

(iv) the conduct of the prosecutrix is not informing and seeking assistance from the hotel management after the first incident and even after the

second incident or rape in the hotel room is unnatural and surprising;

(v) the find of semen stains on the 'salwar' and 'kurta' of the prosecutrix runs counter to her evidence that on both the occasions she was completely denuded before she was ravished;

(vi) the absence of marks of physical violence also runs counter to her version that when she tried to raise an alarm she was slapped by the respondent;

(vii) the evidence of PW 3 Dr. Vijaya and the medical report Ex. 17 do not lend corroboration to the evidence of the prosecutrix that the respondent had sexual intercourse with her notwithstanding the resistance offered by her.

(viii) the report of the Assistant Chemical Analyst Ex. 71 shows that neither semen nor spermatozoa were detected from the vaginal smear and slides that were forwarded for analysis; and

(ix) the evidence of PW 12 Dr. More and his report Ex. 41 shows that no physical injuries were found on the person of the respondent to indicate that he had forcible sexual intercourse shortly before his examination.

22. Before we proceed to deal with these discrepancies we think it is necessary to clear the ground on the question whether the prosecutrix had a sufficiently strong motive to falsely involve the respondent and that too a police officer. It is possible that she may have felt annoyed at being dragged out of the hotel room at dead of night after they had satisfied Police Sub-Inspector Qureishi that they were legally wedded only a few hours back. PW 1 may also have felt offended at being wrongly booked under Sections 110/117, Bombay Police Act. The question is whether on account of this annoyance both PW 1 Mohmad Shafi and PW 2 Shamimbanu would be prepared to stake the reputation of the latter ? As pointed out earlier ordinarily an Indian woman would be most reluctant to level false accusation of rape involving her own reputation unless she has a very strong bias or reason to do so. In the present case although the couple had reason to be annoyed with the conduct of the

respondent, the reason was not strong enough for Mohamad Shafi to involve his wife and soil her reputation nor for Shamimbanu to do so. An Indian woman attaches maximum importance to her chastity and would not easily be a party to any move which would jeopardise her reputation and lower her in the esteem of others. There are, therefore, no such strong circumstances which would make the court view her evidence with suspicion.

23. The next question is whether the High Court was justified in refusing to place reliance on her evidence in view of the discrepancies and inconsistencies indicated above. It is not in dispute that the respondent had taken both PW 1 and PW 2 to the police station at dead of night. At the police station both of them were separated. She was all alone with the respondent till about 5.00 a.m. This was her first encounter with the police. She must have been nervous and considerably shaken. She must have felt helpless as she was all alone. She must be terribly worried not only about her own fate but also that of her husband. It is during the time she was alone with the respondent that the latter is alleged to have misbehaved with her. How could she complain to the other police officers in the police station about the behaviour of their colleague unless she be sure of their response? Having seen the behaviour of one of them, how could she place confidence in others belonging to the same clan. She may rather prefer to ignore such behaviour than speak of it to unknown persons. Ordinarily an Indian woman is ashamed to speak about such violations of her person, more so to total strangers about whose response she is not sure. There was no point in speaking to her parents who had disowned her. She however, claims to have informed her husband about the same on his return. The omission on the part of her husband to make a mention about the same cannot discredit her. Even if we assume that she omitted to mention it, the said omission cannot weaken her evidence as obviously she would attach more importance to what happened thereafter in the hotel room. the respondent's behaviour in the police station had paled into insignificance in view of his subsequent misdeeds. No wonder she would attach greater importance to the subsequent events rather than dwell on advances made earlier. We, therefore, cannot agree with the High Court's observation

that "the prosecutrix is not only prone to make improvements and exaggerations, but is also a liar disclosing a new story altogether to serve her interest". This is a harsh comment which, we think is totally unwarranted.

24. The High Court has argued that the conduct of the respondent in sending for her parents and in permitting her to go with them shows that the respondent's intentions were not evil. In the first place, it must be mentioned that the suggestion to call the parents came from PW 1. Secondly, the evil thought may have taken concrete shape after the parents refused to take her with them. It was then that the respondent realised the helplessness of the girl and chalked out a plan to satisfy his lust. As a part of that design he falsely booked Mohmad Shafi and made arrangements to lodge the girl in a hotel of his choice. The evidence of PW 4 Suresh Trivedi read with the entry in the hotel register and the contradiction brought on record from his police statement leave no room for doubt that the girl was lodged in his hotel at the instance of the respondent. PW 6 and PW 7 have also resiled from their earlier versions to help the respondent. But notwithstanding their denial we see no reason to disbelieve Shamimbanu on the point of PW 7 having lodged her in room No. 36 of Anand Mahal Hotel as the same is corroborated not only by the remark in the entry Ex. 25 of the hotel register but also by the fact that it was PW 7 who informed Mohmad Shafi that she was in room No. 36. We are, therefore, of the view that her evidence in this behalf is supported by not only oral but also documentary evidence. How then could she seek help or assistance from the hotel staff which was under the thumb of the respondent? The hotel was situated within the jurisdiction of the respondent's police station. It was at the behest of the respondent that she was kept in that room. She must have realised the futility of complaining to them. Failure to complain to the hotel staff in the above circumstances cannot be described as unnatural conduct.

25. It is true that the prosecutrix had deposed that on both the occasions she was completely denuded before the respondent raped her. On the first occasion he had removed her 'kurta' before she was laid on the cot. Her 'salwar' was removed while she was lying on the cot. Therefore the 'salwar' may be lying on the cot itself when the act was committed. It is,

therefore, not at all surprising to find semen stains on the 'salwar'. She was wearing the same clothes when she was ravished the second time. On the second occasion he first threw her on the cot and then undressed her. Therefore, both the 'kurta' and the 'salwar' may be lying on the cot at the time of sexual intercourse. Besides she had worn the same clothes without washing herself immediately after the act on each occasion. It is therefore, quite possible that her clothes were stained with semen. It must also be remembered that this is not a case where the prosecuting agency can be charged of having concocted evidence since the respondent is a member of their own force. If at all the investigating agency would try to help the respondent. There is, therefore, nothing surprising that both these garments bore semen stains. Besides, there was no time or occasion to manipulate semen stains on her clothes and that too of the respondent's group. Her clothes were sent along with the other articles attached from room No. 36 for chemical analysis under the requisition Ex. 67. The report of the Assistant Chemical Analyser, Ex. 69 shows that her clothes were stained with human blood and semen. The semen found on one of her garments and on the bed-sheet attached from the room was of group A which is the group of the respondent, vide Ex. 70. Of course the other articles, viz, the mattress and the underwear of the respondent bore no stains. On the contrary the find of semen lends corroboration, if corroboration is at all needed to the version of the prosecutrix. The possibility of the semen stains being of Mohmad Shafi is ruled out as his group was found to be 'B' and not 'A'. In the circumstances the absence of semen o spermatozoa in the vaginal smear and slides, vide report Ex. 71, cannot cast doubts on the creditworthiness of the prosecutrix. The evidence of PW 3 Dr. Vijaya Lele shows that she had taken the vaginal smear and the slides on August 23, 1981 at about 1.30 p.m. i.e., almost after 24 hours. The witness says that spermatozoa can be found if the woman is examined within 12 hours after intercourse, thereafter they may be found between 48 and 72 hours but in dead form. Sharnimbanu may have washed herself by then. Therefore absence of spermatozoa cannot discredit her evidence.

26. The absence of marks of physical violence on the prosecutrix is not surprising. According to her the respondent had slapped her and threatened her with dire consequences when she tried to

resist him on both occasions. Since she was examined almost 24 hours after the event it would be too much to expect slap marks on her person. It is, however true that according to PW 12 Dr More there were no marks of injury on the body of the respondent when he was examined on the 22nd itself at about 8.45 p.m. While it is true that the version of the prosecutrix is that she had tried to resist him, it must be realised that the respondent being a strong man was able to overpower her and take her by force. Besides, he was a man in authority in police uniform. The prosecutrix was alone and helpless. In the circumstances as pointed out earlier the resistance would be considerably dampened. But the evidence of PW 12 Dr More who examined the respondent on the 22nd at 8.45 p.m. reveals that he had noticed (i) absence of smegma around the glans penis, and (ii) the frenum tortuous and edematous, indicative of the respondent having had sexual intercourse within the preceding 24 hours. However, absence of marks of violence and absence of matting of pubic hair led the witness to state that no definite opinion could be given whether or not the respondent had sexual intercourse in the last 24 hours. In cross-examination an attempt was made to show that smegma may be absent in a man with clean habits; that the frenum may be edematous if there is friction with rough cloth and tortuousness of the frenum could be due to anything that causes swelling of the skin. The witness, however, said that he had not seen marks of itching thereby negativing the suggestion. Be that as it may, the evidence of this witness does show that there was evidence suggesting the possibility of the respondent having had sexual intercourse within the preceding 24 hours although the witness could not hazard a definite opinion. Therefore, the noncommittal opinion of this witness cannot be said to run counter to the evidence of the prosecutrix. It may be that the evidence as to resistance may have been overstated, a tendency which is generally noticed in such cases arising out of a fear of being misunderstood by the society. That is not to say that she was in any way a consenting part. She was the victim of brute force and the lust of the respondent.

27. PW 1 Mohmad Shafi's evidence is also brushed aside on account of so-called contradictions set out in paragraphs 32 to 34 of the High Court judgment. The first

reason is the nondisclosure of details in the first oral statement which was reduced to writing at Ex. 50. That was skeleton information. That is why the need to record a detailed version Ex. 7 was felt. Therefore, merely because the details are not set out in Ex. 50 it cannot be said that the prosecutrix had not narrated the details. We have treated Ex. 50 as FIR for deciding this case. The previous involvement of PW 1 in a couple of cases is not at all relevant because the decision of the case mainly rests on his wife's evidence. But even Ex. 50 shows that his wife had told him that the respondent had raped her. We, therefore, do not see how the evidence of PW 1 can be said to be unacceptable.

28. The fact that the respondent had gone to Gurudeo Lodge at an odd hour and had taken the prosecutrix and her husband to the police station at dead of night is not disputed. The fact that the respondent refused to sign the police visit book of the Lodge, though requested by the Manager PW 5 Manohar Dhote, on the pretext that he was in a hurry and would sign it later, which he never did, speaks for itself. Then the respondent booked Mohmad Shafi under a false charge and put him behind the bars thereby isolating the prosecutrix. We say that the charge was false not merely because it is so found on evidence but also because of the report Ex. 46 dated September 21, 1981 seeking withdrawal of prosecution for want of material to sustain the charge. Having successfully isolated the prosecutrix he sent her to Anand Mahal Hotel with PW 7 who lodged her in room No. 36. The respondent, therefore, had planned the whole thing to satisfy his lust. The subsequent attempt on the part of the respondent to commit suicide on being prosecuted as evidence by the FIR Ex. 56 betrays a guilty conscience. We are, therefore, of the opinion that if the prosecution evidence is appreciated in the correct perspective, which we are afraid the High Court failed to do, there can be no hesitation in concluding that the prosecution has succeeded in proving the respondent's guilt. Unfortunately the High Court stigmatised the prosecutrix on a thoroughly erroneous appreciation of her evidence thereby adding to her woes. If the two views were reasonably possible we would have refrained from interfering with the High Court's order of acquittal. In our opinion the trial court had adopted a correct approach and had properly evaluated the evidence

and the High Court was not justified in interfering with the trial court's order of conviction.

29. On the question of sentence we can only say that when a person in uniform commits such a serious crime of rape on a young girl in her late teens, there is no room for sympathy or pity. The punishment must in such cases be exemplary. We, therefore, do not think we would be justified in reducing the sentence awarded by the trial court which is not harsh.

30. In the result we allow this appeal, set aside the order of the High Court acquitting the respondent and restore the order of conviction and sentence passed on the respondent by the trial court. The respondent will surrender forthwith and serve out his sentence in accordance with law. His bail bond will thereupon stand cancelled.

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(Also reported in 1990 (1) SCC 550)

State of Maharashtra ... **Appellant**

Versus

Prakash and Another ... **Respondent**

This appeal is preferred by the State of Maharashtra against the judgment of a learned Single Judge of the Bombay High Court allowing the criminal appeal filed by the respondents accused herein and acquitting them of all the charges. The learned Extra Additional Sessions Judge, Amravati had convicted both the accused respondents under Section 376 read with Section 34 IPC as well as under Section 342 read with Section 34 IPC and sentenced them to rigorous imprisonment for three years on the first count and for two months on the second count....

3. According to the prosecution, on the night intervening 9/10th September, 1978, respondent 2 went to the house of Nirmala's parents at about 2.00 a.m. and called out PW 2. PW 2 was taken to the house of respondent 2. After a little while, PW 2 returned but was again called out by respondent 2 saying that he was being called by respondent 1, police constable. PW 2 again went to the house of respondent 2. Respondent 1 caned PW 2 alleging that he was going to destroy the idol of Ganapati. The respondents asked both PWs 1 and 2 to accompany them to the house of respondent 2 where PW 1 was asked to sign on certain papers under a threat that her husband would be placed in custody in case she does not sign the papers. The first respondent then took PW 1 inside the house and committed the offence of rape upon her. Thereafter, respondent 2 went inside and he too committed the said offence upon her. They threatened PWs1 and 2 not to report the matter to the police. Afraid of them, PWs 1 and 2 went back to the house of PW 1's parents and spent the rest of the night there. On the morning of September 10, PW 2 met another constable, Kailashpuri (PW 4) and told him of what happened on the previous night. PW 4 asked him to report to the police station. Accordingly, at 11.30 a.m. both PWs 1 and 2 sent to the Police Station Pathrot and gave the first information (Ex. 10). PW 5, Sub-Inspector registered the offence, inspected the spot, seized a carpet and some other articles from the

scene of offence including the saree and blouse of PW 1 and sent PW 1 for medical examination. On receipt of this medical report and the report of the chemical analyzer, a charge-sheet was filed against both the respondents. They were committed by the learned Magistrate to Sessions Court for trial.

4. Seven witnesses were examined by the prosecution. the respondent-accused denied the offence altogether claiming that they have been falsely implicated. The learned Sessions Judge found them guilty and convicted and sentenced them as stated hereinbefore.

5. At the trial, PWs 1 and 2 spoke to the prosecution case. Their evidence was corroborated by PW 4. The said evidence was accepted by the learned Sessions Judge. The learned Single Judge of the Bombay High Court, however, took a different view. The learned Judge held on the basis of the first information (Ex. 10) that "there were no threats given to the prosecutrix so as to make her surrender her body to the appellants. It is also clear that the husband had left the place and yet she went inside the room of accused 2. It is apparent from this report that she did not shout till entering the room, even after the door was closed by constable Prakash.She also did not shout till be police constable had removed the uniform and underwear from his person. For the first time, she shouted after the appellant was naked. She, therefore, did not shout even (when ?) accused 1 completed the sexual intercourse and went out and sudhakar came and had sexual intercourse with her." The learned Judge then compared the contents of her report (Ex. 10) with her oral testimony in court and found certain contradictions between them. On an examination of the evidence the learned Judge concluded that PW 1 had voluntarily went to the house of second respondent and that she was a willing partner in the act of sexual intercourse. He referred to the absence of marks of violence upon her body and concluded therefrom that no force was used upon her.

6. We are of the opinion that the learned Single Judge has thoroughly erred in appreciation of the evidence of PWs 1 and 2. PWs 1 and 2 belong to labour class. They were poor rustic villagers eking out their livelihood by daily labour. In the middle of night, the husband was called by the police

constable. The allegation leveled was that he wanted to desecrate and destroy the idol of Ganpati and for that he would be placed in the police remand. Under this threat and duress, PW 1 was made to surrender herself to both the accused. It is worthy to note that police constable was in uniform and on bandobast duty. By show of his authority, he coerced PWs 1 and 2 into total abject surrender. It is, therefore, not a case of PW 1 being a willing party to sexual intercourse. It is a case where she has surrendered herself involuntarily, under duress and threat held out by the first accused. Both the accused had entered into an unholy plan and adopted a stratagem to fulfil their illegal desires.

7. For the offence of rape, it is not necessary that there should be actual use of force. A threat of use of force is sufficient. See the clause "thirdly" in the definition of rape in Section 375 of IPC. It reads : "*Thirdly*. — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.". It is also not suggested that PW was a prostitute. Even a prostitute has to be paid to make her agree to such intercourse. It is not one's case either that PW 1 is a prostitute or that she was paid any money by the accused. In all the circumstances of this case, the minor contradictions between her oral testimony and the report are of little consequence.

8. The respondents-accused denied the charge totally. Their only plea was that they have been falsely implicated. It is not even suggested as to who implicated them and why. It is not suggested that PW 1 and 2 had any animus or motive against the accused. Nor is it suggested that they were being used by someone else to implicate the respondents falsely. In the circumstances, the mere allegation of false implication has no significance. Not that we are basing our finding on this score. We are refering to this aspect only as a minor corroborating aspect.

9. We have already referred to the fact that PWs 1 and 2 were poor rustic villagers earning their livelihood by daily labour. They were threatened by the police constable, who was in uniform on bandobast duty, of having attempted to defile the Ganpati idol and threatened with police remand and all that follows. The situation may perhaps have been different if they were educated or at least reasonably well-connected persons. These poor

rustic helpless villagers, the police constable represents, absolute authority. They had no option but to submit to his will. In all the facts and circumstances of the case, therefore, we are of the opinion that the learned Single Judge was in error in acquitting the accused. Accordingly, we set aside the judgment of the learned Single Judge and restore that of the learned Sessions Judge.

10. We are aware that the offence had taken place in the year 1978 and that they were acquitted by the High Court as far back as August, 1981 and we are reversing the acquittal after a lapse of more than 10 years but having regard to the nature of the offence and the circumstances in which it was perpetrated, we are of the opinion that the respondents deserve no mercy. They should suffer for their deed.

(Also reported in 1993 Sup. (1) SCC 653)

State of Himachal Pradesh --- Appellant

Versus

Raghubir Singh ... Respondent

ORDER

1. On special leave being granted, the State of Himachal Pradesh has preferred this appeal against the judgment and order dated November 16, 1983 acquitting the respondent of an offence under Section 376 IPC earlier recorded by the learned Sessions Judge.

2. Briefly stated the prosecution case is that on August 2, 1982, the prosecutrix, Raksha Devi PW 4 along with her father Nikko Ram PW 5 and an order sister by name Samti were in their fields. It started to rain all of a sudden and the prosecutrix her father and her sister, ran towards their house. The prosecutrix got separated from her father and elder sister and was following them when the respondent Raghubir Singh then aged about 16 years, came to her and caught hold of her hand and took her under a mango tree. The prosecutrix, who was 7/8 years old at that time was wearing a frock and having a shawl with her. The respondent spread the shawl on the ground and making the prosecutrix lie on that shawl committed rape on her. since, the prosecutrix had not reached her home, Nikko Ram her father after waiting for about half an hour returned towards the field and saw the respondent lying on the top of the prosecutrix Raksha Devi, under the mango tree. He raised alarm and the respondent ran away carrying with him his underwear. The prosecutrix was crying and was bleeding per vagina. the occurrence took place at about 2.30 p.m. and First Information Report Ex. PE was lodged at the Police Station at 5.50 p.m. the prosecutrix was got examined by the doctor, who found her hymen ruptured and slight bleeding coming out of the vaginal edges. Blood clot was also present and the external genitals of the prosecutrix were found to be tender and red. The vagina admitted one finger with difficulty, which got smeared with blood. The doctor who had examined the prosecutrix, namely, Dr. Urmil Gupta, Medical Officer Rural Hospital, Nalagarh at about 7 p.m. on the same day, appearing as PW 1 at the trial had also testified that when the prosecutrix was brought to her by her father, he had also brought with

him a shawl, which was found to be having some mud and blood stains. According to the opinion of Dr Urmil Gupta PW 1, the prosecutrix had been subjected to sexual intercourse and the probable duration of the injuries on her private parts, including the vagina, was about 6 to 12 hours. During the cross-examination, a suggestion was put to the doctor that the injuries found on the prosecutrix could have been caused by a fall on some bushes or on the stem of a 'beree' tree but the docor had categorically denied the suggestion. It was also suggested to her that the vaginal injury could also be caused by inserting a finger in the vagina.The X-ray, the skiagram and the examination of her teeth by Dr. Subhash Chandra Aggarwal PW 2 established the age of the prosecutrix to be between 6 to 8 years. The respondent was also examined by Doctor C.L. Sharma PW 3, Medical Officer at the Rural Hospital, Nalagarh. He had found the respondent to be potent and capable of sexual intercourse. He denied the suggestion that injuries would necessarily be caused to the penis in case of sexual intercourse by a grown up male with a virgin when during the act her hymen gets torn.

3. The father of the prosecutrix Nikkoo Ram PW 5, the prosecutrix Raksha Devi PW 4 and Taru PW 7, who had rushed to the scene of occurrence on hearing the alarm and had also seen the respondent running away therefrom carrying with him his underwear supported the prosecution case in its totality.

4. The learned Sessions Judge after a careful appraisal of the evidence on record found that the respondent had committed the offence of rape and sentenced him to suffer RI for a period of five years for the offence under Section 376 IPC. While awarding the sentence, the learned Sessions Judge took into account the age of the prosecutrix, the age of the accused and the other attending circumstances and directed that it would be appropriate if the accused was kept in the open air jail in Bilaspur during the term of five years RI. The respondent appealed to the High Court of Himachal Pradesh and on November 16, 1983. The High Court acquitted him.

5. We have heard learned counsel for the parties at length and have gone through the evidence on the record. The statement of the prosecutrix, Raksha Devi PW 4 is clear, cogent and specific. The learned Sessions Judge before recording her statement was

conscious of her age and had therefore, taken all the precautions required by law to ascertain whether she was capable of giving evidence or not and on being satisfied that she was so capable, recorded her statement. She narrated the occurrence in a simple and straight forward manner. The prosecution case as noticed in the earlier part of the judgment was fully supported by her during her statement and nothing has been brought out in the cross-examination from which any doubt could be caused about her veracity. Her statement receives ample corroboration from the testimony of Nikkoo Ram PW 5, her father who even otherwise would be the last person to come forward with a false accusation of the type of rape on his young unmarried daughter. His testimony has impressed us and we find him to be a truthful and reliable witness. The medical evidence of Dr. Urmil Gupta has supported the prosecutrix in all material particulars. She has also testified to the presence of mud and blood stains on the shawl. The evidence of Taru PW 7 who had also seen the accused running away from the scene of crime carrying his underwear further lends credence to the prosecution version. The learned Sessions Judge, in our opinion, was therefore justified in relying upon the prosecution evidence and recording an order of conviction against the respondent for an offence under Section 376 IPC. His findings were based on proper appreciation of evidence and were not unreasonable much less perverse. The learned single Judge of the High court in our opinion, without appreciating or properly discussing the evidence set aside the findings recorded by the Sessions Judge. The High Court appears to have embarked upon a course to find some minor contradictions in the oral evidence with a view to disbelieve the prosecution version. In the opinion of the High Court, conviction on the basis of uncorroborated testimony of the prosecutrix was not safe. We cannot agree. There is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. In the present case the evidence of the prosecutrix is found to be reliable and trustworthy. No corroboration was required to be

looked for, though enough was available on the record. The medical evidence provided sufficient corroboration. The High Court, however, while dealing with the medical evidence observed as follows :

> "Lady doctor Urmil Gupta PW 1, who had examined the prosecutrix, had admitted in so many words towards the end of her cross-examination that the injury found on the private part of the prosecutrix and which is the only injury found in the instant case could be caused by insertion of a finger by a grown up person like the parents of the prosecutrix. It is true that normally no parents would not (*sic*) do so but in the peculiar circumstances of this case, this possibility may not be ruled out altogether. In any case the mere fact that the hymen of the prosecutrix had been found ruptured, would not prove the prosecution version and connect the appellant with the offence charged against him."

The above approach to say the least was highly improper. What were the 'peculiar circumstances' of the case from which the learned Single Judge of the High Court thought that the possibility could not be ruled out that the parents of the prosecutrix would have themselves caused injury to the prosecutrix by inserting finger in her vagina rupturing her hymen is not at all understandable. There is no suggestion that on account of any enmity, the parents of the girl would go to that length to falsely implicate the respondent. Dr Ghatate, learned senior counsel was also unable to point out any such 'circumstances' from the record which could show that there was any possibility of the hymen of the prosecutrix having been ruptured in the manner suggested by the High Court or any reason to falsely implicate the respondent. In fairness to Dr Ghatate it must be recorded that he did not support the observations of the High Court noticed above.

6. The learned Single Judge of the High court also drew an inference against the prosecution from the fact that only two blood stains had been found on the shawl by the Chemical Examiner and doubted the prosecution version on the that account. According to the learned Single Judge :

> "In natural course if this shawl had been used under the prosecutrix at the time of the

alleged offence, the same should have been drenched with blood in the middle. Moreover, this shawl should have been full of mud as it remained lying on the ground under the prosecutrix for such a long time and when it had rained throughout."

In making the above observation, obviously the High Court ignored the testimony of Doctor Urmil Gupta who had found the presence of blood stains and mud on the shawl and who had opined that the bleeding from the edges of the vagina was slight and that some amount of clotted blood was also present. The prosecutrix was a girl of tender age and on account of the rape committed on her, there was bleeding from her vagina but to expect that the shawl should have got "drenched with blood" as if the large blood arteries had been cut, is letting the imagination run wild and ignoring the circumstances of the case.The absence of spermatozoa on the vaginal slide which was also pressed into aid by the High Court to acquit the respondent, was not based on proper scrutiny of the evidence. The prosecution case itself was that on being surprised while the respondent was in the act of comitting sexual intercourse on the prosecutrix, he ran away carrying his underwear. The absence of spermatozoa under the circumstances could not be said to be a circumstance in favour of the respondent at all. The judgment of the High Court, in our opinion, is based more on surmises and conjectures than on proper appreciation of evidence. It exposes the insensitivity of the learned Judge to the serious crime committed against human dignity. We are not impressed by the manner in which the High court dealt with the case. Courts must be wary, circumspect and slow to interfere with reasonable and proper findings based on appreciation of evidence as recorded by the lower courts, before upsetting the same and acquitting an accused involved in the commission of heinous offence of rape of hapless girl child.

7. Dr. Ghatate, learned senior counsel for the respondent submitted, by reference to *Rahim Beg* v. *State of U.P.*[1] that the absence of injuries on the penis of the respondent should be treated as sufficient to negative the prosecution case. We are afraid we cannot agree. Inferences have to be drawn in every case from the given set of facts and circumstances.

There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal to the prosecution case and would discredit the evidence of the prosecutrix, otherwise found to be reliable. The presence of injuries on the male organ may lend support to the prosecution case, but their absence is not always fatal, *Rahim Beg Case*[1] was based on its peculiar facts and the observations made therein were in a totally different context and cannot advance the case of the respondent. The observations in *Rahim Beg case*[1] cannot be mechanically pressed into aid in every case regardless of the specific circumstances of the crime and absence of the fact situation as existing in that case. Every case has to be approached with realistic diversity based on peculiar facts and circumstances of that case. Doctor Sharma who had examined the respondent had found him to be capable of sexual intercourse and according to his opinion the absence of injury on his male organ was not suggestive of the fact that he had not indulged in sexual intercourse with the prosecutrix, then of tender years of age. His evidence was not at all challenged on this aspect by the defence.

8. Thus, considered on the whole, we are of the opinion that the judgment of the High Court is based on conjectural findings and cannot be sustained. The same deserves to be set aside and is hereby set aside. The reasoning given by the learned Sessions Judge and the findings recorded by him on appreciation of evidence have appealed to us and we find no reason to take a view different than the one taken by the learned Sessions Judge.

9. We, accordingly, set aside the acquittal of the respondent and hold him guilty of the offence under Section 376 IPC for having committed rape on the prosecutrix, Raksha Devi, on the date and in the manner alleged by the prosecution.

10. Having recorded the conviction of the respondent for the offence under Section 376 IPC, the next question is about the awarding of proper sentence. The occurrence took place on August 2, 1982, more than a decade ago. The learned Sessions Judge after recording the conviction under Section 376 IPC had sentenced the respondent to suffer RI for five years. The State did not move the High court for any enhancement of the sentence. We, therefore, feel that the ends of

justice would be met if the sentence to be imposed on the respondent is confined to five years RI as was awarded by the learned Sessions Judge for cogent reasons recorded by him. We may emphasise that though for such an offence a more severe sentence would have been desirable but we have restricted ourselves to the maintenance of the sentence as imposed by the learned Sessions Judge for the reason that the State did not seek any enhancement of the sentence by filing an appropriate petition in the High court or in this Court and for over a period of seven years, while the case has remained pending here no notice had been issued to the acquitted respondent to show cause as to why in the event of his acquittal being set aside, a more dererrent sentence, than the one imposed by the Sessions Judge, be not imposed upon him and without putting him on such a notice, the Court cannot enhance the sentence. If the notice were to issue now, it would further delay the disposal of the case and we do not consider that to be a proper course to be adopted. The more stringent minimum sentence prescribed for an offence under Section 376 IPC was also incorporated in the Code by an amendment only with effect from December 1982 after the offence in the present case had been committed.

11. The appeal is consequently allowed and the judgment of the High Court is set aside. The respondent is held guilty of an offence under Section 376 IPC and sentenced to suffer rigorous imprisonment for a period of five years. The respondent shall be taken into custody to suffer the term of imprisonment.

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(Also reported in 1993 (2) SCC 622)

Laxman Naik ... Appellant;

Versus

State of Orissa ... Respondent.

The present case before us reveals a sordid story which took place sometime in the afternoon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of adherent nature is said to have been committed by the appellant herein who is none else but an agnate and matemal uncle of the deceased victim Nitma, a girl of the tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large.

2. The appellant Laxman Naik was charged and tried under Sections 376 and 302 of the Penal Code for committing rape and soon after murder of the victim inside the forest know as Chhotsima jungle, situated on the way between the Villages Pathkadihi and Tangarjoda. Learned Sessions Judge Mayurbhanj, Baripada, relying on the circumstantial evidence found to be established against the appellant, convicted him for an offcence under Section 376 as well as under Section 302 of the Penal Case and having regard to the peculiar facts and circumstances of the present case found it to be rarest one the rare cases and, therefore, sentenced him to death. However, no separate sentence for the offence under Section 376 of the Penal Code has been awarded. The learned Sessions Judge made a reference to the High Court of Orissa for confirmation of the death sentence. The appellant Laxman Naik also preferred an appeal in the High Court of Orissa challenging his conviction and sentence as aforesaid. After a careful and close scrutiny of the evidence on record the High Court dismissed the appellant's appeal and confirmed the death sentence awarded to him. This appeal, therefore, has been filed before this Court on being granted special leave.

3. Briefly stated the prosecution case it turns out from the evidence on record was that Rema Naik, PW 2 resident of Village Patkadihi has performed funeral rites at his house on February 16, 1990 in which he has invited his relatives and other

villagers. Smt. Nitma Naik, PW 3, the mother of the present appellant is the sister of the father of Rema Naik, PW 2. Smt. Nitma Naik, PW 3, her son the appellant Laxman and the deceased Nitma daughter of the elder brother of the appellant, being close relatives of Rema Naik, also went from their Village, Tangarjoda to the house of Rema Naik at Village Patkadihi to attend the said ceremony. It is said that in the afternoon of February 17, 1990 when all the relatives assembled in the ceremony including Rema Naik, PW 2 were busy in the observance of the ceremony, the appellant commanded the deceased to accompany him back to their village and the deceased followed him in obedience of his command. Around 4 p.m. the appellant and the deceased were found to be absent from function. Shortly thereafter Genada alias Ganga Ram, PW 1, resident of Village Patkadihi saw the appellant and the deceased near Chhotisma jungle, going towards their Village Tangarjoda. Some time later the appellant along reached his house in Village Tangarjoda where on being asked about the deceased by his elder brother Hindu Naik, PW 4, the father of deceased, the appellant is said to have told him that the mother and the deceased Nitma were at the house of Rema Naik in Village Patkadihi. In the same evening the appellant returned back to Village Patkadihi and on being questioned by his mother Nitma Naik, PW 3 as to the whereabouts of the deceased, the appellant told her that she had safely reached her Village Tangarjoda. Next morning when the appellant's mother Nitma Naik was heading towards her Village Tanjarjoda, she noticed the appellant roaming about near Chhotsima jungle. On being asked again as to the whereabouts of the deceased, the appellant told his mother that she was there in Village Tangarjoda. But to her utter surprise when Nitma Naik, PW 3, the mother of the appellant reached her Village Tangarjoda she did not find the deceased there and therefore, she rushed back to Village Patkadihi where she told Rema Naik, PW 2 and other villagers that the deceased was missing. They therefore, including Hindu Naik, PW 4, the father of the deceased proceeded towards Chhotsima jungle in search of the deceased. The Searching party found the deceased lying in a lonely place in Chhotsima jungle in revealing circumstances. The said part found the torn wearing apparel (underwear) of the appellant near the dead body of the victim. There were marks of violence over the

dead body of the victim and bleeding injury in her private part. A ribbon belonging to the deceased and some tamarinds were also found lying near her dead body.

4. A ward member of Village Patkadihi, Bhangala Majhi, PW 5 who had also gone to the jungle with the search part, dictated a report Exh. 1 to his son Apna Majhi, PW 7 which was handed over to Rasananda Rout, PW 9, Sub-Inspector of Police, Jharadihi Outpost under Tirang Police Station. He entered the said report in the station diary and sent the report to the Officer-in-charge of the Police Station with his endorsement and took up the investigation. The ASI reached the spot at about 1.30 p.m. same day and prepared inquest report Exh. 3. He seized the frock, underwear and ribbon belonging to the deceased and some tamarinds under Exh. 2. He also seized a sample of blood-smeared earth from the place of occurrence — Exh. 6. He also recorded the statement of some of the witnesses.

5. Dr. Pushp Lata, PW 11 performed an autopsy over the dead body of the deceased on February 20, 1990 who as per her post-morterm report Exh. 11 found the following injuries on her :

1. Abrasion over the middle of back and over fifth lumber vertebra.

2. Abrasions were noticed on the left index finger, back of forearm and right middle finger of right hand.

3. Lacerated wound 1 1/3" in the vagina extending towards rectum.

4. Bruises over neck 2 c.m. x 1 c.m. over sternomastoid muscles on right and left side, 2" below the angle of the mandible.

6. On dissecting the underlying tissues of the neck, the doctor noticed extravasation of blood into the subcutaneous tissues as well as in the underlying sternomastoid muscles. The larynx and trachea were found to be congested containing frothy mucous. Bloody froths were coming out from the mouth and nostrils.

7. All the injuries detailed above, in the opinion of the doctor were homicidal and anti-mortem in nature and the cause of death was due to asphyxia by throttling. The external and corresponding internal injuries caused to the neck by strangulation were found to be sufficient in the ordinary course of

nature to cause the death of the victim. The time of death as given out by the doctor was also corresponding to, at or about the time of occurrence. Further the doctor gave her firm opinion about the forcible sexual assault having been made on the deceased just before her death. Vaginal smear of the deceased was lifted which indicated presence of red blood corpuscles..

8. The frock and underwear of the deceased as well as underwear belonging to the appellant seized from near the place of occurrence were sent to the Chemical Examiner who as per his report found blood on the underwear belonging to the appellant and human blood on the frock and underwear belonging to the deceased. After the occurrence the appellant had absconded and could be apprehended only on April 5, 1991 after about 14 months. The appellant in his examination under Section 313 of the Code of Criminal Procedure denied the allegations and gave evasive replies to some of the questions, while some of the facts were admitted by him which shall be discussed by us sometime later in this judgment. The appellant, however, adduced no evidence in his defence.

9. There is no ocular version of the incident and the prosecution entirely based its case on circumstantial evidence. Learned counsel for the appellant vigorously urged before us that the circumstances relied on by the prosecution have not been satisfactorily established and that in any event the circumstances said to be established against the appellant do not provide a complete chain to bring home the guilt against the appellant. He vehemently submitted that Ganga Naik,, PW 1 who is said to have last seen the appellant and the deceased together did not disclose this fact to anyone and that his case diary statement was recorded after about a month and as such the evidence of this witness should not be accepted as credible and that though he is also a witness to the inquest report but this fact is conspicuously missing in the inquest report that he had last seen the deceased and the appellant together. It was, therefore, submitted that no value can be attached to the evidence of Ganga Naik, PW 1. Learned counsel for the appellant further assailed the evidence of Jagannath Naik, PW 8 by contending that he along with others had consumed liquor right from the morning and was badly under the influence of liquor and, therefore, he could have hardly

taken any notice of the alleged call said to have been given by the appellant to the deceased to follow him to the village or to see that both of them actually proceeded towards their village. He also submitted that this fact was not disclosed by the witness to the police in his case diary statement. Learned counsel for the appellant further submitted that the mere fact that the appellant was out from his house for few days as usual cannot be used as a link to the circumstances leading to his guilt and that in any case the said fact cannot be used as a circumstances against the appellant as no question in this behal of was put to the appellant during the course of his examination under Section 313 of the Code of Criminal Procedure.

10. Leaned counsel for the appellant also submitted that since the appellant used to leave the house very often for days together and, therefore, his mother PW 3 and brother PW 4 were annoyed with him and it was for this reason that both of them gave false statement against the appellant.

11. The standard of proof required to convict a person on circumstantial evidence is now well established by a series of decisions of this Court. According to that standard the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together should lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime. To quote a few decisions of this Court in this regard a reference may be readily made to the case of *Sharad Birdhichand Sarda* v. *State of Maharashtra*[1] and *Dhananjoy Chatterjee* v. *State of W.B.*[2]

12. Having regard to these principles enunciated with regard to the proof of guilt by circumstantial evidence we shall now examine the various circumstances said to be appearing against the appellant and at the same time examine the

contentions advanced by the learned counsel for the appellant referred to above.

Evidence of last seen.

13. It is an admitted fact that Rema Naik, PW 2 had celebrated obsequies ceremony at his house in Village Patkadihi on February 16, 1990- in which amongst other relatives, the appellant himself along with his mother Smt. Nitma Naik, PW 3 and her granddaughter, the deceased Nitma i.e. the niece of the appellant had also gone to the house of Rema Naik from their village for participation in the said ceremony. Jagannath Naik, PW 8 who is father-in-law of Rema Naik, PW 2 and resident of the same Village Patkadihi had also attended the said ceremony. Jagannath Naik deposed that in the afternoon of Saturday — the day of occurrence, while he was sitting in the verandah of the house of Rema Naik he heard the appellant saying to the deceased to accompany him to their village and shortly thereafter he witnessed the appellant proceeding towards his village with the deceased. The witness, Jagannath admitted in cross-examination that on Saturday, the day of occurrence, he had also taken Handia (liquor) right from the morning and that he was badly influence by that intoxicant. His evidence was therefore, sought to be assailed on the ground that being under the influence of liquor he would have hardly taken any notice of the alleged call having been made by the appellant to the deceased or would have in fact remembered that he had seen the appellant and the deceased actually going towards their village. But on scrutiny of the evidence of Jagannath Naik we find that there is no merit in the aforesaid submission for the reason that he emphatically asserted that he can definitely say that the appellant Laxman and the deceased Nitma were seen moving towards their village which he had seen with his own eyes. He also submitted that there were many other persons present when the accused had given the call to deceased Nitma to accompany him to the village. We do not find anything in the statement of this witness to suggest that he had lost all senses and was not capable witnessing what was going on or happening around him. Learned counsel for the appellant further challenged the evidence of this witness Jagannath by contending that he had not disclosed to the police in his case diary statement that he had seen the appellant Laxman proceeding towards his village with the deceased. But this argument is liable

to be dismissed for the simple reason that the witness was not confronted with his case diary statement at all nor is there any material before us to accept the contention that the witness had not disclosed this fact to the police particularly when the witness with an emphatic denial stated that it is not a fact that he did not disclose to the police that he had seen the appellant and the deceased moving towards their village.

14. Apart from the evidence of Jagannath Naik, PW 8 there is yet another evidence of Rema Naik, PW 2 who deposed that the appellant, his mother and niece (the deceased) had also attended the ceremony and that the appellant Laxman and the deceased were found to be absent from the function. From the evidence discussed above it clearly turns out that the appellant had left the Village Parkadihi along with the deceased. Further Genada alias Ganga Ram Naik, PW 1 a resident of Village Patkadihi along with the deceased. Further Genada alias Ganga Ram Naik, PW 1 resident of Village Patkadihi deposed that on the date of occurrence while he was returning to his village at about 4.00 p.m. he saw the appellant and the deceased near Chhotsima jungle and both were heading towards their village. Learned counsel for the appellant sought to discard the evidence of this witness by contending that he did not disclose this fact to anyone till his case diary statement was recorded by the police after about a month. We are unable to persuade ourselves to concede to the submission. It is true that the witness Ganga Ram Naik deposed in cross-examination that he has examined by the police one month after the occurrence and till then he had not disclosed this fact. But this statement appears to be due to the failure of his memory as the incident had occurred on February 17, 1990 while he was examined on Novermber 26, 1991 after about two years, therefore, he faultered as to the date and time when his statement was recorded by the police. The view that we are taking of the evidence of this witness is supported by the evidence of the Investigating Officer, Niranjan Pareda, PW 10 who deposed that he had examined the witness on February 21, 1990 after the dead body of the deceased was recovered from the forest. It may also be pointed out that the witness Ganga Naik, PW 1 is an illiterate person and an aboriginal belonging to Advisasi tribe and, therefore, is not expected to remember the date and time with that exactitude as is expected from

a literate and an average person. In this view of the matter it cannot be accepted that the police recorded the statement of PW 1 after about a month from the date of occurrence. The witnesses Ganga Ram Naik, PW 1, Rema Naik, PW 2 and Jagannath Naik, PW 8 are all independent witnesses having no axe to grind against the appellant so as to make false statement to implicate the appellant. We accept their version to be truthful and reliable. It is thus established that on the day of occurrence the appellant had commanded the deceased to accompany him to the village and the appellant and the deceased had actually both proceeded towards their village and while on their way the appellant and the deceased both were last seen together in the Chhorsima jungle.

Misrepresentation and intentional false statement of the appellant as to the whereabouts of the deceased Nitma :

15.Hindu Naik, PW 4 is the real elder brother of the appellant and father of the deceased Nitma who did not go to attend the ceremony but had stayed back in the house at Village Tangarjoda. Hindu Naik deposed that the deceased along with the appellant and his mother had gone to Village Patkadihi to the house of Rema Naik to attend the 'Sudhi' ceremony on Friday and stayed there for the night. On the following day i.e. on Saturday evening the appellant came back to the house at village Tangarjoda. Hindu Naik enquired from the appellant about the deceased and the mother Smt. Nitma Naik and the appellant told him that they were staying at Patkadihi in the house of Rema Naik. Hindu Naik father of the deceased deposed that the next morning, that is, on Sunday he did not find the appellant in the house and at about 5.00 p.m. that day his mother Nitma also came to the house from whom he enquired about his deceased daughter. His mother told him that the appellant had reported to her that the deceased had already returned to the house. But Hindu Naik informed his mother that the deceased had not come to the house at all. After this dialogue Hindu Naik along with his mother Nitma Naik, PW 3 set out in search of the deceased but she could not be traced out. Next day i.e. on Monday they again went out in search of the deceased and reached the Village Patkadihi where his mother told him that his daughter has been killed in Sima Dungri forest. If we look to the evidence of Nitma Naik, PW 3 the mother of the appellant, we find that she

deposed that in the afternoon of the date of occurrence she searched for the accused and the deceased in the house of Rema Naik but they could not be found there. In the morning of Sunday she left Village Patkadihi for her Village Tangarjoda and while she was heading towards her village she noticed the presence of appellant in the Chhotsima jungle. Nitma Naik, PW 3, the mother of the appellant questioned the appellant about the whereabouts of the deceased to which the appellant replied that the deceased had already reached her Village Tangaarjoda long before. On being so informed Smt. Nitma Naik rushed back to Patkadihi again and the appellant preferred to remain near about the place of occurrence. But very soon thereafter the appellant also returned back to Patkadihi. The presence of the appellant near about the place of occurrence and absence of the deceased in the house in Village Tangarjoda roused suspicion in the mind of the lady and, therefore, she again proceeded to her Village Tangarjoda where she did not find the deceased. She went back to Village Patkadihi along with her elder son Hindu Naik, PW 4 and as she entertained serious suspicion on account of misrepresentation made by the appellant about the whereabouts of the deceased, she along with several villagers of Village Patkadihi set out in search of the deceased and found the dead body lying in the Chhotsima jungle

Evidence relating to injuries on the deceased :

16. The search party which discovered the dead body of the deceased in jungle, noticed that her clothes were soaked with blood and there were multiple injuries on the person of the deceased as are described by Dr Pushp Lata PW 11 in her post-mortem report Ex. 11 as well as in her statement made in the Court. There was abrasion on the back and fifth lumbar vertebra, as well as on left index finger, back of forearm, right middle finger, there was lacerated wound in the vagina extending towards rectum and bruises over neck, right and left sternomastoid muscles. On dissecting the underlined tissues of the neck, the doctor noticed extravasation of blood into subcutaneous tissues as well as in the underlying sternomastoid muscles. The larynx and trachea were congested containing frothy mucous. Bloody froths were coming out from the mouth and nostrils. This evidence eloquently speaks that the innocent, helpless soul was first subjected to

brutal and forcible sexual intercourse and then mercilessly done to death by throttling so that there remains no direct evidence against the culprit.

Discovery and seizure of incriminating articles :

17. Smt Nitma PW 3, the mother of the appellant as well as Hindu Naik, PW 4, the brother of the appellant who were amongst those who searched out the dead body in the jungle, have stated that one underwear stained with blood belonging to the appellant was lying near the dead body. A ribbon belonging to the deceased and some tamarinds were also found lying by the side of the dead body. They also deposed that the wearing apparels of the deceased were completely smeared with blood.

18. This brings us to the evidence regarding seizure of the aforesaid articles found near the dead body and the clothes of the deceased. Karu Majhi, PW 6, is the son of Bhangala Majhi, PW 5, a ward member, who had given the written report of the recovery of the dead body. Karu Majhi, PW 6, deposed that he was guarding the dead body in the jungle after its recovery till the arrival of police at about 4.00 p.m. He deposed that in his presence the police had seized one underwear stained with blood, a piece of ribbon and some tamarinds which were lying by the side of dead body. Seizure memo was read over and contents thereof were explained to him and then he put his thumb impression on the seizure memo as a witness. The underwear belonging to the appellant and the wearing apparels of the deceased seizure from the place of occurrence were sent for the chemical examination and also to the serologist and the experts as per their reports Exts. 9 and 10 found that they were stained with blood. Though the appellant disowned the bloodstained underwear found near the dead body at the place of occurrence but the same has been identified by none else but by the mother of the appellant, Smt Nitma Naik, PW 3 as well as by Hindu Naik, PW 4, the elder brother of the appellant. Both of them categorically stated that the same underwear belonged to the appellant.

19. Learned counsel for the appellant, however, urged that mother and brother of the appellant (PW 3 and PW 4) were not happy with the appellant because most often he used to disappear from the house for days together and it was for this reason that they made the statement against the appellant and

as such no weight should be attached to their testimony. Be that as it may, it is beyond comprehension to think that a real mother and real brother would ever think of falsely implicating the appellant in a heinous crime like this before us only because the appellant was in habit of disappearing from the town very frequently. The argument simply deserves to be rejected without any merit.

20. Here, we may also refer to the examination of the accused under Section 313 of the Code of Criminal Procedure, wherein he denied few allegations but at the same time admitted some of the facts and gave evasive replies to some of the questions. The relevant questions put to the appellant and answers given thereto by him may be reproduced with advantage as follows :

> Quest. 2. It transpires from the evidence of the PWs that you, your mother, deceased Nitma had gone to the house of Rema Naik of Village Pathadihi on February 16, 1990 to attend the obsequies ceremony observed by him in his house. What have you got to say ?
>
> Ans. Yes
>
> Ques. 4 It transpires from the evidence of PW 2 and others that on February 17, 1990 at 4.00 p.m. you and deceased Nitima were found absent from the house of PW 2 at Parkadihi and on search they could not trace you or Nitma What have you got to say ?
>
> Ans. I had gone to my house. Nitma did not go with me.
>
> Ques. 5 It transpires from the evidence of PW 1 that he had seen you proceeding towards your village with deceased at Chhotsimha Pahada (Dungri). What have you got to say?
>
> Ans. I do not know.
>
> Ques. 6 It transpires from the evidence of your mother that on the occurrence day evening you came alone to the house of PW 2 and when she asked about the whereabouts of Nitma, you falsely told her that Nitma is at your house. What have you go to say ?
>
> Ans. I do not remember. I cannot say.

Quest. 19 The cumulative effect of all the evidence adduced in the case suggests that you intentionally committed the murder of the deceased by strangulation after committing sexual intercourse with her and intentionally gave false information to your mother and brother by giving them to understand that Nitma had gone to Village Tangarjoda and stays back at Patkadihi respectively on the date of occurence. What have you got to say ?

Ans. Yes, I have told lie to my mother. I do not remember, what I have told to my brother.

21. A plain reading of Question No. 5 with regard to the evidence of Ganga Ram Naik, PW 1 that he had seen him in Chhotsima Dungri along with the deceased proceeding towards his village, will go to show that the appellant while answering the same had to courage to squarely deny it but gave an evasive reply that "I do now know". Similarly, in reply to Question No. 6 with reference to the evidence of his mother that when she asked him about the whereabouts, of Nitma, the appellant falsely told to her mother that Nitma was at the house, the appellant again did not deny the same but gave an evasive reply by saying that "I do not remember. I cannot say". But it can be significantly pointed out that in answer to Question No. 19 to the fact that he had intentionally committed the murder of the deceased after subjecting her to sexual intercourse, he gave false information to his mother and brother, the appellant admitted by saying "Yes I have told lie to my mother. I do not remember, what I have told to my brother".

22. The discovery of appellant's underwear stained with blood lying near the dead body and a false representation made by the appellant provides a link and may be called in aid to lend assurance to the court. These circumstances directly and substantially point the finger at the accused-appellant to be the perpetrator of the crime because it is unthinkable that the real mother of the appellant and his real brother would endeavour to falsely implicate the appellant in such a heinous crime.

23. Thus, on a close and critical examination of the evidence on record, the circumstances which are fully established against the appellant are that in the afternoon on February 17, 1990, Jagannath

Naik, PW 8 heard the appellant commanding the deceased to accompany him to their Village Tangarjoda, and that on February 17, 1990, itself at about 4.00 p.m. Rema Naik, PW 2 noticed the conspicuous absence of the appellant and the deceased from the function at his house. Immediately before the occurrence on February 17, 1990 at about 4.00 p.m. Ganga Ram Naik, PW 1 had last seen the appellant and the deceased together in Chhotsima jungle both proceeding towards their village. In the evening of February 17, 1990 the appellant went back to his Village Tangarjoda and falsely told his brother Hindu Naik, PW 4 that the deceased and his mother Nitma Naik, PW 3 were at Patkadihi at the house of Rema Naik. The appellant made a false representation to his mother, Nitma Naik, also that the deceased had reached back to her Village Tangarjoda which the appellant himself admitted in his statement under Section 313, Criminal Procedure Code that he had given false information to his mother. In the morning of Saturday the appellant was found by his mother Nitma Naik PW 3 moving about near the said forest and again gave a false information to her that the deceased had already arrived at her Village Tangarjoda. But when Smt. Nitma Naik, PW 3 the mother the appellant reached her village Tangarjoda she did not find the deceased in the house and the appellant also escaped from the house soon thereafter. Thereafter on Monday when a search for the deceased was made, her dead body was found lying in Chhotsima jungle. The searching party found a serious bleeding injury in her private part and her clothes were found smeared with blood, eloquently speaking about the monstrous sexual assault made on her and lastly the presence of bloodstained underwear belonging to the appellant near the dead body which was seized and identified as on belonging to the appellant and the chemical and serological examination established the presence of blood on the same.

24. From the evidence discussed above it is satisfactorily and conclusively proved that all the links in the chain are complete and do not suffer from any infirmity.

25. The aforementioned circumstances found to be established against the appellant form a complete chain of evidence as not to leave any reasonable ground for a conclusion consistent with the hypothesis of the innocence of the appellant but on

the contrary the same are of exclusive nature consistent only with the hypothesis of the guilt of the appellant and conclusively lead to irresistible conclusion that it was the appellant and he alone who had committed murder of the girl Nirma after subjecting her to forcible sexual intercourse.

26. This brings us to the question of sentence to be imposed upon the appellant for the offences for which he has been found guilty by the two courts below as well as by us as discussed above. In this connection it may be pointed out that this Court in the case of *Bachan Singh* v. *State of Punjab*[3] while discussing the sentencing policy, also laid down norms indicating the area of imposition of death penalty taking into consideration the aggravating and mitigating circumstances of the case and affirmed the view that the sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime guided by the legislative policy discernible from the provisions of the crime guided by the legislative policy discernible from the provisions contained in Sections 253(2) and 353(3) of the Code of Criminal Procedure. In other words, the extreme penalty can be inflicted only in gravest cases of extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty it may be noticed that there are absolutely no mitigating circumstances in the present case. On the contrary the facts of the case disclose only aggravating circumstances against the appellant which we have to some extent discussed above and at the risk of repetition shall deal with that again briefly.

27. The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have resposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the appellant. The victim was a totally helpless child there being no

one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfil his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act.

28. The evidence of Dr. Pushp Lata, PW 12, who conducted the post-mortem over the dead body of the victim goes to show that she had several external and internal injuries on her person including a serious injury in her private parts showing the brutality which she was subjected to while committing rape on her. The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code. As regards the punishment under Section 376, neither the learned trial Judge nor the High Court have awarded any separate and additional substantive sentence and in view of the fact that the sentence of death awarded to the appellant has been confirmed we also do not deem it necessary to impose any sentence on the appellant under Section 376.

29. In the result the appeal preferred by the appellant fails and is hereby dismissed.

❖ ❖ ❖

(Also reported in 1994 (3) SCC 381)

Ram Kumar and Nain Singh ... Appellant;

Versus

State of Himachal Pradesh ... Respondent.

Appeals dismissed.

1. This case relates to a custodial rape. The Court of Session acquitted the two appellants herein on the crime but the High Court recorded convictions under more than one head, besides 'rape' and sentenced substantively Nain Singh appellant to seven years' rigorous imprisonment and Ram Kumar appellant to two years' rigorous imprisonment which has given rise to these appeals.

2. Learned counsel for the respective appellants have been at pains to urge that the judgment of the trial Judge is far more convincing than that of the High Court. It is inevitable that each court would justify its order by assigning appropriate reasons. We cannot cast any preference of one over the other. We have thus resorted to the reading of the statement of the prosecutrix. She was married to Khem Raj, PW 4 and had been residing at Chandigarh wherefrom the couple had been fetched to Rajgarh in Himachal Pradesh by Chuhar Singh, PW1, brother of Khem Raj. On the fateful night the prosecutrix and her husband were sleeping in the house of Chuhar Singh where around midnight they were rudely awakened by the two appellants; one of whom i.e. Nain Singh was an Investigating Head Constable and the other Ram Kumar just a Constable posted at Rajgarh police Station. On the ostensible but false plea that a wireless message had been received from Chandigarh indicating the prosecutrix to be an abducted girl, she and Khem Raj, PW 4 were forcibly taken by the appellants to the police station. There they were kept in separate rooms. In one of the rooms Nian Singh appellant first brutally hit her, then molested her, and finally raped her. He shrieks were heard in the room where Khem Raj PW 4, was confined. Guarding him kept sitting Ram kumar, appellant. He did not react to it. His conduct right from the act of his forcibly taking the prosecutrix by the arm separately to the police station, her separate confinement in a room, Nain Singh misusing his position and having forcibly raped her and Ram Kumar - appellant not doing anything about

it while keeping a watch over the husband, reflected a mind of consistency in aiding and abetting the commission of the crime of rape. The prosecutrix is not only a reliable witness but her word directed against the appellants bears a ring of truth for no explanation whatsoever as to why the appellants have been accused of the offence has been rendered. Her word is corroborated by the evidence of not only her husband Khem Raj, PW 4, but her brother-in-law, Chuhar Singh PW 1. Besides this evidence, we have the evidence of local people who had seen the prosecutrix being led to the police station and that of Dr. Rama Nand PW 6, who was approached by Chuhar Singh PW 1, to seek help because of the illegal confinement of the prosecutrix and her husband. The entire conspectus was viewed by the High Court in vivid detail to come to the conclusion that the appellants were guilty of the crime. The cryptic judgment of the Court of Session was rightly upset by the High Court.

3. For the above reasons, we find no cause to interfere in the judgment under appeal. It would, however, be fair to learned counsel for Ram Kumar, appellant, to highlight an argument put forth to the effect that Ram Kumar should not be held guilty of abetment of crime of commission of rape as he could not anticipate the designs of Nain Singh. As stated above, his conduct and consistency were towards facilitating that crime as otherwise he would have reacted on the hearing of the shrieks of the hapless prosecutrix who was a young girl aged about 19 at that time. His turning deaf ears to her cries was the finale on his conduct and he must be assumed to have had this end in mind when he dragged the prosecutrix forcibly to the police station. Having come to this view, we unhesitatingly uphold the judgment and order of the High Court and dismiss these appeals. The appellants are on bail. They are directed to surrender forwith to their bail bonds.

4. Ordered accordingly.

Karnel Singh ... **Appellant;**

Versus

State of M.P. ... **Respondent.**

2. The appellant challenges his conviction under Section 376, IPC, and the sentence and fine imposed on him. The facts leading to the conviction, briefly stated, are that the prosecutrix (PW 1) Panchbai, was working at a factory where she had reported for duty on the morning of 28-8-1987 around 8.00 a.m. Her job was to lift boulders and place them within the factory premises. While she was working inside the factory, another labourer by the name Charan was also present. The appellant and his companion Pyaru came to the factory premises, asked Charan to fetch tea and on his departure the appellant lifted her bodily and took her inside the machine room, placed her on the ground, undressed her from below the waist and had sexual intercourse with her. Pyaru, since acquitted, was asked to keep a watch outside the factory. According to the prosecution after the appellant had satisfied his lust and before Pyaru could take his turn the prosecutrix ran through the opening in the compound wall of the factory, searched her husband, a rickshaw-puller, and thereafter lodged the first information report (Ex. P-1). She was sent to the hospital for medical examination where PW 2 Dr (smt) S. Rajpoot, examined her and prepared the report (Ex. P-3). Her evidence has been recorded in brief to the effect that she examined the prosecutrix on that very night about 9.00 p.m. and found that she was habituated to sexual intercourse. She did not find any marks of injury or struggle on the person of the prosecutrix. However, her Saya (petticoat) which was attached earlier in point of time and shown to her bore semen stains. In her cross-examination she stated that she did not see any signs of forcible intercourse on the prosecutrix and was, therefore, not in a position to say whether or not she was the victim of rape. The garment of the prosecutrix was got examined by the Chemical Analyser, which examination confirmed the existence of semen stains. The prosecutrix in her evidence has stated that immediately after she ran from the place of occurrence she met one Reza Multanabai, a co-labourer, and narrated to her the incident before going in search of her husband. Thus, at the earliest point of time she narrated the incident to the aforesaid person, but unfortunately that person was not cited and examined as a witness,

nor was Charan produced as a witness. Thus, both these witnesses who could have corroborated the prosecutrix were not examined. In the course of investigation the undergarment (chaddi) of the accused is stated to have been recovered. Dr. R.D. Sharma noted semen like stains on the garment and advised its examination by the Chemical Analyser. The seizure of the 'chaddi' was, however, held not proved. Surprisingly, the investigating officer has not uttered a word about the seizure of this article. Therefore, this important piece of evidence on which the prosecution sought to rely is of no avail to it. The vaginal swabs had semen stains. This is the state of evidence...

4. We have very carefully scrutinized the evidence having regard to the fact (PW 6) that the investigating officer had not taken the care expected of him. He did not record the statements of the two witnesses nor did he refer to the attachment of the 'chaddi'; in his oral evidence. That was a very vital piece of evidence to which little or no attention was paid. If the seizure of that article was properly proved, the article with semen stains would have lent strong corroboration to the evidence of the prosecutrix. There is no doubt that the investigation was casual and defective. But despite these deficiencies both the courts below have recorded a conviction. The question is : are they right ?

5. Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. Any investigating officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the 'chaddi'. That is the reason why we have said that the investigation was slipshod and defective.

6. We must admit that the defective investigation gave us some anxious moments and we were at first blush inclined to think that the accused was prejudiced. But on closer scrutiny we have reason to think that the loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury.

7. We have carefully examined the evidence of the prosecutrix, the medical evidence of her examination and the evidence of the investigating officer and we are inclined to think there is no risk involved in accepting the version of the prosecutrix. Her evidence shows that she had joined the two accused persons hardly three days before the incident as a labourer under a contractor. She was, therefore, in not too familiar an environment. She was the only female worker just out of her teens. Besides, the two accused persons and the prosecutrix there was one more person by the name Charan who was sent away to fetch tea. Taking advantage of the prosecutrix being alone in their company the appellant picked her up and took her inside the machine room, laid her on a pile of sand, removed her saree and petticoat, and had sexual intercourse with her against her wish. After he had satisfied his lust, he called his companion but before the latter could have her, she ran away and narrated the incident to Multanabai and then went in search of her husband, a rickshaw-puller. After narrating the incident to him, both of them went to the police station and lodged the complaint, Exhibit P-1, at about 4.10 p.m. It was said that there was considerable delay and sufficient time for tutoring and therefore her evidence could not be believed. There is no merit in this contention. The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathies with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false. The possibility of tutoring is ruled out because the evidence does not show that her husband knew the appellant and his companion before the incident. She too had started work hardly three days before and therefore she had no reason to falsely involve the appellant. No such reason is even suggested. She was a poor labourer hired by a contractor just a few days back and had no enmity with the appellant and his companion. Nor is there any such history so far as her husband is concerned. There is, therefore, no reason to doubt her word. As for corroboration the find of semen stains on her 'saya' and in her vagina lends sufficient assurance to her accusation. In *State of Maharashtra* v.

Chandraprakash Kewalchand Jain[1] this Court speaking through one of us (Ahmadi, J.) had occasion to point out that a woman who is a victim of sexual assault is not an accomplice to the crime but is a victim of another person's lust and therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. She is not in the category of a child witness or an accomplice and therefore the rule of prudence that her evidence must be corroborated in material particulars has no application, at the most the court may look for some evidence which lends assurance....

8. Applying the above test to the facts of the present case we are satisfied beyond any manner of doubt that the prosecutrix, a victim of the crime, had absolutely no reason whatsoever to falsely involve the appellant nor did her husband have any reason to do so or tutor his wife to involve the appellant. No such suggestion was made to the prosecution witnesses in cross-examination nor is there any evidence on record in that behalf. The prosecutrix is a poor labourer who was toiling to earn her livelihood to augment the family income. She was working in the factory since the last few days only and the appellant and his companion, taking advantage of the situation, drove away Charan by asking him to fetch tea and after he left the appellant violated her person. The find of semen stains on the petticoat and in the vagina lend assurance to the story narrated by the prosecutrix. The submission that there was delay in lodging the complaint has to be stated to be rejected for the simple reason that immediately after the incident she had to go in search of her husband who was a rickshaw-puller, narrate to him the incident, go down to the police station and then lodge the complaint. She has explained the absence of injuries by stating that she was laid on minute sand which was lying on the floor and, therefore, there were no marks of injury. The only explanation is by way of suggestion in the cross-examination of the prosecutrix to the effect that she was falsely implicating the appellant in order to grab money. Therefore, taking an overall view of the matter we are satisfied that it is safe to place reliance on the testimony of the prosecutrix. Both the courts below relied on her evidence and we see no reason to take a different view.

9. For the above reasons we see no merit in this appeal and dismiss the same.

* * *

(Also reported in 1995 (5) SCC 518)

State of Maharashtra ... Appellant;

Versus

Priya Sharan Maharaj ... Respondents

OTHERS

2. Heard the learned counsel.

3. On 11-5-1991, on Purushottam Wasudeo Deshpande lodged a complaint at the Dhantoli Police Station, Nagpur that his two young daughters, Hema and Meera were kidnapped by Priya Sharan Maharaj (Respondent 1) with the help of Suhasini (Respondent 6) and Sharwari Devi (Respondent 7). On the basis of this report an offence was registered under Section 363 and 366 IPC. Investigation of that offence disclosed that Kripalu Maharaj (Respondent 2), who claims to be a spiritual teacher and has his ashrams at Vrindavan and Mangadh, is a highly immoral person and in order to satisfy his lust he, with the help of his disciples, including Respondents 1 and 3 to 7, used to entice young girls and have sexual intercourse with them against their wish. Respondent 2, through his disciples, used to impress upon the young girls that he is the incarnation of Lord Krishna, that they should treat him as their husband and that what he was doing with them was in the nature of "Prasad" of God and by such acts they were really blessed. The investigation further disclosed that Meera, Hema and one Sulakshana were thus subjected to sexual intercourse by Kripalu Maharaj. Accordingly, the offence which was registered against them earlier under Sections 363 and 366 IPC was altered to an offence under Section 376 IPC and all the seven respondents were shown as accused.

4. On being charge-sheeted, they were put up for trial before the learned Second Additional Sessions Judge, Nagpur who had framed the following charge :

> "1. That, you above-named Accused 2, prior to 1987 at the house of one Nilu Chaurasia, in front of Vijay Talkies, Nagpur, committed rape on one Km Meera, d/o Purushottam Deshpande, aged 26 years, r/o Nagpur, against her will and without her

consent, posing yourself, you are a divine spirit of Lord Krishna. So also, again in the month of February 1991, you Accused 2, posing yourself that you are a divine spirit of Lord Krishna, committed rape on said Km Meera Deshpande, at the house of one Shrivastava, near Previnamee School, Nagpur.

Again on 16th Day of January, 1990, at about 5.00 p.m. at the house of one Khatri, Kadhi Chowk, Nagpur, committed rape on one Sulakshana d/o Shyamsundar Pehankar, a girl aged about 14 years, r/o Juni Shukrawari, Nagpur. Again on 14-4-1990, at about 5 p.m. at the house of one R.P. Shrivastava, Nagpur you committed rape on said Km Sulakshana, posing yourself that you are a divine spirit of Lord Krishna.

So also in the month of September 1980, at the house of one Chaurasia, Near Vijay Talkies, Nagpur, you Accused 2, posing yourself you are a divine spirit of Lord Krishna, committed rape on one Km Hema @ Brijgauri d/o Purushottam Deshpande, aged about 19 years, against her will and without her consent, and thereby you above-named Accused 2, committed an offence punishable under Section 376 of the Indian Penal Code, within my cognizance.

2. Secondly, that above-named Accused 2, on the aforesaid day, date time and place, committed the offence of rape on the said girls, and that you above-named Accused 1,3,4,5,6 and 7, in furtherance of your common intention, abetted the said Accused 2, in the commission of the said offence of rape, which was committed in consequence of your abetment. So also, you above-named Accused 1,3 to 7 were personally present at the time of commission of the said offence, and that you all thereby committed offences punishable under Sections 109 and 114 read with Section 34 of the Indian penal Code, within my cognizance."

5. Aggrieved by framing of the charge the respondents had preferred a revision application by the High Court declined to interfere as it was open to the respondents to approach the Sessions Court itself for granting the reliefs prayed for. The respondents, therefore,

filed three applications in the Sessions Court. Exhibit 36 was not pressed. The learned Additional Sessions Judge rejected both the applications for discharge.

6. Against the order passed by the learned Additional Session Judge, the respondents preferred Criminal Revision Application No. 130 of 1994 before the Nagpur Bench of the High Court of Bombay. The High Court, by an unduly long order running into 89 pages, allowed the revision application quashed the charge framed against the respondents and discharged them. The High court was of the view that as five acts of rape were committed during the period from September 1986 to February 1991 on three different girls, the charge as framed was in contravention of the provisions of Section 219 of the Code of Criminal Procedure. It also held that the three girls had told lies and developed a false story against the respondents and that "no prudent man can dare to accept or believe" it. The State has, therefore, filed this appeal.....

8. The law on the subject is now well settled, as pointed out in *Niranjan Singh Punjabi* v. *Jitendra Bijjaya*[2] that at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

9. What we find from the judgment of the High Court is that the learned Judge, in order to ascertain the correct legal position, referred to various decisions and quoted extensively from them but did not apply the law correctly. The judgment also contains some quotations which have no relevance. After referring to the case-law, the learned Judge has observed as under:

"Considering the facts and circumstances as obtained in the instant case, I am reminded of the learned observations of their Lordships while discussing or reflecting on the criminal cases."

and thereafter quoted the following passage from the decision of this Court in *State of Punjab* v. *Jagir Singh*[3] : (SCC pp. 285-86, para 23)

"23. A Criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. 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. Crime is an event in real life and is the product of interplay of different human emotions. 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 courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of the conjectures.

That was not a case dealing with the scope and nature of enquiry at the stage of framing of charge. Those observations were obviously made in the context of appreciation of evidence and standard of proof required for convicting the accused. This clearly indicates that the learned Judge failed to apply the correct test.

10. The following observations again lead us to that conclusion :

"Giving conscious thought to the rival submissions of the learned counsel for the parties, it is abundantly clear that except the statements of prosecutrix, there is no evidence directly or indirectly to corroborate their testimonies. According to Km Sulakshana she was molested initially on 16-1-1990 and subsequently on 14-4-1990 however there is no disclosure to anyone including her parents. Considering her age at the relevant time, no injuries were found as indicated by

Modi. Similarly though Km Meera alleged that she was molested prior to 1987 and in February 1991, instead of disclosing the nefarious activities of Maharaj continued to stay in the company of Applicant 2 Kripaluji Maharaj and his disciples. She not only continued her stay with them but moved from place to place to preach the tenets of the cult of Kripaluji Maharaj. Similarly, though it is alleged by Km Hema that she was molested in the month of September 1986, she too continued to remain with Maharaj. Even it is not the case of the prosecution that these two sisters disclosed about the indecent activities of Kripaluji Maharaj amongst themselves. Meera and Hema both are graduates and Km Sulakashana was an adolescent. It cannot be expected from such educated girls to continue to accompany the person who according them, proved to be a demon and to continue in his cult propagating his teachings. The conduct of all three girls not being in consonance with normal dispositions of prudent human beings, corroboration thus, becomes a necessity or emiant (*sic*). Taking a broad view of the matter, particularly various infirmities and improbabilities, no man of prudence will give any importance to the story unfolded. It is, thus, clear that except the bare words of these three girls, there is no other evidence to corroborate their story. Such conduct can be a corroborative piece of evidence of her/their evidence. In other words subsequent conduct not only is relevant but important and material

These three girls levelled allegations against Applicant 2 Kripaluji Maharaj after a lapse of considerable time i.e. after months and years and, therefore, the probability as depicted by the defence that it was at the instance of Nityanand, cannot be overruled. It needs mention that no report was lodged by either of the girls at any time. It is also clear from the record that Nityanand's statement which was recorded on 11-5-1991 i.e. on the day on which the FIR was lodged by Purushottam Deshpande. Subsequently only the statements of all the three

prosecutrix came to be recorded. Even in the FIR there is no whisper that at any time, Applicant 2 had committed rape on any of the prosecutrix or on any other disciple.

So the evidence does not become reliable merely because it has been corroborated by a number of witnesses of the same brand.

In this case, there is unreasonable, inordinate or extraordinary delay in leveling allegations of physical molestation or rape committed, by all the three prosecutrix against a saintly old man of 69 years of age who renounced the world and became engrossed in spiritual world. The explanation as could be revealed from the statements of the prosecutrix that the disciples of Kripaluji Maharaj all the while stated that he is an incarnation of God and whatever happened with them, be taken as a "Prasad" or blessing of God and so not to disclose to anyone, it is difficult to digest as the chastity is the jewel of the Indian woman and no woman will consider the sexual intercourse against her will as Prasad or blessing of God.

It also does not stand to reason that a saintly man who has thousands/millions of disciples all over India, direct his own disciple and in their presence will commit sexual intercourse with the pracharak of his cult.

Considering the overall effect of evidence collected by the prosecution, there is according to me, no ring of truth. No prudent man can dare to accept or believe the infirm and improbable evidence of the prosecutrix.

All these facts go to show that the girls evidently told lies and developed false story against Applicant 2 and his disciples."

11. The above-quoted paragraphs from the judgment clearly disclose that the High Court was much influenced by the submission made on behalf of the defence that Kripalu Maharaj is a saintly old man, who has renounced the world, who is engrossed in spiritual activity and who has thousands/millions of disciples all over India and, therefore, he was not likely to

indulge in the illegal acts alleged against him. It failed to appreciate that it is not unusual to come across cases where the so-called spiritual heads exploit young girls and women who become their disciples and come under their spell. Moreover, the reasoning of the High Court that it also does not stand to reason that a saintly man who has thousands/millions of disciples all over India would commit sexual intercourse with the pracharak of his cult in the presence of his disciples stands vitiated because of the vice of misreading the statements. The three girls have nowhere stated in their statements that R-2 had sexual intercourse with them in the presence of other disciples. The High Court gave too much importance to the conduct of the three victims and the delay in disclosing those illegal acts to their parents of such an offence will behave would depend upon the circummstances in which she is placed. It often happens that such victims do not complain against such illegal acts immediately because of factors like fear or shame or uncertainties about the reactions of their parents or husbands in case of married girls or women and the adverse consequences which, they apprehend, would follow because of disclosure of such acts. What the three girls had stated in their statements was not inherently improbable or unnatural. They have disclosed the reasons why they could not immediately complain about those illegal acts for such a long time. What the High Court has failed to appreciate is that while making a complaint to the police or giving their statements they were not required to give detailed explanations. As stated earlier, what the Court has to consider at the stage of framing of the charge is whether the version of the person complaining together with his/her explanation is prima facie believable or not. It was, therefore, not proper for the High Court to seek independent corroboration at that stage and to quash the charge and discharge the accused in absence thereof. It was also improper to describe the version of Sulakshana as false because no extensive injuries were noticed on her person while she was examined by a doctor on the basis of some observations made in Modi's textbook on *"Medical Jurisprudence and Toxicology"* . We do not think it proper to say anything further as, in the view that we are taking, the accused will have to face a trial and whatever observations we make now

may cause some prejudice to them at the trial. We would not say that the High Court was wholly wrong in discarding the material placed before the Court as false and discharging the accused on that ground.

12. Before us also the learned counsel for the respondents had made a grievance that the charge as framed was not in accordance with Section 219 of the Criminal Procedure Code. The application, Exhibit 36, was made to the Sessions Court for modification of the charge so as to make it consistent with Section 219. That application was not pressed and the Court was invited to dispose of the other applications made by them for quashing the charge and discharging them. As we are inclined to allow this appeal the Sessions Court will have to now consider afresh whether the charge is required to be altered or amended.

13. We, therefore, allow this appeal, set aside the judgment and order passed by the High court and direct the Sessions Court to proceed further with the trial in accordance with law. The trial court shall do so after re-examining the material and hearing the learned Public Prosecutor and the lawyer for the accused on the question of amending or altering the charge so as to make it consistent with the relevant provisions of the Code and also after considering whether it will be possible to try all the offences at one trial or that they will have to be tried separately.

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(Also reported in 1997 (4) SCC 393)

State of Rajasthan ... Appellant:

Versus

N.K. The Accused ... Respondent

The State of Rajasthan has come up in appeal feeling aggrieved by an order of acquittal recorded by the High Court of Rajasthan reversing the judgment of the Sessions Court which had found the accused-respondent guilty of an offence punishable under Section 376 of the Indian Penal Code and sentenced him to undergo seven years' rigorous imprisonment with a fine of Rs. 2000 and to a further simple imprisonment of one year and nine months in default of payment of fine.

2. According to the prosecution, *G*, PW 2 the prosecutrix, was aged 15 years and was living in Village Bhania Yana (Jaisalmer) with her father mother and a younger sister. The family resided in a lonely hutment situated in a field. On 1-10-1993 at about 12 noon, the prosecutrix was alone in her hut busy washing clothes on a water pump. *NK*, the accused-respondent was known to the prosecutrix since before. He came to her and initially asked for water which she provided in a lota. The accused then asked for a knife for peeling the skin of a cucumber. The prosecutrix brought the knife and handed it over to him. When the prosecutrix was about to turn and go back, the accused caught hold of her. He twisted her hand on her back and forcibly took her to a nearby place called bhitian, i.e., a place surrounded by walls. The accused forced the prosecutrix to lie down on the ground, put his foot on her chest, closed her mouth with his palm, removed her lehenga upwards and then forcibly committed sexual intercourse with her. The prosecutrix offered resistance and tried to save herself but the respondent gagged her mouth by a towel pressed against her mouth. Having thus raped the prosecutrix, the accused-respondent went away to Thane, another village or another part of the same village. The prosecutrix reached back her home and narrated the entire incident to a woman, described as "wife of Udai Singh" and to her father, PW 10, who had returned by that time. The victim accompanied by her father wanted to go to the police station and lodge the first information report of the incident but they were prevented from doing so by several village people belonging to the community

of the accused who also proposed the matter being settled within the village by convening a panchyat. However, the report of the incident was lodged on 5-10-1993 at 11.20 a.m. The offence was registered and investigation commenced.

3. The prosecutrix was referred for medical examination so as to find out the injuries on her person as also to ascertain her age. Dr. V.D. Jetha (PW 9) the medical officer posted at Primary Health Centre, Jaisalmer Examined the prosecutrix on 6-10-1993 at about 12 noon upon a requisition made by the investigating officer. Dr Jetha found inner alia that the hymen of the prosecutrix was ruptured in multiple radial tears, the edges of which showed healing at most of places and mild tenderness. The hymen hole admitted one finger easily with mild tenderness. Sample of vaginal swab from posterior front of vagina was taken and smear slide was prepared which was sealed and sent to the Forensic Science Laboratory for examination. In the opinion of Dr Jetha sexual intercourse with the prosecutrix was done 5 to 7 days before the day of examination. He further opined that after a lapse of 5 to 7 days, the examination of vaginal smear and vaginal swab could not confirm the presence of semen.

4. For the purpose of ascertaining the age of the prosecutrix, x-rays of arms and elbow joints were taken in his presence. After examining the x-rays he opined that the age of the prosecutrix was 15 years.

5. On 4-11-1993 on a requisition made by the investigating officer, Dr Jetha examined *NK*, the accused-respondent. He was found to be a person of average build suffering from no disease or infirmity. His height was 5 ft 11 inches and weight was 61 kg. He was found fit and competent to perform sexual intercourse. No mark of injury was found on his person.

6. The trial court found the incident, as alleged, proved. In the opinion of the learned trial Judge the testimony of the prosecutrix inspired confidence. It was corroborated by the medical evidence as also by the testimony of her father. The prosecutrix was held to be 15 years of age on the date of the incident. Though there was delay in lodging the FIR but it was satisfactorily explained. Accordingly, the accused-respondent was found guilty of the offence punishable under Section 376 IPC and sentenced as above.

7. The High Court has, in an appeal preferred by the accused-respondent, held that the prosecutrix was not proved beyond reasonable doubt to be below 16 years of age. In the opinion of the High Court though the factum of the accused-respondent having committed sexual intercourse with the prosecutrix was proved but the absence of injuries on the person of the prosecutrix was a material fact not excluding the possibility of the prosecutrix having been a consenting party. The delay in lodging the FIR was not satisfactorily explained. The delay coupled with the non-examination of "the wife of Udai Singh" to whom the incident was first narrated by the prosecutrix immediately after the occurrence rendered the prosecution case doubtful. Mainly on this reasoning the High Court has allowed the appeal and acquitted the accused-respondent....

9. Having heard the learned counsel for the parties we are of the opinion that the High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women. In *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*[1] this Court observed that refusal to act on the testimony of a victim of sexual

assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion....

10. The questions arising for consideration before us are : whether the prosecution story, as alleged, inspires confidence of the court on the evidence adduced ? Whether the prosecutrix, is a witness worthy of reliance ? Whether the testimony of a prosecutrix who has been a victim of rape stands in need of corroboration and, if so, whether such corroboration is available in the facts of the present case ? What was the age of the prosecutrix ? Whether she was a consenting party to the crime ? Whether there was unexplained delay in lodging the FIR ?

11. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short or corroboration as understood in the context of an accomplice would do....

12. According to Dr. V.D. Jetha, ex-ray of the left elbow and arm of the prosecutrix were taken for assessing her age. Though the technician who had actually x-rayed the prosecutrix and prepared the x-ray plates has not been examined in the Court but the non-examination is of no consequence. According to Dr. Jetha, x-rays were taken in his presence. Based on the x-ray plates he had drawn deductions, formed an opinion based on standard textbooks and prepared the report on the question of age. He has further stated that there was no need for prosecutrix being referred to a radiologist inasmuch as what a radiologist could have read from the x-ray plates could also have been done by him as he has done.

13. Dr. Jetha found that top radial was fully ossified. Olecranon

of ulna was also fully ossified. Distal end of radial and ulna were not completely ossified. On the basis of such data he inferred the age of the prosecutrix to be about 15 years. However , during cross-examination he admitted that the age of the prosecutrix could be 15 or 16 years because a variation of 3 on plus or minus side as described by Modi in his *Medical Jurisprudence* was possible. The learned counsel for the State vehemently argued that non-ossification of the distal ends of radial and ulna was a positive indicator of the prosecutrix having not crossed the age of 15 years and in support of his submission he referred to certain passages and tables from *Modi's Medical Jurisprudence*. However we are not satisfied that only on the basis of Dr Jetha's testimony, a positive finding can be recorded that the prosecutrix was less than 16 years of age on the date of the incident. In the estimate made by Dr Jetha he himself admits a variation of 3 years on either side being permissible. The prosecutrix herself and her father are illiterate persons. The prosecutrix has not taken any schooling. There is no other satisfactory evidence as to her age available on record. We cannot positively hold on the basis of the material available that she was less than 16 years of age on the date of the incident.

14. It is true that the incident dated 1-10-1993 was reported to the police on 5-10-1993. The prosecutrix was a married woman. Her *Muklana* ceremony had not taken place. Muklana ceremony is a rural custom prevalent in Rajasthan, whereunder the bride is left with the parents after marriage having been performed and is taken away by the husband and/or the in-laws to live with them only after a lapse of time. The origin of the custom owes its existence to performance of child-marriages which are widely prevalent there. The *muklana* was yet to take place. The prosecutrix was a virgin prior to the commission of the crime and this fact finds support from the medical evidence. The parents of such a prosecutrix would obviously be chary to such an incident gaining publicity because it would have serious implications for the reputation of the family and also on the married life of the victim. The husband and the in-laws having become aware of the incident may even refuse to carry the girl to reside with them. The incident if publicised may have been an end to the marriage of the prosecutrix. Added to this is the communal tinge which was sought to be given by

the community of the accused. PW 10, the father of the prosecutrix, the prosecutrix, PW 2 and other witnesses have stated that while they were about to move to the police station they were prevented from doing so by the community fellows of the accused who persuaded them not to lodge a report with the police and instead to have the matter settled by convening a *panchayat* of the village people. After all the family of the victim had to live in the village in spite of the incident having taken place. The explanation is not an afterthought. An indication thereof is to be found in the FIR itself where the complainant has stated — "the delay in lodging the report is due to village panchayat, insult and social disrepute". Nothing has been brought out in the cross-examination of the witnesses to doubt the truth and reasonableness of the explanation so offered.

15. We may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the court it cannot be counted against the prosecution....

18. Absence of injuries on the person of the prosecutrix has weighed with the High Court for inferring consent on the part of the prosecutrix. We are not at all convinced. We have already noticed that the delay in medical examination of the prosecutrix was occasioned by the factum of the lodging of the FIR having been delayed for the reasons which we have already discussed. The prosecutrix was in her teens. The perpetrator of the crime was an able-bodied youth bustling with energy and determined to fulfil his lust armed with a knife in his hand and having succeeded in forcefully removing the victim to a secluded place where there was none around to help the prosecutrix in her defence. The injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in the ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered to resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily

an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In *Sk. Zakir*[11] absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In *Balwant Singh*[12] this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In *Karnel Singh*[9] the prosecutrix was made to lie down on a pile of sand. This court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of the sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply a common-sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished.

19. For the offence of rape as defined in Section 375 of the Indian Penal Code, the sexual intercourse should have been against the will of the woman or without her consent. Consent is immaterial in certain circumstances covered by clauses thirdly to sixthly, the last one being when the woman is under 16 years of age. Based on these provisions, an argument is usually advanced on behalf of the accused charged with rape that the absence of proof of want of consent where the prosecutrix is not under 16 years of age takes the assault out of the purview of Section 375 of the Indian Penal Code. Certainly consent is no defence if the victim has been proved to be under 16 years of age. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected

to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. The prosecutrix before us had just crossed the age of 16 years. She has clearly stated that she was subjected to sexual intercourse forcibly by the accused. She was not consenting part. She offered resistance to the best of her ability but she succumbed and fell victim to the force employed by the accused. She has narrated how she was approached by the accused She has narrated how she was approached by the accused while she was busy washing clothes near her hut. The accused initially asked for water in a *lota*. Then the accused asked for a knife on the pretext that it was needed for peeling cucumber. The accused was gaining time to ascertain if the prosecutrix was alone. No sooner the prosecutrix turned her back unmindful of what lay ahead, her hand was caught hold of by the accused and twisted behind her back. The accused pushed her to a *bhitian*, a secluded place. She was thrown on the ground. The accused put his knee on her so as to overpower her. Her shouting was throttled by the accused who placed his palm on her mouth and later covered her mouth by a towel pressed against her lips. She was then raped. Blood oozed out from her private parts. Having finished his act the accused left her alone and took to his heels. The prosecutrix was weeping. She narrated the incident to a woman described as "the wife of Udai Singh" and to her father in quick succession. The statement of the father of the prosecutrix corroborates her in all material particulars and is admissible in evidence and relevant under Section 157 as her former statement corroborating her testimony as also under Section 8 of the Evidence Act as evidence of her conduct. In spite of delay in medical examination in the circumstances already discussed the medical evidence corroborates the testimony of the prosecutrix. According to Dr Jetha, he had found the hymen ruptured in multiple radial tears, the edges of which showed healing at most of the places and mild tenderness. The prosecutrix was not used to sexual intercourse. Pieces of broken bangles were found at the place of the incident and seized. The Forensic Science Laboratory has found (vide report Ex. P-9) presence of human semen on the lehenga seized from the prosecutrix.

It is true that "the wife of Udai Singh" has not been examined. It would have been better if she would have been examined. However, no dent is caused in the case of the prosecution by her non-examination. She would have repeated the same story as has been narrated by the father of the prosecutrix. We have found the testimony of the prosecutrix's father (PW 10) trustworthy and unembellished. The prosecutrix and her father have both been subjected to lengthy cross-examination. The trial court has found both the witnesses reliable. We too find no reason to disbelieve their testimony. A father would not ordinarily subscribe to a false story of sexual assault involving his own daughter and thereby putting at stake the reputation of the family and jeopardizing the married life of the daughter. We find the testimony of the prosecutrix's father reliable and lending support to the narration of the incident by the prosecutrix. No reason has been proved, nor even suggested during cross-examination of any of the witness why the prosecutrix or any member of her family would falsely implicate the accused roping him in a false charge of rape. We are surprised to note how an inference as to consent could have been drawn against the prosecutrix and to hold that she was a willing party to the sexual assault made by the accused. Upon an evaluation of the evidence available on record we are satisfied to hold that the prosecutrix is a witness of truth. Her testimony inspires confidence. Other evidence available on record lends assurance to her testimony. The trial court had rightly held that sexual assault amounting to rape was committed on her by the accused-respondent. In spite of her having not been proved to be under 16 years of age the High Court was not justified in holding her to be a consenting party to the sexual assault on her.

20. For the foregoing reasons, we are of the opinion that the High court has committed a clear error of law in interfering with the judgment of the trial court regarding proof of guilt of the accused. The appeal is allowed. The judgment of the High Court is set aside. We hold the accused-respondent guilty of the offence charge i.e. under Section 376 IPC.

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(Also reported in 2000 (5) SCC 30)

3
Medical Evidence

Medical evidence is crucial to the trial of a sexual abuse/rape case. It is a conclusive factor in deciding about the offence without any doubt. However, the manner in which medical evidence is written and given is hypothetical and the judges in many cases interpret in favour of the accused. Doctors say that they are trained to write medico-legal certificates in that manner.

One of the factors that has to be borne in mind is that while medical evidence is important, it is not sacrosanct since there are many aspects which the medical evidence will not reflect.

In the case of *Mange versus State of Haryana*[43], the accused after having been convicted by the sessions court and confirmed by the High Court had approached the Supreme Court. The principle defence was that that prosecutrix was not examined and that the medical evidence said that the rape could not have been committed on the day as alleged in the charge sheet. The victim was a deaf and dumb girl of 13 years. She could not make a statement. The medical evidence recorded that duration of the injury found on the victim may be about 12-28 hours and there was no bleeding. The doctor had also said that the hymen was torn but there was no swelling, redness or inflammation around the bruises. The Court held that these two circumstances did not warrant any interference with the conviction as medical evidence had not ruled out the committing of rape at the time contended by the prosecution and the fact that there was a rupture of the hymen and a bruise around the hymen was sufficient. The Court also held that medical evidence cannot falsify an eye-witness.

In children's cases, especially very young children and babies, the penetration may not be as much as of an adult. In *Madan Gopal Kakkad versus Naval Dubey and another*[44], the medical officer had given an opinion that "it seems an attempt to rape has been made" and in cross examination "I concluded about attempt to rape on account of abrasion and redness on labia majora and minora respectively". The doctor had also opined that hymen admitted the little finger.

The Supreme Court observed that the prosecutor had not put any question to clarify her opinion in the re-examination. The Supreme Court

[43] 1979 (4) SCC 349
[44] 1992 (3) SCC 204

also observed that the medical officer was inexperienced and gave the opinion out of her inexperience. The Court held

"Merely because the inexperienced medical officer has opined that it was an attempt to commit rape, probably on the ground that there was no sign of complete penetration, we are not inclined to accept PW4's legal opinion as to the nature of the offence committed by the respondent.

A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the date which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert, may form its own judgement on those materials after giving due regard to expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."

Eventhough there was no full penetration, there was enough to attract the provision of section 375 IPC.

Absence of spermatozoa is not fatal to the case of the prosecution. This has been held in a number of judgements. In ***State of Maharashtra versus Chandrapraksh Kewalchand Jain***[45], the court observed that spematozoa can be found if the woman is examined within 12 hours after intercourse, thereafter they may be found between 48 and 72 hours but in dead form. If the prosecutrix washes herself by then, the spermatozoa may not be found.

In ***Narayanamma versus State of Karnataka and others*** [46] , the victim was a minor and was gang raped. The trial court convicted all the three accused. The High Court reversed the verdict. The High Court came to this conclusion on the basis that the prosecutrix was not a reliable witness and there was no medical evidence to corroborate the same. The medical evidence revealed that hymen was ruptured, admitted two fingers, bled

[45] supra
[46] 1994 (5) SCC 728

on touch, was reddish in colour and was painful and tender. It further revealed that there were injuries as irregular linear contusion on both the breasts of the prosecutrix being 3-4 in number, reddish in colour. The vaginal smear examination did not show any spermatozoa on it.

The Supreme Court held that admission of two fingers was enough to prove rape. Injuries on the breasts demonstrate that there was force used on her. As regards the absence of spermatozoa, the Court held that the victim had not made a statement that the accused had reached orgasm and emitted semen. There could also be mistakes in the manner of preservation and therefore absence of spermatozoa could not be held against the prosecutrix.

In *Ranjit Hazarika versus State of Assam*[47] the Court held that:

" The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. ..... To constitute the offence of rape, penetration however slight, is sufficient..... The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on ' no reasons'".

The same reasoning was given in *State of T.N. versus Suresh and another*[48] where the Court held that absence of semen or spermatozoa in vaginal swab collection does not disprove rape.

This was also followed in *State of H.P. versus Lekh Raj and another*[49]. In this case, it was held that the presence of spermatozoa, dead or alive would differ from person to person and its positive presence depends upon various circumstances. It should be used for corroborative purposes only.

[47] 1998 (8) SCC 635
[48] 1998 (2) SCC 372
[49] 2000 (1) SCC 247

In the case of *State of H.P. versus Mango Ram*[50], the medical evidence was as under:

"She was a girl of average build, conscious, well oriented in place and time. Height 4' 10-1/2, weight 31 kg, breasts and papillae were elevated as small mounds and there was enlargement of areolae's diameter. Axiallary hair were not developed. Pubic hair were not developed. She was referred to dentist for examining her dental age. There were no marks of violence over the breasts, nipples, cheeks and lips. No marks of violence were seen on the external genitals, perineum, abdomen, chest, back, limbs, neck and face. Menarche not yet attained.

Perineal examination

There were no marks of injury over vulva. Hymen found intact with a small laceration at 6 o' clock position. Clotted blood was seen at vaginal orifice, which admitted tip of the finger with great difficulty."

The doctor's opinion was that it was difficult to say whether intercourse had taken place or not.

Both the courts below acquitted the accused. The Supreme Court held that the medical evidence ought to be appreciated in the background of the evidence given by the victim. It is quite likely that the clothes were washed before chemical examination. The absence of spermatozoa was also not accepted by the court as forming any conclusion about the rape.

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[50] 2000 (7) SCC 224

Mange ..... Appellant

Versus

State of Haryana ..... Respondent

In this appeal by special leave the appellant has been convicted under Section 376 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and a fine of Rs. 300. The prosecution case has been fully narrated in the judgment of the High Court and the Sessions, Judge. It appears that on June 10, 1972 at about 8,00 a.m. Raj Bala the daughter of PW 5 Jaswant Singh was stopped by the accused while she was coming through a 'pag-dandi' and was forcibly taken into the chamber (Kotha) of the tube-well of the accused on which she started crying. Her cries attracted Mohinder Singh, PW 4, the stepbrother of the father of Raj Bala. Mohinder Singh entered into the chamber of the accused and saw the accused lying upon Raj Bala and committing sexual intercourse with her. On seeing Mohinder Singh, the appellant left her and ran away. Mohinder Singh then brought Raj Bala to her house and he found that the 'nalla' of the 'salwar' of the girl had been snapped and the 'salwar' had been brought up to her ankles and was bloodstained. Jaswant Singh, the father of Raj Bala had gone to Delhi and when he returned the entire occurrence was narrated to him by PW 4 Mohinder Singh. Thereafter, Jaswant Singh went to the police station and lodged first information report at 10 p.m. The police after usual investigation submitted charge-sheet against the appellant on the basis of which the appellant was convicted by the Sessions Judge, as indicated above. The appellant filed an appeal before the High Court which was also, dismissed and thereafter, he filed a petition to this Court for grant of special leave and after obtaining special leave, this appeal has been placed before us.

In the first instance, it was contended that Raj Bala was not examined by the prosecution and on that ground alone the prosecution case must fail. It appears, however, that Raj Bala was a deaf and dumb girl of only 13 years of age. So apart from being a child witness, she was also deaf and dumb and no useful purpose would have been served by examining her. Moreover, if there

was any infirmity in the prosecution case the same has been removed by the examination of PW 4 Mohinder Singh who was a full fledged eyewitness to the act of rape. Once the courts below believed the evidence of PW 4 that the appellant had forcibly performed sexual intercourse with Raj Bala there was an end of the matter. No further corroboration was required. It was then pointed out that medical evidence does not support that the rape had taken place on June 10, 1972 because the lady doctor says that the girl may have been subjected to intercourse two days before. It is true that the lady doctor who examined Raj Bala has said that if it was a case of a fresh rape bleeding should have been there and the duration of injury found on the victim may be about 12 to 28 hours. Her evidence, however, does not clearly exclude the act of rape having been committed on June 10, 1972 at about 8 a.m. It was then contended that the doctor found that hymen was torn and ruptured yet she did not find any swelling, redness or inflammation around the bruises which should have normally been found if rape had been committed recently. This circumstance is not sufficient to put the prosecution case out of court because the fact that there was a rupture of the hymen and a bruise around the hymen was sufficient to prove the act of rape. It is difficult for any medical expert to give the exact duration of time when the rape was committed. More particularly when we have the evidence of PW 4 as to the time and date of the occurrence, the medical evidence can hardly be relied upon to falsify the evidence of the eyewitness because the medical evidence is guided by various factors based on guess and certain calculations. We are therefore unable to discard the evidence of PW 4 on the basis of the statement by the lady doctor. It was then contended that PW 4 did not narrate the occurrence to the mother of the girl Mst. Murti, PW 6. To begin with, PW 4 had undoubtedly brought the victim to Mst. Murti in a condition from which anybody could have presumed that a sexual intercourse had been committed with her. PW 4 was after all the stepbrother of Jaswant Singh and may have thought it better to wait until his brother returned to narrate the details of the occurrence lest he might be misunderstood by Ms.. Murti. Her father Jaswant Singh had gone to Delhi and he returned some time in the evening and as soon as he returned PW 4 narrated

the occurrence to him. In these circumstances, therefore the omission of the witness to narrate the incident of rape to Mst. Murti is clearly explainable. Some other contentions had been raised by the learned counsel for the appellant also which we do not find it necessary even to mention. On a consideration of the evidence and circumstances, therefore, we are satisfied that the High Court was right in holding that the prosecution case against the appellant had been fully proved. We do not see any force in this appeal which is dismissed accordingly.

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(Also reported in 1979 (4) SCC 349)

Madan Gopal Kakkad ... Appellant

Versus

Naval Dubey and Another ... Respondents

The factual matrix leading to the filling of this appeal which is quite simple gives an account of a sordid and obnoxious incident wherein the respondent, medical practitioner who had created a private hell of his own was gratifying his animated passions and sexual pleasure by sexually assaulting and molesting young girls not only in utter disregard of the universal moral code, human dignity, his professional ethics and values but also in flagrant violation of the law of the country.

2. The brief facts of this shameless intrigue as unraveled by the prosecution at the trial are as follows :

The respondent/accused who just then graduated from the Medical College was staying with his family consisting of his parents, his brothers, his sister-in-law Smt Tara dubey and niece Richa Dubey, who is the daughter of the respondent's stepbrother Niraj Dubey, in Adarsh Nagar, Jabalpur. His father Bhagwan Dass Dubey (DW 2) was a retired Professor and his sister-in-law Tara Dubey (DW 1) was a lecturer. His another elder brother at the relevant time of this occurrence was working as Superintendent of Police in Rajgarh District. Opposite to his house at some distance Satish Bhasin (PW 9) and Sapna Bhasin (PW 10) were residing with their minor daughter Priti. Within the same locality 3 to 4 houses away from the house of the respondent/accused, the appellant Madan Gopal Kakad (PW 5) was living with his wife, a German lady, by name, Elesabeth Kakad (PW 6), his sister Veera (PW 7) and his minor daughter Tulna Sheri (PW 13), a girl aged about 8 years and his younger son Pulkit. The family members of the respondent and PW 5 were on cordial relationship making frequent visits to the houses of each other.

3. Tulna Sheri (PW 13) the unfortunate victim in this case was studying in the third standard in St. Joseph Convent along with her classmate Richa Dubey. Tulna used to come frequently to the house of the respondent to play with Richa Dubey and her other girlfriends.

Tarun Lata Joshi (PW 12) was living with her father who was a tenant in the house of PW 5.

4. According to the prosecution, the respondent who had a crush on young girls used to develop friendship with the girls who used to come to his house to play with his niece Richa Dubey by narrating interesting stories from comic books. On the day of this deplorable incident, i.e. on September 2, 1982 at about 4 to 5 p.m. Richa Dubey called Tulna (PW 13) stating that her mother wanted her. Accordingly Tulna wearing underwear and jeans accompanied by her younger brother Pulkit went to the house of Richa, but found none except the respondent. The respondent found fault with Tulna for having come there in jeans accompanied by her brother. When the two girls namely, Tulna and Richa started playing in the drawing room, the respondent whispered something in the ears of Richa, who then told Tulna that she had been asked by her uncle (the respondent) to take Pulkit outside and narrate him some stories and that the respondent would 'make love', presumably meaning that he would tell some lurid tales of sex to her thereby stimulating immoral thoughts so that Tulna might fall a prey to his lewd and lascivious behaviour. As soon as Richa went outside taking Pulkit, the respondent bolted the door from inside, completely stripped of himself; removed the jeans and underwear of Tulna and made her naked and asked Tulna to do fellatio, that is to suck his penis. Thereafter the respondent cuddled and pined Tulna close to him, and slightly inserted his penis into her vulva and started sucking her lips. Within a few seconds, he ejaculated and freed the girl from his clutches and thereafter put on his pyjamas and asked Tulna to wear her jeans. Again the respondent longing for his lascivious passion, laid down Tulna on a sofa in his drawing and remained lying on her and closed her mouth so that the girl could not scream. A little later after wetting his sexual appetite he got up; opened the door allowed the girl to go out. While the girl was leaving the drawing hall, the respondent threatened her not to disclose his affairs to anyone, otherwise his elder brother who is a high ranking police officer would mercilessly beat her parents. Tulna came out of the room and told Richa as to what all happened inside the room.

5. In the evening of that day she told her mother (PW 6) that the

respondent was a dirty fellow and he had asked her to suck his private part, to which PW instructed not to go to the house of respondent thereafter. However, Tulna did not narrate the entire episode to her mother on the day of the incident evidently out of fear. When Tulna again narrated this incident to Richa, the latter told her that her Chacha referring to respondent, was like a dog and that he used to do the same thing with her also by stripping of her whenever she came from the school and whenever she was lying on her bed and further told that the respondent when asked as to why Tulna and Priti are in fair complexion, her Chacha replied that their complexion is fair because they sucked his male organ and that if Richa also did the same thing she would also become very fair in her complexions. PW 12, Tarun Lata Joshi, who was present nearby seeing Tulna and Richa whispering each other asked them what was the matter. Tulna narrated the incident to her and other girlfriends. On the next day, seeing the respondent standing near the gate of his house Tulna repeated the same remark to her mother (PW 6). Thus on the third day, Tulna told her mother the entire incident which took place in the drawing hall of the house of the respondent on September 2, 1982.

6. On hearing this horrid episode, PW 6 was very much annoyed and conveyed this painful and jarring piece of information to PW 7 (Veera). Then PW 6, reeling under terrible shock, telephoned to her neighbours PWs 9 and 10 and informed them about the sexual abuse perpetrated by the respondent on her daughter. At about 9.00 p.m. the appellant Madan Gopal (PW 5) came to his house and learnt about the occurrence. Faced with the traumatic situation, the helpless panic stricken parents who have been so deeply disturbed by the dehumanising act of the respondent rushed with boiling blood to the house of the respondent accompanied by PWs 7, 9 and 10 and searched for the respondent, but could not find him there. They then informed the purpose of their visit to the elder brother and sister-in-law of the respondent who told PWs 5 and 6 that the respondent had gone to a cinema hall and they would send the respondent's younger brother to fetch him. All those including the rightful indignanted parents of the victims Tulna, assembled in the house of the respondent, kept waiting till

midnight. The respondent after returning from the theatre, realising that the entire atmosphere was thick with the charge of sexual molestation against him and finding him in a cul-de-sac voluntarily confessed his crime stating that he had raped Tulna and also had committed the same kind of sexual assault on earlier occasions with Richa, Priti and other girls of that locality, but being a Doctor he had been careful enough not to rupture their hymen. When PW 5 on being acerbated and mentally perturbed on hearing the confessional statement rushed towards the respondent to attack him, respondent's brother and sister-in-law fell at the feet of PW 5 and pathetically beseeched not to do anything till the arrival of the parents of the respondent in the next morning.

7. Coming to know of the arrival of the father of the respondent Bhagwan Dass (DW 2) with his wife on the next morning, Madan Gopal (PW 5) along with PWs 6, 9 and 10 met DW 2 who took strong objection for PW 5's behaviour on the last night. When PW 5 informed DW 2 that his son (respondent) had raped his minor daughter Tulna, DW 2 was not prepared to believe their accusation. Thereafter at the request of PW 5, he called his son and questioned him. Though the respondent first abjured his complicity, however, admitted his abominable crime of sexual assault on Tulna. Thereupon Bhagwan Dass gave his stick to Madan Gopal and said that it was for PW 5 either to show mercy or to give corporeal punishment as he deemed fit and also made an earnest appeal to PW 5 not to precipitate any action against his son. Presumably, PW 5 and his family members thinking that the police might not take any action against the respondent since his brother was a Superintendent of Police and his family was wielding a high influence in that area and also fearing that any publicity of this incident would bring only a disrepute to their family and that the future life of their daughter would be completely shattered, suffered in silence for 2 or 3 days, without approaching any authority. However, on September 7, 1982 PW 5 mustered his strength and decided to lodge a criminal complaint against the respondent. Accordingly, he handed over a written complaint Ex. P-7 to his friend, Subhash Bhujbal (PW 8) and go it delivered at the police station. On the strength of Ex. P-7 a case was registered by the SHO

of Jabalpur Police Station (PW 11) and the investigation was entrusted to ASI (PW 14). During the course of the investigation the victim Tulna (PW 13) was examined by Dr Chitra Tiwari (PW 4) on September 7, 1982 on being sent by the police. According to PW 4 there was a abrasion on the medial side of labia majora about 1-1/2" in length, redness present around the labia majora with a white discharge, and hymen was intact and admitted tip of little finger. PW 4 has opined that an attempt to rape had been made. Ex. P-6 is the medical certificate. PW 4 has further stated that she prepared a slide for confirmation of the white discharge found around labia minora. In the cross-examination she has deposed that the white discharge was not flowing out, but it was at the same place where she noticed the redness and the discharge could have been as a result of infection which itself could have caused the redness found around labia minora. Further she has stated that she did not find any crest on labia majora. The Chemical Examiner after examination of the slide, sent his report Ex. P-13 which did not reveal any seminal stains in the vaginal smear. PW2, a Medical Officer examined the respondent on September 13, 1982 and found him as a virile person with well built body capable of performing sexual intercourse, but found no injuries on his person. The Investigating Officer after examining all the witnesses and completing the investigation filed the charge-sheet against the respondent for the offence of rape punishable under Section 376 IPC.

8. The respondent took his trial on the indictment that he committed rape on Tulna between 4 and 5 p.m. on September 2, 1982 in the drawing hall of the house of the respondent. The totality of the evidence on the basis of which the prosecution rests its case consists of three categories, namely, (1) the oral testimony of the PW 13 corroborated by PWs 6 and 12; (2) the extrajudicial confession made by the respondent on two occasions; and (3) the medical evidence. Of the witnesses examined Tulna (PW 13) alone speaks about the actual commission of rape on her. Though Tulna reported this unpleasant incident to Richa immediately after coming out of the drawing hall, Richa has not been examined by the prosecution obviously for the reason that Richa is none other than the niece of the respondent himself. The next set of corroborating witnesses who speak

about the victim's reporting about the incident are PWs 6 and 12. On the evening of the date of incident even though Tulna reported to her mother that the respondent was a bad man and that he asked her to suck his penis, she did not reveal the other part of the incident relating to the commission of the rape obviously fearing that her parents would beat her. It was only on the third day, the mother (PW6) came to know from Tulna about the actual incident, presumably after the victim girl started reporting this incident to PW 12 and to her other playmates. The second category of evidence is the extrajudicial confession made by the respondent before PWs 5, 6, 7, 9 and 10 in the house of the respondent himself after he had been sent for from the cinema hall. According to the above witnesses, this confession was made not only in their presence, but also in the presence of the respondent's brother and sister-in-law (DW 1). (It is but natural that the brother and sister-in-law of the respondent would not figure as witnesses on the side of the prosecution and depose against the respondent.) According to the witnesses the confession made by the respondent was thus:

> "I have raped the girl, but I have not ruptured her hymen. You should not be perplexed, I know what are my limits, I am a doctor. You need not to go to any doctor."

9. Thereafter on the next morning the respondent made the similar confession before his parents in the presence of PWs 5, 6, 9 and 10 when PW 5 asked the respondent to tell the truth before his father by catching hold of him. On the two occasions the respondent confessed in English "I have raped the girl but not ruptured hymen". The last category of the evidence is that of the Medical Officer (PW 4), who examined the victim girl Tulna on September 7, 1982 and opined that there was an attempt of rape on Tulna.

10. The trial court for the discussions made in its judgement arrived at a conclusion that the prosecution launched against the respondent on account of some enmity between the two families and that the prosecution has not adduced any acceptable evidence for holding the respondent guilty of the offence under Section 376 IPC and consequently acquitted the respondent. The reasons assigned by the trial court for such a conclusion are based on its following findings:

(1) The evidence of PWs 5, 6, 7, 9 and 10 is highly tainted and as such no safe reliance can be placed on their testimony.

(2) The extrajudicial confession which the respondent had retracted cannot be said to be free from threat, coercion or promise.

(3) The extrajudicial confession as such seems to be unnatural and it is wholly the product of an illegal advice and false fabrication.

(4) The evidence of the victim (PW 13) is not corroborated by other independent evidence.

(5) The First Information Report has been belatedly lodged and there is no reasonable explanation for such a delay.

11. On being aggrieved by the judgement of the trial court acquitting the respondent, the State preferred an appeal before the High Court challenging the order of acquittal. It is seen from the judgment of the High Court that the complainant who is the appellant before this Court also filed a revision in Criminal Revision No. 596/83 questioning the legality of the order of acquittal and further one Jay Rao of New York (U.S.A.) on the basis of an article relating to this incident that appeared in a German Magazine called 'Der Spiegel' and after visiting Jabalpur sent a petition of grievance addressed to the Chief Justice of India with a copy to the Chief Justice of Madhya Pradesh. On the basis of this petition, another revision in Criminal Revision No. 599/83 was registered. The High Court disposed of the State appeal and the two criminal revisions by a common judgment, whereby it allowed the State appeal for the reasons assigned therein accepting the oral testimony of the prosecution witnesses particularly of PWs 6, 12 and 13 and the extrajudicial confession made by the respondent. No separate orders were passed in the criminal revisions. However, the High Court found the respondent guilty of the offence only under Section 354 IPC and sentenced him to pay a fine of Rs 3,000, in default to suffer simple imprisonment for 6 months and also directed a sum of Rs 2,000 out of the fine amount if collected to be paid over as compensation to PW 5.

12. The State has not preferred any appeal before this Court. However, the father of the victim

girl, namely, PW 5, feeling aggrieved by the judgment of the High Court has filed this criminal appeal mainly on two grounds, namely, (1) The High Court has erred in finding the respondent guilty of a minor offence under Section 354 IPC when all the necessary ingredients to constitute an offence punishable under Section 376 IPC have been satisfactorily established; (2) that the sentence of fine alone imposed by the High Court under Section 354 IPC for this serious offence is grossly inadequate and is not commensurate with the gravity of the offence committed by the respondent. When the matter came up for admission before this Court on August 25, 1988, the following order was made:

> "Special leave granted, confined to the nature of the offence and the sentence to be awarded."

13. It is pertinent to note that the respondent has not challenged the findings of the High Court by filing an appeal and as such the findings of the High Court rendered with reference to the evidence adduced by the prosecution and the conviction based upon those findings have reached their finality so far as the respondent is concerned.

14. Before pondering over the question with regard to the nature of the offence and the quantum of punishment to be awarded, we feel that it is necessary to recall some of the findings of the High Court:

> (1) The High Court after observing, 'there is no reason as to why a small innocent girl would have laid such a serious charge against the respondent, if it was not true', held that the evidence of Tulna has been materially corroborated by her friend Tarun Lata (PW 12).
>
> (2) Referring to the confession of the respondent, it has been held by the High Court, 'Though there can be penetration without rupture, the absence of any sign of injuries, negatives a case of rape with a small girl.'
>
> (3) As regards the evidence of Tulna, the Court has held thus, 'The statement of Tulna can be safely accepted to the extent that the respondent after undressing himself and Tulna, asked her to suck his organ and he then lay over her. She has been fully corroborated by her mother Elsabeth, father Madangopal, friend Tarunlata and neighbours Satish and Sapna. They have no axe to

grind against the respondent. No adverse inference can be drawn for lodging the report 5 days after the incident.'

(4) Then referring to the corroboration required to the extrajudicial confession made by the respondent on two occasions, the High Court has recorded the following observation:

"After realising that his misdeeds have been exposed and he can no longer hide himself, he had no option but to confess. This was the only option left when he was cornered by his own neighbours and relations....There was no question of any coercion or inducement in presence of his family members in his own house....The confession was nothing but by way of repentance for the wrongs done to the young girls and other girls. It appears that the respondent was a perverted person and was satisfying his sexual urge by outraging modesty of young girls who fell easy prey to his designs."

(5) Commenting on the finding of the trial court as regards the confession, the High Court has said, 'The evidence of extrajudicial confession has not been accepted because the witnesses have not repeated like parrots in the same words what the respondent had uttered but the substance is the same i.e. the respondent confessed that he had violated *(sic)* the girl but not ruptured her hymen. Whether the witnesses said the same thing in Hindi or English would not make any difference.'

(6) Coming to the probity question of the evidence of Tulna, the Court said thus:

"Although she was a child, she had modesty allright and was ashamed to tell everything to her mother. She was also not sure what would be the reaction of her mother. Therefore, there was hesitation on her part. But she did tell to her classmate Richa and also to her friend Tarunlata (PW 12) about it on the next day. Tarunlata has corroborated her, ... We are also satisfied that Tarunlata has deposed regarding what she was told by Tulna..."

15. The above findings and observations made by the High Court clearly show that the High

Court was fully satisfied with the evidence of the victim Tulna (PW13) and found sufficient corroboration on all material particulars from the evidence of PWs 5, 6, 9, 10 and 12 and that the extrajudicial confession given by the respondent was true and it was not obtained by any inducement, coercion or threat but on the other hand it was voluntarily made and that there could be penetration without rupture. Having accepted the entire evidence adduced by the prosecution in toto, the High Court nonetheless entertained a doubt with regard to the accusation of rape holding there was no sign of injuries and held that the offence is not one punishable under Section 376 IPC or under Section 376 read with 511 IPC but only one under Section 354 IPC on the ground that the respondent has outraged the modesty of Tulna by "feeling pleasure in getting him and the victim made naked, asking unwary minor girls to fiddle with his organ" taking advantage of the absence of the other adult family members in his house. Coming to the question of sentence, the High Court gave the following reason:

> "The learned Government Advocate has nothing to say about the sentence. There can be no doubt that the act of the respondent is most reprehensible, he was attempting to corrupt innocent and unwary minor girls and his activities were menace to the neighbours, but since he is now gainfully employed and there is nothing to show that he is indulging in his nefarious activities, no useful purpose will be served by again sending him to jail and sentence of fine will meet the ends of justice."

16. As we have pointed out in the preceding part of this judgment, the findings of the High Court, rendered in exercise of its appellate jurisdiction are findings of fact which in our opinion cannot be reopened in this appeal especially when the respondent has not challenged those findings and when there is absolutely no reason much less compelling reason for holding that those findings are either in utter disregard of the evidence or unreasonable and perverse or any part of the evidence in favour of the respondent is jettisoned. However, we would like to point out that the trial court has allowed some inadmissible evidence to be let in by the prosecution which evidence has also been taken note of and discussed by the courts below, such as the statement alleged to have been made by Richa (not

examined) to Tulna about the respondent's abnormal sexual behaviour with her despite the fact that she falls within the prohibited degree of consanguinity and the evidence touching the character of the respondent that he has sexually assaulted not only Richa and Priti but also a number of minor girls. We, while analysing and evaluating the evidence and considering the findings of the High Court qua the sexual assault committed on PW 13 by the respondent, proceed only on the basis of the evidence legally permissible without being influenced by the inadmissible evidence and some of the observations made thereon by the courts below. Before expressing our independent opinion on the evidence, we give a brief background of the status of the witnesses and the cordial relationship between the family members of the respondent and the witnesses.

17. The material prosecution witnesses are all highly educated and respectable people of the same locality within which the houses of the respondent and the witnesses are situated. PW 5, the father of the victim girl had been in Germany working in the field of journalism for nearly 18 years and he is well conversant with English, Germany and Hindi languages. His wife PW 6 is a German lady who after having settled in India has learnt to speak in Hindi. PW 7, who is the sister of PW 5, is also a well educated lady working as a Teacher in a School. PW 6 was enjoying the facility of a telephone connection in his house. PW 9, a Contractor and his wife PW 10, who are the parents of Priti are very respectable people enjoying a high social status and having their house near about the house of the respondent, provided with all modern facilities including telephone etc. It is said that the people in that locality inclusive of the family members of the respondent used to visit their house to make use of their telephone. In that way the family members of the respondent, PWs 5, 9 and others were having a very close and cordial relationship till this incident occurred. As earlier pointed out, respondent's father was a retired Professor and his elder brother was then occupying a key position in the Police Force in the rank of a Superintendent of Police posted in the district of Rajgarh during the relevant period. His sister-in-law (DW 1) was a Lecturer and his uncle was a leading lawyer. It is said that the family of the respondent

was wielding high influence in that area. There is absolutely no evidence, even to remotely suggest, that there was any enmity or any kind of misunderstanding between the families of the respondent and PW 5 till this incident to raise the accusing finger against the respondent either by the little innocent girl (PW 13) or by PW 5 and to make this ignoble allegations at the risk of their family honour and the future prospects of PW 13. Of course, the respondent has suggested a motive against PW 5 evidently drawing the same from the fertility of his imagination that Tulna had told him that her parents were getting money for spying for German Embassy and PW 5 after coming to know of this disclosure of spying has fabricated this false story of molestation of his minor daughter fearing that he would be exposed to criminal prosecution by the respondent's brother, the Superintendent of Police which defence theory on the face of it has to be thrown overboard and which in fact did not find acceptance at the hands of the High Court.

20. Though it is not necessary for us to enter upon a reappraisal or reappreciation of the evidence since the findings of fact of the High Court have not been challenged, yet we after most carefully and closely scrutinising the galaxy of the proven facts, have no hesitation in agreeing with the High Court that the extrajudicial confession made by the respondent which is not shown to have been obtained by coercion, promise of favour or false hope etc. is plenary in character and voluntary in its nature acknowledging his guilt-i.e. the gravely incriminating fact of the commission of rape on Tulna-in precise and explicit words. This confession has been made in presence of a body of persons on two occasions inclusive of the family members of the respondent as well as PWs 5, 6, 9 and 10. PW 7 was present only on the first occasion along with other witnesses. As ruled by this Court in *Piara Singh* v. *State of Punjab*[1] law does not require that the evidence of an extrajudicial confession should in all cases be corroborated. However, coming to the facts of the case, the confession of the respondent is amply corroborated by the evidence of the victim (PW 13) whose testimony in turn is corroborated by PWs 5, 6, 7, 9 and 10 and also by the medical evidence.

21. As regards the evidence of PW 13 relating to the incident, the High Court has accepted only one

part of the accusations, namely, that the respondent asked Tulna to be an active agent of oral copulation by sucking his penis, notwithstanding the fact that the High Court without any compunction has accepted the evidence of PW 13 as being substantially corroborated and the extrajudicial confession of the respondent as being free from any vice and held that "it is beyond comprehension that the complainant would have laid a false and reckless charge against the respondent by involving his own minor daughter Tulna in such unsavory incident for nothing, not caring about her future and his own reputation and honour. There is no reason as to why a small innocent girl would have laid such a serious charge against the respondent, if it was not true." In our considered view, the High Court was not at all justified in reaching a distorted conclusion which has resulted in miscarriage of justice.

22. On a careful scanning of the entire records, we have no reservation in accepting the evidence of PW 13 in its entirety and the extrajudicial confession of the respondent which clearly makes out a case for an offence under Section 376 IPC, the reasons for which we will discuss infra.

23. There are a series of decisions to the effect that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. Vide (1) *Rameshwar* v. *State of Rajasthan*[2], (2) *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*[3], (3) *Krishan Lal* v. *State of Haryana*[4].

24. We shall now briefly deal with the principles regarding the powers of the High Court to review the evidence while examining an order of acquittal sitting in its appellate jurisdiction.

25. An appeal against acquittal provided under Section 378 of the Code of Criminal Procedure falls under Chapter XXIX under the caption "Appeals". This Chapter covers Sections 372 to 394. Whilst Section 374 deals with the 'Appeals from Convictions', Section 377 deals with the 'Appeal by the State Government against sentence'. As

stated above Section 378 of the new Code (corresponding to Section 417 of the old Code) gives the High Court full power to review at large the evidence upon which the order of acquittal was founded and to reach its own conclusions upon that evidence either by reversing the order of acquittal or disposing of the same otherwise as facts therein warrant. In other words, the High Court is clothed with the plenary powers to go through the entire evidence and to come to its own conclusions as warranted by the facts of the case concerned but, of course, subject to certain guidelines laid down by the judicial pronouncements. The Privy Council in *Sheo Swarup* v. *King-Emperor* in dealing with the power of the High Court to review the evidence and reverse the acquittal held thus:

"Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

26. In *Wilayat Khan* v. *State of U.P.* this Court while examining the scope of Sections 417 and 423 of the old Code pointed out that even in appeals against acquittal, the powers of the High Court are as wide as in appeals from convictions. See also (1) *Surajpal Singh* v. *State* (2) *Tulsiram Kanu* v. *State* (3) *Aher Raja Khima* v. *State of Saurashtra* (4) *Radha Kishan* v. *State of U.P.* holding that an appeal from acquittal need not be treated different from an appeal from conviction; (5) *Jadunath Singh* v. *State of U.P.* (6) *Dharam Das* v. *State of U.P.* (7) *Barati* v. *State of U.P.* and (8) Sethu Madhavan Nair v. *State of Kerala.*

28. Reverting to the instant case, if the conclusion of the High Court that the offence made out is only punishable under Section 354 IPC, is scrutinised with reference to the evidence adduced by the prosecution and tested in the light of the above principles of law laid down by this Court, in our view, the conclusion under challenge is not a reasonable and justifiable one since the totality of the evidence demonstrably establishes a graver offence. Moreover, the sentence of fine alone imposed by the High Court even assuming that the offence is punishable under Section 354 is grossly inadequate and is not commensurate with the serious nature of the offence. Of course, this question of the inadequacy of sentence under Section 354 does not come within the purview of our consideration because we proceed on the footing that the offence is not a mere outraging the modesty of woman but much more than that. Further, we are constrained to hold that the High Court even after observing that "the respondent's activities were menace to the neighbours" has shown a misplaced sympathy to the respondent which is patently reflected from the penultimate paragraph of its judgment and which has led to the miscarriage of justice. The impugned finding that the offence is one of outraging the modesty of woman for which sentence of imprisonment is not compulsory is erroneous and untenable.

29. The next crucial question that arises for our consideration is whether the proved facts establish the offence of rape or only attempt to commit rape. Before the High Court, the learned Government Advocate appears to have urged that the offence was punishable under Section 376 read with 511 IPC though the charge was for a specific offence of rape punishable under Section 376 IPC.

30. The medical officer PW 4 who was then only 28 years old, on examining the victim after 5 days of the incident i.e. September 7, 1982 has given her opinion as follows:

"From the above findings, it seems an attempt to rape has been made."

31. In the cross-examination, the following answer is brought out from the medical officer, PW 4:

> "I concluded about attempt to rape, on account of abrasion and redness on labia majora and minora respectively."

32. It is true that this medical officer who could not have gained much experience by that time has given her opinion that the abrasion found would have been less than 2 days' duration which opinion of course is not precise but approximate and probable. Though the prosecutor who conducted the case before the trial court has not put any question clarifying her opinion in the re-examination, it has been clearly brought out in the cross-examination itself that the medical officer was basing her opinion on the abrasion found on labia majora and minora. It means that the medical officer was of the opinion that the abrasion measuring one and a half inches in length found on the medical side of the labia majora and the redness around the labia minora could have been caused even on September 2, 1982. By this opinion, PW 4 has given a margin of 5 days in fixing the probable duration of the injury. The defence counsel has not further pursued and put any question clarifying the subsequent answer given by the medical officer regarding the duration of the injury.

33. Though in the grounds of appeal, it is specifically stated that all ingredients for constituting an offence within the ambit of Section 375, punishable under Section 376 IPC are made out, alternatively a hesitant plea is made that the offence at any rate would not be less than Section 376 read with 511 IPC. We also prima facie were of the opinion that the offence may be punishable under Section 376 read with 511 IPC but after deeply going through the evidence, we have no hesitation in holding that the offence is nothing short of rape punishable under Section 376 IPC. Merely because the inexperienced medical officer has opined that it was an attempt to commit rape, probably on the ground that there was no sign of complete penetration, we are not inclined to accept PW 4's legal opinion as to the nature of the offence committed by the respondent.

34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials

after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

35. Nariman, J. in *Queen* v. *Ahmed Ally*[15] while expressing his view on medical evidence has observed as follows :

> "The evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."

36. Fazal Ali, J. in *Pratap Misra* v. *State of Orissa*[16] has stated thus:

> "... (I)It is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix."

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by *Modi in Medical Jurisprudence* and *Toxicology* (Twenty-first Edition) at page 369 which reads thus :

> "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. *Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victime. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.*"
>
> (emphasis supplied)

38. in *Parikh's Textbook of Medical Jurisprudence* and *Toxicology*, the following passage is found :

> "Sexual intercourse. — In Law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In *Encyclopedia of Crime and Justice (Vol.4) at page 1356*, it is stated :

> "... (E)even slight penetration is sufficient and emission is unnecessary."

40. In *Halsbury's Statutes of England and Wales*, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of Section 44 of the Sexual Offences Act, 1956. Vide (1) *R.* v. *Hughes*[17], (2) *R* v. *Lines*[18] and *R.* v. *Nicholls*[19].

41. See also *Harris's Criminal Law*, (Twenty-second Edition) at page 465.

42. In American jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of *Penal Code of California* reads thus :

> "*Rape; essentials — Penetration sufficient* — The essential guilt of rape consists in the outrage to the person and feelings of the victime of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

43. The First Explanation to Section 375 of Indian Penal Code which defines 'Rape' reads thus :

> "*Explanation.* — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial.

45. Reference also may be made to *Prithi Chand* v. *State of H.P.* though the facts therein are not similar to this case.

46. In the case on hand, there is acceptable and reliable evidence that there was slight penetration though not a complete penetration. The following evidence found in the deposition of PW 13 irrefragably proves the offence of rape committed by the respondent:

"Nawal uncle untied his pyjama and took out his male organ and put in inside my vagina and clutched me... Nawal Chacha put his male organ inside my vagina and since it was fat it kept slipping out. After that my vagina was paining;

... When Nawal uncle held apart, then there was some white liquid coming out from his male organ...

Naval Chacha pressed my mouth so I could not scream."

47. In the cross-examination, the following answer is given:

"I suffered pain by what Naval Chacha did..."

48. When the evidence of PW 1 is taken with the evidence of medical officer who found an abrasion on the medial side of labia majora and redness present around the labia minora with white discharge even after 5 days, it can be safely cocluded that there was partial penetration within the labia majora or the vulva or pudenda which in the legal sense is sufficient to constitute the offence of rape. Moreover, the respondent himself has confessed twice admitting the commission of rape without rupturing the hymen which confession is not disbelieved by the High Court. The respondent is a medical officer who has got the practical knowledge of the anatomy of a human being and the tender sexual organ of a young girl and who must have been quite aware of the implication of his confession having fully understood the meaning of the word 'rape'. Therefore, as admitted by the respondent himself, he without forcibly and completely penetrating his penis into the vagina of PW 13 had slightly penetrated within the labia majora or vulva or pudenda without rupturing the hymen and thereby satisfied his lust after emission of semens. In this context, it is not necessary to enter into any nice discussion as to how far the male organ has entered in the vulva or pudenda of PW 13 since it is made clear that there was penetration attracting the provisions of Section 375 IPC. The evidence of PW 13 is amply corroborated not only by the medical evidence and the corroborating evidence of PW 1`2

but also by the plenary confession of the respondent himself.

49. From the above discussion, we unreservedly hold that the prosecution has satisfactorily established its case that the respondent has committed rape on PW 13 by proving all the necessary ingredients. required to make out an offence of rape punishable under Section 376 IPC.

50. In the result, we set aside the judgment of the High Court convicting the respondent under Section 354 IPC and sentencing him to pay a fine of Rs. 3,000 instead convict the respondent under Section 376 IPC.

51. What would be the quantum of punishment that would meet the ends of justice in the facts and circumstances of the case, is the next question for our consideration.

52. It is very shocking to note from the judgment of the High Court that the Government advocate did not address on the question of sentence. The High Court thought of imposing fine only on the ground that the respondent "is now gainfully employed and there is nothing to show that he is indulging in his nefarious activities". We regret to say that we are not able to understand the above reasons which are not in conformity with the concept of sentencing policy in a grave case of this nature.

53. We are told at the bar that the victim who is now 19 years old, after having lost her virginity still remains unmarried undergoing the untold agony of the traumatic experience and the deathless shame suffered by her. Evidently, the victim is under the impression that there is no monsoon season in her life and that her future chances for getting married and settling down in a respectable family are completely marred.

54. Though the State has kept silent after the disposal of the appeal by the High Court, the helpless panic stricken father of the victim (PW 13) with a broken heart has entered the portals of this Court and is tapping the door, crying for justice.

55. It will be appropriate to refer the following observation of Ranganath Mistra, J. (as the then was) in his separate concurring judgment sitting in the seven-Judge Bench in *A.R. Anthulay* v. *R.S Nayak.*(SCC p. 672] para 83)

"No man should suffer because of the mistake of the Court ... *Ex debito justitiae*, we must do justice

to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."

56. Accordingly, we, having regard to the seriousness and gravity of this repugnant crime of rape perpetrated on PW 13 who was 8 years old on the date of the commission of the offence in1982, while convicting the respondent under Section 376 IPC sentence him to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 25,000 in default to suffer rigorous imprisonment for 1 1/2 years. The fine amount of Rs. 25,000 if realised shall be paid to the victim girl who is not a major. If the fine amount of Rs. 3,000 imposed by the High Court which we have set aside, has already been paid that amount shall be adjusted with the fine amount now imposed by us.

"JUSTICE DEMANDS, THE COURT AWARDS"

57. Before parting with the judgment, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilised society should be mercilessly and inexorably punished in the severest terms.

58. We feel that Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand.

59. The appeal is allowed accordingly.

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(Also reported in 1992 (3) SCC 204)

Narayanamma (Kum)	...	Appellant;
Versus		
State of Karnataka and Others	...	Respondents
State of Karnataka	...	Appellant;
Versus		
Muniyappa and Others	...	Respondent

These two appeals by special leave, one by the State of Karnataka and the other by the victim of the crime, are directed against the judgment and order of the High court of Karnataka in Criminal Appeal No. 157 of 1986 decided on 20-11-1987 recording an order of acquittal in favour of the accused-respondents.

2. Kum. Narayanamma is the prosecutrix. She was about 14 years of age on the date of the commission of the offence. She is illiterate and used to eke out a living, as did her other family members, by working as an agricultural labourer (in common parlance a "coolie"). On 3-10-1983 at about 3.30 p.m. she had gone towards the fields to cut some grass for her cattle, and while she was returning at about 5.00 p.m. with a basket full of grass, she found accused 1, Muniyappa, aged about 23 years standing close to a "Honge" tree on the footpath. When she got close to him, he caught her by the hands, speaking to her suggestively with an evil design. Accused 2 Venkataswamy aged about 17 years emerged from a close-by fence and caught her by the legs. Both of them bodily lifted the prosecutrix by her hands and legs and took her a few feet away in the field of one Gopalappa know as the "field of stones". There Sorghum (jowar) crop was standing and they dumped her on the standing jowar plants which matted. Accused 3, Somanna, aged about 20 years, who was already present there, lifted her clothes, forcibly inserted his organ in the private parts of the prosecutrix as also broke open the hooks of her blouse and squeezed her breasts, while the victim was immobilised by Muniyappa who held her by her hands closing her mouth and Venkataswamy catching her by the legs. Having laid up on the prosecutrix for sometime Somanna

got up and immediately thereafter Venkataswamy indulged in the same act. At that time, Somanna stood close by, and Muniyappa kept holding the hands of the prosecutrix for her resistance had somewhat waned away by that time. She kept raising however screams and cries all the same which attracted one the scene a grazier by the name of Muniswamappa, PW 2. He had seen Muniyappa having immobilised the prosecutrix, Somanna standing close by and Venkataswamy raping her. On Seeing PW 2, the three accused ran away. In the meantime the nephew of the prosecutrix, a child about 9 years named Yellappa PW 7 helped her get up and made her wear her clothes. Then came the sister of the prosecutrix by the name Nagrathna PW 5 and her mother, Venkatagiriamma, PW 6 to whom the prosecutrix narrated as to what had happened to her. They then took her to the village. In the meantime Krishnappa PW 8, brother of the prosecutrix arrived and he too was told by the prosecutrix as to what had happened to her. Then he taking his sister, the prosecutrix as also Nuniswamappa PW 2 went to the Police Station, Bangarpet having travelled a distance of about 9 miles on foot where first information report was lodged on the statement of the prosecutrix much before midnight. The police then went into action by inspecting the spot wherefrom they could recover some pieces of broken bangles belonging to the prosecutrix. The police also took care of arresting the accused and in having them medically examined from Dr Basavaraju, PW 4 on the day following the day of the occurrence at about 1.15 p.m. Beforehand the police had taken care to have the prosecutrix examined by Dr C.V. Reeta, PW 3 immediately after the recording of the FIR within about six hours of the incident.

3. On completion of the investigation, the three accused respondents were put up for trial, Muniyappa constructively with the aid of Section 114 of the Indian Penal code and the other two accused directly for the offence of rape, besides all the three accused for peripheral offences. The trial ended in conviction of the respondents under all counts for which they were awarded terms of imprisonment as disclosed in the judgment and order of the Sessions Judge, Kolar. The High Court reversed that decision and recorded order of acquittal.

4. According to the High Court, the prosecutrix was not a reliable witness as her statement was not corroborated by medical evidence. We on closer consideration of the matter, with respect, differ from the High court. As we view it, the prosecutrix was a reliable witness. She stood corroborated on all material particulars not only by the medical evidence but by the evidence of PW 2 who had appeared on the scene of the crime and seen it being committed, by the accused respondents. The particulars which have attracted adverse comments from the High Court and which we have smoothened in our effort are as follows :

(*i*) According to the prosecutrix, she had been bodily lifted by the Muniyappa and Venkataswamy, respondents, taken to the field of Gopalappa ;where Somanna already present in waiting raped her while she was forcibly laid on the matted jowar crop. Since there were no marks of injury on the back of the prosecutrix and the field was reported to be having stones on the surface, the word of the prosecutrix was doubted by the High Court about the manner in which the crime was committed. The High Court unfortunately did not appreciate the importance of the use of jowar stalks, which in the month of October, when the occurrence took place, would have been more than a man's height and when trampled upon and matted would provide sufficiently a cushion for the crime being committed without the prosecutrix receiving any injury on her back. The surrounding crop would also provide a cover obstructing visibility to a casual passer-by. Thus we view that the absence of injuries on the back of the prosecutrix can be of no consequence in the circumstances.

(*ii*) According to Dr. Reeta, PW 3, the prosecutrix told her that she had been caught hold of by Muniyappa and Venkataswamy and was raped by Somanna. When the prosecutrix had laid claim in the first information report, and to which she stuck to at the trial, that Somanna and Venkataswamy had committed rape on her while Muniyappa immobilised her, the High Court viewed that there was a contradiction made by the prosecutrix when naming only one person as her ravisher to Dr. Reeta, PW 3. Surprisingly, the prosecutrix's statement to Dr. Reeta about her naming one person to have committed rape on her was

not put to the prosecutrix during cross-examination. In the absence of the same being put to her it cannot be said that there was a contradiction for there might well have been an omission which the prosecutrix could supply and render a plausible acceptable explanation. Besides the first assault in any case was by Somanna which was correct; and her statement to the doctor may not have been completed. But that cannot be the end of the matter. This particular, in our view, cannot weigh against the prosecutrix.

(*iii*) The prosecutrix having supplied the details of the crime to her mother PW 6, the mother deposed at the trial that she was told by the prosecutrix that the three accused by name had committed rape on her. This the High Court termed as an exaggration because as is the version Muniyappa had not committed rape. In a sense, Muniyappa facilitated the commission of the crime. He was the initiator and had an active role to play and was equally guilty. The prosecutrix could not be condemned if she conveyed to her mother that he was guilty of the crime of rape committed on her. It could be a difference of perceptions. This particular also does not weigh against the prosecutrix.

(*iv*) According to Dr. Reeta, PW 3 hymen of the prosecutrix was ruptured, admitted two fingers, bled on touch, was reddish in colour, and was painful and tnder. On this basis, the doctor opined tht these were signs of rape. The ability of admission of two fingers and the hymen being ruptured was she did not qualify her statement that it stood ruptured as a of old or carried an old tear. With clear objective in view, the doctor must be presumed to have noticed the hymen as freshly ruptured, as otherwise, the doctor would not have described it in that fashion to be bleeding, tender and painful. The factum of admission of two fingers could not be held adverse to the prosecutrix for it would depend upon the size of the fingers inserted. Experience tells us that when medical experts try to opine about the medical condition of a woman used to sexual intercourse, it is described as admission of two fingers *easily*, but here the doctor qualified her statement by saying that it was painful and bleeding on touch. These conditions obviously related to the hymen. The doctor was thus clear in her opinion that

rape had been committed on the prosecutrix. There was no occasion for the High Court in holding it to the contrary.

(*v*) That there were injuries such as irregular linear contusion on both the breasts of the prosecutrix being 3 to 4 in number, reddish in colour, is also suggestive of force being used on her while she was subjected to the crime. The High Court unfortunately did not give weight to this piece of evidence as it deserved.

(vi) With regard to the vaginal smear examination conducted at a different hospital, Dr. Reeta, PW 3 has reported that no spermatozoa was seen on it, and the absence of sperms has been viewed against the version of the prosecutrix. It was never elicited from the prosecutrix as to whether the two persons who committed rape on her had reached orgasm emitting semen in her private parts. No presumption can be made that penetration of penis in the private parts of a rape victim must necessarily lead to the discover of spermatozoa. It is a question of detail and has to be put to test by cross-examination. Otherwise also there may be various other factors which may negative the presence of spermatozoa such as faulty taking of the smear, its preservation, quality of semen etc. The absence of spermatozoa prima facie could not be allowed to tell against the version of the prosecutrix.

5. It cannot be forgotten that the prosecutrix was 14 years of age. She had no axe to grind in accusing the respondents of the crime and describing the roles played by them in the commission of it. The FIR was lodged by her at the earliest possible time. She was medically examined immediately thereafter within six hours of the commission of the crime. She stood corroborated not only by the medical evidence but also by the evidence of persons who came by and who met her immediately after the occurrence. In particular evidence of Muniswamappa, PW 2 is of great significance. He is an independent witness. There is no reason why he should speak against the accused respondents. The reasons suggested that he had some sort of ill-will with the respondents, is neither here nor there. The prosecutrix also could not be doubted on the supposition that her cries should have attracted some people from the neighbouring fields, or people returning to the village in the evening. Her word could not be disbelieved on mere generalities.

Whosoever was close by such as Muniswamappa, PW 2 was attracted to the scene. He saw what was happening to the prosecutrix. Things spoke to him on their own. The fact that he accompanied the brother of the prosecutrix and the prosecutrix to the police station further lends credence to his testimony.

6. To conclude the aforesaid discussion, we hold that the High Court fell into an error in rejecting the clear and natural testimony of the prosecutrix. We hold her to be a reliable witness. Her evidence not only inspires confidence but is otherwise corroborated on all material particulars. She being below the age of consent, the respondents cannot escape liability merely because no marks on injury on their person suggesting resistance could be found. Thus we have to reverse the judgement and order of the High Court restoring that of the Sessions Judge, Kolar whereunder the respondents were variedly sentenced, as is evidence from his judgement. Though we consider that the sentence awarded by the Sessions Judge was not adequate being barely three years' rigorous imprisonment for the crime of rape such as this, but at this point of time we do not wish to enhance it in these proceedings and would be content in restoration of the orders of the Sessions Judge, Kolar and the conviction and sentences recorded by him. Ordered accordingly.

7. For the aforegoing reasons, these appeals are allowed in the terms and manner abovementioned.

(Also reported in 1994 (5) SCC 728)

State of U.P. ... **Appellant**

Versus

Babul Nath ... **Respondent**

The respondent Babul Nath a young man of 32 years was charged and tried for an offence punishable under Section 376 of the Penal code of committing rape on Kumari Nirmala Devi, a child aged about 5 years , in the afternoon of 15-3-1977 in the grove of one Baleshwar Pathak in village Rampa within the jurisdiction of Police Station Bhadohi, district Varanasi. In Sessions Trial No. 26 of 1978 the learned Session Judge, Varanasi found the respondent guilty of the offence charged with and, therefore, convicted him under Section 376 IPC and sentenced him to suffer imprisonment for five years. On appeal by the respondent the High court rejected the testimony of the sole eyewitness Ram Lakhan, PW 1, set aside the conviction and sentence imposed on the respondent and acquitted him of the charge of rape. The State of Uttar Pradesh has, therefore, approached this Court in appeal under Article 136 of the constitution of India on grant of leave.

2. The prosecution case as it emerges out of the written report made by Ram Lakhan, PW 1, is that on 15-3-1977 at about 4 p.m. when Ram Lakhan, PW 1, Jokhan Ram, PW 2, Kansraj, PW 3 and Kauleshwar while passing by the side of the grove belonging to Baleshwar Pathak of Village Rampa they heard screams and cries of some girl and, therefore, they rushed into the grove where they saw the girl Nirmala lying down on the ground in a semi-conscious state with her private part profusely bleeding and the respondent Babul Nath was seen running away arranging his Dhoti from that place. They arranged for a Khatola (small cot) and proceeded on foot with the girl to Khatola to the Police Station, Bhadohi where Ram Lakhan, PW 1, made a writtin report Ext. Ka-1 which was received by the Head Constable Awadh Narain Singh, PW 4. On the basis of said report Head Constable Awadh Narain Singh prepared a formal chik report Ext. Ka-2 and an offence under Section 376 IPC was registered against the respondent as per Ext. Ka-3.

3. Thereafter, the girl was taken to the hospital, Bhadohi same day

where she was medically examined by Dr. (Mrs.) Santosh Kohali, PW 6, at 10.30 p.m. Dr. Kohali found the girl in semi-conscious state and her general condition was poor. Her pulse was 100 per minute. On external examination the doctor found hymen completely torn and there was laceration on all sides of her vagina. There was fresh bleeding. On internal examination doctor noticed that a finger could be easily inserted in her private part. The bloodstained discharge was coming out. In the opinion of the doctor the girl was subjected to sexual intercourse.

4. At the trial the appellant abjured his guilt and pleaded false implication. He took the plea that he was a barber by profession and since he had left shaving the beards of the complainant and the witnesses and, there being party-bandi in the village he was falsely implicated on that account. The appellant, however, led no evidence in defence. The learned trial Judge relying on the evidence of the solitary witness Ram Lakhan, PW 1, supported by the medical evidence found the appellant guilty for the offence he was charged with and, therefore, convicted and sentenced him accordingly as said above. On appeal by the respondent, the High court took a different view of the medical evidence as well as the evidence of the sole eyewitness Ram Lakhan, PW 1. The High Court was of the opinion that from the medical evidence a reasonable probability was made out that the girl was subjected to indecent assault and it was not proved beyond reasonable doubt that she was subjected to sexual intercourse. With regard to the sole eyewitness Ram Lakhan, the High Court took the view that he lodged the report in the police station after more than 5 hours of the incident and the explanation for the delay in lodging the report was fabricated and that his evidence on two important facts was contradictory to the written report lodged by him and that his evidence in court is not consistent with the first information report and the statement made under Section 161 CrPC. On these premises the High court reversed the findings and recorded the order of acquittal of the respondent.

5. At the very outset we may mention that in an appeal under Article 136 of the Constitution this court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the

evidence by the High court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and findiing is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High court are manifestly perverse and unsupportable from the evidence on record. In the instant case, on a close scrutiny of the evidence on record particularly the statement of the eyewitness Ram Lakhan PW 1, as well as the medical evidence and the law relating to the commission of offence of rape, we are of the definite view that the High court fell into serious error in holding that the victim of this case was subjected only to an indecent assault and was not subjected to sexual intercourse. As regards the evidence of Ram Lakhan, PW 1, and his reliability, the High Court faulted in assessing his evidence correctly as well as in holding that he was not a reliable witness resulting into grave injustice.

6. While appreciating the evidence of the lady doctor smt Kohali, PW 6 the High court observed that the lady doctor conceded that the injuries found on the private part of the girl could also be caused by instrument like a piece of glass and on that basis took the view that the opinion of the lady doctor that rape was committed on the girl becomes doubtful. This finding is wholly unwarranted and perverse for the reason that simply because the injuries found on the private part of the girl could also be caused in several other ways than the sexual assault on the victim cannot lead to the conclusion that the injuries on her private part were not sustained by commission of the rape but by some other instrument in the absence of any material to support such a conclusion. In the present case though the doctor deposed that the injuries could also be caused by instrument like piece of glass but there were neither circumstances nor any material to conclude or even to suggest that the victim had sustained the injuries by any piece of glass. No piece of glass was found at or near the place of occurrence. On the contrary there is positive and convincing evidence showing that there was sexual assault on the girl and the finding that she was subjected to indecent assault is absolutely incorrect.

7. In order to see whether there was sexual assault on the girl we

may have look to the medical evidence. Doctor Smt Santosh Kohli deposed that the victim girl was brought to the hospital in a semi-conscious state and her general condition was poor. On external examination of the girl the doctor found that the hymen was completely torn and there was laceration on all sides of vagina. The doctor noticed that there was fresh bleeding in her private part. On internal examination the doctor found that a finger could easily be inserted in her private part and bloodstained discharge was coming out. Thus from the medical evidence it is clear that the girl was not only subjected to an indecent assault but there was sexual activity and the girl was subjected to sexual assault, otherwise the doctor would not have found the hymen completely torn, laceration on all sides of the vagina and fresh bleeding. There is yet another factor which goes to show that the girl was subjected to sexual intercourse. According to the evidence of lady doctor a finger could be easily inserted inside her private part which otherwise was not possible in the case of a child aged 5 years because according to the *Medical Jurisprudence* by Modi, 21st Edn., p. 376, in a girl under 14 years of age the vaginal orifice is usually so small that it will hardly allow the passage of the little finger through her hymen. In the present case if the girl aged 5 years was not subjected to sexual intercourse the finger could not have been easily inserted in her private part as observed by the lady doctor. The High Court totally ignored this aspect of the matter also and on wrong premises came to the conclusion that the victim was subjected to indecent assault only.

8. It may here by noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows :

> "*Explanation.*— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape"

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence or rape neither Section 375 of IPC nor the explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/ prosecutrix. In other words to constitute the offence of rape it is

not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her.

9. Now coming to the evidence of the sole eyewitness Ram Lakhan PW 1, we find that the observations of the High Court that he fabricated the explanation for delay in lodging the report and that he is not a reliable witness are not correct. It may be pointed out that the girl Nirmala Devi was totally a stranger for informant Ram Lakhan PW 1 and the other persons who attended on her when she was found lying in semi-conscious state with injuries on her private part with profuse bleeding. Ram Lakhan deposed that he, along with others took the girl and proceeded on foot to the police station. They first tried to trace out the identity of the girl and her parentage and then managed for a Khatola (small cot) on which the girl could be taken to the police station which was at a distance of about 3-4 kms from the place of occurrence. He stayed for sometime near his village on the expectation that some more villagers may also join them for taking the victim to the police station. Ram Lakhan categorically stated that scores of persons arrived and he has also given the names of some of the persons. They proceeded to the police station where he lodged a written report. According to Ram Lakhan about 5-6 hours were spent in all this before reaching the police station. There appears to be no apparent reason for fabricating the explanation for the delay in lodging the report which was bound to occur in the facts and circumstances stated above.

10. The evidence of Ram Lakhan has been held to be unreliable as

the High Court found that his statement was not consistent with the report lodged by him and the statement made to the police under Section 161 CrPC. But strangely enough the High court lost sight of the fact that FIR or the written report is not substantive piece of evidence but it can be used only to corroborate or contradict the maker thereof. Ram Lakhan, PW 1, was not confronted with the alleged inconsistent statements contained in his report or in his case diary statement under Section 161 CrPC, yet the High court relied on those statements which is not permissible under the law unless inconsistent statements were put to the witness. In these circumstances the reasons on the basis of which the High court found Ram Lakhan as unreliable witness could not be accepted as the High court made a wrong approach while appreciating the evidence of Ram Lakhan. Ram Lakhan deposed that while he and other persons were passing from near the grove of Baleshwar Pathak they heard the cries of the girl and, therefore, they rushed to the place. It took about 5-10 minutes to them to reach at the place of occurrence inside the grove and it appears that during this period of 5-10 minutes the respondent would have completed his sexual activity on the girl. According to the statement of Ram Lakhan when he reached into the grove and near the place of occurrence he saw the respondent running away from the place of occurrence arranging his Dhoti and the girl was found in semi-conscious condition in a pool of blood. This statement of Ram Lakhan is corroborated from the medical evidence that we have already discussed in the earlier part of this judgment. Thus, the evidence of Ram Lakhan, PW 1, has to be accepted as the same has been corroborated by the medical evidence. Not only this but even the other witness who turned hostile namely, Jokhan Ram, PW 2, has also admitted that the girl was found in a semi-conscious condition and that he along with several persons including the witness Ram Lakhan, PW 1, had taken the unknown girl on a Khatola to the police station where Ram Lakhan had lodged the written report. He also stated that they had reached the police station at about 8.30 p.m. In view of these facts and circumstances the High court fell into a serious error in taking the view that the explanation for the delay in lodging the report was fabricated or that the girl was not subjected to sexual intercourse. The evidence of Ram Lakhan coupled

with the medical evidence clearly goes to establish that the respondent was responsible for sexual assault on the child Nirmala aged about 5 years resulting into serious injuries on her private part and, therefore, he was rightly convicted and sentenced by the learned trial Judge. The judgment of the High court is based on surmises and conjectures and its appreciation of the medical evidence is absolutely faulty. The acquittal, particularly in crimes against girl child encourage the criminals. The courts have, therefore, to be sensitive while dealing with such cases but the High court in this case appears to be far from being sensitive while appreciating the material on the record.

11. In the facts and circumstances narrated above the appeal succeeds and is hereby allowed. The judgment and order of acquittal recorded by the High court is set aside and the judgment of the trial court holding the respondent guilty for the offence punishable under Section 376 and imposing a sentence of 5 years' rigorous imprisonment is restored. The respondent shall be taken into custody to serve the sentence. His bail bond is herby cancelled.

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(Also reported in 1994 (6) SCC 29)

Ranjit Hazarika ... Appellant

Versus

State of Assam ... Respondent

1. Through this appeal by special leave, the appellant has called in question his conviction and sentence for the offence under Section 376 IPC as recorded by the trial court and upheld by the High Court of Assam.

2. According to the prosecution case, the prosecutrix, a young girl of 14 years of age (according to the medical evidence, the age was clinically found to be between 13 - 17 years) was subjected to rape by the appellant on 18-5-1987. The prosecutrix was witnessing a performance along with her girl friends at Dhanaising Chapori which finished at about 3.30 a.m. As she was leaving for her home, the appellant offered to walk with her to her house but on the way, subjected her to sexual intercourse without her consent and threatened her not to inform anybody about the occurrence. The prosecutrix, after having been subjected to rape, rushed to her house and informed her parents about the occurrence. The FIR was lodged at Teaok Police Station. The investigation was taken in hand. The prosecutrix was sent up for medical examination and after completion of investigation, the appellant was tried for the offence under Section 376 IPC.

3. The prosecution, in support of its case, examined apart from the prosecutrix, her parents, besides the doctor and the investigation officer. The appellant, in his statement under Section 313 CrPC, denied the prosecution allegations.

4. The prosecutrix has, in her statement recorded at the trial as also her earlier statement recorded under section 164 CrPC, clearly narrated the manner in which the appellant forcibly performed sexual intercourse with her without her consent on the roadside after taking the prosecutrix forcibly in his arms and removing her panties. Her statement has remained virtually unchallenged in the cross-examination. The statement of the prosecutrix has been amply corroborated by her mother and her father, PW 2 and PW 3 respectively, who are the two persons to whom the prosecutrix immediately narrated the story

about the occurrence. Their evidence was not challenged in the cross-examination at all.

5. The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any inquiry on her private parts. To constitute the offence of rape, penetration however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".

6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated.

7. Both the courts have considered the evidence of the prosecutrix and relied upon the same. We see no reason to take a

different view. Even though no corroboration of her testimony was essential to record the conviction of the appellant, we find that in this case there is sufficient corroboration of the testimony available from the evidence of her parents, PW 2 and PW 3. The conviction and sentence of the appellant are well merited and have been recorded on a proper appreciation of evidence. This appeal has no merits. It fails and is dismissed.

(Also reported in 1998 (8) SCC 635)

State of Tamilnadu ... Appellant;

Versus

Suresh and Another ... Respondent.

A young enceinte housewife fell from the top of a four storeyed building down on the pavement of a street at Madras during the odd hours on the night of 9-6-1987 and died in a trice with her skull and the bones extensively broken into pieces. Initially it was taken by the neighbours and the police as a case of suicide, but eventually it became a case of gruesome murder. Her husband, a flourishing businessman at Madras (now Chennai) and his brother (another businessman) and two of their employees were put on trial in the Sessions Court for criminal conspiracy, rape and murder. One of the culprits was made an approver and he gave evidence in support of the prosecution case. The Sessions Court acquitted the husband of the deceased but convicted the other two persons of murder and rape and sentenced both of them to death.

2. A Division Bench of the High Court of Madras heard the reference which was made under Section 366 of the Code of criminal Procedure on the sentence of death, along with the appeals preferred by the convicted persons as well as the appeal preferred by the State in challenge of the acquittal. The division Bench confirmed the acquittal and set aside the conviction and sentence passed by the Sessions Court. Hence the present appeals by special leave.

3. The first accused Ramesh Kumar and his younger brother Suresh Kumar (A-2) hail from Rajasthan, and they have settled down in Madras. Each of them acquired separate business establishments. Ramesh Kumar, the eldest, had married Kamla Devi (the deceased) who was then only 19 and belonged to a less affluent family in Rajasthan, about four years before her death. Thereafter the couple lived on the top floor apartment of a multistoreyed building situated on Thulasinga Mudali Street at Madras. The second accused Suresh Kumar got married to a girl from Rajasthan a few months before the occurrence but he did not bring his wife to Madras from Rajasthan. He too was residing with his elder brother Ramesh Kumar on 4th floor of the

building. Kamla Devi (deceased) had a little child (Sandeep) who was only 4 years' old when she died.

4. As the business of first accused expanded he started entertaining a feeling that if he had married from a rich family he would have got a handsome dowry. This led to some estrangement between the spouses. The second accused Suresh Kumar did not see eye to eye with Kamla Devi (deceased) for certain reasons of his own, one among them alone has come to the forefront in evidence that he believed that Kamla Devi was injecting hatred in the mind of his brother that A-2 was becoming a habitual drunkard.

5. In the above backdrop, the synopsis of the prosecution case having an eerie profile, can be narrated as follows:

A couple of days prior to the death of Kamla Devi her husband Ramesh had gone abroad (Singapore) in connection with his business and before he left India he and the other three culprits had entered into a criminal conspiracy to finish Kamla Devi off during his absence. After he left, the second accused informed the remaining culprits that the best way to achieve the target was to drop her down from the top floor of the building so that it would appear to the rest of the world that she had committed suicide.

6. On the midnight of 9-6-1987 when everybody else was asleep the three culprits (A-2 Suresh, A-3 Kuman Singh and PW 1 Bhoparam) moved from the room on the 4th floor where they were to sleep and entered the room where the deceased was sleeping with her little child Sandeep. They first gagged her mouth with a cloth but then she woke up and instinctively resisted the onslaughts of the assailants. But, she was overpowered and the third accused pressed her neck and mouth on the direction of the second who was holding her in his grip while she was struggling to squirm out of the lethal grip. In that melee the bangles on her hand broke down. PW 1 caught hold of her legs and the second accused sexually molested her in that condition. A-3 also ravished her on being prompted by the second accused. Though PW 1 was also persuaded to do the same on her he did not do it as he found that she was unconscious. Then all the three persons lifted her up and brought her to the balcony and tried to drop her down. But somehow she regained consciousness then

and gripped on the parapet frieze but the assailants exerted greater force in pushing her down and she lost her grip and fell deep down from such a height of the four-storeyed building— she died instantaneously.

7. The entire prosecution case revolved on the solitary evidence of the approver PW 1 Bhoparam. Learned trial Judge relied on his evidence with the aid of some corroborative circumstances and found A-2 Suresh and A-3 Kuman singh guilty of rape and murder.

8. It was difficult for the High Court to act on the evidence of the approver mainly for two distinct reasons: (i) His version of the occurrence is fraught with improbabilities and hence it did not inspire confidence; (2) He being an accomplice his evidence is unworthy of credit even otherwise, as it did not receive adequate corroboration from any source. Hence the conviction and sentence were set aside by the High Court.

9. Learned counsel for the appellant contended that the Division Bench of the High Court did not make a pragmatic approach to the evidence of PW 1, and it resulted in the improper rejection of the evidence of an eyewitness to such a dastardly prepetrated crime. The counsel further contended that if strict adherence to the rule of corroboration of the evidence of an accomplice witness is inssisted, as done by the High Court in this case, no approver evidence would stand scrutiny in any case and the consequence would be miscarriage of justice. Learned Judges expressed a regretful note in the judgment by way of an epilogue in the following lines:

"We are really pained to note that the prosecution was not able to bring home the persons really involved in this crime. Even though there is a lurking doubt in our mind as to the involvement of one or more of the accused in this crime, they cannot be punished on such a doubt, however strong it might be... Folllowing the high traditions of criminal jurisprudence in our country, we are not inclined to send the accused to the gallows on mere suspicion, and on the evidence stands uncorroborated."

10. We have perused the evidence carefully and considered the reasoning of the learned Judges, but we are unable to pe;suade ourselves to concur with the judgment of the High Court.

11. How Kamla Devi would have died can be inferred from the post-mortem appearances noted by PW 22 Dr Cecila Cyril, (Additional Professor in the Department of Forensic Medicine of the Medical College, Madras) who conducted the autopsy on the dead body. the doctor found that the deceased was pregnant by 4 weeks. After listing all the ante-mortem injuries in Ext. P-41 (post-mortem certificate) the doctor opined that her death might have been on account of the head injuries as well as asphyxia due to smothering and compression of neck. There are enough data to support the conclusion that Kamla Devi would have been smothered by pressing her mouth and neck. Injuries 1 to 7 are abrasions and contusions and lacerations around the lips. Injuries 17 to 24 are similar injuries on the chin and neck and also on the lower part of the nose. None of her teeth was affected. From all the above features we can unhesitatingly accept the doctor's opinion that Kamla Devi would have been subjected to forceful smothering.

12. The skull of the dead body had extensive fractures and brain matter was found protruding. There were fractures on the sternum and on the ribs. While giving evidence the doctor concurred with the suggestion of the prosecution that "there was very good chance of the victim being alive after sustaining the injuries due to smothering and compression of neck when she would have been in a condition of shock. After smothering and compression of neck she could have been alive for a few minutes depending upon her power of volition.".

13. PW 1 Bhoparam narrated the evidence which preceded and succeeded the occurrence and gave a complete picture in vivid detail of the occurrence. It would be unnecessary to repeat his evidence as it is consistent with the prosecution story summarised above. PW 1 deposed that the neighbours and relatives of the deceased were informed of the death of Kamla Devi and they all arrived and her husband A-1 also flew down from Singapore. He further said that on the third day he went to the house of his brother-in-law (PW 6) and stayed there for 6 days and then went to Mahabalipuram (a suburb of Madras) where he got a temporary employment in the tea shop of PW 15. On 24-6-1987 he happened to notice his photo in a Tamil daily and then he rushed back to PW 6's

house and made a shrift to him of all what happened and with the help of PW 6 he surrendered to the police.

14. The High Court seems to have accepted the contention of the defence counsel that PW 1 would have been in police custody from 10-6-1987 till 25-6-1987 (when he was produced before the magistrate). The following reasons were advanced by the High Court for accepting the said defence contention. The first is, as first accused had offered money to PW 1 for carrying out the operation PW 1 would normally have remained in the house until the money was paid. (PW 1 could not have remained in the same house as tension would have been mounting up in his mind and it was only natural that he would have moved out of that jinxed house instead of lingering on there as money could have been collected even at a later stage.) The second is that PW 1 was unable to remember the names of PW 6's employees, and if he had really stayed in that house he could have remembered those names. (This is too fragile a reasoning as one may or may not remember the names of such employees particularly his mind would then have been preoccupied with thoughts about the horrendous crime committed by them.) The third is that he failed to disclose the incident to PW 6 or to his employer PW 15. (It is too much to expect that PW 1 would have readily divulged it to anyone else at the first instance because the whole episode was perpetrated by the culprits in secrecy.) The fourth reason is that PW 1 did not read newspapers during the interregnum and that indicates his absence in the free world. (There is nothing on record to show that this employee of A-1 was regular newspaper reader, without which such an inference is out of place.)

15. All the above reasons are hence very tenuous grounds for disbelieving the version of PW 1 that he had stayed with PW 6 and PW 15. Learned Judges of the High Court should have appreciated his testimony in the light of the evidence of PW 6 and PW 15 against which nothing has been pointed out either by the High court or before us as to why those two witnesses should have perjured in court about PW 1's sojourn with them.

16. The High Court did not believe the case of PW 1 that A-2 and A-3 would have sexually ravished Kamla Devi. The sole circumstance which the learned

Judges highlighted on that score is the absence of semen or spermatozoa in the vaginal swab collected from the dead body as the result If laboratory analysis of the swab showed. The High Court seems to have overlooked the following data available in the post-mortem; report which is a very telling circumstance regarding the sexual molestation the victim would have been subjected to:

"Bruising of tissues on right side of vagina 2 x 1 x 1/2 cm; bruising is reddish blue in colour. Bruising over the anterior lip of the cervix."

Dr Cecila Cyril (PW 22) had no doubt that the above features are consistent with the victim offering resistance against forcible sexual intercourse. The doctor witness emphatically repudiated the suggestion that such bruises could have been caused in a fall. In view of the above, the High court went wrong in negativing the version of PW 1 regarding sexual ravage merely on the basis of non-detection of semen or spermatozoa in the vaginal swab. There could be more than one explanation for absence of semen in the vaginal swab. We have no doubt that Kamla Devi would have been made a victim of a forcible sexual assault.

17. Once of the points which dissauded the High court from believing the version of PW 1 is the most abominable and despicable act attributed to A-2 vis-a-vis his own sister-in-law. The High Court has stated thus on that aspect:

"Even if there was some reason for A-2 to end the life of the deceased with a view to secure peaceful life for his brother, certainly he would not have resorted to the most inhuman method of committing rape on his own brother's wife that too, along with two of his servants."

18. Learned counsel for the accused also repeated the same reasoning before us in support of his contention that such an act of barbarity would be unthinkable and counter to the social order for a brother to do it on his sister-in-law. We too agree that if A-2 had done those acts attributed to him ;then it would have been woeful and despicable of a human conduct.

19. We have considered the said contention with the seriousness it deserves. One thing is clear that somebody had done it on her during that night. Whoever had done those acts during that night i.e. by sexually molesting her and then dragging her and throwing her

living body down from the balcony, the assailant would have been someone who was simmering with unquenchable grudge towards her. It is extremely remote that a burglar or a stranger rapist would have gatecrashed into the house and done all those atrocities on that helpless woman when the house was occupied by 3 adult male members. It must be remembered in this context that even the defence had to suggestion that the deceased had any enemy outside, for, if she had any such enemy that fact would not have escaped from the knowledge of her husband, if not of A-2 also. If PW 1's version is true A-2 had his own grudge towards the deceased. The intensity of that grudge was known only to himself or perhaps the deceased also. If A-2 had decided to kill his sister-in-law in such a savage manner by thowing her from the balcony that itself would indicate the superlative degree of gravity of his wrath towards her. With such a mind simmering with acerbity he would as well have thought to subject her to excruciating mental pain by devastating her womanhood in the manner it was done on her. So the degree of woefulness of the onslaught is not enough to militate against the horrendous nature of the crime.

20. We are hence totally unable to agree with the view of the High Court that the story narrated by PW 1 lacked probability. After all PW 1 is an accomplice and hence his narration would be incriminating to him also.

21. The testimony of an accomplice is, no doubt, a stigmatised evidence in criminal proceedings. It is on account of the inherent weakness which such evidence is endowed with that illustration (*b*) to Section 114 of the Evidence Act suggests that it is open to the court to presume that the uncorroborated testimony of an accomplice is unworthy of credit. But the legislature had advisedly refrained from including the said category of evidence within the ambit of legal presumptions but retained it only within the area of factual presumptions by using the expression "the court may presume". In order to make the position clear the same enactment has incorporated Section 133 saying that it is not illegal to convict a person on the uncorroborated testimony of an accomplice. The raison d'tre for such legislative marshalling is to enable the court to have its freedom to act on the evidence of an accomplice in appropriate cases, even without

corroboration if the court feels that a particular accomplice evidence is worthy of credence.

22. Thus, the law is not that the evidence of an accomplice deserves outright rejection if there is no corroboration. What is required is to adopt great circumspection and care when dealing with the evidence of an accomplice. Though there is no legal necessity to seek corroboration of accomplice's evidence it is desirable that the court seeks reassuring circumstances to satisfy the judicial conscience that the evidence is true.

23. A Bench of three Judges of this Court in *Dagda v State of Maharashtra* has laid down the legal position after making a survey of the case-law by referring to *Rameshwar v. State of Rajasthan* and a number of other decisions of this Court as well as of English Courts. Chandrachud,J. (as the learned Chief Justice then was) has stated for the three-Judge Bench as follows: (SCC pp. 74-75, para 21)

"*21.* There is no antithesis between Section 133 and illustration (*b*) of Section 114 of the Evidence Act, because the illustration only says that the Court 'may' presume a certain state of affairs. It does not seek to raise a conclusive and irrebuttable presumption.

Reading the two together the position which emerges is that though an accomplice is a competent witness and though a conviction may lawfully rest upon his uncorroborated testimony, yet the Court is entitled to presume and may indeed be justified in presuming in the generality of cases that no reliance can be placed on the evidence of an accomplice unless that evidence is corroborated in material particulars, by which is mean that there has to be some independent evidence tending to incriminate the particular accused in the commission of the crime.... All the same, it is necessary to understand that what has hardened into a rule of law is not that the conviction is illegal if it proceeds upon the uncorroborated testimony of an accomplice but that the rule of corroboration must be present to the mind of the judge and that corroboration may be dispensed with only if the peculiar circumstances of a case make it safe to dispense with it."

24. This is not a case where evidence of PW 1 is totally berefit of any reassuring circumstance. The occurrence as featured by PW 1 is supported by the following circumstances:

(*1*) Post-mortem appearances noted by PW 22 Dr Cecila Cyril.

(*2*) Broken bangles found on the floor of the room and on the balcony.

(*3*) The admission of A-2 and A-3 that they along with PW 1 were present in the same flat during that night. (It is quite improbable that any outsider would have made an entry into this apartment during that night and with or without the help of PW 1 would have made all those atrocious acts least distrubing the sleep of her four year-old son hubbling on the mother or the sleep of A-2 and A-3.)

(*4*) The statement by PW 6 that on 24-6-1987 PW 1 told him of this incident in which he involved all the three culprits.

25. The section envisages two categories of statements of witnesses which can be used for corroboration. First is the statement made by a witness to any person "at or about the time when the fact took place". The second is the statement made by him to any authority legally bound to investigate the fact. We notice that if the statement is made to an authority competent to investigate the fact such statement gains admissibility, no matter that it was made long after the incident. But if the statement was made to a non-authority it loses its probative value due to lapse of time. Then the question is, within how much time the statement should have been made If it was made contemporaneous with the occurrence the statement has a greater value as res gestae and then it is substantive evidence. But if it was made only after some interval of time the statement loses its probative utility as res gestae, still it is usable, though only for a lesser use.

27. What is meant by the expression "at or about the time when the fact took place"? There can be a narrow view that unless such a statement was made soon after the occurrence it cannot be used for corroboration. A broader view is that even if such statement was made within a reasonable proximity of time still such statement can be used for corroboration. The legislature would not have intended to limit the time factor to close proximity though a long distance of time would deprive it of its utility even for corroboration purposes.

28. We think that the expression "at or about the time when the fact

took place" in Section 157 of the Evidence Act should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Section 157 of the Act. The test to be adopted, therefore, is this : Did the witness have the opportunity to concoct or to have been tutored? In this context the observation of Vivian **Bose, J.** In *Rameshwar v. State of Rajasthan* is apposite:

"There can be no hard and fast rule about the 'at or about' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or..... (emphasis supplied)

29. Hence when PW 1 disclosed to his brother-in-law (PW 6) on 24-6-1987 about his version of the occurrence we have not come across anything to indicate that PW 1 was either tutored influenced by anybody during the interregnum. Looking at the statement from that perspective we are inclined to treat it as a corroborative piece of evidence giving us a reasurrance regarding the truth of PW 1's evidence in court so far as the persons involved in the episode are concerned.

30. Shri Ranjit Kumar, learned counsel for A-3, took much pains to impress us that PW 1's version that they trekked along a cornice to reach the deceased's room, is highly incredible as they could easily have walked through the normal passage. PW 1 has an explanation for choosing that circuitous route. But we are no interested to know why they chose a longer passage to reach the deceased's room. What we know is that they reached her room during that midnight hour.

31.The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A-2 and A-3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the

conviction passed against A-2 and A-3, though we are not inclined, at this distance of time., to restore the sentence of death passed by the trial court on those two accused.

32. In the result, we allow the appeals and set aside the judgment of the High Court of Madras and restore the conviction passed by the trial court under Section 302 and 376 read with Section 34 of the IPC as against A-2 Suresh and A-3 Kuman Singh, and we sentence them each to undergo imprisonment for life on the first count and rigorous imprisonment for a period of 10 years on the second count. Sentences of both counts will run concurrently. We direct the Sessions Judge, Madras (now Chennai) to take immediate steps to put the aforesaid convicted persons in jail for undergoing the sentence.

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(Also reported in 1998 (2) SCC 372)

State of H.P. ... Appellant;

Versus

Lekh Raj and Another ... Respondents

2. The prosecutrix, a widow of 55 years of age was criminally assaulted and subjected to forcible sexual intercourse by the respondents on 10-11-1993 near her village Baadi in Gumanu Nalla, District Mandi, Himachal Pradesh when she was coming back to her house after attending the marriage of the daughter of her husband's brother. The first information report was submitted by her on the next date against the respondents. She was medically examined and her torn salwar was sent for chemical analysis. On medical examination various injuries were found on her person. As the prosecutrix was found habituated to sexual intercourse, being an elderly woman and mother of two grown-up children, no opinion was possible about the last date of sexual act. However the doctor upon examination of the injuries, mentioned in the medico-legal certificate, was of the opinion that the injuries reflected the signs of a struggle. The trial court of Sessions Judge, Mandi convicted the respondents under Sections 376(2)(g) and 323 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for five years and to pay a fine of Rs 5000 each under Section 376 IPC and six months' rigorous imprisonment under Section 323 with a fine of Rs 500 each. In default of the payment of fine, the appellants were to undergo further rigorous imprisonment specified in the judgment. In the appeal filed by the appellants the High court vide order impugned in this appeal set aside the order of Sessions Judge and acquitted the respondents of the charges framed against them. Alleging that the judgment of the High Court was against law and facts, the State has preferred this acquittal appeal...

* * *

5. We are, however, of the opinion that the High Court was not justified in holding that the prosecutrix had not been subjected to forcible sexual intercourse or the prosecution had failed to prove the case against Respondent 1 also. To hold that the prosecution had not proved the case against the respondent, beyond reasonable

doubt, the High Court mainly relied upon the medical evidence and finding that "no dead or alive spermatozoa were seen. Absence of such dead or mobile spermatozoa either in the vagina or in the cervix of the prosecutrix rules out the possibility of the prosecutrix having been subjected to sexual intercourse on the date and time alleged by the prosecution". Such a conclusion is not referable to any evidence on record. No such suggestion was put to the doctor nor any medical authority referred to in support of the conclusions arrived at by the High Court. This Court in *State of Maharashtra* v. *Chandraprakash Kewalchand Jain*[2] relying upon medical evidence observed that "spermatozoa can be found if the woman is examined within 12 hours after intercourse, thereafter they may be found between 48 and 72 hours but in dead form". If the prosecutrix washes herself by then, the spermatozoa may not be found. In that case the Court after satisfying itself regarding the presence of semen on the clothes of the prosecutrix held that "the absence of semen or spermatozoa in the vaginal smear and slides, cannot cast doubts on the creidt worthiness of the prosecutrix".

6. Modi in his *Medical Jurisprudence and Toxicology* has noted :

> "The presence of spermatozoa in the vagina after intercourse has been reported by Pollack (1943) from 30 minutes to 17 days, and by Morrison (1972) up to 9 days in vagina and 12 days in the certix. However, in the vagina of a dead woman, they persist for a longer period."

It follows, therefore, that the presence of spermatozoa, dead or alive, would differ from person to person and its positive presence depends upon various circumstances. Otherwise also the presence or absence of spermatozoa is ascertained for the purposes of corroboration of the statement of the prosecutrix. If the prosecutrix is believed to be a truthful witness in her deposition, no further corroboration may be insisted. Corroboration is admittedly only a rule of prudence.

* * *

...The other circumstances which prevailed upon the High Court to pass the order of acquittal is that the sealing of salwar Exhibit P-1 was not properly established.

It is not denied that the seized salwar had stains of blood and semen on it. The mere fact that some different marks were noted on the sealed packet was by itself no ground to discard the otherwise reliable evidence of the prosecutrix. The High Court appears to have completely ignored the medical evidence specifying the injuries on the person of the prosecutrix which proved and established the struggle and resistance shown by her at the time of commission of the offence of rape. The doctor had noted the following injuries on the person of the prosecutrix.

"1. There was a small abrasion on right side of her forehead with clotted blood.

2. There were abrasions on extensive surfaces on both legs and left knees which were reddish-brown in colour.

3. There were multiple abrasions on lateral surface of both thighs.

4. There was a bruise on posterior surface on left thigh.

5. There was also bruise on left buttock 4" x 3" in size.

6. Abrasion on left side of back in lumbar region."

These injuries were sufficient to lend corroboration to the testimony of the prosecutrix particularly when no motive is attributed to her for falsely involving Respondent 1 in the commission of the crime. The prosecutrix, in her cross-examination, had denied even the suggestion that the injuries sustained by her were sustained while cutting grass in the jungle. She had also denied that she was a liquor addict. The suggestion regarding the existence of a dispute between Lekh Raj respondent and her husband over the fishing net was also not admitted. She also denied the suggestion that the accused persons had neither met her nor committed any rape. The suggestions in cross-examination were not rightly believed by the courts below to hold the existence of a motive for falsely implicating the respondents. During the arguments before us also the learned counsel for the appellant could not point out to the existence of any motive for falsely implicating the respondents. The fact that the prosecutrix was a widow of about 55 years of age having two grown-up children was a circumstance to be taken note of for the purposes of satisfying the Court that there was no Interior motive of roping the accused in the commission of crime...

9. One of the discrepancies which persuaded the High Court to disbelieve the prosecution evidence is the alleged shifting of the place of occurrence from the main road to 20 feet away from it. The prosecutrix has categorically stated that she was dragged from the road down the path which was about 20 feet away from the road and raped there. The discrepancy or contradiction pointed out is that in the FIR which was submitted in writing and was in the English language, the place of occurrence was mentioned as road. Such mention was based upon recording of the complaint by Shri S.P. Parmar, Advocate, after hearing the narration of the prosecutrix whom he found at that time to be scared, nervous and hesitant. Such a discrepancy cannot be held to be a major discrepancy amounting to contradiction under the circumstances of this case. It is not disputed that the statement of the prosecutrix under Section 161 was recorded immediately and in that statement she had not alleged to have stated that the occurrence had taken place on the road and not away from the road. She was categoric in stating that the accused persons grappled with her on the path and took her down at a distance of about 20 feet where they committed the crime. It is alleged that such a discrepancy was fatal inasmuch as the road was motorable one and had the occurrence taken place there, a number of witness could have seen the occurrence. The argument is without any substance inasmuch as it has come in evidence that the road was not a thoroughfare and only one or two vehicles used to ply on it.

10. The High Court appears to have adopted a technical approach in disposing of the appeal filed by the respondents...

* * *

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 hypertechnicalities 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. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind.

11. The learned Additional Sessions Judge has noted the following facts to find the accused guilty of the commission of crime:

> "(i) According to the prosecutrix both the accused persons had grappled with her and she was made to lie down on the earth and in that process she sustained injuries on her body and these injuries were noticed at the time of her examination by PW 1 Dr. Maulshri Lata as stated above, which are also described in the medico-legal certificate Ex. PA and synchronise with the time of alleged incident. The possibility of sustaining these injuries in the agricultural operations is of no use when there is direct evidence to show that these injuries have been sustained by her in a particular way, as stated by her when examined in the court and she was also subjected to a lengthy cross-examination by the accused persons.
>
> (ii) At the time of contacting her advocate, Shri S.P. Parmar, PW 11, she was scared and hesitant.
>
> (iii) The place of the alleged incident was pointed out 20-feet down the road, by her to the investigating officer on the basis of which the site plan Ex. PG was prepared.
>
> (iv) The prosecutrix is a widow. She was living with her

son. The alleged incident took place on 10-11-1993 in the evening. She lodged the complaint on 11-11-1993 and on the same date, presented it before the Superintendent of Police, Mandi and thereafter the case was registered on the same day, i.e., on 11-11-1993 In Police Station Sadar, Mandi

(v) She did not consent to sexual act, but complained against it to the police as aforesaid and also testified it on oath. Since the case falls under Section 376(2)(g) of the Penal Code, thus the presumption as required under Section 114-A of the Evidence Act has to be drawn against the accused person.

(vi) On 12-11-1993 the salwar Ex. P-1 of the prosecutrix was taken into possession. It was torn and there were some stains over it. It was sealed in the presence of S/Shri Babu Ram and Padam Singh with seal impression 'M'. This act has not been disputed by the accused persons. It was sent for examination to the Forensic Sciences Laboratory, Shimla, and on its examination report Ex. PH was received which showed presence of human blood and semen. Further, with reference to this, it is to be noticed that she was a widow."

We agree with the conclusion arrived at by the learned Sessions Judge on proper appreciation of evidence so far as Respondent 1 is concerned. We have also critically analysed the statement of the witnesses and have come to the conclusion that the prosecution has proved its case against Respondent 1 beyond all reasonable doubts.

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(Also reported in 2000 (1) SCC 247)

State of H.P. ... Appellant;

Versus

Mango Ram ... Respondent

This appeal has been filed by the State of Himachal Pradesh against the acquittal of the accused for the offence under Section 376 IPC. The respondent-accused was tried by the Court of Sessions Judge, Chamba Division of Himachal Pradesh alleging that he committed rape of a girl aged 13 years.

2. The prosecution case is that the prosecutrix was the eldest daughter of Jagia Ram. Jagia Ram is a small agriculturist residing with his wife Smt Pinji and children in a village by the name of Kuthed. He is a native of neighbouring Village Bhadhad. The accused is his brother-in-law being the brother of his wife, Smt Pinji. the accused was aged about 17 years and was a student of VIIIth standard during the relevant time. On 17-4-1993, Smt Pinji asked her daughter to go to Village Bhadhad and get the plough kept in the house of Jagia Ram. The prosecutrix left for Bhadhad at about 6.00 p.m. on 17-4-1993. The accused also accompanied the prosecutrix. When she entered her father's house at Bhadhad to get the plough, the accused followed her and when she reached the cowshed, she was caught by the accused from behind. The prosecutrix tried to extricate herself from him but she was overpowered by the accused and was made to lie on the floor of the cowshed. The accused then untied the know of her salwar and lift (*sic*) it down and thereafter, committed sexual act. There was bleeding from her private parts. The prosecutrix returned home immediately and told her father Jagia Ram about the incident. Jagia Ram went to PW 8, Shri Devi Chand, Pradhan of the Gram Panchyat of the area who, in turn, advised to lodge a complaint to the police. Jagia Ram reported the matter to the police. As the prosecutrix was having a severe pain and uncomfort (*sic*), she did not accompany her father to the police station.

3. The police registered the case and investigation was commenced. The prosecutrix was subjected to medical examination by PW 2 Dr Veena Sehgal. The accused was arrested and PW 1 Dr Hemant Sharma examined him. Police

visited the place of occurrence and recovered a bloodstained piece of cloth. The salwar and kameez worn by the prosecutrix at the time of the occurrence were also recovered. In the course of investigation, the police collected a family history book which indicated the age of the prosecutrix and the accused.

4. The piece of cloth recovered from the place of occurrence and the kameez worn by the prosecutrix were found to be stained with blood and on serological test found to have blood of A +ve group. Even though, there were some bloodstains on the salwar, the grouping could not be made. The undergarments worn by the accused during the relevant time were also recovered and subjected to chemical examination and they neither contained blood nor spermatozoa.

5. The prosecutrix was medically examined by PW 2 Dr Veena Sehgal. She observed as under :

> "She was a girl of average build, conscious, well oriented in place and time. Height 4' 10½", weight 31 kg. breasts and papillae were elevated as small mounds and there was enlargement of areolae's diameter. Axillary hair were not developed. Pubic hair were not developed. She was referred to dentist for examining her dental age. There were no marks of violence over the breasts, nipples, cheeks and lips. No marks of violence were seen on the external genitals, perineum, abdomen, chest, back, limbs, neck and fact. Menarche not yet attained.
>
> Perineal examination
>
> There were no marks of injury over vulva. Hymen found intact with a small laceration at 6 o'clock position. Clotted blood was seen at vaginal orifice, which admitted tip of the finger with great difficulty."

6. On the basis of the above examination, PW 2 Dr. Veena Sehgal opined as under :

> "From the above, it was difficult to say whether intercourse had taken place or not. Vaginal swab slide was prepared and got examined microscopically in the District Hospital Chamba under which no dead or alive sperms were seen. Her blood group was A+ve. She was also referred for X-ray to determine her radiological age."

7. PW 2 Dr Veena Sehgal was of the view that the age of the prosecutrix at the time of the examination would have been 13 years or 14 years. PW 3 Dr. Lokender Badotra, a Senior Medical Officer (Dental) opined that the prosecutrix was about 13 years of age and issued a certificate. PW 13, Medical Officer-cum-Radiologist, based on X-ray examination of the prosecutrix, stated that the age of the prosecutrix must be within 14 to 16 years.

8. Fourteen witnesses were examined on the side of the prosecution. The prosecutrix was examined as PW 5 and her father Jagia Ram was examined as PW 7. Both of them firmly supported the prosecution. The other items of evidence include the medical evidence.

9. The Sessions Court acquitted the accused on the ground that the ingredients of the offence of rape had not been established and there was no penetration as alleged by the prosecution. The learned Sessions Judge was of the view that the prosecutrix must have been above the age of 16 years and the evidence as a whole indicated that there was a consent on the part of the prosecutrix to have the sexual act. The learned Single Judge before whom the appeal was filed by the State did not interfere with the findings of the learned Sessions Judge by holding that the view taken by the trial court was not either perverse or grossly wrong. The learned Single Judge also observed that the medical evidence did not positively point out the commission of the alleged offence on the prosecutrix.

10. The above findings are challenged before this Court. We heard the counsel for the appellant and also Mr. U.U. Lalit for the accused who was appointed as amicus curiae. The counsel for the appellant contended that the findings entered by the learned Sessions Judge which were confirmed by the learned Single Judge are unsustainable and that there was ample evidence to show that the accused had committed the offence of rape. It was contended that the prosecutrix was below the age of 16 years and there was no consent on her part for any sexual act and she was physically overpowered by the accused and medical evidence clearly indicated that she was ravished by the accused. Whereas the counsel for the respondent-accused contended that the absence of spermatozoa

either on the clothes worn by the prosecutrix or on the undergarment of the accused which were subjected to chemical examination clearly showed that the accused had not committed any sexual act. The counsel for the respondent-accused had not committed any sexual act. The counsel for the respondent-accused submitted that this is a false case filed against the accused to get at his property.

11. We carefully considered the rival contentions and also pursued the records and the impugned judgments. The verdict of not guilty has been entered by the learned Sessions Judge mainly based on two grounds that the prosecutrix was aged above sixteen years and if at all there was any sexual act, it must have been with her consent. Both these findings are erroneous and incorrect.

12. As regards the age of the prosecutrix, there is evidence of PW 2 Dr Veena Sehgal who examined the prosecutrix and after taking note of the physical features stated that the prosecutrix must be of the age between 13 to 14 years. PW 3 Dr Lokender Badotra, who examined the prosecutrix also supported this version. This view is more strengthened by the family history which showed that she was born in the year 1979. Therefore, the finding of the learned Sessions Judge that the prosecutrix was above the age of sixteen is based on faulty reasons and is unsupported by evidence.

13. Even if it is assumed that the prosecutrix was above 16 years, the reasons attributed by the learned Sessions Judge to prove that she had given consent for the sexual act are not true. According to the prosecutrix, she resisted the accused by scratching him with her nails but as no nail marks were found on the body of the accused, the learned Sessions Judge was of the view that for this reason, it is to be assumed that there was consent on the part of the prosecutrix. The accused was examined on 20-4-1993. As the incident occurred on 17-4-1993, even if there were any marks of violence on the body of the accused, the same would have been obliterated and were not so prominent so as to be noticed by the Medical Officer who examined him. Therefore, the absence of nail marks or minor injuries on the body of the accused is of not much significance. From the oral evidence of the prosecutrix (PW 5) it is proved that the accused caught her from behind and he lifted her and

pushed her down and despite her attempt to cover herself with the salwar, the accused pulled it down. She also stated that the accused gagged her mouth when she attempted to cry aloud. The subsequent conduct of the prosecutrix also shows that she was very much resistant to the sexual onslaught on her. She came to her father immediately and told the entire incident as to how she was ravished by the accused. The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. From the evidence on record, it cannot be said that the prosecutrix had given consent and thereafter the turned round and acted against the interest of the accused. There is clear credible evidence that she resisted the onslaught and made all possible efforts to prevent the accused from committing rape on her. Therefore, the finding entered by the learned Sessions Judge that there was consent on the part of the prosecutrix is without any basis.

14. The learned counsel for the accused argued that there were no marks of violence over the breasts, nipples, or cheeks and lips or other external genitals of the prosecutrix and that she herself had not deposed anything about the extent of penetration and this would indicate that there was no commission of the offence. It was argued that the absence of spermatozoa on the clothes worn by the prosecutrix and the accused also indicated that there was no sexual act and at the most this would have been only an attempt to outrage the modesty of the girl. We are not inclined to accept this contention.

15. The medical certificate issued by PW 2 Dr Veena Schgal clearly indicates that there was laceration of the hymen at 6 o'clock position and clotting of blood was seen at the vaginal orifice. This item of medical evidence is to be appreciated in the background of the oral evidence given by PW 5 the prosecutrix. She deposed that the accused lifted (*sic*) down her

salwar and had sexual act with her. It is not known whether these clothes were washed before they were subjected to chemical examination. A piece of cloth which was recovered from the place of the occurrence and the wearing apparel worn by the prosecutrix were stained with blood. The learned Session Judge made a casual observation that these bloodstains might have been caused due to the menstruation of the prosecutrix. PW 2 Dr. Veena Sehgal stated that she had no history of menstruation and there was no suggestion also on the part of the accused as to whether the prosecutrix sustained injury on account of any other violent act. The evidence of PW 2 Dr. Veena Sehgal on these facts is not seen challenged in the cross-examination.

16. In view of the evidence of the prosecutrix (PW 5), which is corroborated by medical evidence and other items of evidence and in the absence of any consent on the part of the prosecutrix, it is clearly established that the accused had committed rape on the prosecutrix and is liable for the offence punishable under Section 376 IPC. The finding given by the learned Sessions Judge is not based on proper appreciation of evidence and, therefore, unreasonable and we are of the view that the Sessions Court dealt with the case so lightly. The offence of rape being a serious one, the case should have received careful attention and the learned Sessions Judge and the learned Single Judge should have shown greater sensitivity to these type of cases. The evidence should have been appreciated on broader probabilities and not to be carried away by insignificant contradictions.

17. In view of the foregoing conclusion, we reverse the findings of the learned Sessions Judge which were confirmed by learned Single Judge and find that the accused is guilty of the offence punishable under Section 376 IPC. As regards the sentence, we take a lenient view for the reason that the prosecutrix and the accused are related. They were both teenagers with an prosecutrix and the accused are related. They were both teenagers with an age difference of about 2-3 years. Both were immature and young. Evidence indicates no marks of violence at all on any part of the body of the prosecutrix. The incident happened in 1993. After the acquittal by the passage of time, the members of the two families must have buried the hatchet, if

any, arisen on account of this incident. The learned counsel for the respondent argued that a further order for custodial sentence at this distance of time may cause rupture to social harmony in the village life and may only help to rekindle the flames of anger which have been smouldering for so long between near relatives. Having regard to all these matters, we hold that the sentence already undergone by the accused would be sufficient to meet the ends of justice, and we do accordingly.

18. The appeal is accordingly disposed of.

(Also reported in 2000 (7) SCC 224)

4
Sentence

After the trial the sentence is extremely important. It is crucial that adequate sentence is given considering the grave nature of the crime. It has to be borne in mind that no punishment can compensate the loss the child or the woman has suffered. It would be an added insult after the entire ordeal the accused gets a minimal sentence.

It has been held by the Court in many judgements that as a matter of practice, the sentence should not be lower than that prescribed in the penal code. There have to be extremely special reasons assigned for granting a lesser sentence and these reasons have to be recorded.

In *Ram Kishan Aggarwala versus State of Orissa*[51], the court held that even though the accused was 70 years of age, the beastliness of the crime did not warrant reduction of sentence.

In *State of A.P. versus Bodem Sundara Rao*[52], the Court held:

"In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the legislature under section 376(1) of the Act.

10.We thus consider it our plain duty to enhance the sentence in this case."

[51] 1976 (2) SCC 177
[52] 1995 (6) SCC 230

In *State of Maharashtra versus Rajendra Jawanmal Gandhi* [53], the Supreme Court enhanced the sentence reversing the order of the High Court which had granted sentence under section 354 and ordered imprisonment of the accused only for 33 days. The Supreme Court held that in a case of attempt to rape, the courts have to sentence under section 376 read with 511 even though a charge has not been framed for the attempt to rape. It would be incorrect to convict under section 354, IPC which has a minimal punishment.

In *State of Karnataka versus Krishnappa*[54], the Court held that courts should impose sentence commensurate with the gravity of the offence having regard to the facts and circumstances of the case. There should be no leniency showed on persons committing heinous crime of rape on innocent helpless girls. The status of accused is irrelevant for the sentence. The sentence should serve as a deterrent for commission of like offences by others. The court also held that courts have an obligation to respect the legislative mandate in the matter of awarding of sentence and recourse to the proviso must be had only for special and adequate reasons.

In *Kamal Kishore versus State of H.P.*[55], the court held that the fact that the offence had taken place 10 years ago, and that the accused might have by then settled in life did not amount to adequate and special reasons. The court held that there is no discretion to award a lesser sentence and also that there cannot be either adequate or special reasons for a lesser sentence. The reasons should be both adequate *and* special.

In *Kommarajula Narasaiah versus State of A.P.* [56], the court held that the reasons for reducing sentence or awarding a lesser sentence cannot be arbitrary.

The principle was also upheld in *State of A.P. versus Polamala Raju @Rajarao*[57] . The Court, while disapproving the manner in which High Court reduced the sentence, laid down guidelines for awarding the sentence.

[53] 1997 (8) SCC 386
[54] 2000 (4) SCC 75
[55] 2000 (4) SCC 502
[56] 2000 (9) SCC 756
[57] 2000 (7) SCC 75

State of A.P. ... Appellant;;

Versus

Bodem Sundara Rao ... Respondent.

1. Leave granted.

2. On 16-12-1985 the prosecutrix, PW 2, aged between 13-14 years was sexually assaulted by the respondent in broad daylight. The prosecutrix was carrying lunch for her father, who was grazing cattle in the fields when the respondent all of a sudden caught hold of her and committed rape on her despite her protestations. The prosecutrix, who was bleeding profusely from her vagina on account of the rape committed by the respondent, reported the incident to her father, PW 3 and to her mother PW 4. The first information report was thereafter lodged with the police. The prosecutrix was medically examined and the doctor opined that she had been subjected to rape. The respondent was sent up for trial under Section 376 Indian Penal Code. The trial court after appraising the evidence on the record found the respondent guilty of an offence under Section 376 Indian Penal Code vide judgment dated 7-2-1986 and imposed the sentence of ten years' rigorous imprisonment on him. The respondent filed an appeal in the High Court against his conviction and sentence. While maintaining the conviction of the respondent, the High Court, however, reduced the sentence to a period of four years. While reducing the sentence the High Court merely observed :

> "However, sentence of 10 years, which is on a higher side, is reduced to 4 years' RI with this modification the appeal is dismissed."

3. The State has come in appeal by special leave complaining about the inadequacy of the sentence imposed upon the respondent by the High Court. It is submitted that the High Court was not at all justified in reducing the sentence and that in any even should not have imposed any sentence less than the prescribed minimum under Section 376(1) IPC (After amendement) Despite service the respondent chose not to appear before us. We, therefore, directed the appointment of an amicus curiae to represent him.

4. We have heard learned counsel for the parties.

5. From the evidence of the prosecutrix and her parents and the medical evidence, it stands established that the respondent committed rape on her and therefore his conviction is well recorded. Prosecution evidence is cogent, reliable and trustworthy. We, therefore, find that the conviction of the respondent as recorded by the trial court and upheld by the High Courts is well founded.

6. After its amendment, Section 376(1) provides for a minimum sentence of seven years which may extend to life or for a term which may extend to 10 years besides fine for the offence of rape. The proviso to sub-section(1) lays that the court may for adequate and special reasons to be recorded in the judgment, impose a sentence of imprisonment for a term of less than seven years.

7. Keeping in view the nature of the offence and the helpless condition in which the prosecutrix a young girl of 13/14 years was placed, the High Court was clearly in error in reducing the sentence imposed upon the respondent and that too without assigning any reasons, much less special and adequate reasons. The High Court appears to have overlooked the mandate of the Legislature as reflected in Section 376(1) IPC....

9. In recent years we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify

imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act.

10. We, thus, consider it our plain duty to enhance the sentence in this case. Keeping in view the facts and circumstances of this case and the submissions made by the learned amicus curiae, while maintaining the conviction of the respondent for the offence under Section 376, Indian Penal Code, we enhance the sentence of 4 years' RI to 7 years' RI, which is the minimum prescribed sentence under the section, for we find no adequate or special reasons to impose a sentence less than the prescribed minimum. Necessary warrants shall be issued to take the respondent into custody to undergo the remaining period of sentence.

(Also reported in 1995 (6) SCC 230)

State of Maharashtra ... Appellant;

Versus

Rajendra Jawanmal Gandhi ... Respondents

2. Rajendra Jawanmal Gandhi (the accused) was convicted by the Sessions Judge, Satara for offences under Section 376 Indian Penal Code (IPC) and Section 57 of the Bombay Children Act, 1948 for having committed rape on a girl of eight years of age and sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs. 5000 and in default of payment of fine to undergo rigorous imprisonment for six months and for offence under Section 57 of the Bombay Children Act, he was sentenced to undergo rigorous imprisonment for one year and fine of Rs. 500 and in default thereof rigorous imprisonment for one month. The substantive sentences were ordered to run concurrently. The Maruti car in which the offence of rape was committed was ordered to be forfeited and confiscated by the State. The accused appealed to the Bombay High court against his conviction and sentence. A Division Bench of the High court by judgment dated 4-10-1994 upheld the conviction of the accused under Section 57 of the Bombay Children Act and upset the conviction under Section 376 IPC and instead convicted him for an offence under Section 354 IPC and sentenced him to suffer rigorous imprisonment which he had already undergone (which was 33 days in all) and to pay fine of Rs. 40,000. In default of payment of fine, the accused was sentenced to undergo rigorous imprisonment for three months. It was ordered that out of the fine so realised, a sum of Rs. 25,000 shall be paid to the complainant who was the father of the girl. For an offence under Section 57 of the Bombay Children Act, sentence was reduced to imprisonment already undergone and the accused was not required to undergo any separate imprisonment for this offence. The Maruti car was ordered to be returned to the accused and the order of forfeiture and confiscation was set aside.

3. The matter did not end at that. Nagrik Kirti Samiti, Kolhapur which had been formed was agitated about the acquittal of the accused for an offence under Section 376 IPC. The convenor of the Samiti, Mr. P.D. Hankare represented to the State

Government to file an appeal to this Court against the acquittal of the accused under Section 376 IPC. In the meantime the accused had deposited the fine, of Rs. 40,000 as ordered by the High Court and out of this amount a sum of Rs. 25,000 had been withdrawn by the father of the girl. Perhaps this was the consideration for the State Government not to file any appeal in the Supreme Court. Since there was no response from the State Government, Mr. P.D. Hankare, Convener of the Nagrik Kirti Samiti, Kolhapur approached this Court. He was granted permission to file special leave petition against the conviction and sentence imposed on the accused by the High court as aforementioned. After notice of this appeal was served upon the State of Maharashtra and the accused, both filed separate appeals in this court. While the State of Maharashtra filed appeal against the conviction and sentence of the accused by the High court praying for his conviction under Section 376 IPC and for enhancement of his sentence to a minimum of 10 years, the accused filed appeal against his very conviction and sentence under Section 354 IPC and Section 57 of the Bombay Children Act.

4. Since the State itself has filed an appeal praying for conviction of the accused under Section 376 IPC and for his punishment under Section 376(f) as the girl child was less than 12 years of age, leave granted to P.D. Hankare, Convener, Nagrik Kirti Samiti, Kolhapur loses its significance and we direct that the leave be revoked.

5. It may be noticed at the outset that the offence was committed at Kolhapur and the accused was to be tried there in the court of Session. But because of public outcry, the plea of the accused that he may not get fair trial at Kohlapur was accepted and the case was transferred to the file of Sessions Judge, Satara....

7. Section 57 of the Bombay Children Act, 1948 is as under :

> "57. Whoever seduces or indulges in immoral behaviour with a girl under the age of eighteen years shall, on conviction be punished with imprisonment of either description for a term which may extend to two years or with fine which may extend to one thousand rupees or with both."

8. "Immoral behaviour" is defined under Section 4(*j*) of this Act and it includes any act or conduct which is indecent or obscene.

9. The accused was charged for having committed rape on a girl of 8 years of age in a Maruti car of chocolate colour on a road leading to Ragala Park at Kolhapur at about 9.30 a.m. on 24-9-1986, thus committing offences punishable under Section 376 and Section 57 of the Bombay Children Act.

10. In support of the charge the prosecution examined as many as 24 witnesses. The material witnesses would, however, be (1) the complainant Shrikant Deshpande, father of the girl, (2) prosecutrix, (3) Police Inspector Labde who initially investigated the case, (4) Dr Mrs Sahastrabudha (family doctor of the complainant), (5) Dr Gunda (Medical Officer, Civil Hopital, Kolhapur), (6) Dr Hoshing (Civil Surgeon, Kolhapur), (7) Vishakha Kulkarni who gave the registration number of the maruti car of chocolate colour), (8) Parashuram Jadhav (earlier registered owner of the car but had sold the same to the company of which the accused was a Director), (9) Meena Bornvankar (Additional S.P., Kolhapur) and (10), Police Inspector Katambale (Investigating Officer).

11. The prosecutrix, a student of 4th class, had gone for tuition at 8.15 a.m. on 24-9-1986 to a private teacher in the colony where she was living with her parents. After her private tuition, which was from 8.15 a.m. to 9.15 a.m., she was coming back to her home and then go to school with other children in a cycle-rickshaw hired for the purpose. When the prosecutrix was going along the colony road at the intersection of this road and a by-lane, which was a secluded spot, the accused caught hold of her on the pretext that her assistance was required for pulling either the pipe or the wires in the Maruti car which was parked there. The girl was pushed inside the car. At that time she was wearing a midi-frock and knickers. The accused pulled down her knickers and laid her on the seat in the car. She did try to resist by saying that she should be allowed to go and that she would be late in reaching home. The accused then opened the zip of his pants and started pressing his penis on her private parts. When the girl cried that she would be late in reaching home, the accused said "wait", "one second". According to her, thereafter the accused urinated. She felt wetness on her private parts, After the girl was released she came home weeping. She embraced her father and narrated the whole incident to him. The parents of the girl examined her private parts and the garments

and noticed the sticky substance (semen) on some parts of the midi-frock as well as on the knickers. There was redness on her private parts. The girl described the person who committed such bashful (*sic* shameful) act on her. Shrikant Deshpande, the father of the girl took her on his scooter and came to the spot where the incident took place but there was nobody. They returned home. The mother of the girl gave her a bath and she went to her school as usual. Deshpande, however, did not stop at that and he made more enquiries. He went to the spot again and there he was told by Vishakha Kulkarni, a college student, who was living in the vicinity that a Maruti car of chocolate colour was seen there which bore registration No. MGR-942. Deshpande went to RTO and came to know that the car was registered in the name of Parashuram Jadhav. Thereafter he met Meena Bornvankar, Additional SP who at the relevant time was holding the charge of SP Kolhapur. She sent him to the police station to lodge a formal complaint. Parashuram Jadhav was traced. From his interrogation, it transpired that the Maruti car had been sold by him and further investigation revealed that at the relevant time it was in the possession of the accused.

12. At about 7.30 p.m. on the same day Despande took her daughter to a family doctor Dr. Mrs. Sahastrabudha for examination as after returning from the school the prosecutrix was complaining of pain in her private parts. Dr Mrs Sahastrabudha had been informed in the morning of the incident of rape. She noticed inflammation of labium minus (labia minora). It appears, as held by the Sessions Judge, that this doctor did not fully examine the prosecutrix for when she was apprised that Deshpande had lodged a report with the police she advised him to get the girl examined by the Civil Surgeon as it was a medico-legal case. Dr Gunda was the Medical Officer at Civil Hospital, Kolhapur and he examined the prosecutrix at 9 p.m. on 24-9-1986 itself. This he did on the basis of police 'yadi'. On examination he found :

(i) Labia minora was inflamed and reddened.

(ii) External urethral meatus was reddened and swollen.

(iii) Hymen was intact.

(iv) P.V examination was not possible. He therefore took the swab from introitus (opening of the

vagina) and not from inside the vagina."

13. He, however, did not issue the medico-legal certificate on the same day. On 2-10-1986, he issued the certificate and under the head "Chief complaints" he had written: "Complains of burning micturition since afternoon today".

Then on the following day he certified that rape was committed with the following report :

> "Conclusion — *Rape committed.*
> This conclusion I have drawn after clinical examination of the girl."

14. Report about the incident appeared in the newspaper of the town on the following day, i.e., 25-9-1986 and there was an immediate outcry in the public and "morchas" taken out.

15. Dr Hoshing was the Civil Surgeon, Kolhapur, who, it would appear under intense public pressure formed a panel of three private doctors to again examine the prosecutrix. The panel examined her on 29-9-1986. This panel consisted of Dr. Naganonkar, M.D. in Gynecology, Dr Kudalkar and Dr. Maladkar, both senior doctors and the result of their examination is as under

"(i) Labia minora inflamed.

(ii) External urethral meatus inflamed.

(iii) Fourchette showed abrasions with signs of inflammation.

(iv) Infected linear vertical tear on right para-urethral region, and

(v) Tear of hymen at 3 o' clock position."

16. The midi-frock and the knickers of the prosecutrix were taken into possession in the course of investigation and so also the underwear, T-shirt and pants which the accused was wearing at the time he was taken into custody. The semen stains of blood Group B were found on the knickers of the prosecutrix. The semen stains of Blood Group B were also found at the spot where the penis of the accused was touching his underwear. The blood group of the accused is Group B.

17. It may be noticed that the trial court came heavily on the conduct of Dr Gunda, the Medical Officer in his not submitting the

medical report at the earliest and also to an extent of Dr Hoshing, the Civil surgeon. It justified the medical examination of the prosecutrix on 29-9-1986 by a panel of private doctors.

18. The trial court also noticed the following observations in the commentary on Medical Jurisprudence :

> "Mere redness of the labia minora is not indicative of recent sexual activity and it may be no more than an indication of a lack of personal hygiene, especially in young girls."

19. After examining the evidence and considering the arguments advanced, it came to the conclusion that it was the accused who indulged in sexual intercourse with the prosecutrix and that there was penetration. The Court, therefore, held that the accused was guilty of an offence of having committed rape on the prosecutrix. The trial court also found that it was proved that the accused indulged in immoral behaviour with the prosecutrix. It, therefore, convicted the accused and sentenced him as aforesaid.

20. The accused appealed to the High Court. It did not agree with the trial court that considering the statement of the prosecutrix, examination of the clothes she was wearing and the medical evidence, any offence of rape within the meaning of Section 375 IPC was committed. The High court noticed the medical examination of the prosecutrix in the following words:

> "The girl was taken to the family doctor Shashikala Sahastrabudha (PW 7) by her father in the evening at 7.30 p.m. who clinically examined her and found her private parts had become reddish. In the night of 24th September, 1986 at about 9 p.m., 'X' was examined by Dr Gunda (PW 14), — Medical officer, Civil Hospital. He has also deposed that the case papers are at Ex. 56. He says that on internal examination of 'X', both labia minora were found inflamed (reddened) and external urethral meatus was reddened and swollen. Hymen was intact."

21. The High Court then referred to the clothes which the prosecutrix was wearing at the time of the crime and it was found that there were two semen stains on her undergarments. The High Court also examined the clothes of the accused and it found that the semen

stains found on the undergarments of the prosecutrix and underwear of the accused were of the same Blood Group 'B' which was the blood group of the accused. One semen stain on the underwear of the girl was about 2 cm in diameter near the waistband of her undergarment. From the examination of the evidence, the High Court also came to the conclusion that it was the accused who indulged in the perpetration of the crime which was committed on 24-9-1986 at about 9.30 a.m. as was the charge laid by the prosecution. On the question, if it was a rape or an offence under Section 354 IPC — outraging the modesty of a woman the High Court referred to the statement of the prosecutrix and that of her father, Deshpande, who lodged the FIR. As to what the FIR recorded, we may refer to the following observations of the High Court :

> "In the FIR, Ex. 26 filed by the father, it is mentioned that the girl informed that the accused slept her on seat and then he slept on her body and began to struggle with her. The accused then pulled away her underpants and pulled the chain of his pants and took out his male organ and put it in her private parts and pressed it. Her private part was then aching. After some time he passed his urine on her private parts and he rubbed his organ to her frock. Then she took her underpants onwards and came home running. However, the C.A. report, Ex. 82, shows that there was no semen found on the frock. The evidence of the girl, her father and the FIR show that the legs of the accused were on the road. The knickers of the girl were only pulled and not removed. This is also clear from the C.A. report, Ex. 82, that her knickers were having two stains of semen. If the knickers, would have been removed then thee would have been no stains as it is not the case of the prosecution that it was used by the accused for wiping his organ. Her legs were neither separated nor lifted. The evidence shows that he took out is organ and pressed it against her body and within seconds he discharged."

22. The High Court then noticed that the girl was given a bath and she went to school and that she only complained of some pain or burning sensation and that if there was

anything serious noticed by the parents on examination, they would not have allowed her to go to school and rather would have taken her immediately to the doctor. When the parents examined her private part they found only reddishness. Her father took her to the family doctor Dr Mrs Sahastrabudha at about 7.30 p.m. on the same day and the doctor noticed only some portion of her private part had become red. No blood was noticed. Then the girl was examined by Dr Gunda at about 9.00 p.m. on that very day. After examining the report of Dr Gunda, the High Court concluded that clearly ruled out the actual rape. The High Court disapproved the constitution of the panel of doctors which it held was done under pressure from the public and that Dr Hoshing, Civil Surgeon succumbed to that pressure. The High Court was critical of the statement of Dr. Naganonkar who was member of the panel. The High Court referred to the fact that at the time of examination by the panel of three doctors neither Dr Sahastrabudha nor Dr Gunda was called. Dr Naganonkar stated that some respectable citizens of Kolhapur had approached him with a request that come for examination of the girl. No reason was recorded as to why it was necessary to re-examine the girl. The High court noticed that Dr Naganonkar was evasive when he was asked whether he could say that the injuries noticed by the panel were present on 24-9-1986. He however admitted that if the tear was beyond the superficial layer, then it was bound to bleed As there was no bleeding it was an abrasion involving the superficial layer. He admitted that such abrasion was possible due to scratching. He also agreed that rupture of hymen was almost invariable accompanied by bleeding and that bleeding was brisk, immediate and visible. Dr Naganonkar also agreed with the proposition that the clothes immediately would have bloodstains. The High court commended that Dr Naganonkar was "required to make various acrobatics just to support the opinion and that while doing so he virtually admitted that there was a rape". The High Court held that there was no rupture of hymen and the girl was a virgin. The accused was also examined and there was no injury to her private part. It noticed the statement of Dr Naganonkar where he agreed with the opinion in *Medical Jurisprudence* quoted above and further the "excisation (*sic* excision) of this type

is common in young children as a result of poor local hygiene, scratching due to worm infection". For all these reasons the High Court rejected the conclusion arrived at by the panel of doctors. As to the conduct of Dr Gunda which we have noticed above the High court was of the opinion that it seemed that he was required to bow before public pressure and the internal official pressure. It, therefore rejected the opinion given by him on 3-10-1986 which certified that the rape was committed. The High Court said that a great disservice had been done to the little girl because of public agitation and which tended to make the future of the girl bleak. The Court, therefore, held that there was no rape as contemplated by Section 375 committed or proved. Then the High Court concluded that in its opinion, the evidence on record would, at the most show that the accused attempted to commit rape. But then added that :

> "However, as the evidence shows that her knickers were not completely removed, her legs were not separated or lifted and the act was sought to be done standing on the road, we hold that the act of the accused would fall within Section 354 of IPC and that he used criminal force as covered by Section 350 of IPC knowing full well that it would cause injury to the girl. He knew that it would thereby outrage the modesty of the girl. He pulled down her knickers and opened his pants and laid himself on her and discharged. The girl suffered pain. Therefore, we find the accused guilty under Section 354 of IPC".

On the question if an offence under Section 57 of the Bombay Children Act was committed, the High Court held that similarly as in the case of the offence under Section 354 IPC, the offence of the accused would also under Section 57 of that Act. The court, therefore, held that the accused acted indecently and was thus guilty under Section 57 of the Bombay Children Act, 1948.

23. Both the Sessions Court and the High Court accepted the prosecution evidence as to how and who committed the crime. They, however, differed on the approach as to what offence was committed. While the trial court holds the accused guilty of an offence under Section 376 IPC, the High court holds him guilty under Section 354

IPC. Both the courts did not attach any importance to the discrepancies in the statements of the witnesses which were insignificant and, did not damage or impair the case of the prosecution. The courts have considered all the relevant circumstances to come to the conclusion that the crime was committed and it was the accused who did so. The High Court, however, does say that there was attempt to commit rape which would be an offence falling under Section 376 read with Section 511 IPC. But by some curious reasoning, the High Court proceeds to hold the accused guilty for an offence under Section 354 IPC. We think that the High Court is right in its approach that from the medical evidence and the statement of the prosecutrix and attendant circumstances, it cannot be said that there was penetration and there was, therefore, no sexual intercourse though the ingredients of attempt to commit offence of rape are there. The High court had set aside the order of the Sessions Court confiscating the Maruti Car in which the offence of attempt to rape was committed as the car was owned by a company of which the accused was a Director. Since there is no appeal against this part of the order, we need not go into the scope and intent of Section 452 CrPC if the court could order confiscation of the car, it having been "used for the commission" of the offence of rape particularly if the car had been owned by the accused.

24. The circumstances show that the accused intended to commit rape on the girl. In the commission of that crime, he laid the girl on the seat in the Maruti car and then laid himself over her. He pulled down her knickers and also opened the zip of his pants and took out his male organ. He pressed his male organ on the private parts of the girl. But since he discharged, he could not penetrate and was unable to complete the offence of rape. However, it is clear that he did attempt to commit rape...

26. In 1983, law was amended prescribing more severe punishments for the perpetrators of the crimes of rape and other sexual offences.

27. The Law Commission of India in its 42nd Report on Indian Penal Code submitted in June 1971 suggested amendments to Sections 375 and 376 IPC, expanding the definition of rape and promising for more severe punishment. The commission also suggested

incorporation of other offences relating to sexual offences in the IPC. In its 69th Report on the Indian Evidence Act, 1872, the Law Commission had also recommended reform in the law. Nothing, however, was done and the law not amended. Then the subsequent Law Commission in its 84th Report suggested changes in the law on rape and allied offences and amendments to the laws of procedure and on rape and allied offences and amendments to the laws of procedure and evidence. The Commission submitted its report in April 1980 to the Central Government. After that the IPC, CrPC and Evidence Act were amended by the Criminal Laws (Amendment) Act, 1983. In the Statement of Objects and Reasons while presenting the Bill, it was mentioned that recommendations of the Law Commission had been examined in consultation with the State Governments and suggestions on the subject received. It was mentioned that the changes proposed in the Bill had been formulated principally on the basis of the following considerations.

"(1) The law should be made more stringent without jeopardising considerations of fair trial;

(2) the definition of rape should be amended to remove certain loopholes and inadequacies and to ensure that consent should be vitiated unless it is real and given out of free choice

(3) minimum punishments for rape should be prescribed;

(4) the prosecutrix should be protected from the glare of embarrassing publicity during the investigatory as well as trial stage and any information leading to identification of the victim should not be disclosed;

(5) in the case of rape of a police officer or by a group of persons or by a person having custodial control by virtue of his special position over the victim, once it is proved that sexual intercourse has taken place, the onus should be on the accused to prove that the sexual intercourse was with the consent of the woman."

28. It will be useful to quote the following passage from the 84th Report of the Law Commission :

> "It is often stated that a woman who is raped undergoes two crises —the rape and the subsequent trial. While the first seriously wounds her dignity,

curbs her individual, destroys her sense of security and may often ruin her physically, the second is no less potent of mischief, inasmuch as it not only forces her to relive through the traumatic experience, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focussed upon her.

In Particular, it is now well established that sexual activities with young girls, of immature age have a traumatic effect which often persists through life, leading subsequently to disorders, unless there are counter-balancing factors in family life and in social attitudes which could act as a cushion against such traumatic effects.

Rape is the 'ultimate violation of the self'. It is a humiliating even in a woman's life which leads to fear for existence and a sense of powerlessness. The victim needs empathy and safety and a sense of reassurance. In the absence of public sensitivity to these needs, the experience of figuring in a report of the offence may itself become another assault.

Forcible rape is unique among crimes, in the manner in which its victims are dealt with by the criminal justice system. Raped women have to undergo certain tribulations. These begin with their treatment by the police and continue through a male-dominated criminal justice system. Acquittal of many de facto guilty rapists adds to the sense of injustice.

In effect, the focus of the law upon corroboration, consent and character of the prosecutrix and a standard of proof of guilt beyond reasonable doubt have resulted in an increasing alienation of the general public from the legal system, who find the law and legal language difficult to understand and who think that the courts are not run so well as one would expect."

35. In our opinion, therefore, the High Court after having come to the conclusion that the accused was guilty of an offence under Section 376/511 of the IPC could not have convicted the accused for an offence under Section 354 IPC. Section

511 IPC provides punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment. In this case since the girl was under 12 years of age and the Sessions Judge having found that offence of rape had been committed could not have awarded sentence of 7 years when the law prescribes minimum sentence of rigorous imprisonment for a term not less than 10 years, unless exceptional circumstances existed. However, we find that the State of the complainant did not come up in appeal in the High Court for enhancement of the sentence. Though there was no charge under Section 376 read with Section 511 IPC, under Section 222 of the Code of Criminal Procedure when a person is charged for an offence he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

36. Having come to the conclusion that the accused committed an offecne under Sections 376/511 IPC, the question arises as to what sentence should be imposed upon him. It was submitted before us that the time when the offence was committed the accused had also a daughter of 8 years of age. If that be so, perversion of the mind of the accused does not appear to have any limit. It was submitted that a long time had elapsed since the offence was committed and that in terms of the judgment of the High Court the accused deposited Rs 40,000 out of which Rs 25,000 had already been withdrawn by the father of the prosecutrix. It was submitted that if the Court came to the conclusion that the sentence had to be enhanced then amount of fine could be raised. We, however, do not think so. A heinous crime has been committed and the accused must suffer for the consequences. A rapist not only violates the victim's personal integrity but leaves indelible marks on the very soul of the helpless female. The girl of 8 years must have undergone a traumatic experience. The question of imposition of sentence after lapse of 11 years of the offence troubled our mind a great deal. Keeping the objects of the amendment of IPC in view and the law as it exists today, the decisions of this Court referred to above on the question of sentence, the message is loud and clear that no person who commits or attempts to commit rape shall escape punishment.

37. We agree with the High Court that a great harm had been caused to the girl by unnecessary

publicity and taking out of morcha by the public. Even the case had to be transferred from Kolhapur to Satara under the orders of this Court. There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is the very antithesis of rule of law. It can well lead to miscarriage of justice. A Judge has to guard himself against any such pressure and he is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law. While imposing the sentence of fine and directing payment of whole or certain portion of it to the person aggrieved, the court has also to go into the question of, damage caused to the victim and even to her family. As a matter of fact the crime is not only against the victim it is against the whole society as well. Since late, there has been a spurt in crimes relating to sexual offences.

38. Considering the whole aspect of the matter, we are of the opinion that a sentence of five years' rigorous imprisonment and fine of Rs 40,000 will meet the ends of justice. The fine has already been paid, out of that Rs 25,000 has been withdrawn by the father of the girl as per direction of the High Court which we uphold. We, therefore, allow the appeal of the State convert the conviction of the accused-respondent from one under Section 354 IPC to that under Sections 376/511 IPC and sentence him as aforesaid. Since fine has already been paid, no sentence of imprisonment in lieu of payment thereof need be imposed. The conviction and sentence of the accused under Section 57 of the Bombay Children Act as ordered by the High court shall, however, stand. The sentences shall run concurrently. In this view of the matter, appeal filed by the accused is dismissed. The accused will be taken into custody and would undergo the remaining portion of his sentence.

❖ ❖ ❖

(Also reported in 1997 (8) SCC 404)

Kamal Kishore ... Appellant;

Versus

State of H.P. ... Respondent

The victim of a rape had just crossed single digit in her age. So tender was that lass when she was ravished. But the damage caused to her genitalia was woeful. The girl narrated the story before Ms Kiran Agarwal, Sessions Judge, Una (Himachal Pradesh) who tried the case, but the story told by her did not impress the Sessions Judge and hence her testimony was jettisoned and the man who was arraigned as the rapist exonerated. However, a Division Bench of the High court of Himachal Pradesh dissented from the said verdict and convicted him under Section 376 of the Indian Penal code. Nonetheless, the Division Bench was not disposed to award the minimum sentence prescribed by law for the offence on the premise that the accused who was twenty-five "might have settled in life". So the High court directed him to undergo rigorous imprisonment for three years and to pay find of rupees ten thousand.

2. The verdict of the High court did not satisfy both sides — the accused and the State of Himachal Pradesh. The former because of the reversal of the order of acquittal and the latter because of the inadequacy of the sentence. So both sides filed separate appeals by special leave. We heard both appeals together.

3. The case put forward against the accused can be summarised in the following lines :

Shishna Devi (PW 2) is the eldest of the three children of Sher Singh and his wife Kunta Devi. During the year of occurrence Shishna Devi was studying in the 4th class. Accused Kamal Kishore was running a flour mill located adjacent to his house. The incident happened on 21-5--1989. Shishna Devi after taking her evening meals proceeded to the house of her aunt, but on the way she stepped into the house of the accused presumably for viewing a TV film. Either at the end of the film or a little before it, Shishna Devi was asked by the mother of accused to fetch some cooking utensils from the flour mill. So she went and brought the utensils to the kitchen. It was the right time and the accused followed her up to the kitchen. He caught hold of her from behind, muffled

her mouth, lifted her up and took her to flour mill and after dragging her to a side room stripped her off and he committed rape on her.

4. When the wearing apparels of Shishna Devi became wet with the blood accused brought a bucket of water and washed the dress. He threatened her not to reveal it to anybody else. The house of her aunt (Kaushalya Devi — PW 4) was located close by and Shishna Devi instead of going back to her own house went to that aunt's house and spent the night there.

5. Next morning Shishna Devi returned home. Here mother Kunta Devi (PW 3) noticed bloodstains on her dress and she enquired about the cause of it. Shishna Devi then narrated the incident to her mother. Her husband (father of Shishna Devi) was not in the house then as he had gone for his work. (He is a daily-wage-earning labourer). Next day when he returned home the story was narrated to him. On hearing the same he wanted to report the matter to the police and hence he took his wife and Shshna Devi to Bangana Police Station and lodged Ex. PC complaint.

6. Shishna Devi was examined by PW 14 Dr J.S. Kanwar of Indira Gandhi Medical College (Shimla) at 4.30 p.m. on 23-5-1989. The doc;tor noted the following features on her person :

> 1. Congestion (contusion) of labia minora both sides.
>
> 2. Tear in the perennial fourchette in midline involving vagina mucosa and perineal (*sic*) skin (¾th cm long in skin). Swelling and tenderness noted at that site.
>
> 3. Congestion and oedema of vestibule around urethra.
>
> 4. Hymen showed lacerations on the left side. There was oedema and tenderness. It was bleeding on touch."

7. According to PW 14, the injuries could probably had been sustained 24-48 hours prior to his examination of the girl. The doctor collected the swab from the posterior fornix of the vagina, and that along with the wearing apparels of Shishna Devi were sent for chemical tests. The result of such test showed spermatozoa and semen.

8. The aforesaid materials are sufficient to show, beyond any of doubt, that Shishna Devi was

sexually ravaged by a man. Hence the only question which fell for consideration is whether it was the accused who did the act on that little girl. No question of consent of the victim need vex the judicial mind in this case as the age of Shishna Devi then was far distal from the age of 16.

9. For the narrowed compass of consideration in this case i.e. whether accused was the rapist, the most decisive evidence is the testimony of the victim herself. None else will be more competent than her to tell the court as to who raped her. There is no scope for doubting that she would not have seen the person who seduced her. PW 2 Shishna Devi pointed at the accused in unmistakable terms as the person who ravaged her. On that aspect there was no discrepancy in the evidence. But the Sessions Judge went into the details of the occurrence and after dwelling on certain features thereof the case was dubbed as highly improbable.

10. Learned Sessions Judge pointed out from the evidence of PW 2 that the time of her visit to the house of the accused was 6 p.m. for viewing the TV film, and then referred to the evidence of her aunt Kaushalya Devi (PW 4) that Shishna Devi reached her house at 11 p.m. The Sessions Judge made the following comment on that aspect :

> "Now it remains a mystery where the prosecutrix remained up to 11 p.m. Even if the watching of the film on the television by the prosecutrix in the house of accused for some time is construed to be one hour or two hours, 10-15 minutes in bringing the utensils from the flour mill and half and hour in the process when the accused-petitioner dragged her from the kitchen to the room by the side of the flour mill and raping her and then bring a bucket of water with which he washed her shirt, even then there remains a considerable period of about two hours till 11 o'clok at night when the prosecutrix reached the house of her aunt Kaushalya Devi where she slept for the night. Thus the unexplained time gap makes the deposition of the prosecutrix highly improbable."

11. The Division Bench of the High Court, after referring to the evidence on that aspect, has observed thus :

"We do not find any unexplained time gap as held

by the Sessions Judge. Moreover, the prosecutrix and her mother had not given the time when the prosecutrix reached the house of her aunt Kaushalya Devi. It is only Kaushalya Devi who has stated that the prosecutrix had come to her house at about 11 p.m. when she was asleep. In the absence of her further statement that she has noticed the time as 11 p.m. in her wrist watch or in any other watch or clock, the possibility cannot be ruled out that she gave the time only as per her estimate and the margin of error might be from half an hour to one hour."

12. After referring to certain other details of the occurrence the Sessions Judge expressed her inability to believe the story narrated by Shishna Devi and then observed that "there are a few important missing links in the prosecution case and no attempt has been made by the investigating officer to collect those links". As an example the trial Judge pointed out that "none from the family of the accused or the locality has been examined in order to prove the presence of the prosecutrix in the house of the accused on the evening of the occurrence for watching the television." But the High Court totally disagreed with the said reasoning and stated : "It is too much to expect that any member of the family of the respondent or from the houses in the neighbourhood would appear as witness in support of the statement to the prosecutrix that she was present in the house of the respondent for watching TV." The learned Judges pointed out that prosecutrix is the daughter of a poor daily-wage-labourer, whereas the accused is the sone of a proprietor of a flour mill and landlord.

13. We have no doubt that the Sessions Judge had reached an erroneous conclusion by approaching the question from a wrong angle. The evidence of the adolescent girl — the victim of rape, as duly corroborated by the testimony of her mother and aunt, and adequately confirmed by the medical evidence, had conclusively established that she was subjected to ravishment by the accused and none else. The reasons adverted to by the High Court are far sturdier and stronger than those suggested by the Sessions Judge to rely on. The Division Bench of the High Court has thus rightly reversed the order of acquittal and convicted the accused under Section 376 of the

IPC.

14. While considering the sentence we have to bear in mind that the offence was committed after the enforcement of Criminal Law Amendment Act (CLAA) 43 of 1983. So the provision prescribing more rigorous sentence must apply if the offence falls within the purview of sub-section (1) of Section 376, and then he "shall be punished with imprisonment of either description for a term which shall not be less than seven years". If the offence falls under sub-section (2)(*f*) (commits rape on a woman when she is under 12 years of age) the offender is liable to be "punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine".

15. The question of the age of Shishna Devi is, therefore, important in this area. If she was below the age of 12, on the date of occurrence the minimum sentence would be rigorous imprisonment for 10 years. PW 14 Dr J.S. Kanwar has fixed up the above of PW 2 Shishna Devi as 10 years on the date of her examination. This was testified to by the doctor on the strength of clinical examination conducted by him. But the doctor did not conduct either ossification test or any other pathological tests to reach at least the approximate age of the victim. So his assessment regarding age is based on fragile premises.

16. According to Ext. PH (school certificate of Shishna Devi) her date of birth is 11-11-1978, which means that on the date of occurrence she was below 11 years of age. But Ext. PH lost its credibility when Ext. PO (the certificate issued by the Panchyat) was produced in which the date of birth of PW 2 is shown as 24-11-1978. But the evidence of PW 2's mother Kunta Devi (PW 3) shows that Shishna Devi was 12-13 years old. The Sessions Judge found her age as put forth by Kunta Devi, the mother of PW 2, and the High Court did not interfere with that. Therefore, we have to follow the said finding on fact. Even then, the sentence prescribed under sub-section (1)a of Section 376 IPC has stipulated a minimum limit that it "shall not be less than 7 years".

17. However, learned counsel for the accused made a serious endeavour to bring the case within the proviso to Section 376 IPC which reads thus:

> "Provided that the court may, for adequate and special

reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years."

18. As pointed out earlier, the Division Bench of the High Court reduced the sentence from the minimum limit, on a premise that "in view of the fact that the occurrence is of 21-5-1989 when he was 25 years of age and he might have settled in life"....

21. As Parliament has disfavoured the sentence to plummet below the minimum limit prescribed Parliament used the expression "shall not be less than" which is premptory in tone. The court has, normally, no discretion even to award a sentence less than the said minimum. Nonetheless Parliament was not oblivious of certain very exceptional situations and hence to meet such extremely rare contigencies it made a departure from the said strict rule by conferring a discretion on the court subject to two conditions. One is that there should be "adequate and special reasons", and the other is that such reasons should be mentioned in the judgment.

22. The expression "adequate and special reasons" indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons. What the Division Bench of the High court mentioned (i.e. occurrence took place 10 years ago and the accused might have settled in life) are not special to the accused in this case or to be situations in this case. Such reasons can be noticed in many other cases and hence they cannot be regarded as special reasons. No catalogue can be prescribed for adequacy of reasons no instances can be cited regarding special reasons, as they may differ from case to case.

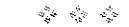
23. As the reasons advanced by the Division Bench of the High court could not be supported as adequate and special reasons, learned counsel for the accused projected an alternative profile in order to support his contention that there are adequate and special reasons. He submitted the following:

Shishna Devi (PW 2) has since been married to another person and she is now mother of children and is well-settled in life. The accused was aged 23 when the offence was committed and now he is 34, but

he remains unmarried. He says that on two occasions his marriage had reached the stage of engagement but both had to be dropped off before reaching the stage of marriage due to the social stigma and disrepute which surrounded him. These are the reasons which he advanced for extending the benefit of the proviso.

24 Those circumstances pleaded by him are not special reasons for tiding over the legislative mandate for imposing the minimum sentence. We, therefore, enhance the sentence for the offence under Section 376 IPC to imprisonment for 7 years.

25. The long time lag which elapsed subsequent to the date of offence and the fact that the prosecutrix got married and is well settled in life and that she is now mother of children — all these things which happened during the intervening period, may be factors for consideration by the executive or constitutional authorities if they have to decide whether remission of the sentence can be allowed to the accused. We make it clear that we have imposed the enhanced sentence on him without prejudice to any motion he may make for such remission of the sentence before the authorities concerned.



(Also reported in 2000 (4) SCC 502)

Kommarajula Narasaiah ... Petitioner;

Versus

State of A.P. ... Respondent.

1. The Petitioner along with another accused was tried for the offences under Sections 366-A and 376 IPC. Both of them were however acquitted under Section 366-A but the petitioner was convicted for the offence punishable under Section 376 IPC by the Assistant Sessions Judge, Jangaon and was sentenced to seven years' RI as also to a fine of Rs 500. On default in payment of fine he was to undergo a further two months' simple imprisonment.

2. The petitioner preferred an appeal. The learned Sessions Judge Warangal who disposed of the appeal on 15-10-1996 reduced the sentence from seven years to five years. The reasons for reducing the sentence set out in the judgment by the learned Sessions Judge are as under :

> "Insofar as the punishment part of the judgment of the lower court is concerned, the learned Assistant Sessions Judge has imposed seven years of imprisonment as contemplated. Section 376 IPC provides that for any adequate and special reasons to be mentioned in the judgment the court could impose a sentence of less than seven years. Here it is a case where, from the angle of the appellant we could see that it is not out of total lust towards the prosecutrix, A-1 happened to commit rape on her. It is on account of total abandonment of his wife that happened due to PW 1 developing illicit intimacy with A-1's wife, A-1 has taken the step of taking away Swaroopa and committing rape on her. Further A-1 did not want to rape Swaroopa; and totally abandon her. Even as per her evidence A-1 attempted to tie thali and give Swaroopa a status in the society. It is also be mentioned that both A-1 as well as Swaroopa belong to the same caste - Waddera. Thus the circumstances of the case would clearly show that it is not out of total lust, the offence has been committed, but due to circumstances narrated above, and these circumstances can be taken for lessening the sentence

imposed by the learned Assistant Sessions Judge."

3. Revision filed by the petitioner was dismissed by the High Court by the impugned judgment dated 11-12-1998.

4. By order dated 7-4-2000 this Court had issued notice to the petitioner to show cause why the sentence be not enhanced.

5. We have heard the learned counsel for the petitioner and we have also gone through the judgments of the trial court, the lower appellate court as also that of the High Court. The reasons on the basis of which the sentence of seven years was reduced to five years have been set out by the Sessions Judge which indicate that he was impressed by the fact that the rape was committed not for lust alone but on account of other circumstances which are that his wife had abandoned him, perhaps, on account of PW 1developing illicit intimacy with his wife. But that should not have given him a cause to take away Swaroopa (prosecutrix) and commit rape on her. It is a heinous crime and, therefore, for this reason alone the sentence could not have been reduced from seven years to five years. Section 376 in specific terms provides that the sentence shall not be less than seven years. The proviso which enables the court to impose the sentence of less than seven years does not give arbitrary discretion to the court to reduce the sentence on irrelevant grounds.

6. This Court in *State of Karnataka* v. *Krishnappa* and *State of Rajasthan* v. *N.K.* has already considered the circumstances in which a sentence less than that prescribed under the Act could not have been imposed.

7. Having regard to the circumstances set out by the Assistant Sessions Judge in his judgment by which the petitioner was in error in reducing the sentence to five years.

8. For the reasons stated above, we do not find any merit in the special leave petitions and dismiss the same but enhance the sentence to seven years as imposed by the learned Assistant Sessions Judge.

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(Also reported in 2000 (9) SCC 756)

T.K. Gopal Alias Gopi ... Appellant;

Versus

State of Karnataka ... Respondent.

2. The appellant was found guilty of the offence under Section 376 IPC and was sentenced to 10 years' rigorous imprisonment and to pay a fine of rupees one thousand, in default of which he was to undergo RI for another three months, by the Additional Sessions Judge, Tumkur, by her judgment dated 30-9-1994. This has been upheld by the High Court by the impunged judgment dated 24-1-1997. The appellant is in jail and it is from the jail that he has filed the present appeal. Mr Seeaj Bagga has appeared as counsel for the appellant and it was in his presence that the order dated 10-9-1999 was passed by this Court, which reads as under:

"Delay condoned.

The victim of rape in this case a child of one-and-a-half years. The petitioner has been convicted under Section 376 IPC and sentenced to ten years' rigorous imprisonment. Section 376 IPC provides that on the offence of rape being established, the court shall sentence the accused with rigorous imprisonment for a term not less than ten years, but 'which may be for life' and shall also be liable to fine. The proviso to sub-section (2), however, allows the court to impose a sentence of imprisonment of either description for a term which may be less than ten years.

Having regard to the facts of this case, especially the age of the victim, we issue notice to the petitioner to show cause why the sentence of ten years' rigorous imprisonment should not be enhanced to life imprisonment. The notice shall be returnable within six weeks."

3. Mr Seeraj Bagga has argued the case with full vehemence at his command and has also filed written submissions in which he has set out the extenuating circumstances on the basis of which he has prayed that the sentence may not be enhanced to life imprisonment.

4. The victim in the instant case is an infant child. Yashoda of the tender age of one-and-a-half years. Her mother, Uma (PW 1) lived with her husband in a rented house at Konehalli Village with her children, a son aged about four years and the

infant daughter, Yashoda. The appellant, at that time, was a mistry working in that village. Uma was working as a maidservant in the house of Gowramma (CW 2). She also worked as a mason-labour under the appellant. Her husband worked as a Waterman in the Water supply Department. The cae of the prosecution is that the appellant, as a mistry, used to provide ration to Uma (PW 1) who used to cook food for the appellant and his colleagues, including CW 7 Raja, CW 8 Gandhi as also another person, Murthy. The appellant and his associates used to go to the house of Uma for lunch between 1.30 p.m. to 3.00 p.m. On 22-6-1991, at about 3 p.m., the appellant came to the house of Uma, but did not express any desire to have his meal. The appellant, on the contrary, indicated to her that he would take rest for a while. Her children were sleeping in the house and Uma, while allowing the appellant to take rest, went to the neighbour's house to grind rice for preparing "idlis" for the next day. She retuned to her house at about 4.45 p.m. and was shocked to see the appellant lying over her daughter, Yashoda, who was lying below his private parts. She rushed towards the appellant and pushed him aside. She found her daughter bleeding from the private parts and also noticed bleeding near her lips. She cried for help whereupon the appellant ran away. The child was taken to Arasikere Hospital where the doctors intimated the police and on the police reaching the hospital, the complainant narrated the whole incident whereupon a case was registered against the appellant under Section 376 IPC. The case was investigated and a charge-sheet was subsequently submitted against the appellant;, who was tried for the offence under Section 376 IPC and ultimately convicted and sentenced to ten years' RI. The appeal filed by him was dismissed by the High Court. The trial court as also the High Court have recorded concurrent findings of fact that the appellant committed rape on a child of one-and-half years. These findings are based on the evidence brought on record. The medical report as also the statement of the complainant clearly establish the commission of the offence by the appellant.

5. Having regard to the facts of this case, the question that arises now is whether the Additional District Judge was justified in awarding a sentence of 10 years' RI to the appellant or he should have been awarded life imprisonment, which is the maximum sentence prescribed under IPC Section

376(2) IPC provides, inter alia, as under:

"376, *Punishment for rape* — (1)

* *

(2) Whoever, —

* *

(*a*)-(*e*)

(*f*) commits rape on a woman when she is under twelve years of age;

* *

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

6. A perusal of the above provision would indicate that where the victim is a woman of less than 12 years of age, the minimum sentence that can be awarded to the accused is ten years, but it may also extend to life imprisonment apart from a fine which may also be imposed upon him. The proviso to this section, however gives a discretion to the court to award to sentence of less than 10 years for adequate and special reasons which have to be mentioned in the judgment.

7. Since the victim in the instant case was an infant child of one-and-half years, the trial court as also the High Court both were right in awarding a sentence of 10 years to the appellant. That was wholly in consonance with the provisions of Section 376(2) IPC. The question, however, is that if the law gave the court the discretion to award even life imprisonment for the offence of rape under Section 376(2) IPC, why was that discretion not exercised by the trial court or the High Court in the instant case where the victim of rape was an infant child? The trial court, while awarding ten years' RI to the appellant has observed as under :

2". In view of the submissions made before me, though I have to agree with the submission of the learned counsel for the accused that there is reformation in the mind of the accused as he is in custody as undertrial prisoner for more than a year and there are dependants depending upon him, as the office committed by him is of such a grievous nature that leniency with

regard to the awarding of punishment cannot be exercised and also as the victim of the offence was hardly one-and-a-half years old at the time of commission of offence without having the capacity of self-defence and the victim for no fault of hers has been made to suffer a black mark of the incident throughout her life, who knows, even at the cost of her future comfortable living. In a decision reported in *Gajanand Maganlal Mehta* v. *State of Gujarat* in the very opening of the judgment, their Lordships have observed that :

'Human weakness or wickedness; either of the two or both of them together may be the cause of sexual offences. If the offence is on account of wickedness, the accused naturally deserves no sympathy.'

In this case, the fact of the accused could only be attributed to wickedness. As such, the accused deserves no sympathy at the hands of this Court. Such acts should be put down with a strong hand and a deterrent punishment should generally be awarded. In a decision reported in *Narayan Franna Pothanthi* v. *State of Maharashtra* in a similar case, where the victim was hardly aged 7 years, their Lordships while awarding sentence have observed as hereunder:

'... Our attention was invited to the provisions contained in Section 376(2) of the Indian Penal code, which made child rape punishable under clause (f) thereof, punishable with rigorous imprisonment for a term which shall not be less than 10 years, but which may be for life and shall also be the liability to fine. Thus, when the legislature itself has indicated the minimum limit of the leniency that could be shown in such cases, it would not be justifiable to show more leniency than what is deserved in a case of the present type, on the ground that the revision petitioner was a young man.'

3. In the circumstances, in view of the above decision and taking into consideration the nature and gravity of offence committed by the accused and the tender age of the victim, I am not inclined to show any leniency in awarding punishment to the accused."

8. The High Court, while upholding the findings of fact recorded by the trial court did not advert itself to the question of enhancement of sentence as, perhaps in its opinion, the sentence of ten years' RI was sufficient for the offence committed by the appellant.

9. Mr. Seeraj Bagga, Advocate, appearing as amicus curiae, in this case has in his written statement pointed out the following extenuating circumstances on the basis of which it is prayed that the sentence may not be enhanced:

"*Reformation of the peittioner*

5. That the petitioner is in judicial custody from the date of his arrest after 22-6-1991 and has been undergoing the sentence since then. That there has been a reformation in the mind of the accused since he is in custody. In this regard the observation of the trial court is reproduced below: (p. 38, para 2)

'In view of the submission made before me, though I have to agree with the submission of the learned counsel for the accused that there is reformation in the mind of the accused as he is in custody as undertrial prisoner for more than a year.'

It is respectfully submitted that this observation was recorded by the trial court on 30-9-1994, i.e., after about 3 years from the date of incident and it is very likely that after such a long period in the judicial custody, after having pondered over the whole matter, self-realisation and introspection, the reformation of the peitioner cannot be denied as it is well known that nowdays religious discourses, meditation and other reformatory programmes are undertaken for the benefit of the prisoners confined in jails. Thus, in this view of the matter, it is respectfully submitted that the Hon'ble Court may take a sympathetic and lenient view of the matter and discharge the notice of enhancement of sentence.

Mitigating circumstances

6. That it is respectfully submitted that in view of the following mitigating circumstances, the Hon'ble court may take a lenient view of the matter as the petitioner is the sole breadwinner of his family, which includes besides his wife, his two daughters aged about 16 and 10 years respectively. There is no other source of help to the petitioner's family and the wife of the petitioner is with great difficulty running the family by doing labour work.

That this Hon'ble Court in the case entitled Bharwada Bhoginbhai Hijibhai v. State of Guraraj reduced the sentence awarded in view of the special circumstances which existed in favour of the appellant therein. It may be stated that in that case, the conviction under Section 376

read with Section 511, 354 and 342 IPC was upheld by the Hon'ble court but the sentence was reduced in view of the special circumstances which were as under:

(*a*) The appellant lost his job in view of the conviction recorded.

(*b*) The incident occurred some 7 years back from the date of the decision of the appeal; by this Hon'ble court.

(*c*) A long time had elapsed after the dismissal of the appeal by the High Court.

(*d*) The appellant was to be sent back to the jail after six-and-a-half years.

(*e*) The appellant must have suffered great humiliation in the society.

(*f*) The prospects of getting a suitable match for the appellant's own daughter had perhaps been marred in view of the stigma in the wake of the finding of guilt recorded in the context of the offence.

The Hon'ble court taking a cumulative effect of all these special circumstances, reduced the sentence for an offence under Section 376 read with Section 511 IPC from two-and-a-half years' RI to 15 months' RI.

That on behalf of the petitioner, it is respectfully submitted that even though the offence and the conviction recorded in the above mentioned case are different from that in the present case but similar special mitigating circumstances also arise in the present case which should be taken into consideration by the Hon'ble court at least for the purpose of discharging the notice of enhancement of sentence which the Hon'ble court has issued to the petitioner as in the present case, it is quite evident:

(*a*) That as a result of the arrest and conviction of the petitioner, who was the sole breadwinner and was maintaining the family, his two daughters and wife are suffering and are without any help.

(*b*) That the incident occurred around 9 years back and the record of the case reveals that the Petitioner is in custody since the date of incident.

(*c*) That the petitioner and his family have suffered great humiliation in the society.

(*d*) That the petitioner has two daughters aged about 16 and 10 years and the prospects of getting

a suitable match for them have been marred to a great extent in the wake of this conviction and sentence and the fact that the petitioner is in custody for the last about 9 years.

(*e*) That the sentence of 10 years' RI awarded to the petitioner would be over within a year or so and if the Hon'ble court at this stage enhance the sentence to life imprisonment then the family of the petitioner and particularly his two daughters and their future would be ruined for no fault of theirs.

That in view of the above special mitigating circumstances which exist in favour of the petitioner and his family, it is respectfully prayed that the Hon'ble court may take a sympathetic view of the matter and discharge/withdraw the notice of enhancement of sentence issued to the petitioner."

10. Mr Seeraj Bagga has also pointed out that the State has not filed any appeal for the enhancement of the sentence.

11. Crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as the commission of an act specifically forbidden by law; it may be an offence against morality or social order. In *State of Punjab* v. *Gurmit singh* Anand, J. (as his Lordship then was), observed in para 21 of the Report as under: (SCC p. 403)

"*21.* 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 rights in all spheres, we show little or no concern for her honour. It is a said reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — *it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.*" (emphasis supplied)

12. In Bodhisattwa Gautam v. Subhra Chakraborty one of us (S. Saghir Ahmad, J.) while delivering the judgment, observed as under: (SCC p. 500, paras 9-10)

"9. Unfortunately, a woman, in our country, belongs to a class or group of society who are in a disadvantaged position on account of several social barriers and impediments and have, therefore, been the victim of tyranny at the hands of men with whom they, fortunately, under the Constitution enjoy equal status. Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated.

They also have the right to lead an honourable and peaceful life. Women, in them, have many personalities combined. they are mother, daughter, sister and wife and not playthings for centre spreads in various magazines, periodicals or newspapers nor can they be exploited for obscene purposes. They must have the liberty, the freedom and, of course, independence to live the roles assigned to them by nature so that the society may flourish as they alone have the talents and capacity to shape the destiny and character of men anywhere and in every part of the world.

10. Rape is thus not only a crime against the person of a woman victim, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the right to life contained in Article 21. to many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects."

14. Under the punitive approach, the rationalisation of punishment is based on retributive and utilitarian theories. Deterrent theory which is also part of the punitive approach proceeds on the basis that the punishment should act as a deterrent not only to the offender but also to others in the community.

15. The therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family

problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective methods of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the criminal through various processes, the most fundamental of which is that in spite of having committed a crime, may be a heinous crime, he should be treated as a human, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this Court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy. (see: *Sunil Batra* v. *Delhi Admn., Sunil Batra (II)* v. *Delhi Admn., Charles Sobraj* v. *Supdt., Central Jail Tihar* and *Francis Coralie Mullin* v. *Administrator, Union Territory of Delhi.*)

16. Sexual offences, however, constitute an altogether different kind of crime which is the result of a perverse mind. The perversity may result in homosexuality or in the commission of rape. Those who commit rape are psychologically sadistic persons exhibiting this tendency in the rape forcibly committed by them.

17. In some States in the U.S.A., therefore, emphasis was laid on psychotherapeutic treatment of the offender while he was under detention. For that purpose, psychopath sexual offender laws have been enacted in certain jurisdictions in U.S.A. These laws treat the sex offenders as neurotic persons and psychotherapic treatment is given to them during the period of their detention which may, in some cases, be an indefinite period, in the sense that they would not be released till they are cured. But the provision for idefinite detention even beyond the maximum period of imprisonment for that offence was seriously objected to by a group of lawyers and, therefore, in many of the States, this provision was dropped from the satatute.

18. Here, in India, satutory provision for psychotherapic treatment during the period of incarceration in the jail is not available, but reformist activities are systematically held at many places

with the intention of treating the offender psychologically so that he may not repeat the offence in future and may feel repentant of having committed a dastardly crime.

19. The question of sentence in such cases was considered by Krishna Iyer, J. In *Phul singh* v. *State of Haryana* in which he observed that sentencing efficacy in cases of lust-loaded criminality cannot be simplistically assumed by award of long incarceration, for, often that remedy aggravates the malady. He further observed that a hypersexed homo, sapien cannot be rehabilitated by humiliating or harsh treatment. In that case it was found that the appellant was a young man of 22 years with no criminal antecedents save the offence of rape committed by him. The learned Judge thought that given correctional courses through meditational therapy and other measures, his erotic abdrrations may wither away, particularly as the appellant had a reasonable prosepct of shaping into a balanced person. But, this theory was not followed in later decisions as it was found that in spite of devices having been employed and adopted within the jail premises so as to reform the offenders, there was negligible improvement in the commission of crime. Crime, instead of declining, had increased and, today, it has assumed dangerous proportions. While one person is reformed and moves out of jail another offender is born. Consequently, in two recent decisions, relating to the offence of rape, one rendered by the present Chief Justice of India and the other by brother Lahoti, the sentence was enhanced in *State of Karanataka* v. *Krishnappa* while in the other case, namely, *State of Rajasthan* v. *N.K.* the order of acquittal passed by the High Court was set aside and substituted by an order of conviction.

20. However, having regard to the extenuating circumstances pointed out by Mr Seeraj Bagga in the instant case, specially the fact that the appellant's two daughters have come of age and are to be married, we feel that the present period of incarceration of the appellant in jail is enough and he should not be made to further suffer the consequences of his bestiality. We therefore, while dismissing the appeal, recall the notice issued to the appellant for enhance of his sentence.

State of A.P. ... Appellant;

Versus

Polamala Raju Alias Rajarao ... Respondent.

1. A little girl of five years of age was ravished by the respondent on 4-1-1985 at about 2..00 p.m., taking advantage of her helpless state.

2. The respondent, a neighbour of the prosecutrix living almost opposite her house was tried for an offence under Section 376 IPC on an FIR lodged by the father of the prosecutrix. The version of the prosecutrix regarding the commission of offence by the respondent, as narrated in court through her mother, PW 1 received ample corroboration from medical evidence and other evidence led in the case. We are not repeating the prosecution version of the case or gist of the evidence led in the case for the simple reason that the learned Assistant Sessions Judge, West Godavari, after recording evidence and hearing partties, both on the question of conviction and sentence, vide order date 9-9-1985, convicted the respondent for an offence under Section 376 IPC. After taking into account the report of the District Probabtion Officer, relating to the character, conduct and antecedents of the respondent, the trial court awarded a sentence of 10 years' RI and a fine of Rs 10, and in default, simple imprisonment for one week for the said offence. The convict filed an appeal, challenging his conviction and sentence, which came to be heard by a learned Single Judge of the High Court of Andhra Pradesh. The learned single Judge, vide judgment dated 15-9-1987, "entirely" agreed with the conclusions arrived at by the trial court and confirmed the conviction of the respondent for an offence under Section 376 IPC. However, the sentence was reduced to a period of five years' RI. while maintaining the sentence of fine and imprisonment in default of payment of fine.

3. The respondent has not filed any appeal challenging his conviction and sentence.

4. The State is in appeal against reduction of sentence of the respondent by the High court.

5. We have, with the assistance of learned counsel for the parties, examined the record. In our opinion, both the trial court and

the High Court were justified in convicting the respondent for an offence under Section 376 IPC as the prosecution has established its case against the respondent beyond a reasonable doubt through cogent and reliable evidence. We, accordingly, also confirm the conviction of the respondent for the offence under Section 376 IPC.

6. Was the High Court justified in interfering with the discretion exercised by the trial court by reducing the sentence from 10 years' RI to 5 years' RI for an offence under Section 376 IPC, is the only question requiring our consideration.

7. Section 376(2) IPC reads thus :

> "376. Punishment for rape.—(1) * * *
>
> (2) Whoever,—
>
> (a)-(*e*) * * *
>
> (*f*) commits rape on a woman when she is under twelve years of age; or
>
> (*g*) * * *
>
> shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:
>
> provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

8. The age of the prosecutrix in the instant case was admittedly five years at the relevant time. Normal sentence under Section 376(2) IPC in case where rape is committed on a child below 12 years of age, is "not less than 10 years" RI", an expression which is pre-emptory in nature. The courts are obliged to respect his legislative manadate when the case falls under the proviso {*Sic* Section 376(2)}. The ;proviso to Section 376(2) IPC, however lays down that in exceptional cases, "for special and adequate reasons"' sentence of less than 10 years' RI may also be awarded in a given case. The proviso, in our opinion, would come into play 7 when the are "adequate and special reasons" available in a case. Those reasons need to be disclosed in the order/ judgment itself so that the appellate forum is in a position to know as to what weighed with the court in awarding a sentence less than the minimum prescribed under the Act.

9. We are of the considered opinion that it is an obligation of the sentencing court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence. The sentencing court must hear the loud cry for justice by the society and more particularly, in cases of heinous crime of rape of innocent helpless children, as in this case, of the victim of the crime and respond by imposing a proper sentence.

10. In the present case, the reasons given by the High Court in the instant case for reducing the sentence from minimum 10 years is contained in the last para of the judgment which reads :

> "I entirely agree with the conclusions arrived at by the learned Assistant Sessions Judges. I accordingly confirm the conviction imposed by the Court below. But, having regard to the circumstances of the case, the sentence of ten years' RI imposed by the Court below is reduced to a period of five years' RI and the sentence of fine of Rs 10 shall stand."
>
> (emphasis ours)

11. To say the least, the order contains no reasons, much less "special or adequate reasons". The sentence has been reduced in a rather mechanical manner without proper application of mind. It appears that the provisions of Section 376(2) IPC were not at all present to the mind of the Court. This Court has time and again drawn attention of the subordinate courts to the sensitivity which is required of the court to deal with all cases and more particularly in cases involving crime against women. In *State of A.P.* v. *Bodem Sundara Rao*[1] this Court said : (SCC pp.232, para 9)

"9. In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. *Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal.* The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. *Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment.* The

courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14-years-old girl shakes our judicial conscience. The offence was inhumane."

... (emphasis ours)

14. We have given due consideration to the plea raised by learned amicus on behalf of the respondent that it being an old case the order of the High Court need not be interfered with. We are unable to persuade ourselves to agree with the submission. We do not find any extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the prescribed minimum on the respondent. To show mercy in a case like this would be travesty of justice. There are no reasons, much less sufficient and adequate reasons available on the record to impose a lesser sentence than the prescribed minimum.

15. The High Court, in the facts and circumstances of the case, was not at all justified in interfering with the proper exercise of discretion by the trial court. We, therefore, set aside the order of the High Court insofar as the reduction of sentence is concerned and restore the sentence of 10 years' RI, as imposed by the trial court. The respondent shall be taken into custody to undergo the remaining sentence.

16. The learned amicus lastly submitted that because of the long time which has elapsed subsequent to the date of offence and the possibility that the prosecutrix, as also the respondent, may have got married and settled in life during the pendency of these proceedings, fine instead of sentence be imposed. We cannot agree. These factors may be relevant for consideration by the executive or constitutional authorities, if they choose to remit the sentence on being so approached, as opined in *Kamal Kishore* v. *State of H.P.*[3] (SCC Pr. 25) but insofar as our judicial conscience is concnered, we find no reason to go against the legislative mandate and award any lesser sentence.

17. The appeal succeeds and is allowed in the above terms.

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(Also reported in 2000 (7) SCC 75)

Supreme Court on Rape Trial is a book comprising some of the judgements of the Supreme Court of India passed in the period 1950-2000 relating to rape trials. These are published to enable judges and prosecutors to have access to some of the best judgements of the Supreme Court on rape trials and apply the same in their cases.

The judgements have been put together by Aparna Bhat, who is an Advocate practicing in the Supreme Court for the last 11 years. Aparna specializes in child rights and has been working towards ensuring better trial for child victims of sexual abuse. She heads the child rights initiative of the Human Rights Law Network, which is a NGO providing legal aid across the Country. With Human Rights Law Network, she has filed some of the leading public interest cases in the Supreme Court. She is also the convenor of the National Campaign Against Child Sexual Abuse which is a network of concerned NGOs and individuals working towards prevention of child sexual abuse.