

Balram Singh Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Mar-07-2000

Reported in : 2000(4)MPHT39

Judge : A.K. Mishra, J.

Acts : Sexual Offences Act, 1956 - Sections 44; [Evidence Act, 1872](#) - Sections 26 and 27; Code of Criminal Procedure (CrPC) , 1974 - Sections 107, 116, 151, 313, 357, 357(1) and 357(3); [Fatal Accidents Act, 1855](#); Arms Act; [Indian Penal Code \(IPC\), 1860](#) - Sections 47(2), 53(3), 148, 149, 160, 325, 342, 366, 375, 376 and 376B; Police Act; Police Regulations; [Constitution of India](#) - Article 309

Appeal No. : Criminal Appeal No. 434/89

Appellant : Balram Singh

Respondent : State of M.P.

Advocate for Def. : D. Joshi, Adv.

Advocate for Pet/Ap. : S.C. Datt, Sr. Adv.

Disposition : Appeal dismissed

Judgement :

A.K. Misra, J.

1. The appellant who was a responsible police officer, was holding post of Circle Inspector in the police department of Government of M.P. He has been convicted for committing rape on Shyam Bai prosecutrix, under Sections 376, 366 and 342 IPC and sentenced to undergo R.I. for a period of five years under Section 376B, under Section 366 to undergo R.I. for 3 years, under Section 342 to undergo R.I. for 3 months.

2. The incident took place on 2nd April, 86 and at the relevant time appellant Balram Kusre was posted as Circle Inspector at Balod, District Durg. Accused Balram Kusre was residing in the house of Ratanlal situated near the petrol pump. As per the prosecution case, on 2-4-1986 in the night at about 10:30 p.m. few persons of Tikrapara, Balod found prosecutrix Mst. Shyam Bai and one Roopram in suspicious condition in the house of one Meena Bai. They both were brought to the police station and were placed in the custody of police. Incharge of police station Balod registered a case under Section 151 against Roopram and since it was night he was sent to the house of Kachra Bai for sleeping. Thereafter, in the night about 2-2:30 a.m. accused Gannulal Constable went to the house of said Mst. Kachra Bai and informed that Balram Kusre, Circle Inspector, would come. Kachra Bai asked constable Gannulal to go away. Thereafter Circle Inspector Balram Kusre reached the house of Kachra Bai along with constable Gannulal and succeeded in taking out Shyam Bai under the guise of recording her statement. She was taken to the house of Circle Inspector Balram Kusre by Gannulal from the house of Kachra Bai over a cycle. Another constable Anandram No. 941 was asked by him to take Shyam Bai to the resident of Balram Kusre. Accused No. 1 Anandram Constable took Shyam Bai to the residence of accused Balram Kusre. Accused Balram Kusre took Shyam Bai in his room, bolted the door from inside and thereafter he performed forcible sexual intercourse with the prosecutrix. In the morning about 4 a.m. accused Gannulal came again to the house and as per the directions of Circle Inspector Balram Kusre accused appellant he again took Shyam Bai to the house of Kachra Bai. Accused Balram Kusre had threatened the prosecutrix that she should not disclose the incident to anybody otherwise she would be put behind the bar. Hence, owing to the fear of Circle Inspector she went to her village without lodging the report at the police station. Kachra Bai, informed the incident to one of the members of Nagrik Manch namely, Mr. Ghanshyam

Agrawal with whose help a written report was prepared and sent to the higher officials and thereafter the prosecutrix had lodged the report at police station on the basis of which the offence was registered against the accused.

3. Shyam Bai was referred for medical examination. Her peticoat and printed sari were seized. They were also sent for chemical examination which confirmed the presence of human spermatozoa. Accused was also arrested and was referred for medical examination. Doctor opined that the accused Balram Kusre was impotent.

4. Accused abjured the guilt and contended that he was falsely implicated in the case owing to the political intervention of Nagrik Manch and he was innocent. Gannulal who has been acquitted took the defence that Circle Inspector Balram Kusre used to do the office work at his residence and he was his higher officer and under the orders of Balram Kusre, Circle Inspector, he and constable Anandram took Shyam Bai to the house of Balram Kusre. Trial Court has convicted the appellant Balram Kusre and acquitted Gannulal, accused No. 2.

5. In the appeal learned counsel appearing for the appellant Shri S.C. Datt, Senior Advocate submitted that the conviction of the appellant is unsustainable. He had forcefully submitted that the accused was found impotent on medical examination, thus, it could not be a case of rape. First information report was belated and delay has not been explained properly. The prosecutrix was not in the custody of the appellant as such offence under Section 376B was not made out. Medical evidence does not corroborate the case of rape on the prosecutrix. She was a consenting party. He submitted that the accused ought to have been acquitted.

6. After hearing the counsel, I am of the view that the appeal has absolutely no substance. The method and manner in which offence had been committed unfolds the tyranny of the police personnel and their total apathy to their public duty and the entire conduct of several police personnel was not only wholly irresponsible, but, was highly derogatory to the purpose of establishment of the police department which is meant for protecting the person from the commission of offence. The words are not enough to deprecate the conduct unfolded in the case. If rape is committed by a person in authority such as a police officer, the guidelines have been provided by the Supreme Court to assess the evidence under the

backdrop of the particular fact situation in which she was placed. In case of *State of Maharashtra v. Chandraprakash Kewalchand Jain* (AIR 1990 SC 658) it has been held as under :

'The infrastructure of our criminal investigation system recognises and 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, Sub-section (2) of Section 53 and proviso to Section 160 of the Code. If a police officer misuses his authority and power while dealing with a young helpless girl aged about 19 or 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. 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.'

7. Prosecutrix Shyam Bai has been examined as P.W. 11. According to her she was working as labourer in the Govind Rice Mill and had gone to see a movie from 6 to 9 when she came out of Cinema Hall she met one Roopram, who was working as a labourer in the mill and was her associate. She asked Roopram to drop her at the house of Meena who was residing at Balod in the house of one Prem. Roopram was maternal uncle of Meena. Meena requested Roopram to have the food and thereafter to go. Prosecutrix used to reside at Seoni in her parental house. Distance between Balod and Seoni is two and half miles. They took food and thereafter were talking. Prem Pahlwan came and objected to their staying in the house and telephoned Balram Kusre and called him. They were taken to the police station. Thereafter, Balram Kusre came to the police station. Roopram was put behind the bar and she was sent with one police personnel at the instructions of Mr. Balram Kusre in the hotel of Kachra Bai. Kachra Bai was

instructed to sent prosecutrix Shyam Bai to police station at 9 a.m. After about 10 minutes Mr. Balram Kusre came to the house of Kachra Bai and asked to open the door. She refused to open the door. Accused Balram Kusre threatened Kachra Bai and told that he wanted to record the statement of Kachra Bai. On that Kachra Bai opened the door. Accused Balram Kusre had come with one constable. Balram Kusre thereafter, after talking to the constable went away. The constable accompanying Balram Kusre took her on a cycle. Thereafter he met another constable who took her on a cycle to petrol pump. Accused Balram Kusre also reached there. Accused Kusre sent back the constable who had taken her to the petrol pump and took her inside his house situated by the side of the petrol pump. Accused took her forcibly inside the house by catching hold of her hand, threw her on the cot, bolted the door from inside, removed his clothes and thereafter when she refused to remove her clothes, he removed her peticoat and sari and committed forcible sexual intercourse in spite of her protest. There were no other persons when the forcible sexual intercourse was committed. The accused has inserted entire male organ in her private part. Semen was also emitted during the sexual intercourse. Accused did not leave her even thereafter and kept lying on her. At about 4 a.m. accused left her. There were blood like stains over her clothes. The said version of the prosecutrix has become necessary to be considered as the accused has claimed himself to be impotent. One constable had called Kusre from outside thereafter she was left and was taken by the police. The said constable was asked to drop her at the house of Kachra Bai. Accused Kusre told that whatever he had done was his mistake. She had told accused Kusre that she would report the matter to the police. She was asked not to report the matter to the police because he was holding the higher post and whatever he would like will happen. At 4 a.m. she was taken to Kachra Bai's hotel. Kachra Bai refused to keep her. She left the place at about 5 a.m. Thereafter she went to the place of one Kriparam, who was a relation of the prosecutrix. Accused did not record any police statement in the night for which purpose she was taken to his house. Owing to the fear of the accused Kusre, she did not lodge the report at the concerned police station and lodged it after 8-15 days. The prosecutrix has deposed that she had lodged the report Ex. P-7 which bears her thumb mark. No sexual intercourse was committed with her by any other persons after the date of the offence. Her

clothes were recovered by the police. She all the time apprehended that the accused Kusre may arrest her in any offence. Ghanshyam Agrawal was disclosed the incident. On his advise the report was lodged. She has further stated in the cross-examination that the accused Kusre had committed sexual intercourse for very long time, owing to which she sustained bleeding injury in the private parts. Her peticoat was stained by blood.

8. The version of the prosecutrix P.W. 11 has been supported by Constable No. 941 Anandram examined as P.W. 2 by the prosecution. He has deposed that he was posted as Constable in the month of April, 1986 at police station Balod. He was on duty in the night of 2nd April, 86 and was taking the round. At about 12 a.m. he came to know that large number of persons had collected at police station and at that time Gannulal Constable No. 882 was also with him. Both of them went to the police station. They found that one boy and one girl were in the police station. Station house incharge Mr. Mishra and head constable Hukumsingh were also present in police station. They were making some enquiry from the girl and thereafter the boy accompanying the girl was sent behind the bars and Mr. Mishra, Station Officer incharge asked the witness Anandram constable to enquire at the hotel of Hiralal Yadav whether he was ready to keep the girl in the night at hotel. Hiralal's wife refused to it. The matter was informed to the station officer who thereafter asked to make an enquiry from Kachra Bai. On enquiry from Kachra Bai she told that she would not come to police station, girl should be sent to her house. The witness has further deposed that when he came back after making enquiry from Kachra Bai, Circle Inspector Balram Kusre was in the police station, thereafter prosecutrix was taken to Kachra Bai's house. Head constable instructed Kachra Bai to send the girl to police station in the morning. Thereafter witness had gone at Rajhara Chowk at the place of his duty. He was alone and after about 15-20 minutes, constable Gannulal brought that very girl on a bicycle and called him from the side of the electricity office and asked him to take the girl to Circle Inspector's house as he had called the girl for recording the police statement. It was the pitched dark night and it may be seen that Balram Kusre absolutely had not business or legal right to call the girl for recording of police statement in the night as police regulation does not permit recording of the statement of a girl in the night, but, the intention of the accused was something else and it appears that

these constables were also very much aware of police regulation and knew the purpose for which the prosecutrix was being taken to the house of accused appellant Balram Kusre. She was taken to the house by Anandram constable. Balram Kusre had also reached the place by that time. At about 3-3:30 a.m. in the night, station house officer Mr. Mishra came on round. He informed the fact that Circle Inspector had taken the girl for recording her statement. The conduct of the witness himself as deposed by him was deprecable. However, he tried to justify his conduct by saying that he was following the order of his higher officer. The girl was present at the police station along with Roopram. If her statement was to be recorded that ought to have been recorded in the police station, but, she was to be sexually abused and therefore, was placed with Kachra Bai and was again taken by the two constables one after the other to the house of Balram Kusre. Thereafter accused committed forcible sexual intercourse with the prosecutrix. He has denied the suggestion that he had not taken the girl to the house of Balram Kusre on the date of the incident. There is nothing to disbelieve the version of this witness. He has further submitted that Hukumsingh, head constable No. 793 was also posted at same police station Balod District Durg. He has deposed that he was on the night duty. When he came back after having food at the police station at about 12:30 in the night, he found one boy and girl sitting in the police station, girl disclosed the name Shyam Bai resident of Seoni. Station officer incharge Mr. Mishra was present. They had disclosed that they worked in the Govind Rice Mill. The witness had gone to the house of Kachra Bai to make an enquiry whether she could retain the girl in the night in her house. Next day the boy was prosecuted under Section 151 Cr.P.C. by the station officer incharge.

9. Version of the prosecutrix and constable Anandram finds support from the deposition of Hukumsingh P.W. 3 and he has not been cross-examined on the aspect that the prosecutrix was not brought to the police station. No cross-examination has been made of the witness to the effect that she was not kept with Kachra Bai in the night. Kachra Bai has been examined as P.W. 1. She deposed that Hukumsingh, constable Meghnath and Gannu constable came to her tea shop (Hotel) and told that station officer was calling her to the station. She refused to go. Thereafter constable Hukumsingh came and told her that one woman has to be kept with her for the night. She did not go to the police station, however, the

prosecutrix was brought to her place at about 1 a.m. in the night, who was resident of Seoni. She stated that in the night after about half an hour another constable came asked her to open the door and told that Circle Inspector was coming to the house. Later on some person came again and told that Circle Inspector wants to record statement of the girl as such she should be sent immediately. She opened the door. Constable took that girl who was the prosecutrix with himself. That girl came back in the morning at about 4-5 a.m. and asked her to open the door, but, she refused to give shelter to her again. The witness denied the presence of Circle Inspector which she had stated to the police in the statement Ex. P-1, A to A portion, hence, she was declared hostile and was cross-examined. However, deposition of this witness Kachra Bai substantially corroborates the version of the prosecutrix and the two constables; constable Anandram (P.W. 2) and head constable Hukumsingh (P.W. 3). However, she has deposed in Para 8 that she was not knowing Balram by name, as such she could not say that who had come to take the girl from her house. As girl was not given shelter after commission of offence of rape, by Balram Kusre, by Kachra Bai, she had gone to the house of Kriparam P.W. 4. He has deposed that when she came to his house at 5 a.m. his wife had opened the door. The witness P.W. 4 has not been cross-examined on behalf of the accused appellant. Thus, it is established that on refusal by Kachra Bai she had gone to the house of Kriparam and took shelter in his house.

10. Another constable examined by the prosecution was Anwar Khan P.W. 6. He stated that he was on duty in the intervening night of 2nd and 3rd April, 86 in the wireless room and he had slept in the said room. He has deposed as to the presence of Circle Inspector at the police station. He has further submitted that Hukumsingh Head Constable P.W. 3 was also on the night duty. B.P. Mishra, Sub-inspector, was Station officer incharge at the police station. However, witness had shown his ignorance as to what had happened in the night at the police station. The witness was declared hostile and was cross-examined who denied his police statement. He was already removed from the service of police as in another incident he was levelled with the charge of offence under Section 376, IPC, which explains, why the witness had turned hostile and has tried to suppress the truth and denied his police statement. H.L. Sharma was working at petrol pump by the side of which Circle Inspector Balram Kusre resided. He has deposed that at about

2 a.m. in the night Mr. Balram Kusre had come to the petrol pump and asked the witness for some water. Thereafter Balram Kusre went to his house. Thereafter witness went to sleep and was not aware what happened in the night and from the deposition of the said witness it is clear that though he has not divulge the full details, but, he corroborates the case that Balram Kusre had come at about 2 a.m. in the said night to his house, situated by the side of petrol pump.

11. Ghanshyam Agrawal who has taken the active interest in lodging the report against the accused appellant has been examined as P.W. 10. He has deposed that on 3-4-86 Kachra Bai had come to the office and informed that on 2-4-86 Radhelal had kept one girl Shyam Bai and she was ultimately brought to her place and was taken by Circle Inspector and constable under the pretext of recording of her statement and was taken to the house of Circle Inspector and she had come back thereafter before sunrise but she was thereafter not given the shelter. On that this witness started enquiry and came to know from Shyam Bai that she was taken to the house of Circle Inspector Balram Kusre near petrol pump and forcible sexual intercourse was committed with her. Thereafter Nagrik Manch became active and asked the Government to conduct enquiry and on their advice Shyam Bai had lodged the report of the incident. The said witness belonged to the Janta Party and was General Secretary of Mandal, Balod. The Governor was also informed of the incident by Nagrik Manch. He has denied the suggestion that there was any political motive involved in the matter. The deposition of the witness Ghanshyam Agrawal appears to be truthful, no ground of ill-will or animosity has been suggested of Circle Inspector Balram Kusre to this witness and it appears that he is a public spirited individual and took active interest in booking of the guilty. He supported the prosecution case that Kachra Bai and Shyam Bai both have informed him of the incident and that is how the truth came to the light and heinous offence like rape which is an offence against womanhood. Women as a class are supposed to be respected in our country and placed at a high pedestal. The protector of them had outraged the modesty in the shape of the accused appellant. The accused never intended to record her police statement, it was a pretext to call her to his house and to sexually abuse her. Even if the girl/prosecutrix was destituted by the husband and had gone in the night to see a movie from 6 to 9 p.m. the police had no business to harass her. If she was found

in suspicious condition in the house of Meena, she ought to have been sent back to her own house in the night itself. The boy i.e. Roopram was detained in the police station and kept behind the bar. That was also done so that he separates from the company of the girl and girl could be sexually exploited. The conduct by the accused appellant and entire conduct of the police officials involved in the matter is deplorable, many of them had acted most irresponsibly in the discharge of their duty though only two persons were booked.

12. Prosecutrix was examined by Dr. Smt. Shashi Kladiyas on 16-4-86 after about 15 days of the incident as such no definite opinion could be given about the rape. Doctor has opined that it was not possible to opine about sexual intercourse after 10-12 days of the same because after lapse of 10-12 days it was not possible to find any sign. Her hymen was found ruptured because she was a married lady.

13. Learned counsel appearing for the appellant has mainly placed reliance upon the report of medical examination of the accused Balram Kusre furnished by Dr. M.L. Nayak examined as P.W. 8. As per the report furnished by Dr. M.L. Nayak as contained in Ex. P-4 the accused was examined after about one month, 24 days of the incident by Dr. M.L. Nayak. As per his report Ex. P-4, as to the male part it was found small in size and was not erected. Testis were normal in size and the vasectomy was done on both side, testicular reflex was sluggish on left side and absent on the right side. Doctor opined that the accused is impotent and could not performed the sexual intercourse as his penis was not erected on stimulation. However, Doctor opined that it was not possible to give any opinion whether he could commit intercourse on 2/3rd April, 86. Thus, Doctor's report Ex. P-4 is contradictory itself. On one hand Doctor has opined that it was not possible to give any opinion about accused's capacity to perform intercourse on 2/3rd April, 86 and on the other hand the Doctor has opined that the accused was impotent. If the accused was really impotent, the accused could not perform intercourse on 2/3rd April, 86, but, no such certificate has been given by the Doctor. He could only say that the private part of the accused was not erected on stimulation. In what manner stimulation was given has not been mentioned by the Doctor in the report. The accused was physically healthy. Doctor has not mentioned that any massage was given to the private part of the accused. No other tests were conducted by the

Doctor so as to opine that the accused was impotent. The said Doctor has been examined as P.W. 8. He has qualified his statement in Paragraph 3 of his deposition that he could opine only with respect to date on which he examined the accused. He found him impotent on that day. He has not deposed as to the date of incident. Doctor has not deposed before the Court that any prostrate massage or any stimulation was given and in what manner stimulation was given. He has clearly deposed in Para 3 that he could not state whether accused could perform sexual intercourse on 2/3rd April, 86, i.e., intervening night of the incident as sign of such sexual intercourse were not present. Obviously, after one month and 23 days such sign if any would not be found, but, Doctor has not opined that the accused was not capable of performing sexual intercourse on 2/3rd April, 86 when the incident took place and moreover Doctor appears to have been won over by Circle Inspector. Doctor's deposition is vague and is of non-committal in nature. A letter was written to this witness Ex. P-5. By Ex. P-5 he was required to explain whether the impotency was such that accused could not perform intercourse on 2/3rd April, 86 and whether Doctor could say for how much period the accused was suffering from impotency. This query was made on 19-8-86 from the said Doctor Nayak. He mentioned on the back of the said letter in the portion Ex. P-5A that it was not possible to give an opinion whether accused was impotent on 2-4-86 and it was not possible to give an opinion that from how much period accused was impotent. The Ex. P-5A reply was sent on 20-6-86 by the Doctor and he was not cross-examined by the accused. No question was put in his cross-examination that the accused was not capable of performing sexual intercourse on 2-4-86 and 3-4-86. The trial Court has rejected the report of the Doctor. The medical opinion is only an opinion and it is for the Court to accept it and it has been held so in 1982 SCC (Cr.) page 431. Nature of the expert opinion has been considered by Supreme Court in another case Madan Gopal Kakkad v. Naval Dubey and Anr., (1992) 3 SCC 204 Supreme Court has observed as under :--

'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 in 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 only 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*, (1869) 11 Sutherland WR Cr. 25, 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*, (1977) 3 SCC 41 = 1977 SCC (Cr.) 447 = AIR 1977 SC 1307 has stated thus :'.....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 the exact time when the appellants may have had sexual intercourse with the prosecutrix.'

14. In the instant case Doctor who examined accused has not mentioned in the report that what test he has conducted to certify the accused to be impotent and stimulation was given by which method, how much time and who gave it, nor he has deposed so in the Court. Thus, the opinion of the Doctor is not based on any objective material so as to Judge in an objective manner and it appears that the accused was capable of performing sexual intercourse, hence, Doctor confirmed his opinion with respect to date on which he had examined accused and refused categorically to give any opinion as to potency of accused on the date of offence. Thus, the deposition of Dr. Nayak and his report are of no avail to the accused and have been rightly rejected by the trial Court also.

15. Learned counsel for the appellant has relied upon two decisions, AIR 1954 SC 28 (*Sunderlal v. State of Madhya Pradesh*) and AIR 1957 SC 589 (*Bhagwan Das and Anr. v. State of Rajasthan*). In the said decision of Bhagwandas, it has been held that where the opinions of authors were neither shown to have been given in regard to circumstances exactly similar to those in the particular case before Court nor were they put to the medical witness, it is not a satisfactory way of disposing of the evidence of the witness, to discredit it on the ground that the doctor was a

comparatively young man and his statements did not accord with the opinions expressed in the books. Reliance was placed by Hon'ble Supreme Court on its previous decision in the case of *Sunderlal v. State of M.P.* (AIR 1954 SC 28) in which it was held that drawing conclusion adverse to the accused by relying upon such passages in the absence of medical witness is not permissible. But in the instant case, Doctor's opinion itself is not based on objectivity and he has opined just on the basis of non-erection in the normal circumstance. It may be seen that there are various causes for the impotency. Impotency is generally at the extremes of age. Boys are considered to be sexually potent at the age of puberty, which usually occurs at the fifteenth or sixteenth year. Sexual intercourse is however, possible at about the thirteenth or fourteenth year, as the power of coitus commences earlier and ceases later than the power of procreation. The changes that occur in a boy at puberty are the development of the genital organs, the ability to secrete semen, the growth of hair on the pubes, axillae and chin, and the increase in size of the larynx leading to the deepening of the pitch of the voice. When examining an individual for sexual capacity, the medical jurist should depend more on physical development than on age alone. Modi has mentioned in the chapter relating to the impotence that 'As age advances, the power of sexual intercourse and procreation diminishes, but no limit can be assigned even legally at which this power ceases, as men of eighty years and over have been known to have begotten children. In October, 1924, Modi referred a case to Dr. Mukherjee where he found spermatozoa in a man of about ninety years of age.' Doctor has not opined that there was any malformation. The male organ was fully developed. No abnormality was found in the penis. Thus, accused was capable of performing sexual intercourse and Doctor has not stated that the accused could not perform sexual intercourse on the date of incident. Testicles were present that also show that the accused was potent. No local disease has been found by the Doctor which may have caused impotency. No marked diseases of the penis or of the testicles, such as orchitis following mumps, syphilis, cancer and tuberculosis, which may lead to impotence or sterility or both was found. Inflammatory affections of the testicles, epididymis prostatic gland and seminal vesicles of gonorrhoeal origin are frequent causes of impotence and sterility. The other causes have been reported by Modi in its book to the cause of impotence such as Endocrine disturbances etc.

Sometime impotency may be of specific or temporary. A temporary absence of desire for sexual intercourse may result from fear, anxiety, guilt sense, timidity, aversion, hypochondriasis, excessive passion and sexual over-indulgence. Persons with homosexual tendencies may be impotent. Sometimes, an individual may be impotent with one particular woman, but, not with another. Thus, it is a case where material is lacking. Thus, the medical opinion as to impotency of accused has no value and has to be rejected. 16. It may be seen that meaning of 'sexual intercourse' has been further considered by the Supreme Court in case of Madan Gopal Kakkad (supra) in Paras 38, 39, 41, 42 and 43 which read as under :--

'38. In Prikh'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 of leaving and seminal stains.'39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

'..... (E)ven 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, (1841) 9 C & P 752 = 2 Mood CC 190, (2) R. v. Lines, (1844) 1 Car & Kir 393 and R. v. Nicholls, (1847) 1 Car & Kir 393.

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 victim 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.'The aspect of penetration has been considered by the Supreme Court in Para 44 in Madan Gopal Kakkad (supra) thus : '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. Reference may be made (1) Natha v. Emperor (1925) 26 Cr. L.J. 1185 = AIR 1923 Lah 536 = 88 IC 705, (2) Abdul Majid v. Emperor, AIR 1927 Lah 735 (2) = 28 Cr. L.J. 241 = 100 IC 113, (3) Mst. Jantan v. Emperor, (1934) 36 Punj LR 35 = AIR 1934 Lah 797, (4) Ghanshyam Misra v. State, 1957 Cr. L.J. 469 = AIR 1957 Ori 78 (5) Das Bernard v. State, 1974 Cr. L.J. 1098. In re Anthony, AIR 1960 Mad 308 = 1960 Cr. L.J. 927, it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's The Penal Law of India, 6th Edn. 1955 (Vol. II), page 1678, it is observed, 'Even vulval penetration has been held to be sufficient for a conviction of rape.'

17. In the instant case penetration has been clearly deposed by prosecutrix and discharge of semen has also been deposed by her, thus, offence of rape was completed in the instant case.

18. Learned counsel for the appellant also submitted that the prosecutrix is a girl of loose moral character as she had gone to see a movie with the boy. The submission raised is not only devoid of substance, but, runs contrary to the dictum of the Apex Court in case of State of Punjab v. Gurmit Singh (AIR 1996 SC 1393) wherein para 15 it has been observed as under :--

'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. Such like stigma 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 to 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.'

19. In the present case, there is nothing to doubt the version of the prosecutrix. She has been corroborated by the sub-ordinate constable who was following the directions of the accused protecting him to perpetrate immorality and helped him in commission of offence. In the case of Gurmit Singh (supra) it has been held as under :

'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 at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration

notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be 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. Inference 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.'

20. Prosecution has examined B.P. Misra as P.W. 12. He was holding the post of sub-inspector at concerned police station at the relevant time at Balod. He had deposed that on 2-4-86 Roopram and Meena Bai were brought to police station. Roopram was arrested under Section 151 Cr. P.C. and Meena Bai was sent to the hotel of Kachra Bai. He has produced the entry in general diary at serial Nos. 121 and 122 dated 3-4-86 mentioned as Ex. P-9. In the entry Nos. 121 and 122 in general diary there is reference to Shyam Bai and that she was sent for being kept by Kachra Bai in the night, thus, the witness has not stated correctly the name of the woman who was involved in case under Section 151, Cr.P.C. and was sent to Kachra Bai. However, general diary entry clearly mentioned that it was Shyam Bai, prosecutrix, who was brought to police station and was sent for being kept in the night to the hotel of Kachra Bai. There was no occasion for police to register case under Sections 151/107, Cr.P.C. against Roopram and the girl. It appears that Roopram was put behind the bar just to separate the company of Shyam Bai. B.P. Mishra deposed against the entry in general diary and from his deposition it is clear that he had no business to send the woman to the place of Kachra Bai as it was not permissible to the police and they had acted in most irresponsible manner and in perpetuation of crime. R.C. Patel, Addl. S.P. of Police of Transport has been examined as P.W. 13. He has recorded the first information report Ex. P-7 and has proved recording of first information report Ex. P-7. He has deposed that

complaint was lodged initially to the S.P. prior to the recording of the first information report, inquiry was made. Yet another witness has been examined namely; Nandkishore Solanki P.W. 14. He was working as Circle Inspector at police station Nandini and has investigated the offence in question. He has supported the investigation done by him.

21. In the statement under Section 313, Cr.P.C. the accused has not taken the plea of impotency on question being put. The Doctor was not able to opine whether accused on the date of incident was impotent. Accused has examined in defence a witness; D.W. 1. He allegedly stated that in the house of Balram Kusre in the night at about 2 a.m. accused came back. Thereafter accused went to sleep. On being questioned if he had come to attend marriage, then why he had not gone to attend it, he stated that the place of marriage was about one kilometer away, therefore, he stayed at the house of Kusre. Thus, he has failed to give any reason for staying in the house and not attending the marriage. Thus, his presence is doubtful by itself. He is not a reliable witness.

22. Counsel for the accused appellant has submitted that the prosecution case is not reliable for the reason that there was delay in lodging the first information report. He has placed reliance on a decision of the Supreme Court in 1995 SCC (Cr.) 826 (Jagannivasan v. State of Kerala). In the said case there was delay of 6 days. The said case did not relate to the policeman himself committing crime. Prosecutrix and the appellant were neighbours in the said case. However, in the instant case facts are totally different. Here, a high police official of cadre of Circle Inspector was involved with the help of other police personnel in the commission of offence and he had threatened the girl not to disclose the incident to anybody forthwith. However, report could not be lodged at the concerned police station as police officials themselves of the police station were involved and appear to be hand in glove in commission of offence. Higher official, S.P. had to be approached. Matter was written to the Govt. also and thereafter enquiry was initially ordered by the S.P. of the District and thereafter first information report was recorded and Kachra Bai has immediately informed the matter to Ghanshyam Agrawal who took interest and thereafter by their action the offence could come to light and the prosecutrix lodged a report in writing at some other police station which was

obviously under the orders of the superiors and offence was then handed over to the different circle inspectors of different police stations under the circumstances of the case. The delay of 15 days in lodging the first information report is absolutely immaterial and obviously delay was to be found when protectors were themselves perpetrator of the crime. Counsel's reliance on yet another decision, 1979 Cr. L.J. 3406, is also not available as the delay has to be seen and considered in the facts and circumstances of each and every case. Learned counsel has further placed reliance upon a decision of Supreme Court in the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* (AIR 1983 SC 753) so as to contend that medical corroboration is required to be seen in order to rely upon the version of the prosecutrix. In the said case it has been held in Para 7 that corroboration is not the sine qua non for a conviction in a rape case. Relying upon the decision in *Rameshwar v. State of Rajasthan* (AIR 1952 SC 54), it has been observed by the Supreme Court as under :

'The rule, which according to the cases 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..... 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.'

23. It has been further held in the said decision that the evidence of the 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 eye-witness 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. 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. In the instant case probabilities factors render the evidence of the prosecutrix probable. Prosecutrix has been corroborated by constables P.W. 2, P.W. 3 and entry in general diary. There is evidence of Kachra Bai P.W. 1 and other witnesses mentioned above which corroborates her version and obviously accused was not legally entitled to call her to his house late in the night to record a statement. He has mis-used his position in the official capacity.

24. Learned counsel for the appellant has further submitted that she was not in custody as such even conviction under Section 376B cannot be recorded, it was a case of consent. Section 376B, IPC runs as under :

'376B. Intercourse by public servant with woman in his custody. Whoever, being a public servant, takes advantage of his official position and induces or seduces any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence or rape, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.'

25. It may be seen that the custody has different meaning than arrest. Custody has been defined in Webster 9th Edn. Collegiate Dictionary to mean 'immediate charge and control exercised by a person or an authority. 'Custody' and 'arrest' are not synonymous terms. In every arrest there is a custody, but not vice versa.' In *Roshan Beevi v. Jt. Secy. Govt. of Tamil Nadu* (1984 Cr. L.J. 134, 149), difference between custody and arrest has been considered and it was held that 'Custody'

and 'arrest' are not synonymous terms. In every arrest there is a custody, but, not vice versa. In case of *Maung Lay v. R.*, (1923) 1 Rang 609 = 77 IC 429, it has been held as under :

'As soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of clear evidence to the contrary, in custody within Sections 26 and 27 of the [Evidence Act, 1872](#).'

26. In the case of *State of Madras v. K. Ramaswami*, AIR 1958 Madras 585 = (1958) 2 MPLJ 372, custody has been held to be carrying the meaning 'keeping at care'. It was held that during the time when the buses are being plied they are obviously in the custody of the drivers. In the instant case facts indicates that the prosecutrix was brought to the police station. Roopram the person who was accompanying her was put behind bar. Then she was placed at the instance of the police under the guise of recording her statement in the morning at 8 a.m. in the custody of Kachra Bai. Thereafter immediately she was again taken away by the police personnel in their custody under the guise of recording her statement to the house of Circle Inspector. Thus, obviously the prosecutrix was under the custody of accused. He was a person in authority and prosecutrix and the boy Roopram were brought to the police station and case against boy under Section 151 Cr.P.C. was registered in connection with the offence of having been found in the company of girl in suspicious condition. Thereafter at no point of time she was allowed to go or set free by the police. Thus, the submission raised by learned counsel that she was not in the custody is devoid of substance and is unacceptable. The police has never left the custody of the woman, even her custody had continued, when she was placed with Kachra Bai because Kachra Bai was not allowed by the police to leave the girl free, however, as soon as she was again taken in actual custody of the police from her hotel, actual custody of the police had started and she was required in connection with case under Sections 151, 107 and 116, Cr.P.C. Thus, offence in question, even if it a case of consent would clearly fall within the purview of Section 376B, IPC. Even with the consent no sexual intercourse could be committed by Circle Inspector Balram Kusre. Moreover, this is a case where rape was committed, thus, offence was liable for punishment under Section 376 for a description of a sentence of imprisonment of

not less than 10 years. Even where sexual intercourse is committed with consent, under Section 376B, with a woman who was in custody, such intercourse, not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine. However, in the instant case, in custody the offence of forcible sexual intercourse has been committed which actually amounts to rape. Hence, the punishment which has been inflicted by learned trial Court in para 25 considering Section 376B of five years is clearly based on error, since it is not the case covered Section 376B though the prosecutrix was actually in custody, offence would amount to rape itself punishable under Section 376, IPC. The punishment prescribed in Section 376B is for intercourse not amounting to rape, but, facts of the present case indicates that it was a rape punishable under Section 376, IPC and trial Court committed an error while considering the provision of Section 376B and sentencing him to five years imprisonment. As a matter of fact, gravity of offence required punishment of 10 years imprisonment. However, 15 years have passed since the date of offence, and accused must have lost the service. However, it appears in the circumstances of the case that the prosecutrix has not been suitably compensated. The compensation is provided under Section 357, Cr.P.C. Section 357 Cr.P.C. runs as under:--

'357. Order to pay compensation.-- (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied--

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the [Fatal Accidents Act, 1855](#) (13 of

1885), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this Section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent Civil Suit relating to the same matter, the Court shall take into account any sum paid or recorded as compensation under this Section.'

27. It is apparent from Section 357(3) that when a Court imposes a sentence of which fine does not form a part the Court may when passing the judgment order the accused person to pay, by way of compensation, such amount as may be specified in the order. It may be seen that victimology concept has been developed in various decisions of the Supreme Court. In (1992) 3 SCC 204, the accused was ordered to be sentenced 7 years and fine of Rs. 25,000/- was imposed and ordered to be paid to victim girl who was minor in that case. But, question is while sentence prescribed under Section 376, IPC is imprisonment for

life/imprisonment of 10 years and fine, trial Court has imposed the sentence of imprisonment, no fine has been imposed. Whether compensation can be ordered to be paid without imposing a fine Such course is permissible to ask accused to pay compensation under Section 357(3) Cr.P.C. without imposing fine. When fine has been imposed, it can be ordered to be utilized in the modes provided under Section 357(1). However, the provision of Section 357(3) is independent and this question is not res integra. It was considered by the Apex Court to be so in the case of Hari Kishan & State of Haryana v. Sukhbir Singh (AIR 1988 SC 2127). The Supreme Court has distinguished power under Sections 357(1) and 357(3) in paras 10 and 11 and laid down as under:

'10. Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with subsection (1). We are concerned only with Sub-section (3). It is an important provision but Courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the Court to award compensation to victims while passing judgment of conviction. In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments may also be

given. The Court may enforce the order by imposing sentence in default.'

28. In the case of Hari Kishan (supra) the compensation of Rs. 50,000/- was awarded in a case of Sections 325/148/149, IPC. Yet in another case of Balraj v. State of U.P., (1994) 4 SCC 29, it is held that 'power to award compensation not ancillary to other sentences but in addition thereto. In case of Daulat Ram v. State of Haryana (AIR 1995 SC 1998) the police officers foisted a false case of the Arms Act on the appellant for reasons best known to them. So the State was directed to pay a sum of Rs. 5000/- as compensation to appellant. The State was left free to recover Rs. 2500/- each from two police officers. In 1996 SCC (Cr.) 133 Supreme Court in an offence of rape awarded interim compensation as Court has power to award it in rape case at final stage.

29. Offence of rape is the most inhuman insult inflicted over womanhood. It brings mental agony, social disrepute and leaves scar for the life to its victim. Learned counsel for the appellant submitted that police officer has same passion and cannot be treated at different footing. The submission lacks merits. Legislature has imposed higher duty on him under Police Act and Police Regulations framed under Article 309 of the [Constitution of India](#). He has further tarnished and spoiled image of police. Submission overlooks that police is not uniformed to use criminal force, but, a force, uniformed, to tackle criminality. Time has come when Govt. must seriously consider framing of scheme for conduct of some Yoga classes or meditation course regularly in morning as part of duty, so that the image of police is restored and it becomes real protector of individual rights and liberty.

30. In the present case I was once inclined to issue notice of enhancement of sentence of imprisonment to maximum but considering the lapse of time of 15 years, and no appeal for enhancement has been filed and compensation independent to sentence is being ordered, I have refrained to do so fully conscious of fact that compensation cannot be substituted for sentence of imprisonment.

31. In the result appeal fails and is dismissed. Considering the gravity of offence and agony which victim might have suffered, she is directed to be paid compensation of Rs. 50,000/- by accused Balram Kusre. The Court feels compelled to observe that only two officials were booked, one of them has been

unfortunately acquitted by Court below, the concerned authorities of police shall take into consideration the conduct of entire police staff involved in one way or other and shall take corrective measures as may be deemed fit.

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