

Shayam Singh Vs. State

Shayam Singh Vs. State

SooperKanoon Citation : sooperkanoon.com/682626

Court : Delhi

Decided On : Nov-15-1967

Reported in : 5(1969)DLT222

Judge : T.V.R. Tatachari, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 375

Appeal No. : Criminal Appeal No. 51 of 1967

Appellant : Shayam Singh

Respondent : State

Advocate for Pet/Ap. : H.S. Thakur and; Sushil Malhtora, Advs

Judgement :

T.V.R. Tatachari, J.

(1) This appeal was filed by the accused-appellant under section 408(b) of the Criminal Procedure Code against the order of conviction passed by the Assistant Sessions Judge, Mahasu District, dated 31st May, 1967, whereby the appellant was convicted for an alleged, offence under section 376, Indian Penal Code, and was sentenced to undergo rigorous imprisonment for 7 years and to pay of a fine of Rs. 2,000.00 and in default of the payment thereof to undergo further rigorous imprisonment for 6 months.

(2) The case of the prosecution was as follows :- On 23rd January, 1966, a girl, Smt. Shanta, daughter of Shaligram, aged about 12 years, was grazing cattle in a field in Katoch Kiar all alone. Her mother, Smt. Ranpati, was working in a field at a distance of about 150 feet. The accused, Shiam Singh, it was alleged, finding Shanta all alone, went to her from the side to which she had her back, took her into his lap, carried her some distance to the side of a stone wall, unbuttoned the string of her pyjama and stripped the same up to her knees. He then took off his own pyjama also up to his knees, made Shanta lie flat beside the stone wall, and put his sexual organ into the sexual organ of the girl. Smt. Shanta raised an alarm, and her shouts were heard by two persons, Shawala Nand and Keshru, who were also grazing their cattle in two separate fields which were at a distance of about 200 feet from the place of occurrence, and when they challenged the accused and ran towards him in order to catch hold of him. The accused rose up from the body of Shanta and ran away. The said Shawala Nand and Keshru chased the accused for some distance to catch him, but could not succeed. In the meantime, Ranpati, the mother of Shanta came to the place of occurrence and found Shanta in a lying position with her pyjama pulled down up to her knees. Ranpati helped Shanta to stand up, tied the string of her pyjama, and then took her to their Dohgri, which was nearby. In the evening, keeping Shanta in the Dohgri, the mother, Ranpati, went to her home in village Tikri to inform her husband, Shaligram, about the occurrence. Shaligram had just returned home after putting out some fire in a jungle which was nearby on that day. On learning about the occurrence, Shaligram went to his Dohgri, took the girl Shanta from there and proceeded towards Rohru to lodge the First Information Report in the police station at Rohru. But, it became night before they reached Rohru, and, therefore, they stayed at Chirgaon on the way for the night, and reached Rohru on the next day i. e. on 24th January, 1966. Shaligram lodged the First Information Report in the police station. The girl, Shanta, was also medically examined. A case under section 376, Indian Penal Code, was registered against the accused, Shiam Singh. The police commenced the investigation, and arrested the accused. The accused was, however, released on bail later on. After the completion of the investigation, the accused was charged with the offence of rape under section 376, I. P. C., and he was committed to the court of Sessions for trial.

(3) At the commencement of the trial in 'the Sessions Court, the, accused pleaded nto guilty to the charge and claimed to be tried. The prosecution examined 11 witnesses in proof of the charge against the accused. On a consideration of the evidence adduced by the prosecution, the learned Assistant Sessions Judge, Mahasu and Kinnaur Districts, by his judgment, dated 31st May, 1967, held the accused, Shiam Singh, guilty of committing rape on Shanta, under section 376,I.P.C., convicted him for the said offence, and sentenced him to undergo rigorous imprisonment for 7 years, and to pay a fine of Rs. 2,000.00 and in default of the payment thereof to undergo further rigorous imprisonment for six months. Hence, the present appeal by the accused.

(4) Before dealing with the contentions of the appellant and the evidence in the case, reference has to be made to sections 375 and 376 of the Indian Penal Code. Section 375 runs as under :-

'375.A man is said to commit ' rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions :- First- Against her will. Secondly.-Without her consent. Thirdly.-With her consent when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly.-With her consent, when the man knows that he is nto her husband, and that her consent is given because she believes that he is antoher man to whom she is or believes herself to be lawfully married. Fifthly.-With or without her consent, when she is under 16 years of age. Explanationn.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception.-Sexual intercourse by a man with his own wife, the wife nto being under 15 years of age, is nto rape.'

The present case, according to the prosecution, falls under the Fifth circumstance mentioned above. Section 376 (I' als with the punishment for rape and it is nto necessary to set out the section. Reading the first part of section 375, the Fifth circumstance and the Explanationn together, it is clear that it has to be seen whether, in the present case, the prosecution has succeeded in establishing-

(I)that the girl, Shanta, was under 16 years of age ; (ii) that the appellant had sexual intercourse with the girl, Shanta; and (iii)that there was 'penetration' within

the meaning of the section.

THE witnesses examined by the -prosecution were :- P.W.1.-Shanta. the prosecutorix ; P.W. 2.-Shaligram. the father of Shanta ; P.W. 3.- Dr. M Kaushal, who medically examined Shanta with a view to determine her ; P.W. 4.- Shawala Nand, an eye witness ; P.W. 5-Keshru, antoher eye witness ; P.W. 6.-Ranpati, the mtoher of Shanta ; P.W. 7.-Kewal Ram, Secretary of Gram Panchayat, Tikkri, who produced a copy of an entry in the family register maintained by the said Panchayat regarding the date of birth of Shanta ; P.W 8-Dr. N. C. Jain who medically examined Shanta on the day following that of the occurrence ; P. W. 9. - Dr M. L. Ahuja, Radiologist, who gave his opinion regarding the age of the girl ; P. W. 10.-Shri Sohan Singh, who partly investigated the case ; and PW. 11.-Shri Daulat Ram, Station House Officer, who investigated the case.

(5) The first question for determination is as to whether Shanta was under 16 years of age at the time of the incident as alleged by the prosecution. P. W. 2, Shaligram, the father of Shanta, stated in his evidence, that Shata was 12 years old at the time of the occurrence, Public Witness 3, Dr. M. Kaushal of Snowdon Hospital, Simla, examined Shanta on 7th February, 1966 and issued a certificate, Ex. P.C. It was stated in the said certificate that Shanta was a thin looking young girl and moderately built, that her breasts, 'which develop at the age of 12 years, have nto developed at all', that there were no axillary or pubes hair, that there were no pale coloured ' downy hairs", over the pubes which normally appear at the age of 13 years, that Shanta had a set of 28 permanent teeth which are normally complete between the age of 12 to 14 years of life, that the age of the girl was about 12 years, that the said findings were based on Modi's Jurisprudence, at that the age should, however, be confirmed by taking X-Ray phtoographs of the various hones and joints by a Radiologist. She deposed to the same effect in her evidence. P. W. 9, Dr. M. L. Ahuja, the Radiologist at Snowdown, took various X-Ray phtoographs of Shanta and gave his certificate. Ex. P.H., dated 8th February, 1966. On a consideration of the variours X-Ray Phtoographs and his radiological findings set out in the said certificate, he stated his conclusion in the said certificate that, in his opinion, the skeletal age of Shanta was about 12 years. He deposed to the same effect in his evidence. P. W. 8, Dr. N. C. Jain, who examined

Shanta on 24th January, 1966, the day following the day of the occurrence, issued a certificate Exhibit P.F. He stated in the said certificate, inter alia, that, in his opinion, the age of Shanta, was between 13 and 15 years. Relying on the above evidence, the learned Assistant Sessions Judge held that Shanta, was below 16 years of age at the time of the occurrence. The evidence referred to above clearly supports the finding of the learned Assistant Sessions Judge, and I agree with his conclusion that Shanta was under 16 years of age at the time of the occurrence. I may point out that P. W. 7, Kewal Ram, who was Secretary of Gram Panchayat, Tikri, since 1956, produced Exhibit P. E., a copy of an entry in the family register of the said Panchayat. The said entry was the date of birth of Shanta, which was shown as 12-4-2008 Bk. In his cross-examination, he stated that the family register maintained by the Panchayat previously got burnt when the Panchayatghar (office) was destroyed by fire in 1959, and that the present register was prepared thereafter. He further stated in cross-examination that the entry in question was made by him in his own hand at the instance of Shaligram, the father of Shanta, that no horoscope was produced before him when the entry was made, but that her date of birth was orally conveyed to him by her father, Shaligram, from his memory. In view of the circumstance that the original register maintained by the Panchayat was destroyed by fire, and the circumstance that the date of birth was subsequently entered in the new register on the information given by Shaligram from his memory, it is safer to exclude this entry in considering the question as to the age of Shanta. As already stated above, the other evidence regarding her age shows, in my opinion, that she was under 16 years of age at the time of the occurrence.

(6) On the above finding, the next question for determination is as to whether the appellant herein had sexual intercourse with Shanta with or without her consent, and whether there was 'penetration' sufficient to constitute sexual intercourse within the meaning of section 375 of the Indian Penal Code. P. W. 1, Shanta, stated in her evidence that about one year and 4 months prior to the date of her deposition, she was grazing her cattle in Katoch Kiar, that she was alone at that time, that the accused, Shiam Singh, came from behind her, caught hold of her and put her on his lap, and carried her to some distance to a wall of stone, and that there he took off her trousers and also removed his own trousers, put her on

the ground, and put his male organ into her sexual organ. She further stated that she raised hue and cry when the accused did that to her, that Public Witness 4, Shawala Nand, on hearing her cry, shouted as to what the accused was doing, and thereupon the accused ran away, and that, in the meanwhile, her mother also came to the scene of occurrence, and took her to their Dohgri by holding her arm. It had to be noted here that Shanta could not identify the accused in an identification parade, but purported to identify the accused in the court at the time of her giving evidence.

(7) In cross-examination, she stated that she saw P. W. 4, Shawala Nand, and P. W. 5, Keshru, only at the time when she was crying for help and not prior to that, that her mother was the first person to go to her after the incident, that Shawala Nand and Keshru at that time ran after the accused, that when the said Shawala Nand and Keshru were chasing the accused, her mother had pulled her up from the ground where the accused raped her, that When her mother came on the spot she was still without the pyjama, which she put on with the help of her mother, and that when Shawala Nand and, Keshru came back to the place, she had already put on her pyjama. She further stated in her cross-examination that she saw Shawala Nand when he shouted at the accused, that Shawala. Nand was at about 50 feet from the place of occurrence when he shouted at the accused, that at that time her mother was working in a field nearby, that Keshru did not shout at the time when the incident took place and she did not see Keshru until he came to the place of occurrence, that when Shawala Nand shouted at the accused, the accused was lying; upon her body, that when. the accused was upon her body, her feet were towards the side from which Shawala Nand was coming, that she did not see the sexual organ of the accused when he inserted it into her sexual organ as he hid put his body upon her before he inserted his sexual organ into her private part, that When the nurse at Chirgaob examined her, she (the nurse) did not touch her sexual organ at all nor did she apply any medicine to it, that she did not tell the nurse at that time that she was feeling pain in her sexual organ as a result of the rape, that the medical officer at Rohru had inserted his finger into her sexual organ when he examined her, that she felt pain when the medical officer at Rohru inserted his finger into her sexual organ and she was not feeling any pain in her sexual organ up to the time the medical officer at Rohru inserted his finger,

thathe accused raped her for a very little while, and that she had been married to one Inder Sain, son of Sunder Singh, resident of Tikri, prior to the date of the incident. P. W. 2, Shaligram, the father of Shanta, stated in his evidence that on the date of the incident he had gone to extinguish fire in the jungle and returned home in the evening, that his wife told him that Shanta had been raped, that on further enquiry his wife told him that the accused present in the Court had raped her, that his daughter was at that time at his Dohgri, that he thereafter went to his Dohgri and enquired from Shanta as to what had happened, that Shanta told him that she had been raped while grazing cattle by a person nto known to her, and that he thereafter took her to Rohru where she was medically examined. In cross-examination, he stated that while coming to Rohru he and Shanta had stayed at Chirgaon for the night, and he gto Shanta examined by a nurse at Chirgaon on that night, and that Shawala Nand was present at his Dohgri when he went there, and before he left for Rohru with Shanta, he was told by Shawala Nand at his Dohgri that it was the accused who committed rape upon Shanta. P. W. 4, Shawala Nand, stated in his evidence that one year and 4 months prior to the date of his evidence he was grazing cattle in Katoch Kiar, that it was just afternoon when he heard hue and cry of Shanta and ran towards her, that when he went near her he saw that Shanta was lying on the ground near a stone wall and the accused was lying upon her body, that he shouted at the accused as to who he was who was spoiling the girl, that when the girl, Shanta, was lying on the ground and the accused was lying on her, the pyjamas of both had been stripped down, that upon hearing his shouts, tl:e accused left the body of the girl, Shanta, and ran away, that he chased the accused and caught hold of him while he Was running away, that the accused, however, gto himself freed and gave him a push as a result of which he fell down on the ground, that I e had known the accused since his childhood as the accused belonged to his panchayat circle, that at that time Keshru was also grazing his cattle near there and he also saw the accused running away from the scene of occurrence, that when he came back to the place of occurrence after chasing the accused, Shanta had already been helped to stand up by her mtoher, Ranpati, who had in the meanwhile come on the scene of occurrence, that he had told Ranpati and Keshru that it was tl:e accused who raped Shanta, that he did nto tell anybody else tl at accused Shiam Singh, was tl e

culprit, and that the girl Shanta was at that time crying and was senseless. In cross-examination, he stated that Shanta was distantly related to him as granddaughter, that he knew that the accused, Shiam Singh, was at one time an employee in the Police Department, that he saw the accused and Shanta in a lying position as soon as he heard the hue and cry of Shanta, that when he heard the cries of Shanta, he was at a distance of about 200 feet from the place of occurrence, that he had come running half the distance towards Shanta when the accused bolted away, that the accused remained on the body of Shanta for a lesser time than what would take to smoke out one cigarette, that when he heard the cries of Shanta he says that the accused was lying upon the body of Shanta as a result of which the accused had covered her whole body, that the legs of Shanta were also at that time under the body of the accused, and that the knees of the accused at that time were upon the ground and the legs of Shanta were in between the legs of the accused. He further stated in cross-examination that when he was chasing the accused, Keshru also was running behind him and asking him to catch hold of the accused, that Keshru was about 30 feet behind him, that when he gave up the chase and came back, Keshru also came back with him, that after giving up the chase, he and Keshru did not go to Shanta and Ranpati who were standing at the wall, but that he went to his own cattle while Keshru went to his sheep, and that he told Ranpati at that time from a distance of about 20 feet that it was the accused who raped the girl Shanta. P. W. 5, Keshru, stated in his evidence that one year and 4 months prior to the date of his deposition, he was grazing his sheep at Katoch Kiar, that at about 3 p. m., he heard hue and cry of a girl, that at that time he was with his sheep upon a hillock, and from there he saw that the girl who was crying was lying underneath the body of a male that he knew the girl Shanta, and the accused, who were both present in the Court, that on hearing the hue and cry he started running down the hillock towards the scene of occurrence and also shouted at the accused while running down as to who he was, that he had run down for about 30 feet when he saw that the accused left the body of Shanta and started running, that he also saw at that time that Shawla Nand was also chasing the accused, that Shawala Nand, while chasing the accused, caught hold of him by the shoulder, but the accused, however, got himself freed and gave a push to Shawala Nand as a result of which Shawala Nand fell on

the ground while the accused made good his escape, that he and Shawala Nand still chased the accused for some distance, but in vain, that they both gave up the chase and went back to the place of occurrence, that in the meantime the mother of Shanta had come to the place of occurrence, carried Shanta upon her back, and took her to their Dohgri, and that Shawala Nand then went to his cattle and he went to his sheep. In cross-examination, he stated that on their return after the chase, neither he nor Shawala Nand had any talk with Ranpati as she was crying while Shanta was senseless, that he did not recognise the accused at the time when he starts coming down the hill to catch hold of the accused, but that he, however, recognised the accused when he came near the accused, as he and the accused belonged to the same panchayat circle, that Shawala Nand also told him the name of the accused at that time, that he saw for the first time Shanta and the accused in a lying position from a distance of about 200 feet, that he recognised Shanta as soon as he heard her cries, but he could not see Shanta when she was shouting as she was entirely covered by the body of the accused and was under his chest, but could only see her feet, that he could not say as to what the accused was doing to Shanta when he was lying upon her body, and that as he shouted from the hillock, the accused look towards him while lying up in the body of Shanta. P. W. 6, Ranpati, the mother of Shanta.. stated in her evidence that one year 4 months prior to the date of her deposition, her husband had gone to put off some fire in a jungle near their village, that her daughter. Shanta had gone to graze cattle in the Katoch Kiar, that it was in the afternoon that she heard the cries of Shanta when she (Ranpati) was working in her field, that she ran towards Shanta, that when she reached the scene of occurrence she found that her daughter was lying beside a stone wall, her pyjama had been stripped down to her knees, while the front part of her shirt had been folded upwards, and she was weeping. that she (Ranpati) also saw that Shawala Nand was chasing a man, that Shanta told her that the man who was being chased by Shawala Nand had raped her, that she tied the string of the pyjama of Shanta, helped her to stand up, and then took her to their Dohgri by holding Shanta's arm while Shanta was walking on foot, that after leaving Shanta at their Dohgri, she went to her house in the village Tikri, where she met her husband, Shaligram, and conveyed to him the incident as narrated to her by her daughter, and that thereafter her husband.

Shaligram, went to their Dohgri. In cross-examination, she stated that Shanta had been married to one Inder Sain, prior to the incident, that she was working in her field at a distance of 150 feet from the place of occurrence when she heard the cries of Shanta, that she did not know the accused prior to the date of the incident, and that it was Shawala Nand who told her the name of the accused at the time of the incident as the culprit of the offence,

(8) Thus, according to the evidence of the witnesses mentioned above, the scene of occurrence was 'Katoch Kiar', the girl Shanta was grazing her cattle in that place all alone, Shawala Nand was at that time grazing his cattle up the hill at a distance of about 200 feet, while the girl's mother, Ranpiti, was working in a field about 150 feet away, and Keshru was also grazing his sheep on a hillock nearby about 200 feet from the place of the alleged incident. Shawala Nand and Keshru heard the shouts of the girl, Shanta. and they saw that the girl was shouting from underneath the body of the accused that Shanta was lying upon. her back by the side of a wall while the accused was lying upon her, and that his body had covered the entire body of Shanta, and only her feet were visible from underneath the body of the accused, and were in between the legs of the accused. The pyjamas of both the appellant and the girl were stripped down to their respective knees. Shawala Nand shouted at the accused, and the accused then left the body of Shanta put on his pyjama which he had stripped down to his knees and ran away. Shawala Nand and Keshru started chasing the accused, and they saw Shanta lying near the wall with her pyjama stripped down to her knees, the mother, Ranoati, also saw Shanta in that situation when she came there after hearing her daughter's cries. The mother then helped Shanta to stand up and tie the string of her pyjama. According to the said evidence, the girl told her mother that she had been raped by the person who was being chased by Shawala Nand and Keshru, but who was not known to her at that time. The girl also gave the same version to her father, when he met her at their Dohgri.

(9) In his statement under section 342 of the Code of Criminal Procedure, the appellant stated that he did not know anything about the alleged grazing of her cattle in Katoch Kiar by Shanta about one year and 4 months prior to the date of his statement, that he did not know of any Katoch Kiar near Tikkri village, and that

he did not know Shanta at that time. He denied the entire prosecution case, and stated that he did not know anything about the alleged rape upon Shanti, and that he neither raped her nor knew the age of the girl. He, however, stated that Shawala Nand and Keshru were known to him one year and 4 months prior to the date of his statement as the said Shawala Nand and Keshru and himself belonged to villages which were at a distance of 2 miles from each other. To a question put by the court as to whether he had anything to say as to why the prosecution witnesses were deposing against him, he answered as follows :-

'THE villagers of Tikkri including P. Ws. Shawala Nand, Shalig-ram, Kes'hru, Smt. Ranpati are inimical to me on account of the fact that during the communal riots 1947 the villagers of Tikkri had killed the brother of one Gicha Shaikh and his family consisting of 11 members and thereafter had misappropriated his property. I was at that time serving in the Police as Constable posted in the Rohru Police Station and had accompanied the S.H.O. Rohru to village Tikkri at that time for investigation during which the whole of the property of the Gujjar was recovered from the villagers of Tikkri.'

On a further question as to whether he had anything else to say, he stated as follows :-

'THIS case has been foisted upon me at the instance of Shri Nehar Singh, Ex. M.L.A. Myself and he were bidders at a sale held in respect of land situate in village Mandi, his bid was Rs. 16,000.00 while my bid was Rs. 22,000.00 and as a result my bid was accepted and the land came into my possession. Since that day the said Nehar Singh has been keeping enmity with me and this case is a result of that enmity.'

(10) The question for consideration is as to whether the evidence of the prosecution witnesses can be believed or not. Shri H.S. Thakur, the learned counsel for the appellant, Shiam Singh, referred to some discrepancies in the evidence of the aforesaid witnesses and submitted that in view of the said discrepancies, the evidence should not be believed.

(11) On the question as to whether the appellant herein had sexual intercourse with Shanta with or without her consent, and whether there was 'penetration' sufficient to constitute sexual intercourse within the meaning of section 375 of the Indian Penal Code. the direct evidence adduced by the prosecution was that of P. W. 1, Shanta, Public Witness 4, Shawala Kard and P. W 5. Keshru. So far as the evidence of the prosecuterix, Shanta, is concerned, it can be accepted only to the extent to which it is corroborated by the other evidence in the case. Shri Thakur pointed out firstly that Shanta admitted in her evidence that she did not know the appellant at the time of the occurrence, and she could not identify the appellant in the identification parade. As regards the identification of the appellant, the evidence was only that of P. W. 4, Shawala Nand and P. W. 5, Keshru. Shri Thakur submitted that the evidence of the said two witnesses should not be believed in view of the enmity between them and the appellant which was mentioned by the appellant in his examination under section 342 of the Criminal Procedure Code. It is true that the appellant stated that Shawala Nand, Shaligram, Keshru and Smt. Ranpati were inimical to him on account of the circumstance that during the communal riots in 1947, the villagers of Tikkri had killed the brother of one Gicha Shaikh and his family and had also misappropriated his property, that at that time the appellant was posted as police Constable in the Rohru Police Station and had accompanied the Station House Officer, Rohru, to the village Tikkri at that time for investigation, and that during the said investigation the whole of the property of the Gujjar (the brother of Gicha Shaikh) was recovered from the villagers of Tikkri. But, the said suggestion by the appellant is, in my opinion, a far fetched one. The alleged investigation and recovery was nearly 19 years prior to the occurrence in question. It is difficult to believe that after such a lapse of time, the 4 persons mentioned above, viz. Shawala Nand, Shaligram, Keshru and Smt. Ranpati, took it into their minds to take a revenge upon the accused for the first time in 1966 and gave false evidence against him. It was not stated by the appellant in his aforesaid statement that the said 4 persons were some of the villagers from whom the property of the brother of Gicha Shaikh was recovered, and it is also not known whether these persons were in the village Tikkri in 1947. No such suggestion was made to Shaligram, Smt. Ranpati or Keshru in their cross-examination. The said suggestion was made to Shawala Nand in cross-

examination, but he denied the same slating that he was not arrested in 1947 on account of Hindu-Muslim riots or for murdering Gujjars, and that his property was not confiscated at that time by the police. In the circumstances, the statement of the appellant that Shawala Nand and Keshru were inimically disposed towards him cannot be accepted. It is also true that the appellant stated that the case was foisted upon him at the instance of one Nehar Singh, who, according to the appellant, was having a grudge against him on account of the acceptance of the appellant's bid in an auction in respect of a land as against the bid of the said Nehar Singh. The appellant, however, did not state as to whether the witnesses in question were under the influence of Nehar Singh. No such suggestion was even made to the said witnesses, Shawala Nand and Keshru, in their cross-examination. It cannot therefore, be said that the evidence of Shawala Nand and Keshru should not be believed for the aforesaid reasons, both Shawala Nand and Keshru deposed that it was the appellant who committed the offence in question upon Shanta on the relevant date. It has, therefore to be held that the identity of the appellant is established by the evidence of Shawala Nand and Keshru.

(12) Shri Thakur referred to the following discrepancies in the evidence of Shawala Nand and Keshru, and submitted that their evidence should not be believed in view of the said discrepancies. The discrepancies in the evidence of P. W. 4, Shawala Nand, according to him, are :-

(A) Shawala Nand stated in his evidence that when he came back to the place of occurrence after chasing the accused (appellant), he had told Smt. Ranpati and Keshru that it was the accused who raped Shanta, and that he did not tell anybody else that Shiam Singh, accused, was the culprit. On the other hand, according to P. W. 2, Shaligram, he also was told by Shawala Nand at the Dohgn of Shaligram that it was the accused (appellant herein) who committed rape upon Shanta.

(B) In the Chief Examination, Shawala Nand stated that he heard the hue and cry of Smt. Shanta, that he ran towards her, that when he went near her, he saw that Shanta was lying on the ground and the accused was lying upon her body, and that when the girl was lying on the ground and the accused was lying on her, the pyjamas of both had been stripped down, while in his cross-examination, he stated

:- 'It is correct that I saw Shanta only after I came back on the scene of occurrence after chasing the accused and not before.'

(C) Shawala Nand stated in his cross-examination that the feet of Shanta were towards the direction from which he was coming while her head was towards the stone wall at the time of the incident. He then corrected himself and stated that the head of Shanta at the time of the incident was not towards the stone wall, but that she was made to lie by the side of the wall lengthwise. On the other hand, P. W. 1, Shanta, stated in her cross-examination that when the accused was upon her body, her feet were towards the side from which Shawala Nand was coming.

(D) Shawala Nand stated that Shanta had a shirt on and did not have any chopken or gachi at the time of the incident, while P. W. 1, Shanta, stated that she was at that time putting on a woollen chopken (long coat) and gachi (a string round the chopken) at the time of the incident.

(E) Shawala Nand stated in his Chief Examination that when he came back to the place of occurrence after chasing the accused, Shanta had already been helped to stand up by her mother Ranpati who had in the meanwhile come on the scene of occurrence. In his cross-examination, he stated that he and Keshru did not go to Shanta and Ranpati when they were standing at the wall after giving up the chasing of the accused, that he went to his own cattle while Keshru went to his sheep, and that he told Ranpati that it was the accused who raped the girl, Shanta, at that time from a distance of about 20 feet. P. W. 6, Ranpati, on the other hand, stated in her cross-examination that when Shawala Nand and Keshru came back after chasing the accused, they sat near her and Shanta at the place of the occurrence.

(13) The above statements can hardly be said to be discrepancies, and any case, they are very trivial and not material discrepancies at all.

(14) The discrepancies pointed out by Shri Thakur in the evidence of P. W. 5, Keshru, are the following :-

(A) Keshru stated in cross-examination that the girl, Shanta, was senseless when he and Shawala Nand returned after chasing the appellant. No other witness stated that she was senseless. (b) He stated in Chief Examination that the mother, Ranpati, carried the girl Shanta upon her back and took her to their Dohgri, while according to Ranapati, she took the girl to their Dohgri by holding the girl's arm while the girl was walking. (c) Keshru stated in cross-examination that the appellant and Shawala Nand were running towards opposite directions at the time of the chasing of the accused, and that when Shawala Nand caught the accused by the shoulder, they were facing each other. The counsel suggested that this was improbable as the appellant would be running away from Ranpati and not towards him. (d) He stated in Chief Examination that at the time of the alleged incident he was with his sheep upon a hillock and from there he saw that the girl who was crying was lying underneath the body of a male, that he knew the girl Shanta and the accused (appellant) who were both present in the court, and that when he had run down the hillock for about 30 feet, he saw that the accused (appellant) left the body of Shanta and started running. In cross-examination also he stated that when he shouted from the hillock the accused looked towards him while the accused was lying upon the body of Shanta, and that he did not know what the accused did to Shanta when he was lying upon her body, and he was not told by anybody as to what the accused did to the girl.

(15) The above statements, in my opinion, are not serious or material discrepancies. and the evidence of Keshru need not be disbelieved because of the said statements.

(16) It has to be noticed that all the 3 witnesses, viz., P. W. 1, P. W. 4 and P. W. 5, clearly stated that the appellant lay himself upon the body of the girl. According to P. W.1 and P. W. 4, the pyjamas of the appellant and the girl Shanta were stripped down up to their knees. These statements of the said witnesses corroborate each other. Thus, it is clear from the evidence of the said witnesses that the appellant with his pyjama stripped down up to his knees lay upon the body of Shanta, whose pyjama also was stripped down up to her knees.

(17) The question then is as to whether the appellant committed sexual intercourse with the girl. It is in the evidence of Shanta that the appellant put his sexual organ into her sexual organ, and Shawala Nand. P. W. 4, stated that the accused remained on the body of Shanta for a lesser time than what one would take to smoke out one cigarette. The girl, Shanta, told her mother immediately after the incident that she was raped by the person who was being chased by Shawala Nand she also told the same to her father, Shaligram, when he came to their Dobgri in the evening. That the girl so informed them was stated by the mother and the father also in their evidence. It is clear that the accused (appellant) had sexual intercourse with the girl Shanta, in the sense that he laid himself upon the naked body of the girl, Shanta, and put his sexual organ into the sexual organ of the girl.

(18) The question then arises as to whether the said act of the appellant amounts to sexual intercourse within the meaning of section 375 of the Indian Penal Code. The Explanation to the section states that 'penetration' is sufficient to constitute the sexual intercourse necessary to the offence of rape. The section does not specify what exactly constitutes penetration. It was held in the cases of Abdul Majid and Ghanshyam Misra[^] that even partial penetration is sufficient for the purpose of section 375 and that it is not essential that the hymen should be ruptured. At page 979 in the 'Law of Crimes' by Ratanlal and Dhirajlal (21st Edition), the learned authors referred to two English cases, viz. Joseph Lines and Alien and stated that to constitute penetration, it must be proved that some part of the virile member of the accused was within the labia and the pudendum of the woman, no matter how little, and that the only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman, and it is not necessary to decide how far they entered. The learned authors also referred to the case of Jantan and pointed out that there is a distinction between vulval penetration and vaginal penetration, that in order to constitute rape, the statute merely requires evidence of penetration, and that this may occur and the hymen remain intact. Even apart from the above mentioned decisions, it is clear from the language used in the section 375 and from the addition of the Explanation to the section that to constitute the offence of rape under section 376, Indian Penal Code . there need not be a complete act of sexual intercourse, and that it is sufficient if

there is penetration. The use of the word 'penetration' without any further words of limitation shows that it was intended to cover even partial penetration, e. g. vulval penetration. In the present case, in view of the evidence of Public Witness s. 1, 4 and 5, as to the posture of the bodies of the appellant and the girl, and the period of time during which the appellant lay upon the body of the girl as stated by P. W. 4, Shawala Nand, the inevitable inference has to be that there was vulval penetration, if not vaginal penetration. P. W. 8, Dr. N. C. Jain, Civil Hospital, Nahan, conducted the medical examination of the girl Shanta, on 24th January, 1966, and issued a certificate, Exhibit P. F. He stated in his Chief Examination as follows :-

'EITHER on the back of pyjama or on the front there is not any kind of blood stain. No hairs on the private part. Slightly dirty yellowish coloured stain found near the labia majora, scrapped and prepared the slide, no spermatozoa seen which is reported by the laboratory technician. Labia majora found in firm contract, elastic condition, separated apart, vaginal speculum introduced and examined the part. Hymen found ruptured. No bleeding from anywhere. Swab from posterior fornix taken and slide prepared. No spermatozoa seen in vagina. Only little finger could be introduced with slight difficulty and patient was complaining pain during examination while I was trying to introduce the finger. Every private part normal. Breasts still not developed.'

The certificate, Exhibit P. E. was also to the same effect. In his cross-examination, he stated as follows :-

'I have not given in my certificate the duration of the rupture of the hymen. I could not properly appoint regarding the duration of rupture of hymen as I did not find any blood stains there. I also cannot state as to whether the rupture of hymen was a result of sexual intercourse or it was due to some other cause. It is correct that there would have been tenderness in the private parts of Shanta Devi had any sexual intercourse been done with her within 24 hours of the medical examination. It is correct that the erected penis of the accused would have penetrated vaginal orifice of Smt. Shanta Devi with difficulty. The labia majora could not get separated by a single sexual act in the case of P. W. Shanta Devi.'

(19) It is significant that the doctor recorded at the time of the examination of the girl that the hymen was found to have been ruptured, and that the girl complained of pain when he introduced his little finger into her sexual organ in the course of the examination. In any case, the above medical evidence is in no way inconsistent with the inference drawn above that there was vulval penetration, if not vaginal penetration.

(20) On a consideration of the evidence in the case, I agree with the conclusion of the learned Assistant Sessions Judge that the prosecution has established that the appellant committed the offence under section 376 of the Indian Penal Code. As regards the sentence passed by the learned Assistant Sessions Judge, I consider that it is too severe. The appellant appears to be a first offender, and there is nothing on the record which suggests to the contrary. In the circumstances, I consider that he should have been given a lesser sentence. I, therefore, reduce the sentence of imprisonment from 7 years rigorous imprisonment to 4 years rigorous imprisonment, and set aside the fine of Rs. 2,000.00 imposed by the learned Assistant Sessions Judge. The fine, if already paid, shall be refunded to the appellant. The appeal is allowed to the extent mentioned above, and is otherwise dismissed.