

Shyamraj Vs. the State

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Court : Kolkata

Decided On : Jun-19-1995

Reported in : 1995CriLJ3363

Judge : U.C. Banerjee and ;N.K. Batabyal, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 307, 363, 376 and 376(2);
;Criminal Procedure Code - Section 313

Appeal No. : Criminal Appeal No. 4 of 1995

Appellant : Shyamraj

Respondent : The State

Advocate for Def. : R. Shiv Saroop, Adv.

Advocate for Pet/Ap. : C.S. Chauhan, Adv.

Judgement :

N.K. Batabyal, J.

1. This appeal is directed against the judgment and order of conviction and sentence passed by the learned Sessions Judge, A & N Islands, in Sessions case No. 22 of 1991 (Sessions Trial No. 1st of September, 1994).

2. The Id. Sessions Judge has found the appellant guilty of the offence under Section 363/376(2)(b) of the IPC and convicted him thereunder and sentenced him to suffer rigorous imprisonment for 10 years for the offence under Section 376(2)(b), IPC and to pay a fine of Rs. 2000/- i.e.; to R.I. for six months more. The learned Sessions Judge has also sentenced him to suffer 3 years rigorous imprisonment and pay a fine of Rs. 1000/- i.e. to R.I. for 3 months more for the offence under Section 363, IPC. The two sentences are to run concurrently. The learned Sessions Judge has found the appellant not guilty of the offence under Section 307, IPC and acquitted him thereunder.

3. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence passed by the Id. Sessions Judge, the appellant has preferred this appeal. His main contention is that he is innocent and he has been falsely implicated in this case and he has been illegally found guilty of the offences under Section 376(2)(b) and Section 363 of the IPC. The appeal is hotly contested.

4. The prosecution case in a short compass, is as follows:- Village Dairy farm. Port Blair is a cluster of houses forming the backdrop of the scene of occurrence in this case. The unfortunate victim of this case is Jayanthi (PW. 19) who at the material time was aged 3 1/4 years in 1989. She is a daughter of Jayalakshmi (P.W. 3) and Kamraj (P.W. 9). On the fateful day on 22-1 -1989, a Sunday, Jayalakshmi at about 4-30 p.m. went to assist her husband with her minor son at her husband's pan shop leaving her two minor daughters, Chitra (PW. 20) and Jayanthi (P.W. 19), to the care of Dhuran (P.W. 1), a neighbor. She locked her door keeping her two daughters to Dhuran and gave the key to Dhuran so that Dhuran could enjoy the cinema show in the TV kept in her room that evening. The house of Dhuran is at a distance of about 45 feet from the room of Jayalakshmi. The small child Jayanthi fell asleep in the room of Dhuraan and for this reason she was not disturbed when Dhuran went to the room of Jayalakshmi at the time of the cinema show in the TV at about 5-25 p.m. Dhuran (P.W. 1), her two sisters, Chitra (then aged 6 years) and the minor son of Dhuran, Shyam (then aged 3 years) went to enjoy the cinema show in the TV at the room of Jayalakshmi. There were others in the room of Jayalakshmi at that time. The light was kept burning in the room of Dhuran and the door was shut but not locked from outside. Upto the time of interval of the

cinema show there was no incident. Appellant Shyamraj was close neighbour of Dhuran. His house was about 30-40 feet away from the house of Augustin (P.W. 16) of the same village 1/2 minutes before the interval of the TV show accused Shyamraj came to the room of Kamraj and through the open door peeped into the room standing on the varandah. He asked Dhuran what was the name of film. She gave the name of the film. Then the accused went away. Shortly after the resumption of cinema show after interval, it is alleged, the little baby Jayanthi became missing from her bed. Savitri (PW. 4), sister of Dhuran reported the matter to Dhuran but she did not take the matter seriously and asked Savitri to look for missing Jayanthi. Then both Savitri (P.W. 4) and Chitra (P.W. 20) went out in search of missing Jayanthi but within a short time she returned and reported that the search was in vain. As the cinema show was coming to its close, Dhuran did not immediately react to the second missing report but immediately after the show was over she went out of the room of Jayalakshmi and searched for the missing girl along with Savitri and Chitra. She loudly called for the baby by her name but there was no response. After sometime she saw the little girl crying and coming from the direction of the cattleshed of the accused person. That place was very dark and Dhuran recognised the baby by her voice. When the baby came close, Dhuran lifted her in her lap and asked her where she had gone in Tamil language. The baby then could walk and speak in Tamil and Hindi. The baby replied in Tamil language that accused Shyamraj had taken her away and she was beaten by Shyamraj on her neck and her private parts. She indicated those parts by putting her hands thereon. Savitri (PW. 4) came by the side of Dhuran and told that there was some cow-dung on the back portion of Jayanthi's frock. Then Dhuran examined the back portion of Jayanthi's frock but found that it was not cow-dung but stains of blood. Dhuran¹ then took the little baby inside the room and examined her person and found scratch marks around her neck in the front portion and also saw blood was coming out of her vagina. At that time, the small child did not wear any nether garment but was wearing a sando baniyan and a white frock with blue print. A portion of the frock of Jayanthi was stained with blood, so Dhuran took the frock from her person and dipped it in water and kept it hanging for drying. Thereafter, the parents of the baby were informed. They came and heard of the incident and took the baby the same night to GB Pant Hospital, Port Blair for

treatment. The baby was examined and treated there. Police was informed. FIR was recorded at 23:25 hrs on 22-1-1989 and a case was started under Section 307/376, IPC against the appellant.

5. On completion of investigation, charge-sheet was submitted under Section 376/363 and 307, IPC. The accused pleaded not guilty to the charge. The learned Sessions Judge on trial has been pleased to hold that the prosecution has been able to prove the charge under Section 376/363 of the IPC but the prosecution has not been able to prove the charge under Section 307, IPC beyond all reasonable doubts. He accordingly found the accused guilty under Section 376/363 of the IPC and convicted him thereunder. He acquitted the accused of the charge under Section 307, IPC. The learned Sessions Judge has sentenced the accused appellant as already stated above.

6. At the time of the hearing of the appeal the learned advocate for the appellant has addressed this court mainly on the ground that the prosecution side has signally failed to prove the place of occurrence and that the depositions of the main prosecution witnesses suffer from irreconcilable contradictions and further that the chain of circumstantial evidence renders the prosecution story highly vulnerable. The learned lawyer for the appellant has further submitted that he does not dispute the fact that the little girl Jayanthi (PW. 19) was sexually assaulted and this undoubtedly was an abominable act of bestiality. But according to him, there is no material on record worth the name to connect the accused-appellant with the perpetration of the crime. The learned P.P., Mr. R. S. Saroop on behalf of the prosecution has submitted that there is no substance in the contention in the Id. defence lawyer and that the prosecution side has been able to bring home the charge to the accused person beyond any shade of reasonable doubt.

7. Naturally the main question with which this Court is concerned in this appeal is whether it has been proved beyond all shades of doubts by cogent and reasonable evidence that the accused appellant perpetrated the offence. No doubt the FIR in this case was lodged on 22-1-1989 at 23-25 hours by the mother, Smt. Jayalakshmi (PW 3). The victim herself is the only witness to the occurrence but due to her tender age it was not possible for her to state more than the fact that

she was beaten on her neck and on her private parts and she was also medically examined immediately after the occurrence by Doctor Lal) (PW. 22). According to the Doctor he examined the baby at 11.40 p.m. on 22-1-1989. He found the 2 injuries as stated below :-

1. There was some interference with the private parts of the girl leading to total rupture of the hymen. Rupture was fresh. There was a laceration both lateral and posterior wall of the vagina extending 1' into the vagina 1/2' in the premium. It was profusely bleeding.

2. There were multiple scratch mark found in the front and both sides of the neck.

8. It shows that there was sexual assault on the girl on the date of occurrence. Regarding this part of the prosecution story there cannot be any scope for disbelief. The sole witness to the occurrence Jayanthi (P.W. 19) was aged 10 years when she was examined as a witness in the trial court.

9. The learned Judge tested the intelligence of the baby witness to ascertain whether the child witness attained maturity of understanding. Being satisfied that the child witness understood the significance of telling the truth to the court, the Id., Judge put certain question to the child witness. She told the court that she could not remember what accused Shyamraj had done to her. She only remembered that she was taken to hospital where she remained for a few days. In her cross-examination the child witness stated that she could not remember how many months ago she was taken to hospital or whether she remained in the Children's Ward. She only remembered that she was taken to the hospital at night.

10. The learned-advocate for the appellant has submitted that the sole witness to the occurrence has not said anything against the appellant. The Id. PP on this point has submitted that it was not possible for a baby of 10 years of age to remember what happened to her when she was only 3 1/2 years old; This shows that the baby who was in the custody of the parents was not tutored at all. The learned PP has said that this at least shows the fairness of the prosecution side. Child witnesses are prone to be witnesses of imagination. Therefore their evidence should be sifted with great care. In this case, however, the child witness has

categorically said nothing against the accused appellant. It is true that a child of 10 years cannot remember all that happened to her when she was aged 3/4 years. It is clear in this case that the baby witness did not forget everything, she atleast remembered that she was taken to hospital at night and there she had to stay for a few days. It is surprising that though she remembers her detention in hospital for a few days she has got no memory of the traumatic experience she had at that time. The net result is that there is no direct evidence about the perpetrator of the crime so far as this case is concerned.

11. The main prosecution witnesses are Dhuran (PW. 1), Savitri (P.W. 4) and Chitra (PW. 20). The witnesses corroborating the above witnesses are Alma (PW. 7), Goraiah (PW. 2), Phaskal (PW. 10), Ramasamy (PW. 11) and Dhanpath (P.W. 17). The star witness of the prosecution is Dhuran (PW. 1), as it was she who for the first time heard the name of the accused appellant from the lips of Jayanthi (PW. 19) within a few minutes of the alleged occurrence. This witness has stated that Smt. Jayalakshmi (PW. 3) went to the Pan Shop of her husband Kamraj (P.W. 9) at about 4-30/5.00 pm on 22-1-1989 with her minor son Raju leaving Chitra (PW. 20) then aged 6 years and Jayanthi (PW. 19) to the care of PW. 1 (Dhuran) with their tiff in and keys of her room. There was a TV set in the room of Jayalakshmi (P.W. 3) and the keys were given so that PW. 1 could enjoy the TV show at her room. PW. 1 came to Kamraj's room at about 5-25 p.m. and switched on the TV set when a film show was on. Then she came back to her room at a distance of 45 feet and went back to the Kamraj's room with her 2 sisters Savitri (PW. 4), and Chintamani Chitra (PW. 20) and her minor son Shyam (of 3 years) for enjoying the TV cinema. She left Jayanthi alone in the room with a tube light burning as she was sleeping. The door of her room was closed but no lock was put in the door. PW. 1, PW. 4 (Savitri), Alma (PW. 7), Chintamani (not examined), Shyam. Smti Manimala, Velonika (daughter of Augustin (PW. 16) were there to enjoy the cinema show in the TV that evening up to interval time. All the time the baby Jayanthi was sleeping alone in the room of PW. 1 (Dhuran). 1/2 minutes before the interval, accused-Shyamraj came to the room of Kamraj and standing on the verandah peeped through the open door into the room. He asked PW. 1 (Dhuran) about the title of the film and she gave him the name. Thereafter accused-Shyamraj peeped inside the room and went away. Immediately after the

accused appellant left the place, the interval started. Thereafter PW. 1 (Dhuran) came to her room with Savitri and Chintamani to take water and at that time (Jayanthi) was sleeping in the room. After about 10 minutes PW. 1 returned to the room of Kamraj with her 2 sisters. Within 2/3 minutes after the resumption of the cinema show-after interval electric power went off. PW. 1 (Dhuran) sent Savitri (PW. 4) to her room to bring a match box and to see Jayanthi (P.W. 19). Very soon light was restored and Savitri (PW. 4) came back and reported for the first time that Jayanthi was missing. All other persons enjoying the cinema show in the room of Kamraj were also present then. PW. 1 (Dhuran) being engrossed in the film asked Savitri (P. 4) to look for Jayanthi and began to enjoy the cinema show. Savitri and Chitra (PW. 20) went out in search of Jayanthi. Within a short time Chitra and Savitri returned to report that Jayanthi could not be traced. PW. 1 Dhuran still continued to enjoy the cinema show as the show was still to continue for 2/3 minutes. Immediately after the film was over PW. 1 came out and proceeded towards her room shouting and calling Jayanthi by her name. But there was no reply. When PW. 1 was going towards the side of the cattle-shed of the accused appellant, she saw Jayanthi (PW. 19) coming from the direction of the cattle shed towards her house and crying. The place was dark PW. 1 recognised Jayanthi by her voice. When the baby came very close to her PW. 1 took her in her lap. On being asked in Tamil where she had gone the baby replied that the accused Shyamraj had taken her away and she was beaten on her neck and private parts, she indicated those parts by her hand. Savitri (PW. 4) had by that time come from behind. She told PW. 1 that some cow-dung stained the back portion of the frock of Jayanthi. PW. 1 (Dhuran) examined the back portion of the frock and found blood stains there. PW. 1 then took Jayanthi inside her room and in the light of her room examined her person and saw scratch marks around her neck in the front portion and blood coming out of her vagina. At that time Jayanthi was not wearing any other garment but wearing a sando baniyan and white frock with blue prints. But the time, PW. 1 was examining the PW. 19, a good portion of the frock of Jayanthi got wet by blood. So, PW. 1 took out the frock, washed it in water and spread it out in the air for drying. (The frock has been marked Mat. Ext. I and the banian marked as Mat. Ext. II. Jayanthi was continuously crying and the bleeding was continuing from her vagina.

12. At that time PW. 1 saw Phaskal (PW. 10) at a distance of 3/4 steps from her room. She called him to inform the parents of Jayanthi that she was bleeding from the private parts of her body. PW. 10 went to call the parents. Within 5 minutes, Dhanpat (PW. 17), brother of PW. 1 who at the material time was driving a taxi came there. He was then wearing the driver's dress as he was returning from his duty. PW. 1 told him about sending PW. 10 and requested PW. 17 also to rush to the parents of Jayanthi. PW. 17 went away at once. Within 10 minutes, the parents of Jayanthi came with PW. 17 and PW. 10. Then PW. 1 narrated the entire thing to them. Jayalakshmi (PW. 3) tried to talk with Jayanthi who responded to her queries but she was not able to talk loudly. She spoke in a low voice and slowly. That was not intelligible. The mother took the baby on her lap and left the room of PW. 1 saying-that they would take the baby in a taxi to GB Pant Hospital, Port Blair for treatment. The night police came and recorded her statement. Within 5/4 days she was taken to a Magistrate who recorded her statement. She made the statement voluntarily.

13. It has been stated above already that there is medical corroboration of the injuries on the person of the child who was examined within a very short time of the occurrence. Thus there is no reason to disbelieve that the baby sustained injuries as stated by PW. 1. The FIR was also lodged at the earliest available opportunity. Naturally, there was little scope for embellishment. But the maker of the FIR (PW. 3) had no personal knowledge of the involvement of the appellant Shaymraj. Her source of knowledge was Dhuran (PW. 1) and Jayanthi (PW. 19).

14. According to the prosecution story, the place of occurrence is the cow-shed of the appellant which is lying in the rear portion of the house. In the sketch map (Ext. 18) the location of the rooms of the local area has been shown. There is some controversy about the matter, whether the cow-shed is separate from the varandah of the house or not. This is immaterial. Blood-stained scrapings of the cement floor and control area (Mat. Ext. IV and V) were taken by the IO (PW. 23). But from the report of the Chemical Examiner (vide : Result of Exam, of packet marked IV and V in the report) it appears that no blood was detected in the same. In the absence of any other evidence, it is obvious that the cow-shed or the varandah cannot be fixed up as the place of occurrence. The prosecution side has

thus miserably failed to prove the place of occurrence. This aspect of the case has been overlooked by the Ld. Sessions Judge in his otherwise elaborate judgment.

15. Dhuran(PW. 1) has categorically stated that at the time of interval of the film show in the TV, she went to her room with her two sisters, Savitri (PW. 4) and Chintamani (not examined as a witness) from Kamraj's (PW. 9) room. She found Jayanthi sleeping. The lamp was burning and nothing was wrong in the room. After about 10 minutes she returned to Kamraj's room with her two sisters.

16. Savitri (PW. 4) has stated that she knows the appellant-Shyamraj, a boy of that locality, the appellant before the interval peeped through the door of Kamraj when the show was on and talked to PW. 1. During interval PW. 1 told her (PW. 4) to go and see Jayanthi (PW. 19) who was sleeping in the room of PW. 1. She went there, saw PW. 19 sleeping there. She again shut the door of the room but did not lock it. She started for the room of Kamraj to witness the remaining part of the feature film. Then she saw appellant Shyamraj standing at a distance of 5/6 steps from her room in the street light. At that time PW. 4 was aged 10/11 years. Seeing her, Shyamraj gave her a currency note of Rs. 10/- denomination and asked her bring pan from the shop of Ramasamy (PW. 11) asking her to tell the pan shop owner that the pan was for Shyamraj. Ungrudgingly she went and came back with three pans and gave the pans with Welcome Supari and Rs. 8/- as balance. Shyamraj was still standing at the same place. Shyamraj then gave her Rs. 2/- for sweets. Then she returned to the room of Kamraj to enjoy the remaining part of the feature film. But she did not tell PW. 1 about meeting Shyamraj and etc. The film show resumed after interval. Within 2/3 minutes the lights went off. PW. 1 sent PW. 4 to her room to bring a match box. As soon as she entered the room, the lights were restored. But she could not see Jayanthi in the room. She searched for her in the room but she could not find her. She came back to the room of Kamraj and reported the matter to Dhuran (PW. 1). But she did not take the news seriously as she merely asked PW. 4 to search for Jayanthi. Then PW. 4 and Chitra (PW. 20) went out of the room of Kamraj. they searched for Jayanthi. At that time they saw Augustin (PW. 16) sitting in his verandah. PW. 4 asked him about Jayanthi but PW. 16 told that he had not seen Jayanthi. From there, PW. 4 returned straight to the room of Kamraj and reported that Jayanthi could not be

traced. Still PW. 1 did not react instantaneously. She sat undisturbed to enjoy the film show which was coming to its close. Immediately, thereafter, the film ended. Only three went out in search. They were PW. 1, PW. 4 and PW. 20.

17. PW. 1 called Jayanthi by name loudly. No one responded to her call. Coming near the house of Augustin (PW. 16), she again gave calls in Jayanthi's name as she was also called Porshi. Then PW. 4 and others saw Jayanthi at a distance of 20/25 cubits from there crying and coming from the side of the cow-shed of the appellant, Shyamraj. Seeing her, PW. 1 took her in her lap. PW. 4 noticed black smears on the back of her frock. It seemed to be cow-dung to her. But when Jayanthi was brought near the light, the smears appeared to be of blood. Then PW. 1 asked her what had happened. Jayanthi told in Hindi that Shyamraj had taken her from the bed to the cow-shed and pressed her neck and beat her private parts. Then PW. 1 took off her frock, washed it in water and spread it out for drying. PW. 1 informed Phaskal (PW. 10) to inform the parents of Jayanthi. By that time, Dhanpath (PW. 17) elder brother of Savitri came and PW. 1 told him to rush to the parents of Jayanthi.

18. Jayalakshmi (PW. 3) and Kamraj (PW. 9) have stated that they were informed at their shop by Phaskal (PW. 10) about the call of PW. 1. They met Dhanpath (PW. 17) on the way. Thus they have corroborated PW. 1 on the point of sending them to the parents of Jayanthi. The Ld. Sessions Judge has rightly believed this part of the prosecution story.

19. Augustin (PW. 16) is a man of village of Dairyfarm. Dhuran (PW. 1) lives as a tenant in one room of his house. To the right of his house is the house of Goraiah (PW. 2). To the left is the house of Ramaih. The appellant is known to him. His house is beyond the house of Ramaiah. Kamraj is also known to him. He runs a pan shop. He lives as a tenant in the house of Goraiah (PW. 2). Augustin (PW. 16) has no TV set. He generally goes to the room of Goraiah (PW. 2) to witness the feature film in the TV. According to him, there were two TV sets at the material time in that area - one at the room of Goraiah (PW. 2) and the other at the room of Kamraj. On the date of occurrence, he went to the room of Goraiah to see the feature film. He saw Phaskal (PW. 10) and appellant Shyamraj witnessing the film

standing on the verandah of Goraiah (PW. 2). Shyamraj left the place 2/3 minutes before interval. He did not return after the interval. After the show was over at about 8-25 p.m., he returned to his house. Before taking meal, he was standing on the verandah. At that time, Dhuran (PW. 1) and Chitra (PW. 20) asked him if he had seen Jayanthi. He replied in the negative. After a little while he saw Dhuran coining with Jayanthi who was crying then coming from the left side of his house. Augustin had no talk with her.

20. It is found that there are material discrepancies between the statement of Dhuran (P.W. 1) and that of Savitri (PW. 4). While Dhuran has stated that she went during interval with her two sisters Savitri and Chintamani, to her room, Savitri (PW. 4) has stated that she went alone during interval to the room of PW. 1 at the instance of PW. 1 to See Jayanthi. Again, P.W. 1 has stated that she returned from her room with her 2 sisters after 10 minutes to the room of Kamraj to see the remaining part of the feature film. But Savitri (PW. 4) has stated that she returned alone and saw appellant Shyamraj standing near the room of PW. 1 in the street and then the appellant Shyamraj gave her a Rs. 10/- note for purchasing pan from the shop of Ramaswamy (PW. 11). If P.W. 1 returned together with her two sisters there was hardly any scope for Savitri to meet the appellant alone. Moreover, P.W. 4 has stated that when she went out in search of Jayanthi (PW. 19) along with Chitra (P.W. 20) then she met Augustin (P.W. 16) standing on the Varandah of his room. She asked him whether he had seen Jayanthi but P.W. 16 has stated that when he was standing on the varandah at that time Dhuran and Chitra asked him if he had seen Jayanthi. This contradictions have not been explained. Moreover it appears from the evidence of Ramaswamy (P.W. 11) that on the date of occurrence Savitri (P.W. 4) went to his shop and asked him to supply 3 pans for Shyamraj. Shyamraj was a habitual customer of his shop and he used to take a special type of pan with Zarda. Ramaswamy (P.W. 11) gave three pans of special type to Savitri and returned her a sum of Rs. 8/-. Some 2/3 minutes thereafter, Shyamraj came to his shop and told him that there was less Supari and Zarda in those pans, Ramaswamy gave him extra Supari and Zarda. Thereafter Shyamraj left his shop. According to him Shyamraj came within 5 minutes after Savitri had left his shop. It has been put to this witness in cross examination in that Savitri did not come to his shop as stated by him and Shyamraj

also did not go to his shop as stated by him. It is really surprising how it is possible for Ramaswamy (P.W. 11) to remember the incident of a particular night of supplying pan to the regular customer Shyamraj and especially the fact of tendering of a Rs. 10/- currency note and returning Rs. 8/- being the balance amount. The panwala sells pan through out the day. He has to deal with many customers year in year out. A regular customer purchases pan from his shop on numerous occasions in the year, unless there be any special reason it is never possible for the panwala to remember the incident of a particular day after 4 years with all details. Moreover, the pan shop is about 300 metres away from the area where PW. I was residing. It is difficult to understand how within 5 minutes from the departure of Savitri, Shyamraj could go to the pan shop from the place where he was standing in front of the room of the PW. 1. It is obvious that there is a conscious effort to fix up the physical presence of appellant Shyamraj near the house of PW. 1 at the material time. The story of peeping inside the room of Kamraj by the accused Shyamraj just before the interval and the testimony of Augustin to the effect that the accused person was enjoying the TV film show at the house of Goraiah (P.W. 2) also reveal an attempt to fix up the physical presence of the accused at the material time in the vicinity of the house of P.W. I. Phaskal(P.W. 10) has stated that he along with the accused Shyamraj and Augustin (PW. 16) were sitting on the varandah of Goraiah's room on 22-1-1989 to see the feature film in the TV set. A few minutes before the interval appellant Shyamraj went away from there and he did not return after the interval. He has stated that after the interval he and Augustin saw the remaining part of feature film sitting on the varandah. After the show was over he went to the house of Eswari to get some tobacco leaves and Augustin left for his house. Hearing some noise coming from the room of Dhuran (PW. 1), he came out from the house of Eswari when Dhuran (PW. 1) told him to go immediately to call the parents of Jayanthi.

21. Alma (PW. 17) is the daughter of Augustin. She has also stated that on 22-1-1989 she along with her two sisters, Velonika and Jesika went to the room of Kamraj to see the film in the TV. That room was opened by Dhuran (PW. 1). Kamraj, his wife and son went to pan shop keeping their two daughters Chitra and Jayanthi with Dhuran. Chitra was also witnessing the show but Jayanthi was sleeping in the room of Dhuran. She has stated that after some time when the

show was going on appellant Shyamraj peeped inside the room of Kamraj through the open door and asked something to Dhuran and he went away. This witness has further stated that during the interval Dhuran asked Savitri to go to her room to see whether Jayanthi was sleeping in the room. Savitri went away and returned and reported to Dhuran that Jayanthi was sleeping in the room. 2/3 minutes after the commencement of show, after interval, electricity went off; then Dhuran (PW. 1) asked Savitri to bring a match box and see Jayanthi in her room. Savitri went out of the room of Kamraj The light was immediately restored. And a little while thereafter Savitri came and reported to Dhuran that Jayanthi was not in the bed. Dhuran then asked Savitri to go and search for Jayanthi. Then Savitri went out to search out the girl. After some time they returned and reported that Jayanthi could not be traced. Soon thereafter the feature film came to an end. Then Dhuran, Savitri, Chitra and Alma went out together in search of the baby. Dhuran called the baby by her name and thereafter saw Jayanthi coming from the cow-shed of Shyamraj. She was then crying. Then Dhuran picked her up in her lap. She heard Jayanthi told Dhuran in Hindi that the accused Shyamraj had taken her away from her room to his cow-shed and beaten on her neck and private parts.

22. There is another contradiction as neither PW. 1 (Dhuran) nor PW. 4 (Savitri) has stated in their deposition that Alma was present with them when they went to search out the missing baby.

23. Chitra (PW. 20) was tendered for crossexamination but the defence side declined to crossexamine her.

24. There is lot of discrepancies about the time given by different prosecution witnesses. We have got it that the house of PW. 1 is at a distance of 45 feet from the room of Kamraj and the room of PW. 1 is not visible from the room of Kamraj. We have also got it that cow-shed of the appellant is about 300 metres away from main road according to the I.O. (PW. 23). The house of Dhuran is at a distance of about 15-40 metres away from the house of the accused. We have got it that from the room of Kamraj, Dhuran, Savitri and Chitra went out in search of the little baby and within a few minutes they heard the voice of the baby coming from the side of the cow-shed of the accused person. It is perhaps not possible physically to come

from the room of Kamraj to a place near the house of the accused person within such short span of time. It is also not understood how within 5 minutes of the departure of Savitri from the shop of Ramaswamy (PW. 11) the accused person will reach there and take extra supari and zarda from his shop. It is also not possible to reconcile the statement of the prosecution witnesses that after the resumption of the cinema show on the TV, Savitri (PW. 4) went to the room of Dhuran and came back to report that the baby was not traceable. And within 2/3 minutes, the cinema show came to an end. The Ld. PP has tried to give an explanation about these discrepancies by stating that the chronometric sense of the countryside community in India is notorious since time is hardly of the essence of their slow life and even urban-folk make mistakes about time when a particular reason to remember the hour of minor events existed. In this connection the Ld. PP has referred to the observations made by the Supreme Court in the case of Shivaji v. State of Maharashtra, : 1973 CriLJ1783 . In that case Their Lordship have observed that 'the sluggish chronometric sense of the country-side community in the India is notorious since time is hardly of the essence of their slow life; and even urban-folk make mistakes about time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed. 10-30 a.m. could well have been an hour or more one way or the other and too much play on such slippery facts go against the realism, so essential in a testimonial appraisal'. It is true that to appreciate properly the evidence of witnesses the Court has to be very careful about the level of education, status, norms of life etc. of the witnesses. The standard which is applied in the case or appreciation of evidence of educated urban people cannot be applied in the case of half-educated people living in the remote corners of these islands. Naturally the Court has to apply a realistic standard and it may not be proper to rely too much upon the timings given by such witnesses in their deposition. In this respect the submissions made by the Ld. PP appear to be quite sensible.

25. The Ld. PP has submitted that the scientific evidence in this case is clinching against the appellant. The Ld. defence lawyer has submitted that the materials relied upon by the prosecution side cannot lead to the only conclusion that the accused committed the offence excluding all reasonable probabilities. Doctor Lall (PW. 23) has stated that he examined the appellant Shyamraj at 12-30 a.m. on 23-

1-1989 and found the following :-

There were multiple linear abrasions over the gland either side of the prepuce of the meatus. Abrasions on the posterior aspect of both elbows.

26. The Doctor could not find any presence of stercora on his penis. Nor he found no matted pubic hairs on his genital organs. The doctor also found stains of blood on the anterior aspect of his right leg. The doctor opined from the injuries on the person of Shyamraj that it would be likely that he had committed forcible intercourse. According to the doctor, the abrasions on the elbows of Shyamraj are indicative of the fact that while committing sexual intercourse he was resting his body on the elbows. In his cross-examination, the doctor has stated that though he had not specially mentioned in his report about sexual assault, he had mentioned in the medical examination report that there was interference in her private parts and that means such sexual intercourse. Being further cross-examined, the doctor has stated that penetration of any hard object of the character of the penis and disproportionate to the vaginal orifice might lead to such injuries as were found on the private parts of the victim girl. Such injuries might have also been possible by the penis if that penis was not pointed and was brought to the size of penis.

27. It appears from the Chemical Examiner's report that lungi (Mat. Ext. III) contains stains of blood and semen. Report of the Serologist could not confirm whether the blood on the lungi was of human origin due to its disintegration. Semen sample on the lungi could not be sent as the amount of semen was insufficient for serological test. It has thus not been established whether the semen was of human origin. It is quite likely that traces of semen could be found on the lungi of a grown-up man who appeared to be of 22/23 years of age at the material time. It appears from the item No. VIII of the Chemical Examiner's report that the vaginal swab of Jayanthi was found not to contain any semen. Blood was detected but the amount of blood was considered insufficient for serological examination. In Lyon's Medical Jurisprudence for India, 10th Edition, at page CCXXIII of Supplement, the effect of absence of sperm in the vaginal swab has been discussed. It has been discussed that the sperms in the vagina may retain vitality in the body of the women for a period of 17 days, but this vitality (motion) ceases

immediately after passing of the urine or chemical re-agents. In the case at hand, there is no evidence that the baby passed urine before the swab was taken or that part was treated with chemical re-agent. Absence of sperm in the vaginal swab is thus very eloquent.

28. Let us now come to the consideration of the marks of injury on the person of the appellant. One of the inferences which could be drawn, according to the doctor, was that the accused had committed forcible sexual inter-course. Doctor has opined that injuries on the person of the appellant showed it was quite likely that he committed forcible intercourse. It does not mean and cannot by itself lead to the only conclusion that it was the appellant and non-else who committed the alleged offence. It is to be considered along with the findings of abrasions on the elbows of the appellant. The doctor has opined that the abrasions of the elbows of the appellant were indicating the fact that while committing intercourse he was resting his body on the elbows. In normal course when an adult person commits sexual inter-course forcibly with a grown-up woman that might be plausible. But when a young man of 21 years of age commits forcible rape on a child of 3 1/2 years he cannot stretch his body straight parallel to the level of the ground as the size of the baby is so small that in committing the sexual act he has to rest the weight of the body on his palms bending it near the waist line. Therefore, the inference of the doctor-witness as drawn is not in accordance with common sense in the facts and circumstances of the case.

29. In this case the defence side came with the version that the appellant was present in the village but not at the place as stated by the prosecution and he has been falsely implicated in this case out of grudge. In his examination under Section 313, Cr. P.C. the appellant stated that he was witnessing the TV film show on the night of occurrence at the house of Phulchand with his wife and daughter, Pinky and Dhanesh from start to finish of the show. Thereafter he went to the pan shop, purchased pan and then returned home, took his meal and went to sleep. He has stated that he and some of his friends on some occasions protested against selling of liquor against the Kamraj from his shop and his house. So, they had a grudge against him. He has also told that some criminal cases were started against him by some Tamil men in which case Shyamraj and his wife were

witnesses against him. But he has not given the case number. The appellant has examined two witnesses on his side. They are Smti. Kamla wife of Phul James (DW. 1) and Dhanesh (DW. 2). DW. 1 has stated that on 22-1-1989 the feature film started at about 5-45 p.m. The title of the film was SikanderE-Azam. DW. 1, her husband Phul, her daughter, Sumitra were witnessing the film and at that time accused Shyamraj and Dhanesh (DW. 2) came to her house to witness the feature film. They saw the picture with DW.1 and her family up to the last. During this whole period the appellant did not leave the room. He left the room a little after the feature film was over. A suggestion was put to this witness that one Naib-Tehsildar, Ganapathy who is related to the accused-appellant Shyamraj helped D.W. 1 in getting allotment of land in Dairyfarm. But the witness denied the suggestion. She has stated that her house is about 3/4 houses away from the house of accused. It has been put to her in cross-examination that on the night of 22-1-1989 the appellant did not come to her room with Dhanesh to see the TV film show from 5-45 p.m. to 8-15 p.m. Dhanesh (DW. 2) has supported the DW. 1. From the crossexamination it appears that DW. 2 was a tenant in the house of accused Shyamraj for 5 years from 1983. It was put to this witness in cross-examination that he was not with Shyamraj to witness the TV film in the house of DW. 1 on 22-1-1989 as stated by him.

30. We have already discussed about the discrepancies and contradiction in the evidence adduced by the prosecution witnesses so far as the material witnesses are concerned. The defence is not required to prove its case as precisely as the prosecution side. The Court is to consider the probability of the defence version. It has been held by Their Lordships of the Supreme Court in Dudhnath Pandey v. State of Uttar Pradesh, : 1981 CriLJ618 , that the defence witnesses are entitled to equal treatment with those of the prosecution witnesses. The Court ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses.

31. It is obvious that simple because the defence witnesses have come to depose in favour of the accused appellant, there can be no presumption that they are telling lies. In the case at hand we have got that the prosecution side has completely failed to establish the place of occurrence as alleged by them. There is

no dispute about the fact that an unfortunate baby was sexually assaulted in an abominable manner. It has already been stated above that simply for that reason the appellant cannot be held responsible for the offence. It has been discussed above that there are material discrepancies in the evidence of prosecution witnesses who allegedly have been present immediately after the occurrence. The fact that the FIR was lodged immediately made after the occurrence is of no special significance as the FIR was not lodged by any person who was an eyewitness to the occurrence or who had been present immediately after the occurrence. The main prosecution witness PW. 1 (Dhuran) contradicts PW. 4 (Savitri) on very vital questions of fact. PW. 4 (Savitri) was not corroborated by Augustin (PW. 16) who spins out a story which is not given by PW. 1, the main witness on the prosecution side. There are some inherent improbabilities in the testimony of Ramaswamy (PW. 11). The only eye-witness in this case has not spoken a single word against the accused appellant. Thus considering the facts and circumstances and probability of the case it cannot be said that the defence version is improbable simply because a suggestion has been thrown in cross-examination that DW. 1. got settlement of land with the help of Ganapathy, brother-in-law of accused appellant. Mere suggestion in cross-examination is of no consequence.

32. Thus considering the totality of the facts, circumstances and probabilities of the case, it cannot be said that the prosecution side has been able to bring home the charge to the accused-appellant. He, accordingly, is entitled to an order of acquittal. Accordingly, the appeal is allowed, the impugned judgment and order of conviction and sentence passed by the learned Sessions Judge are set aside. The appellant be set at liberty at once.

33. A copy of this judgment be sent to the learned Sessions Judge, A & N Islands, Port Blair at once.

U.C. Banerjee, J.

34. I agree.

