

State of H.P. Vs. Amrish Kumar

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Court : Himachal Pradesh

Decided On : Dec-29-2008

Reported in : 2009CriLJ2126

Judge : Deepak Gupta and; V.K. Ahuja, JJ.

Appellant : State of H.P.

Respondent : Amrish Kumar

Advocate for Def. : Shri. Ajay Sharma

Disposition : Appeal allowed

Judgement :

Deepak Gupta, J.

1. This appeal by the State is directed against the judgment of the learned Sessions Judge, Shimla, in Sessions Trial No. 36-S/7 of 1991 decided on 18th December, 1993 whereby he has acquitted the accused of having committed offences punishable under Sections 376 and 506 of the Indian Penal Code.

2. The prosecution case, which unfolded during the course of the trial, is that on 21-3-1991 in the evening, the prosecutrix left her school and came by bus to Summer Hill. Thereafter, she was walking down the path to her house in village Sangti. On the way she met the accused who enquired if she (the prosecutrix) had

seen his dog. He then started walking with her and enquired her name, etc. When the accused and the prosecutrix had walked some portion on this path the accused pointed out another path to the prosecutrix and told her that his dog might have gone that way. He asked the prosecutrix to accompany him. Firstly, she refused to accompany him but later on she agreed on the insistence of the accused and since she could reach her house by this smaller path also. After the two had walked some distance on this path leading to the University there was a diversion where the prosecutrix had to go down to her house. At this point, the accused forcibly took the prosecutrix towards some bushes. He got her clothes removed. He removed his own pants and thereafter raped the minor girl. She started crying. On hearing her cries, two boys Surinder PW-4 and Narinder PW-9 rushed to the spot. They saw the accused lying on top of the prosecutrix. But when he heard these two persons coming, he ran away from the spot. Thereafter, Narinder and Surinder pacified the young girl who was crying. They asked her to wear her clothes and sent her home. Then they searched for the accused. While they were searching for the accused they met Rakesh Chauhan who joined them in the search. About an hour later they traced out the accused in the forest. Despite resistance by the accused they apprehended him and then took him towards the police station. On the way they met a police party and handed over the accused to the police party.

3. In the meantime, the prosecutrix had gone home and informed her mother, PW-2 Meera Shandil, about the incident. The father of the prosecutrix was at that time serving in district Kinnaur and was not at home. The mother then narrated the entire incident to her landlord Brahma Nand, PW-11, who advised her to report the matter to the police. Thereafter, the mother accompanied by the landlord and the prosecutrix went to the police station where she lodged the complaint Ext. PA. The prosecutrix was got medically examined and the police completed the investigation. Thereafter, challan was filed against the accused who pleaded not guilty and claimed trial. The prosecution examined as many as 12 witnesses. The case of the accused was of denial simpliciter and according to him a false case had been lodged against him at the instance of PW-4 Surinder and PW-9 Narinder because of some earlier rivalry. The learned Sessions Judge acquitted the accused. Hence, the present appeal.

4. We have heard Shri Rajesh Mahdhotra, learned Deputy Advocate General on behalf of the State and Shri Ajay Sharma, learned Counsel for the accused. Shri Mandhotra has contended that the judgment of the learned Sessions Judge is totally perverse and that the learned Sessions Judge has discarded the statement of the prosecutrix, which is fully supported by the other witnesses as well as the medical evidence, without any reasonable ground.

5. It has been urged by Shri Ajay Sharma, learned Counsel for the respondent accused that since the accused has been acquitted, we in exercise of our appellate jurisdiction should not interfere in the order of the learned trial Court. The principles relating to the powers of the Appellate Court while dealing with an appeal against the acquittal have been enumerated by the Apex Court in Chandrappa and Ors. v. State of Karnataka : 2007 CriLJ2136 . The Apex Court held as follows:

15. Bare reading of Section 378 of the present Code (Appeal in case of acquittal) quoted above, makes it clear that no restrictions have been imposed by the Legislature on the powers of the appellate Court in dealing with appeals against acquittal. When such an appeal is filed, the High Court has full power to reappreciate, review and reconsider the evidence at large, the material on which the order of acquittal is founded and to reach its own conclusions on such evidence. Both questions of fact and of law are open to determination by the High Court in an appeal against an order of acquittal.

16. It cannot, however, be forgotten that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent Court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial Court.

Thereafter the Apex Court culled out the following principles:

42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions' 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial Court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate Court should not disturb the finding of acquittal recorded by the trial Court.

6. Keeping in mind the aforesaid principles, we have considered the case in hand. We are aware that we are dealing with an appeal against acquittal. We have, therefore, dealt with the evidence both oral and documentary in detail.

7. Before we deal with the rival contentions of the parties, it would be apposite to refer to the main grounds which weighed with the learned Sessions Judge while acquitting the accused.

1. Lack of injuries on the private parts of the prosecutrix except mild redness on the inner side of the right labia minora.

2. No blood marks found by the doctor on the underwear of the prosecutrix.

3. No injuries on the private part of the accused.

4. The fact that prosecutrix was walking even after she was subjected to a sexual assault.

5. No injury on the back of the prosecutrix.

6. The fact that accused was apprehended in the forest militated against the theory of rape.

7. The accused who is in final year of the MBBS course could not have done such an act.

8. A false case had been planted against the accused at the instance of Surinder, Bhrama Nand and Narinder, who are interested witnesses, having inimical relations towards the accused.

Evidence led in the case:

8. The prosecutrix was examined as P.W. 1. No oath was administered to her since the Court found that she was a child of tender age and could not understand the sanctity of an oath. The prosecutrix has clearly stated that the accused met her when she was returning to school. He walked with her and enquired her name. Then he took her to the path leading to the University, and further down the path, he forcibly took her to the bushes. He asked her to remove her school bag and her clothes. She was left wearing a vest only. The accused thereafter removed his pants. The accused then made the prosecutrix lie down on the ground, climbed on top of her and inserted his penis into her vagina. The prosecutrix felt pain and

cried out loudly. At this stage, the accused threatened the prosecutrix that in case she made a noise he would kill her. According to the prosecutrix, on hearing her cries, Surinder Bhaiya (P.W. 4) and Narinder Bhaiya (P.W. 9) came to the spot and on seeing them the accused put on his pants and fled away. Thereafter, these two witnesses asked the prosecutrix to wear her clothes and go home and they went to apprehend the accused. On coming home, the prosecutrix narrated the entire occurrence to her mother P.W. 2 since her father was not at home. Thereafter, she reported the matter to the landlord P.W. 11 Brahma Nand and then they all went to the police station. The prosecutrix has identified her underwear Ext. P. 1 which she was wearing at the time of the occurrence. The prosecutrix has been cross-examined at length. According to her she did not know the accused earlier and the accused himself had told his name to her. She states that due to the sexual act forcibly committed by the accused, she had slight bleeding, i.e. 2 to 3 drops of blood only, and had informed her mother about the same. She states that she knows P.W. 4 Surinder and P.W. 9 Narinder since Surinder is the son of landlord and Narinder is a friend of Surinder. She has denied the suggestion that she has made a false statement at the behest of these persons. She states that she is not aware that the relations between the accused on one hand and the landlord Brahma Nand and his son Surinder, on the other hand, are strained.

9. P.W. 2 is the mother of the prosecutrix. She states that on 21-3-1991 at about 5.30 p.m. the prosecutrix came home crying. On enquiry as to why she was crying, she told her mother that one Amrish uncle had committed sexual intercourse with her. The prosecutrix narrated the entire story to the mother. The mother undressed the prosecutrix. The underwear Ext. P-1 was dirty and blood stained. The witness states that since her husband was serving in Kinnaur and was not at home she narrated the entire incident to her landlord, P.W. 11, Brahma Nand who advised her to report the matter to the police. Thereafter, she accompanied by Brahma Nand and the prosecutrix, went to the police station and reported the matter. In cross-examination she has stated that the prosecutrix was bleeding at the time when she had examined her at home and blood was oozing out of her vagina. According to her, she had made a statement to the police about the blood noticed by her. She was confronted with the FIR where there is no mention of the

bleeding. She denied the suggestion that a cry raised at the place of the occurrence could be heard at her house. According to her such cries could be heard on the road but not in the house. The mother has denied the suggestion put to her that she is making a false statement at the instance of her landlord and she also denied to suggestion that the entire story has been cooked up at the instance of her landlord Brahma Nand and his son Surinder.

10. P.W. 4 Surinder Kumar Sharma has supported the prosecution version to the hilt. According to him, on 21-3-1991 between 5.15 and 5.30 p.m. when he along with Narinder were going from his house at Sangti to the University Library they heard cries coming from the bushes. On hearing such cries these two persons rushed towards bushes where they saw from a distance that the accused was lying on the top of the prosecutrix. On seeing the witnesses, the accused put on his pants and ran away. They pacified the prosecutrix and asked her to go home. They then made a search for the accused and found him hiding in the bushes in another portion of the jungle after about one hour. They over-powered the accused and took him to the police station. On the way they met the police party, In cross-examination, this witness states the distance from the place from where they heard the cries and the spot where the prosecutrix was raped was about 50 to 70 feet and there was a small foot path (Pagdandi) connecting the road to the place of occurrence. The witness denied the suggestion put to him that at the time of the anti reservation protests in the year 1990 he had quarrelled with the accused on the question of reservation. He also denied the suggestion that prior to the incident another quarrel had taken place between this witness and his father on the one side and the accused on the other side on account of his cousin Annu. He denied the suggestion that any FIR was recorded in the Police Station Boileauganj in this regard. He denied the suggestion that due to enmity, a false case had been lodged against the accused. It would be pertinent to mention that a suggestion has been put to this witness that at about 6 or 6.30 p.m. on 21-3-1991 this witness along with P.W. 9, Narinder went to the accused and requested the accused to check up the room mate of Narinder, who was unwell and that the accused advised them to take the said person to Dr. Khanna. Another suggestion has been put to this witness that when this witness, along with Narinder, Rakesh and accused reached near the house of Dr. Khanna they started beating up the

accused. He denied these suggestions and also denied the suggestion that Dr. Khanna intervened in the quarrel and asked them to report the matter to the police.

11. P.W. 9 Narinder Kumar has totally supported the prosecution version. In cross-examination he states that at the relevant time he used to reside in the University Hostel. He admits that he is well known to P.W. 4 Surinder. He denied the suggestion that he has made a false statement or that the accused has been falsely implicated to settle scores on account of some previous enmity between the accused and Surinder. He also stated that when they were running up from the road to the place of occurrence after hearing the cries of the prosecutrix and were at a distance of 8 to 10 yards, the accused ran away. After sending the prosecutrix to her home, they searched for the accused. While they were searching for the accused they met Rakesh Chauhan, who joined them in the search and the accused was apprehended after 1 1/2-2 hours. He denied the suggestion that his room mate was ill on the date of the occurrence. Interestingly, the suggestions put to this witness are contrary to the suggestions put to P.W. 4. This witness denied the suggestion that his room mate was ill or that he and Surinder went to Dr. Khanna at about 7-7.30 p.m. and requested him to check up the room mate. The suggestion put to this witness is that Dr. Khanna refused to examine the room mate and advised P.W. 4 and P.W. 9 to take the room mate of P.W. 9 to the accused who is a doctor. He also denied the suggestion that thereafter they went to the house of the accused and had tea at his house. This witness had also denied the suggestion that after taking tea when the accused came out of his house they started beating up the accused. According to this witness, P.W. 4 Surinder had never talked about any quarrel between him and the accused on any account.

12. P.W. 10 Rakesh Chauhan has also supported the prosecution version. He is also student in H.P. University. He was coming home from the university library when he met P.W. 4 Surinder and P.W. 9 Narinder, who told him that they were searching for the accused since he had raped the prosecutrix. He joined them in the search and they apprehended the accused in the forest. This witness admits that he is a tenant of Surinder and that he has cordial relations with both Surinder

and Narinder. According to him the accused was found in the jungle at about 8 p.m. He states that he has no knowledge that any quarrel had taken place between Surinder and the accused.

13. P.W. 11 Brahma Nand states that P.W. 2 Meera Shandil informed him on 21-3-1991 at about 5.45 p.m. about the incident which had happened with her daughter. Then he asked the prosecutrix as to what had happened. The prosecutrix told him the entire story. He has denied that during the Mandal Commission agitation he, Surinder and Narinder had quarrelled with the accused.

14. P.W. 7 Dr. Mrs. Kumar examined the prosecutrix at about 10 p.m. on 21-3-1991 the date of occurrence. She did not find any semen stains on the pubic hair, thighs and other parts of the body of the prosecutrix. The hymen was intact but there was mild redness on the inner side of the right labia minora. White discharge was present. Swab and slides were taken and sent for chemical examination. She has opined that the mild redness present on the inner side of the right labia minora could be caused by penetration of penis. In cross-examination, she has admitted that such redness could also be caused due to itching, or inflammation due to infection. She has further stated in cross-examination that in an act of coitus between a virgin of 11 years and a fully developed male the hymen may be torn, there may be bleeding and there will be local redness/tenderness. Except the redness she found to other signs present on the prosecutrix. She has, however, categorically denied the suggestion that in case the redness was caused due to penetration there ought to have been contusion on the labia minora. She has also categorically stated that in case there is no resistance by the girl there would be no injuries on her back and this would also depend on the nature of the surface where the sexual act was committed. She has stated that she did not see fresh blood marks on the underwear of the prosecutrix taken into possession by her.

15. P.W. 3, Dr. B.R. Sharma examined the accused. He found six injuries on the person of the accused: These injuries were on his face, finger and chest. No injury was found on the penis or the other private parts-of the accused. The doctor found absence of smegma and according to him this was indicative of recent indulgence in sex. In cross-examination he states that the accused had informed him that the

injuries were caused when he was beaten up by some persons including the police. The witness has also stated that in case an adult person engages in sexual intercourse with a virgin aged 10 to 12 years injury would normally occur to the private parts of the male.

Age of the prosecutrix:

16. As far as the age of the prosecutrix is concerned, the school record has been proved by P.W. 8, in which the date of birth of the prosecutrix is recorded as 17-5-1981. This witness has not been cross-examined at all and, therefore, this date of birth has been accepted by the accused. This date of birth finds corroboration from the testimony of the dental surgeon Dr. S.N. Tuli, P.W. 5, who has opined that the dental age of the prosecutrix is not more than 12 years and the Radiologist Dr. Mrs. A. Santoshi, P.W. 6, has opined that the skeleton age of the prosecutrix is between 10 to 14 years. None of these witnesses has been cross-examined.

17. The Apex Court in *Sannaia Subba Rao v. State of Andhra Pradesh* : (2008)11SCC113 has clearly held that the school register is admissible in evidence to prove the date of birth of a person. In any event in the present case nobody has challenged the date of birth of the prosecutrix. Therefore, it is apparent that she was less than 11 years of age at the time of occurrence.

Does the statement of the prosecutrix inspire confidence:

18. The law by now is well settled that an accused in a rape case can be convicted even on the sole testimony of the prosecutrix so long as her statement inspires confidence. The prosecutrix is not to be treated like an accomplice. She is the victim of a dastardly crime. Corroboration in every case is not required but in the present case there is more than sufficient corroboration to the statement of the prosecutrix also.

19. We have gone through the statement of the prosecutrix in great detail. The version given by her unfolds in the most natural manner. It is apparent that she is telling the truth. She is a girl of tender age. She was just about 10 and 1/2 years old at the time of the incident and was little more than 11 years old when her

statement was recorded. Her statement has a ring of truth. The version of the prosecutrix is also corroborated in all material particulars by the statements of the other witnesses, especially the mother P.W. 2, P.W. 4 Surinder, P.W. 9 Narinder and P.W. 11 Brahma Nand.

20. It is only natural that the girl would have immediately informed her mother about the unfortunate occurrence. Since the father of the prosecutrix was not at home, the mother took the landlord into confidence. The landlord, P.W. 11, asked the mother to immediately report the matter to the police and the fact is that the matter was reported to the police within a few hours and the FIR Ext. PA itself was lodged on the same dates at 7.30 p.m. i.e. barely two hours after the incident. Therefore, there was no time to either embellish the facts or to cook up a false story. P.W. 4 Surinder and P.W. 9 Narinder have supported the version of the prosecutrix on all material aspects. They both heard the cries of the prosecutrix when she was being raped and immediately went towards the direction from where the cries were emanating. On reaching the spot, they pacified the prosecutrix, made her wear her clothes and sent her home and then followed the accused to apprehend him. They apprehended the accused about an hour or two later.

21. Shri Ajay Sharma, learned Counsel appearing on behalf of the accused has contended that the statements of the prosecutrix and her mother cannot be relied upon since they both stated that the prosecutrix was bleeding and there was blood on her underwear, whereas the doctor P.W. 7 has not found any blood on the underwear. He submits that in view of this contradiction it is apparent that the story set up by the prosecutrix and her mother is false. We are unable to accept this contention. The prosecutrix clearly states that only 2-3 drops of blood came out. The mother has not talked about the extent of bleeding. The doctor P.W. 7 issued the MLC Ext. PE. In the MLC there is no mention that the doctor did not find any blood on the underwear. All that is mentioned is that the underwear was preserved and sent for chemical analysis. This witness does state that she did not see fresh blood marks on the underwear taken into possession by her. However, the report of the chemical examiner Ext. P.W. 13/B reveals that some blood was found on the underwear but the quantity was so small that it could not be tested any further.

The report of the chemical examiner also shows that human semen was found on the underwear. It may be that the doctor did not notice the blood since the quantity of blood which had oozed out was miniscule, only 2/3 drops as stated by the prosecutrix. It must also be remembered that the prosecutrix was not wearing the underwear at the time when the sexual assault was committed on her and she obviously wore the underwear after Surinder and Narinder came to the spot. Therefore, there would be very little blood on the underwear. In our opinion, therefore, this alleged contradiction does not help the defence of the accused at all.

22. In this case, the evidence led by the prosecution leaves us in no manner of doubt that a young 10 1/2 year old girl was subjected to sexual intercourse. The defence taken up is that a totally false case has been foisted upon the accused. It is alleged that relations between P.W. 4 Surinder, his father P.W. 11 Brahma Nand and P.W. 9 Narinder on the one hand and the accused on the other hand were inimical to each other for the following reasons:

1. That during the Mandal agitation there had been some quarrel between Surinder and his father on the one hand and the accused on the other hand.
2. That prior to this incident some quarrel had taken place between these two sides on account of one girl Annu stated to be a cousin of Surinder.
3. That on the date of the incident, the accused did not treat the room mate of P.W. 9 Narinder and therefore they beat him up.

23. The law is very clear that the prosecution must stand on its' own feet. After going through the entire oral and documentary evidence, we are left in no manner of doubt that the statement of the prosecutrix inspires confidence and is supported by the other evidence and therefore, the prosecution has succeeded in proving its case. The defence would have us believe that this false case was lodged against the accused on the above mentioned grounds. The reasons given above are totally unbelievable.

24. It cannot be believed that a mother would stake the reputation of her daughter of tender age only to satisfy the ego or whim of her landlord. There is no allegation that there was any dispute between the prosecutrix and her mother with the accused. No mother would make a statement in Court as P.W. 2 has made in this case just to help the landlord.

25. The incident took place in March 1991. The Mandal Commission agitation took place about six months earlier. Only suggestions have been put to the witnesses that such a quarrel took place but there is no evidence on record to support the defence version. The mere ipse dixit of the accused in his statement under Section 313 Cr. P.C. and the suggestions put by him to the witnesses cannot be taken as the gospel truth. All the witnesses have denied that there were strained relations between the witnesses on the one hand and the accused on the other hand. On behalf of the defence, a suggestion was put to P.W. 4 Surinder Kumar Sharma that a quarrel had taken place between the accused and his father on account of his cousin Annu. He denied the suggestion. Thereafter, a suggestion was put that an FIR was recorded in this behalf in the year 1991. Even in his statement under Section 313, Cr.P.C. the accused states that he has been involved in a false case at the instance of Surinder and Narinder because of earlier rivalry for which one FIR was registered with Police Station Boileauganj. No effort has been made to prove this FIR. Even P.W. 12 SHO who came from the police station Boileauganj was not put a suggestion as to whether such FIR was registered or not. It is obvious that there was no such FIR and a totally false defence was set up.

26. As far as the alleged incident on the date of occurrence is concerned, the defence itself is contradictory. When P.W. 4 Surinder was cross-examined it was suggested to him that on 21-3-1991 the date of the incident this witness along with P.W. 9 Narinder met the accused to get the room mate of Narinder checked up. Thereafter, the accused advised them to go to Dr. Khanna and when they reached near the house of Dr. Khanna they started beating up the accused.

27. The defence put to P.W. 9 is totally different. The suggestions put to this witness are that he along with Surinder first went to Dr. Khanna to get their friend checked up who advised them to take the friend to the accused. Why would a

doctor send a patient to a person who was still studying medicine? Another suggestion has been put to this witness that both he and Surinder took tea in the house of the accused and after tea when they came out of the house they started beating the accused.

28. If there was a doctor in the University, why would the witnesses who are stated to have inimical relations with the accused approach the accused alone to get their friend treated. On the one hand the defence is that the relations between the parties were so strained that the accused has been falsely roped in a rape case and on the other hand the suggestion is that very same two witnesses came to the accused to get their friend treated. There is also no reason why the accused would then have accompanied them to the house of Dr. Khanna. If the relations were strained why would the accused invite these persons to have tea with him. There is no explanation to these important questions. The two totally inconsistent stands taken render the defence version totally unbelievable.

Legal Provisions:

29. Section 375 reads as follows:

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 six following description:

First: Against her will.

Secondly : without her consent.

Thirdly: With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is a another man to whom she is or believes herself to be lawfully married.

Fifthly: With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or

through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: With or without her consent, when she is under sixteen years of age.

30. Prosecutrix was less than 12 years of age. The first explanation to Section 375 reads as follows:

Explanation : Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

31. A bare perusal of explanation to Section 375 clearly shows that penetration is necessary to constitute the sexual intercourse to the offence of rape. From a reading of the aforesaid provisions, it is clear that no offence under Section 376 can be made out unless there was penetration to some extent. In the absence of any penetration the offence would not fall within the four corner of Section 375 of the Indian Penal Code. However, it is not necessary that the entire sexual act should be completed. Mere penetration of the male organ within the private part of the woman with or without any emission of semen is sufficient to constitute a rape. Penetration of the male organ completely, partially or slightly would be enough to constitute an offence within the meaning of Sections 375 and 376, IPC. This point stands decided by the Apex Court in State of U.P. v. Babul Nath : (1994)6SCC29 .

32. In Tarkeshwar Sahu v. State of Bihar : (2006)8SCC560 the Apex Court dealt with the word penetration in great detail. It held as follows:

13. In order to constitute rape, what Section 375, IPC requires is medical evidence of penetration and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376, IPC.

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21. In view of the catena of judgments of the Indian and English Courts, it is abundantly clear that slight degree of penetration of the penis in the vagina is sufficient to hold the accused guilty for the offence under Section 375, IPC

punishable under Section 376, IPC.

The Apex Court in *Aman Kumar v. State of Haryana* : 2004 CriLJ1399 has held as under:

7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see *Joseph Lines, IC & K 893*). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse (See *S.P. Kohli (Dr.) v. High Court of Punjab and Haryana*). In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration.

Whether rape was committed or it was only an attempt to rape:

33. Shri Ajay Sharma, learned Counsel for the accused in the alternative raised a plea that at best this is a case of outraging the modesty of a girl or at best a case of attempt to rape. He contends that no rape was committed as penetration has not been proved.

34. In our opinion, there can be no manner of doubt that the offence in question is much more serious than that of outraging the modesty of a young girl. Here is a case where the accused has undressed the minor girl and except for the vest she was left not wearing any clothes. She was made to lie down on the ground. He then took off his pants and then climbed on top of her as has been stated by the prosecutrix and P.W. 4 and P.W. 9 who came to the spot immediately thereafter. If this is not an attempt to rape, we fail to understand what further action would be

required to constitute an offence of attempt to rape.

35. In fact, in the present case, the prosecutrix in unequivocal terms has stated that the accused inserted his penis into her vagina and then she started crying because of pain. Much reliance on behalf of the accused is placed on the fact that except for the mild redness on the inner side of the right labia minora there is no other medical evidence to indicate that penetration took place. It is also urged that there are no injury on the private parts of the accused.

36. It is not necessary that the male organ must suffer injury when sexual act is committed by a fully developed male with a girl of tender age. This normally may be so but is not a universal proposition of law. Reference in this behalf may be made to *Ishwaroo v. State of Himachal Pradesh* 1992 (2) Sim LC 102.

37. Lack of injuries on the male organ of the accused as well as the lack of any major injuries on the prosecutrix is not conclusive of the fact that penetration did not take place. Each case has to be decided on its own facts. The evidence in this case reveals that after the accused had undressed the prosecutrix he then took off his pants, made the prosecutrix lie down on the ground and climbed on top of her. Then he inserted his male organ into her private part. She cried out. On hearing her cries, the two witnesses P.W. 4 and P. 9 rushed towards spot. The accused immediately got up, wore his pants and ran away. Therefore, probably the accused did not have time to complete the sexual act but the penetration even if slight had already taken place. Redness on the labia minora of the prosecutrix is a pointer in this regard, which is in total harmony with the statement of the prosecutrix. Therefore, we are of the considered opinion that the offence was complete.

38. We have already pointed out above the reasons which weighed with the learned Sessions Judge while acquitting the accused. We are constrained to observe that the reasoning given by the learned Sessions Judge, to say the least, was ludicrous. He treated the prosecutrix like an accomplice. He discarded the statements of the prosecutrix and the other witnesses merely on the ground that it was alleged that there was some enmity between the parties but accepted the bald suggestions in this behalf put by the defence. He failed to take into

consideration the fact that neither the prosecutrix nor her mother would have staked the reputation and honour of the prosecutrix just to pander to the desire of the landlord. We have dealt with the various reasons given by the learned Sessions Judge while discussing the various issues above and we are compelled to observe that the approach of the learned Sessions Judge towards such a sensitive issue was callous and insensitive, to say the least. The learned Sessions Judge has come to the conclusion that an eleven years old girl could not even have a walk after she was subjected to sexual assault. How and on what basis he came to this conclusion is not borne out from any material on record. There is no evidence to this effect. As far as the injuries on the back of the prosecutrix are concerned, no question was put to the prosecutrix or to the other witnesses as to what was the nature of the surface where the assault took place. Unless the nature of the surface was established how could lack of injuries be held against the prosecutrix. The reasoning of the learned Sessions Judge that since the accused was apprehended in the forest it showed that he was not guilty is absurd. Similarly, his finding that since the accused was in final year of MBBS he could not have committed such an offence is not based on any reasoning. We are again constrained to say that these reasons given by the learned Sessions Judge are beyond our comprehension. Once the accused had been seen committing an offence he ran away. He obviously would not run home because he was known to the witnesses and he wanted to hide somewhere and there is no reason why he would not hide in the jungle. The accused being in the final year of the MBBS is in fact a circumstance which would go against the accused. Was the learned Sessions Judge trying to say that a person studying in the final year of MBBS cannot commit rape We have, therefore, no doubt in our mind that the reasoning given by the learned Sessions Judge is perverse and therefore, we have no hesitation in setting aside his judgment of acquittal.

39. We, therefore, find the accused guilty of having committed an offence punishable under Section 376, IPC and since the prosecutrix was less than 12 years of age he is guilty of an offence punishable under Section 376(2)(f). The statement of the prosecutrix is absolutely clear that the accused threatened her that he would kill her when she protested and cried. We have no reason to disbelieve this statement of the prosecutrix and therefore, the accused is also held

guilty of having committed an offence punishable under Section 506, IPC.

What is the proper sentence:

40. Mr. Ajay Sharma, learned Counsel for the accused has strenuously urged that offence took place in the year 1991 and now since 19 years lapsed, it would be extremely harsh to sentence to the accused for a long period of incarceration and therefore, there are special circumstances to reduce the sentence to below the prescribed minimum.

41. Section 376 of the IPC which deals with a rape of woman under 12 years of age provides that the minimum sentence shall not be less than 10 years but may extend to life.

42. In *State of Karnataka v. Raju* : 2007 CriLJ4700 the Apex Court held as follows:

6. It needs no emphasis that the physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.

7. It is to be noted that in Sub-section (2) of Section 376, IPC more stringent punishment can be awarded taking into account the special features indicated in the said sub-section. The present case is covered by Section 376(2)(f), IPC i.e. when rape is committed on a woman when she is under 12 years of age. Admittedly, in the case at hand the victim was 10 years of age at the time of commission of offence.

8. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and

detering the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the appellant. To show mercy in the case of such heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.

The legislative mandate to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but which may extend to life and also to fine reflects the intent of stringency in sentence. The proviso to Section 376(2) IPC, of course, lays down that the Court may, for adequate and special reasons to be mentioned in the judgment, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' R.I. though in exceptional cases 'for special and adequate reasons' sentence of less than 10 years' R.I. can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The Courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for 'special and adequate reasons' and not in a casual manner. Whether there exist any 'special and adequate reasons' would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application.

These aspects were highlighted in *Dinesh Alias Buddha v. State of Rajasthan* : 2006 CriLJ1679 .

9. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of 'order' should meet the challenges confronting the society. Friedman in his 'Law in Changing Society' stated that, 'State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society'. Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

43. Similar view was taken in *Ramkripal v. State of M.P.* : 2007 CriLJ2302 and *State of Punjab v. Rakesh Kumar* : 2009 CriLJ396 .

44. Other than delay in the hearing of this appeal, there is no reason to take a sympathetic view in favour of the accused. He was aged about 24 years at the time of the incident. He was studying in the final year of MBBS. Despite his being 'educated' he raped a young girl only 10 1/2 years old, less than half his age. There can be no misplaced sympathy with such a person. There are no special circumstances to reduce the sentence below the minimum laid down in the Act. Therefore, we sentenced the accused to undergo 10 years rigorous imprisonment and pay fine of Rs. 10,000/- for the offence under Section 376(2)(f). In default of payment of fine, he shall undergo further rigorous imprisonment for a period of one year. As far as the offence under Section 506, IPC is concerned, the petitioner is sentenced to rigorous imprisonment of two years and fine of Rs. 2000/-. In default

of payment of fine, he shall undergo further rigorous imprisonment for a period of two months. The substantive sentences are directed to run concurrently.

45. The appeal is allowed in the aforesaid terms. The accused is directed to surrender to the trial Court to undergo the sentence imposed upon him.

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