

**ishwar Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/924658](http://sooperkanoon.com/924658)

**Court :** Delhi

**Decided On :** Jan-16-2012

**Appellant :** ishwar

**Respondent :** State

**Judgement :**

\* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A.585/2009 %  
Judgment reserved on : 8th December, 2011 Judgment delivered on: 16th  
January, 2012 ISHWAR ..... Appellant Through: Mr.Anil Soni, Adv. versus STATE  
..... Respondent Through: Ms. Rajdipa Behura, APP for State. CORAM: HON'BLE  
MR. JUSTICE SURESH KAIT SURESH KAIT, J..

1. The instant appeal is being filed while assailing the judgment dated 08.07.2009 whereby, the appellant has been held guilty and convicted for the offence under Section 376 Indian Penal Code, 1860..

2. Vide order on sentence dated 11.07.2009, he was sentenced to undergo RI for 10 years and to pay a fine of ` 7,000/-..

3. The facts in brief of the case are that on 03.11.2008 on receipt of PCR Call, vide DD No. 19A, W/ASI Rakesh Kumari reached Surya Temple, Kabir Nagar, Street No.5, Shahdra, Delhi, where H.C. Karan Singh and Ct. Anil Kumar were already present. Smt. Sarita gave her statement to W/ASI Rakesh Kumari regarding commission of rape Crl.A.585/2009 *Page 1 of 22* upon her daughter Bhagyashri

(name changed), aged about 8 years by the appellant, who was working as a priest in Surya Temple, Kabir Nagar, Shahdra, Delhi on 02.11.2008 in Surya Temple in between 07:00-07:30PM, when she had gone to take Prasad over there. Prosecutrix (Bhagyashri) was sent to G.T.B. Hospital for her medical examination. From the statement of Smt.Sarita and MLC of prosecutrix, case under Section 376 Indian Penal Code, 1860 was registered against the appellant..

4. As per the prosecution case, appellant was sent for medical examination to G.T.B. Hospital through H.C. Karan Singh and Ct.Anil Kumar. Blood sample and underwear of the appellant were taken into possession. Underwear of prosecutrix was also seized. Prosecutrix was produced before Id. MM, who recorded her statement under Section 164 Cr.P.C. and thereafter, exhibits were sent to FSL..

5. After completing the investigation, challan was submitted against the appellant for the offence mentioned above. The charge was accordingly framed against the appellant, to which he pleaded not guilty and claimed trial..

6. In order to bring home the guilt of the appellant, prosecution has examined as many as 15 witnesses..

7. PW1 H.C. Pargesh Kumar on receipt of Rukka on 03.11.2008 recorded the FIR Ex.PW1/B..

8. PW3 Ct. Anil Kumar joined the investigation of the case. He along with W/ASI Rakesh Kumari took the prosecutrix to G.T.B. Hospital for her medical examination..

9. After medical examination of the prosecutrix, W/ASI Rakesh Kumari had handed over the Rukka Ex.PW1/A to him. He took the same to the Police Station and got the case registered. In his presence, site plan was prepared by the Investigating Officer. Appellant was arrested vide arrest memo Ex.PW3/A and his personal search was conducted vide memo Ex.PW3/B..

10. W/ASI Rakesh Kumari deposited 4 parcels duly sealed with seal of G.T.B Hospital and one sealed parcel sealed with the seal of R.K. to H.C. Virender (PW4) working as MHC(M), PS-Shahdra. He recorded an entry to this effect at

Serial no. 2765 on Register no.19. On 25.11.2008, he sent all the four parcels to FSL, Rohini vide R.C. no. 87/21 through Ct. Virender in intact condition..

11. PW9 Sh. Sonu Agnihotri, Ld. MM has proved the statement under Section 164 Cr.P.C. as Ex.PW9/A..

12. PW10 Dr.Arifa, medically examined the prosecutrix on 03.11.2008 and prepared her MLC Ex.PW10/A..

13. PW11 Dr. P.K. Phukan examined the appellant on 03.11.2008 and prepared his MLC Ex.PW11/A..

14. PW12 Ravinder Pratap Singh, Physical Education Teacher brought the Admission Register of M.C. Primary School and deposed that as per School record, prosecutrix was admitted in M.C. Primary School, Jyoti Colony, Shahdra, Delhi on 17.07.2008 in second standard CrI.A.585/2009 *Page 3 of 22* and her date of birth was recorded as 12.01.2000..

15. PW15, Sh. V. Shankar Narain, Sr. Scientific Assistant examined the four parcels which were received in FSL, Rohini, Delhi on 25.11.2008 and gave his statement Ex.PW15/A and PW15/B..

16. The statement of the appellant was recorded under Section 313 Cr.P.C. wherein he admitted that an information, vide DD No.19A, which is Ex.PW2/A, was given by wireless operator to PS-Shahdra, Delhi. According to him this information was given personally by him to the police from his mobile phone. He denied the rest of the case of prosecution. According to him, Prosecutrix Bhagyashri and her brother used to come to the temple and he used to teach them. He never asked the brother of the Prosecutrix to go from the temple. He further stated that earlier he was residing at Karnal in Haryana. He was called by Satpal, who met him 2-3 times in Rishikesh and offered him to come to Delhi. He came to Delhi and Satpal being the Incharge of temple asked him to perform the work of Pujari in Surya Temple. One person namely Kallu used to come in the temple. PW7 Sarita, mother of the prosecutrix used to say that Kallu was having illicit relations with Saina. He told to mother of Satpal that Kallu was a good person and he did not

have any illicit relations with Saina. The said Satpal stated all these things to PW-7 Sarita and on this Sarita threatened to see him (appellant). Initially, Sarita and her family used to reside in the premises of Satpal, later on, they vacated the room at the instance of Satpal and started living near the temple, which belongs to Billoo, a friend of Satpal. Sarita asked him to teach her children. He told her Crl.A.585/2009 Page 4 of 22 that he could teach her children only after performing his routine work. There was an altercation between him and Tejvir, son of uncle of Satpal, who used to asked him (appellant) to sweep and clean the road and nearby vicinity besides watering the plants. Whenever, he used to got to from the temple, Satpal and his family used to tell him that he can go after solemnizing of marriage of Satpal. Billoo, Tejvir, Ashok and Subey Singh used to visit Sarita. One day, Sarita came inside his room and at that time, he was reading book. She bolted the room from inside. When he asked her as to why she was doing so, she demanded a sum of `1,00,000/- from him. When he expressed his inability to pay the amount, she went outside. He heard the noise of Billoo, Tejvir and Mahender Singh. On one occasion, Mahener Singh, younger uncle of Satpal, asked for telephone no. of his Mama who resides at Mathura. Accordingly, he gave the telephone no. of his uncle (Mama). They made a call to his uncle. He received a call from his uncle, who told him that those persons had informed him that he had committed a folly. Thereafter, his uncle and one of his friends came from Panipat on receipt of telephone call. He was taken to the Office of Satpal. These persons misbehaved with him and falsely implicated in this case..

17. It is further stated that he was not willing to remain in temple and he wanted to leave the temple with his Computer system, which he purchased himself. Satpal and others asked him either to pay an amount of `1,00,000/- or to leave the Computer System there itself. Police Officials also came at the spot and they asked him to give an amount of `1,00,000/- to Satpal. Crl.A.585/2009 Page 5 of 22.

18. It is further stated that H.C. Karan demanded an amount of `1,00,000/- and Ct. Anil Kumar demanded an amount of `75,000/- and they threatened him to give the amount, otherwise, they would implicate him in some false case and that is why, this false case has been registered against him..

19. It is further stated that he was also given beatings by police officials. He claimed innocence and his false implication in the instant case..

20. Ld. counsel for the appellant has submitted that as per the statement of Prosecutrix in the court, she had gone to Surya Temple along with her elder brother and younger brother to have Prasad. It were evening hours at that time. Appellant was working as a priest in the said temple. He took her and her younger brother upstairs, while her elder brother was made ran away. Appellant asked her and her brother to fold their hands in front of the God. Thereafter, appellant inserted his Penis in her vagina. She went home along with her younger brother and narrated the entire facts before her mother. Her mother went to the temple. At the time of incident, she was wearing underwear. She felt pain and narrated those facts before her mother. Some stains of urinal discharge had come on her underwear. This statement made before the Court has been proved as Ex.PW6/A..

21. Ld. Counsel further submitted that PW7 Sarita (mother of the prosecutrix) has deposed that the prosecutrix was playing near the Surya Temple, which is at a little distance from her house. Her daughter (prosecutrix) had left home at 7 PM and returned back at 7.30 PM. She came home while weeping. Her son Vikas told that something had been done to the prosecutrix by the priest. Underwear of her daughter was stained with semen and blood stains. She removed the same threw it in the garbage with a view to save her family honour. Her daughter complained her that she was taken upstairs by the priest and made her to fold her hands before the God and he did the indecent act with her. She along with her husband went to the temple. Appellant told them that nothing was done by him with prosecutrix. Public persons had beaten the appellant. Thereafter she came back home. On the next morning, uncle of the appellant was called, who was laughing and saying that appellant is a Kid and if something has had happened, it should be forgiven. Appellant gave a telephone call to Police Control Room. Police reached there. She lodged a report Ex.PW7/A. Her daughter was taken for medical examination. She lifted the underwear of her daughter from garbage and gave it to W/ASI Rakesh Kumari, who seized the same vide memo Ex.PW7/B..

22. Ld. Counsel for the appellant has further submitted that no MLC of private parts has been recorded. He has referred the report of PW10 Dr. Arifa, who had examined the prosecutrix and recorded that "hymen found to be intact"..

23. Ld. Counsel has drawn the attention of this Court to the deposition of PW10 Dr. Arifa, Sr. Resident, G.T.B. Hospital, Shahdra, Delhi, who had deposed that on 03.11.2008 at 09.15 PM Prosecutrix was brought in the hospital by W/ASI Rakesh Kumar with alleged history of going to Temple on 02.11.2008 during evening hours to take Crl.A.585/2009 *Page 7 of 22* Prasad, where Pandit of the temple took her to upstairs in the temple where she was sexually assaulted. Patient gave an history of dysuria and bleeding from vagina. No history of taking bath after the assault. However, her underwear was thrown away by her mother. This witness has further deposed that she was having fair gait. Breasts were in the stage of tanner one. Pubic hair was also in the stage of tanner one. On local examination, no external injury was noted. Slight abrasion was present on the right side of Labia Minora. No signs of fresh tear were present. Hymen was intact. Vaginal swab was taken from the forchette, sealed and handed over to the police. She prepared her MLC Ex.PW10/A..

24. Ld. Counsel has further drawn the attention of this court to the history recorded by PW10 Dr. Arifa, which is as under:- "Alleged history of prosecutrix and her brother gone to temple on 02.11.2008 evening to take Prasad, when Pandit of temple took the girl up in the temple assaulted her. Girl gives history of dysonia and bleeding virginally. No history of taking bath after the assault. But underwear worn on 0211.2008 was thrown by mother..".

25. Ld. Counsel has further submitted that in Parcel-I, no semen found in vaginal swab. The blood group could not be detected. However, the semen detected on the underwear of the appellant is natural..

26. Ld. Counsel for appellant has referred the deposition of PW6 Prosecutrix, where she has stated that when appellant inserted his Penis in her vagina, he had not removed her underwear. It was removed by Crl.A.585/2009 *Page 8 of 22* her mother when she came back home. She was taken to hospital by her mother, however she could not tell to which hospital. She was examined by PW-10 Dr.

Arifa. She had not narrated the facts before the Doctor. On her underwear, some stains of urinal discharge had come (susu had come on her underwear). When Penis was inserted in her vagina, her younger brother was standing outside. Intact position of hymen suggests that there was no penetration. The court questions were put to this witness as under:- "C.Q: Whether hymen of the girl was patulous? Answer: No. C.Q: Whether in patulous hymen there can be intercourse any tear to it? Answer: No. C.Q: Would you like to explain as to what were reasons of abrasion on right side of labia minora? Answer: Abrasions may be on account of somebody might have touched her private part or tried to molest her. C.Q: Whether you suggest that by molestation you mean that somebody used his private part and rubbed it on forchute of the girl? Answer: Yes, it can be"..

27. Ld. Counsel has further referred the deposition of PW8 Vikas, brother of the prosecutrix, who in cross-examination has deposed that the appellant used to give tuition to him. He used to visit Temple daily and have tuition from the appellant. His brother Vivek had also gone to temple along with them. They had gone to temple at 07:00PM. It was 03:10PM. His mother had told that he should say that they had *CrI.A.585/2009 Page 9 of 22* gone to temple at 07:00 PM. His mother had told him that he should speak that they had gone to take Prasad in the temple. His mother had told to depose in the terms that he was made to run away from there by the appellant. His mother had also told to speak that his sister came out of the temple while weeping. His mother also told him to identify the appellant as author of the crime. He was tutored outside the court by his mother. He had narrated the facts as he was so tutored by his mother..

28. Ld. Counsel has further referred the deposition of PW7, Sarita, mother of prosecutrix, who has deposed in cross-examination that Satpal was the employer of her husband. House no. 5/48, wherein they were residing belongs to Billoo, a friend of Satpal. The said house was a single storey house. Billoo resided in an adjoining house. Her husband was working with Satpal for the last 1 year. Satpal used to visit their house. Her husband used to earn ` 3,000/- per month. She did not visit the factory of Satpal, hence she could not say as to how many employees were there. She was not aware as to what job was being performed by her husband. Her husband used to leave home at about 09:00AM and returned at

about 06:00PM. Whenever, he performed overtime, he used to return late. She used to visit Surya temple. She stopped visiting it after this incident. Surya Temple belongs to Satpal. She could not tell as to how storey said temple had. The factory of Satpal is located behind the temple. None except the appellant was residing in the temple. Any other employee of Satpal did not reside in that temple. Temple opens at 04:00 AM and closed at 12:00Noon. It again opens at 05:00PM and closed at 09:00PM. Crl.A.585/2009 Page 10 of 22.

29. This witness has admitted that house of Satpal and his relations were in the near vicinity of the said temple. Earlier they used to reside near the temple. All employees of Satpal were not given residential accommodation by him. Her children used to play in the temple prior to the date of incident also. The temple is two streets away from her house. She has admitted that many families used to in the said temple. It is further deposed in cross-examination that she went to the temple at about 07:00AM next morning. At that time her husband and Moolchand had accompanied her to the temple. None except the appellant was there in the temple at that time. From there, the appellant was called in the factory by Satpal. She had also gone there in the factory. None except the persons referred above were there in the factory at that time. Three-four persons in all were there in the factory at that time. Satpal and Moolchand had beaten the appellant. At that time, she and her husband were in the tension. When appellant was being beaten at that time, he was saying that he had not done anything. Uncle of the appellant had also reached there. He did not know his name. She has admitted that when uncle of the appellant asked him about the incident, at that time, he pleaded innocence. Appellant had reached the temple. His friend was also present by his side. His uncle was also there. At that time, he asked him that he should let her know whether he had committed folly or not. At that juncture, appellant told that, he should be given 2 minutes time to talk and went upstairs, and gave a telephone call to the police control room. He was alone at the temple at that time. Police reached their around 07:00 or 08:00PM. The accused was apprehended and taken away by Crl.A.585/2009 Page 11 of 22 the police. She was also called in the Police Station and was interrogated there. Her daughter was also called in the Police Station. Her statement recorded in the Police Station whereas the police stayed at the time for a while, took the appellant to the police station and went

away. Moolchand and her husband had accompanied her to the police station. Satpal was not with them..

30. This witness has further deposed that she lifted the underwear of her daughter and gave it to the police. W/ASI Rakesh Kumari recorded the statement of her daughter. Thereafter, prosecutrix was taken to the hospital. She along with her daughter and W/ASI Rakesh Kumari had gone to the hospital. She could not tell the time when she had gone to the hospital. She has admitted that her daughter was not medically examined in her presence. She has denied to the suggestion put to her that the prosecutrix was tortured by Satpal..

31. Ld. Counsel for the appellant has submitted that the appellant was working as a priest in the temple. This temple belongs to one Satpal. They wanted to remove the appellant from the temple. Therefore, Satpal, the employer of the husband of the mother of the Prosecutrix throughout been in the whole episode and thereafter and even in the court proceedings. Therefore, Satpal and Mool Chand had played major role in implicating the appellant..

32. Ld. Counsel has further submitted that at best, the instant case could be under Section 354 of Indian Penal Code, 1860 as stated by the prosecutrix that underwear was not removed by the appellant. Therefore, there was not even slightest penetration in the vagina of the *Crl.A.585/2009 Page 12 of 22* prosecutrix, as has been proved by PW-10 Dr. Arifa. Therefore, he could not be held under Section 376 Indian Penal Code, 1860..

33. Ld. Counsel for the appellant has further submitted that mother of the prosecutrix has fully tutored the prosecutrix. Therefore on the tutored statement of the prosecutrix, appellant could not be held guilty..

34. Ld. Counsel for the appellant has further submitted that Ld. Trial Judge has totally gone wrong while relied upon a statement, which is not admissible under the law..

35. Ld. Counsel for the appellant has further submitted that as deposed by the mother of the prosecutrix, Satpal and Moolchand had beaten the appellant at that

time. Therefore, the appellant could not bear the torture of beating. He had himself called the police, which reached only at about 07:00PM in the evening. Because of this fact, the appellant has been booked in serious case, otherwise Satpal and Moolchand would have been in trouble for beating the appellant..

36. Ld. Counsel for the appellant further submitted that in spite of active participation of Satpal and Moolchand, the prosecution have not made them witnesses therefore present case is full of doubts..

37. Ld. Counsel has also pointed out that underwear of the prosecutrix stated to have been thrown in the garbage and only lifted again by PW7 Sarita, mother of the prosecutrix next day and handed over to the police. This under pant had not been proved to be that of PW6 Prosecutrix as it had not been shown to PW6 or PW7 mother of the prosecutrix during the recording of their statement in the court. *Crl.A.585/2009 Page 13 of 22* Moreover, no blood has been detected on it by CFSL vide its report Ex.PW15/A and 15/B. Ld. Counsel has argued that on detecting the semen on the underwear of the appellant is nothing unnatural. Almost all males capable of performing sex may have traces of semen in their underwear. This semen, however, could not be connected to the semen found on the other underwear (allegedly of prosecutrix PW6) by CFSL..

38. Ld. Counsel has further argued that even the swab taken from the prosecutrix's vagina did not reveal any trace of semen or blood as per Ex.PW15/A. In spite of that fact, the prosecutrix had not taken the bath before the medical examination as stated in her MLC Ex.PW10/A..

39. Ld. Counsel has also pointed out that PW10 Dr. Arifa has categorically stated in her deposition that "As far as my opinion goes, there was no penetration with this patient". By penetration, I mean complete or partial penetration of penis. I say that in this case there was no partial penetration." In support of his argument, Ld. Counsel for appellant has referred the case of *Tarkeshwar Sahu v. State of Bihar (Now Jharkhand) 2006 (3) SCC (Crl.) 556*, wherein it is held as under:- "To constitute an offence of rape, there must be a penetration. The appellant had not undressed the prosecutrix, so there was no question of penetration. In the absence of any attempt to penetrate, the conviction under Section 376/511 Indian

Penal Code, 1860 is wholly illegal and unsustainable.".

40. Ld. Counsel has referred another judgment of Chhagan Dame vs. State of Gujarat (1995) SCC (Cri.) 182 on the tutored witnesses wherein it was held as under:- Crl.A.585/2009 *Page 14 of 22* "The court has to carefully consider whether the child was under the influence of any tutoring. In the case, her answers to the question in cross-examination clearly indicates that she was tutored and she was made to give evidence in accordance with the earlier statement recorded under Section.

162. Therefore, the court was of the opinion that it is highly unsafe to place relevance on her evidence"..

41. On the other hand, Ld. APP has submitted that the prosecutrix has categorically stated that the moment the appellant inserted his penis in her vagina, she felt pain and she came out from there while weeping..

42. Ld. APP has drawn the attention of this court to the statement made by the appellant wherein he has admitted his guilt by deposing that previously he was residing in Karnal in Haryana. He was called by Satpal, who met him 2-3 times in Rishikesh and offered him to come to Delhi. He came to Delhi and Satpal being the Incharge of the temple asked him to perform the work of Pujari in Surya Temple. One person namely Kallu used to come in temple. Sarita used to say that this Kallu was having illicit relations with Saina. He stated to the mother of the Satpal that Kallu was a good person and he did not have any illicit relations with Saina. Satpal stated all these things to Sarita and on this Sarita, mother of the prosecutrix threatened to see him. Initially Sarita and her family used to reside in the premises of Satpal and later on, they vacated the room at the instance of Satpal and started living near the temple in a rented room, which belongs to Billoo a friend of Satpal. Ld. APP has pointed out that if there was any relation between the Satpal and the mother of the prosecutrix, there would have Crl.A.585/2009 *Page 15 of 22* no occasion to get the house vacated from them..

43. Ld. APP has further argued that as has admitted by the appellant one day Sarita, mother of the prosecutrix came inside his room and at that time, he was

reading a book. She bolted the room from inside. He asked her as to why, she had bolted the room inside and why she had come over there. On this, she demanded an amount of ` 1,00,000/-. He asked her as to what account he should pay an amount of ` 1,00,000/- , as she had not given any amount to him. He refused to give him any amount and asked him to go from there..

44. Ld. APP has submitted that this, itself revealed that appellant had committed something wrong with the prosecutrix. Therefore, the mother of the prosecutrix went to his room. The rest of the story, the appellant has concocted to save the skin from the instant case..

45. She has referred to Madan Gopal Kakkad v. Naval Dubey and Ors. JT 1992 (3) S.C.

270. wherein it has been held that if reliable evidence of slight penetration though not complete penetration is there, the person has committed offence under Section 376 Indian Penal Code, 1860. She has relied upon on the paras as under:- "39. In Parik's Textbook of Medical Jurisprudence and Toxicology, the following passage is found: "Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains." Crl.A.585/2009 Page 16 of 22.

40. In Encyclopedia of Crime and Justice (Vol.4) at page 1356, it is stated: ".....even slight penetration is sufficient and emission is unnecessary."

41. In Halsbury's Statutes of England and Wales (Forth Edition) Volume 12, it stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of Section 44 of the Sexual Offences Act 1956. Vide (1) R v. Hughes, [1841] 9 C and P 752; R v. Lines, [1844] 1 Car and Kir 393 and R v. Nicholls, [1847] 9 LTOS 179..

42. See also Harris's Criminal Law (Twenty Second Edition) at page 465..

43. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of California reads thus: "Rape; essentials - Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

44. The First Explanation to Section 375 of India Penal Code which defines 'Rape' reads thus: Explanation-Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

45. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a *Cr.L.A.585/2009 Page 17 of 22* consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to *Natha v. Emperor*, 26 Cr. L.J. [1925] page 1185; *Abdul Majid v. Emperor*, AIR 1927 Lahore 735 (2); *Mussammatt Jantan v. The Crown*, (1934) Punjab Law Reporter (Vol.36) page 35; *Ghanashyam Mishra v. State*,(1957) Cr.L.J.

469. = AIR 1957 Orissa 78; *D. Bernard v. State*(1947) CR.L.J. 1098. In re *Anthony*, AIR 1960 Mad.

308. it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's "The Penal Law of India" 6th Edn. 1955 (Vol. II) Page 1678, it is observed, "Even vulval penetration has 946 been held to be sufficient for a conviction of rape."

47. In the case on hand, there is acceptable and reliable evidence that there was slight penetration though not a complete penetration. The following evidence found in the deposition of PW 13 irrefragably proves the offence of rape committed by the respondent: "Nawal uncle untied his pyjama and took out his male organ and put it inside my vagina and clutched me.....Nawal Chacha put his male organ inside my vagina and since it was fat it kept slipping out. After that my vagina was paining." ".....When Nawal Uncle held apart, then there was some white liquid

coming out from his male organ..... "Nawal Chacha pressed my mouth so I could not scream. CrI.A.585/2009 Page 18 of 22.

48. In the cross-examination, the following answer is given: "I suffered pain by what Nawal Chacha did.....".

49. When the evidence of PW 13 is taken with the evidence of medical officer who found an abrasion on the medial side of Labia Majora and redness present around the Labia Minora with white discharge even after 5 days, it can be safely concluded that there was partial penetration within the labia majora or the vulva or pudenda which in the legal sense is sufficient to constitute the offence of rape. Moreover, the respondent himself has confessed twice admitting the commission of rape without rupturing the hymen which confession is not disbelieved by the High Court. The respondent is a medical officer who has got the practical knowledge of the anatomy of a human being and the tender sexual organ of a young girl and who must have been quite aware of the implication of his confession having fully understood the meaning of the word 'rape'. Therefore, as admitted by the respondent himself, he without forcibly and completely penetrating his penis into the vagina of PW 13 had slightly penetrated within the labia majora or vulva or pudenda without rupturing the hymen and thereby his lust after emission of semens. In this context, it is not necessary to enter into any nice discussion as to how far the male organ has entered in the vulva or pudenda of PW13 since it is made clear that there was penetration attracting the provisions of Section 375 IPC. The evidence of PW 13 is amply corroborated not only by the medical evidence and the corroborating evidence of PW 12 but also by the plenary confession of the respondent himself."

46. As discussed above, PW6 prosecutrix herself, PW7 Smt.Sarita, and PW8 Vikas, her mother and brother respectively, all do not inspire CrI.A.585/2009 Page 19 of 22 confidence. PW8, brother of the prosecutrix is a tutored witness. Therefore, his deposition cannot be relied upon..

47. PW10 Dr.Arifa and PW11 Dr. P. K. Phukan have proved that there is not even slightest penetration on the prosecutrix, therefore, the case under Section 376 Indian Penal Code, 1860 is not at all proved..

48. As per the deposition of the prosecutrix her underwear remained intact. No semen or blood found on either vaginal swab or on underwear of the prosecutrix..

49. PW10 Dr.Arifa in response to the Court question has admitted that the abrasions on the right side of labia minora might be on account of somebody touched her private part of tried to molest her..

50. As learned counsel for appellant has argued that instant case would at the best under Section 354 Indian Penal Code, 1860 and not under Section 376 Indian Penal Code, 1860..

51. Law is well settled in *Premiya @ Prem Parkash v. State of Rajasthan* 2008 (10) SCC 81 wherein the Apex Court modified the order on sentence from Section 376 Indian Penal Code, 1860 to Section 354 Indian Penal Code, 1860. To this effect, relevant paras are as under:- "Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially *Crl.A.585/2009 Page 20 of 22* things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. In the instant case after careful consideration of the evidence, the trial court and the High Court have found the accused guilty. But the offence is Section 354 IPC. In the instant case we alter the conviction of the accused from Section 376 IPC to Section 354 IPC. The accused has undergone nearly two years of sentence. The occurrence is of 1987. Custodial sentence shall be the period already undergone. Appellant shall be released forthwith unless required in custody in connection with any other case."

52. In *Shekara v. State of Karnataka* JT 2009 (4) 360 also the conviction of the accused was altered from Section 376 Indian Penal Code, 1860 to 354 Indian Penal Code, 1860..

53. Therefore, keeping the above discussion and the settled law into view, it can be concluded without any hesitation that the allegations of rape against the appellant has not been proved beyond reasonable doubt..

54. Accordingly, I alter the impugned judgment dated 08.07.2009 to the extent that appellant has been acquitted for the offence under CrI.A.585/2009 *Page 21 of 22* Section 376 Indian Penal Code, 1860, however he stands convicted for the offence under Section 354 Indian Penal Code, 1860..

55. Appellant is in custody for the last more than 2 years. The maximum punishment is two years under Section 354 Indian Penal Code, 1860. As such, the order on sentence dated 11.07.2009 is also modified to the period already undergone for the offence under Section 354 Indian Penal Code, 1860..

56. Jail authorities are directed to release the appellant forthwith, if not warranted in any other case..

57. Copy of order be sent to Jail authorities for compliance..

58. Consequently, Criminal Appeal No.585/2009 is partially allowed and stands disposed of. SURESH KAIT, J JANUARY 16, 2012 Jg/Mk CrI.A.585/2009 *Page 22 of 22*

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