

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl. A. 171/2009

Date of pronouncement 11th August, 2009

Mohinder Singh Bhatti Appellant
Through : Mr. K.B. Rohatgi, Advocate.

Versus

STATE (NCT OF DELHI) Respondent
Through : Mr. Lovkesh Sawhney, APP for the
State.

CORAM: HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether reporters of local papers may be allowed to see the Judgment ? **Yes**
2. To be referred to the Reporter or not? **Yes**
3. Whether the Judgment should be reported in the Digest? **Yes**

G.S. SISTANI, J.

1. The present appeal is directed against the judgment dated 13.01.2009 and order on sentence dated 17.01.2009, passed by the learned Additional Sessions Judge, Delhi, in FIR No. 37/07, PS Khajuri Khas, under section 376, Indian Penal Code, 1860 (hereinafter referred to as, "IPC"). By virtue of the said judgment, the appellant was convicted under section 376, IPC and sentenced to Rigorous Imprisonment (hereinafter referred to as, "RI") for a period of seven (7) years with a fine of Rs.5,000/-. In default of the payment of fine, the said appellant was directed to undergo a further Simple Imprisonment (hereinafter referred to as, "SI") for a period of six (6) months. The appellant was also sentenced to undergo RI for a period of six (6) months and a fine

of Rs. 500/- under section 506, IPC. In default of the payment of fine, the appellant was directed to undergo SI for a period of three (3) months.

2. The facts of the case as noticed by the learned Trial Court, briefly stated are.

3. On 20.01.2007 at about 3:07 p.m., an information of commission of rape was received by the Duty Officer of Police Station Khajuri Khas, through Constable Satbir- No.1910, PCR. On receipt of this information, ASI Sunita along with ASI Rajinder and lady Constable Lakshmi reached House No.1502, the alleged house of the appellant. On reaching there, the victim, her mother (Sudha), and one Smt. Pushpa Chamoli met them. The SHO reached at the spot and Crime team was informed. The victim, her mother and Smt. Chamoli along with the police officials went to the house of appellant, Mohinder, but he was not found present at his house. Thereafter, the police officials took the victim to the police station Khajuri Khas, where her statement was recorded. Thereafter, the victim was taken to GTB Hospital, she was got medically examined and MLC bearing No.C-260/07 was obtained. On the basis of the statement of the victim, and in view of the opinion of the Doctor on the MLC, the present case was registered. Investigation was undertaken, site plan was prepared, photographs of the place of occurrence were taken and the appellant was arrested on 26.01.2007. Personal search of the appellant was got done, the disclosure statement of the appellant was recorded, and one bed sheet was recovered at his

instance. The appellant was medically examined, blood sample was taken, however, the appellant failed to give his semen sample. On 07.02.2007, statement of the victim was recorded under Section 164, Cr.P.C. On 13.02.2007, TIP of the appellant was scheduled to be fixed, but the appellant refused to join the proceedings. The samples were sent to the FSL and eventually, the appellant was sent for trial wherein he pleaded not guilty. Post trial, the appellant was found guilty of the offence under section 376, IPC read with section 506, IPC.

4. Learned counsel for the appellant submits that the learned trial court has gravely erred in overlooking vital admitted facts. It is contended that the evidence of the victim is neither reliable nor trustworthy, and even otherwise there are vital discrepancies in the statement made by the victim (PW-1) under Section 161 of the Cr.P.C.; statement recorded under Section 164 of the Cr.P.C.; as well as the statement made by her in evidence before the Court.
5. It is contended by the learned counsel for the appellant that the victim did not name the appellant before the Doctor, who had recorded the MLC nor was the appellant named at the time of recording of the statement of the victim under Section 164 of the Cr.P.C. Learned counsel submits that according to the statement of the prosecutrix (victim, PW-1), at the time of commission of crime, she did not know the name of the appellant which she admittedly learnt after many days had elapsed since the day of the incident and that too because the people were addressing

the appellant by that name, and as such, this is a case of mistaken identity.

6. Learned counsel for the appellant has contended that the appellant has been falsely implicated by the victim, as she was known to extract money from persons. It is also contended that the age of the prosecutrix has not been established by any cogent or reliable evidence. Besides, the mother of the victim has admitted that she cannot tell the date, month and year of the birth of her children.
7. Learned counsel has contended that the story, as unfolded by the victim, is altogether improbable. Learned counsel submitted that even if the testimony of PW-1 is believed, the only case which is made out against the appellant is of attempt to rape falling under Section 354 of the IPC and not under Section 376 of the IPC. It is contended that even according to the prosecutrix, the act of inter-course was never performed inasmuch as the appellant put his penis in her place of passing urine, she shouted, which scared the appellant and whereafter the appellant immediately left her and ran away.
8. Learned counsel for the appellant submits that PW-4 is only a chance witness. Learned counsel for the appellant further contended that the *salwar* produced as evidence before the Court and alleged to have been worn by the prosecutrix at the time of the commission of crime did not belong to the victim, inasmuch as the same has been observed by the learned trial court itself. He submits that the *salwar* is inadmissible in evidence and contrarily

the trial court has drawn an adverse inference against the appellant with regard to the presence of human semen found on the salwar. It is submitted that no other article, having traces of human semen, has been exhibited.

9. Learned counsel further contends that the scientific evidence does not support the case of the prosecution. He submits that on medical examination, hymen was found intact and no injury was found on the body of the victim. Merely because semen was found in the vagina, the same cannot connect the appellant to the crime as the sample of semen of the appellant was not taken, which duly finds mention in the MLC. Learned counsel further submits that finding of semen on the bed-sheet cannot also support the case of the prosecution as it has been wrongly held that the bed-sheet was recovered at the instance and on the disclosure statement of the appellant. Counsel further submits that in view of the fact that the act was not completed, rape cannot be held to have been made out. Moreover, the Doctor, who had examined the appellant, was not produced for his evidence.
10. Learned counsel for the State, *per contra*, submits that it has repeatedly been held by the Apex Court that the sole testimony of the victim, if reliable, can be a ground for conviction of the accused. Learned counsel contends that the victim has supported the case of the prosecution, her evidence is material, reliable and trustworthy. Counsel further contends that the evidence of the victim was unshaken during cross-examination.

11. Learned counsel for the State submits that contention of the appellant that other cases are pending against the victim is baseless in view of the fact that no defence evidence has been led in support of this allegation. It is further submitted that it cannot be a case of mistaken identity as in the statement under Section 313 of the Cr.P.C., the appellant has clearly stated that he had refused to pay the victim as she used to make false allegations, and this shows that the appellant was not unknown to the victim and *vice-versa*. Learned counsel for the State contends that the victim has correctly described the incident and identified the appellant.
12. Learned counsel for the State submits that besides the evidence of the victim, the case of the prosecution stands corroborated by the scientific as well as medical evidence. The blood sample of the appellant was taken and according to the MLC, the appellant is capable of performing sexual intercourse. Learned counsel for the State submits that the appellant had refused to take part in the Test Identification Parade (TIP) and he had also refused to give his semen sample. Both these facts certainly affect the credibility of the case of the appellant and incriminate him. In support of his arguments, learned counsel for the State has relied upon the case of ***Aman Kumar and Another Vs. State of Maharashtra***, reported at 2004 Supreme Court Cases (Cri.) 1266. Counsel has also relied upon ***Ranjit Hazarika Vs. State of Assam***, reported at (1998) 8 SCC 635.

13. It would be useful to analyse the evidence of material witnesses.

PW-1, victim (name withheld) daughter of late Ashok Kumar, deposed in her examination-in-chief that she knew appellant, Mohinder, who was running a milk dairy and keeping buffaloes near the house of Smt.Chamoli. PW-1 stated that her mother used to work in the house of Smt.Chamoli and she used to go to her house for studies. PW-1 stated that she did not remember the month but said that it was on the 20th of the month in the year 2007 at about 1:30 pm. when she had gone to make dung cakes in the dairy of appellant, Mohinder and when she was making dung cakes, appellant Mohinder called her and asked to put the empty balti (bucket) in his room and when she had gone to do the same, the appellant held her hand, dragged her inside his room, and started pressing her breasts by putting his hands inside her clothes. Appellant Mohinder forcibly laid her on the bed and when she tried to make noise, the appellant shut off her mouth with his hand. Thereafter the appellant untied her salwar and removed the same. The appellant unchained his pants took out his penis and inserted the same in the place of her passing urine. It pained her a lot, as a result of which she raised noise and the appellant ran away from there threatening to kill her, if she disclosed about this incident to anyone. PW-1 (victim) has further stated that thereafter she went to the house of Smt.Chamoli and informed her and her mother about the incident. Smt.Chamoli informed the police on telephone. The police officials came to them and accompanied the victim, her

mother, Smt.Sudha and Smt.Chamoli to the house of appellant, Mohinder, but he was not found to be there. Thereafter the police took them to the police station Khajori Khas and recorded her statement Ex.PW-1/A, which bears her thumb impression as well as her signatures at point A and X respectively. Thereafter she was taken to the hospital and got medically examined. Her salwar was taken in the possession in the hospital itself. A sealed parcel bearing the seal of FSL was produced and opened in the Court and a salwar of Yellow colour (Ex.P-1) was taken out. However, PW-1 (victim) categorically did not identify the said salwar (Ex.P-1) as the same which she had allegedly been wearing at the time of the incident. The length of the salwar was also compared with the height of PW-1 and it was found that the salwar was proportionately very big. The Court also observed: *"it is so clear that the said salwar produced in the court cannot be the salwar which the prosecutrix might be wearing at the time of the occurrence."* PW-1 admitted that the signatures on this statement, Ex.PW-1/B, are her signatures at point 'A'. PW-1 further identified the metal bucket, as the same, which appellant Mohinder had asked her to put in his room.

14. PW-1 was cross-examined by learned counsel for the appellant and she deposed that at the time of recording of her statement in the Court, one bhaiyaji used to bring her to the court. She stated that bhaiyaji was not in her relation and was introduced to her by Ms. Laleima, who is an Advocate from Rape Crisis Cell of Delhi, Commission for Women. PW-1 further stated that she was

not a tutored witness. Initially, PW-1 had not named appellant, Mohinder, at the place of occurrence when she had narrated about the incident to her mother and Smt. Chamoli, as she did not remember the same at that point of time. However, PW-1 denied the suggestion that she did not name appellant, Mohinder, as he had not committed the crime but it was some other unknown person. As per PW-1, immediately, after the occurrence, she had reported the matter to her mother and Smt. Chamoli. Police reached there after some time and she was taken to the hospital for her medical examination. PW-1 stated that she had not given the name of the appellant to the Doctor who prepared her MLC and further it was correct that she did not know the name of the appellant, who had committed rape upon her, at the time of preparation of MLC. At that stage, a court question was put to this witness: *"Did you know the accused of rape by face? Ans.: Yes. I knew the accused of rape by face. He is present in the Court and his name is Mohinder."*

15. PW-1 also stated during her cross-examination that the police had recorded her statement, Ex.PW-1/A on her dictation and not at the dictation of anybody else. She learnt the name of appellant as Mohinder, as people were addressing him by that name. She came to know the name of the appellant after many days of the occurrence. Further as PW-1, she had not given the name of appellant as Mohinder in her statement, Ex.PW-1/B, recorded by the Magistrate, although on that date her mother and Smt. Chamoli had accompanied her to the court. She further

stated to not remember whether she had disclosed the place of occurrence as Dairy in her statement, Ex.PW-1/B, recorded by the Magistrate. PW-1 was confronted with Ex.PW-1/B, wherein there was no mention of the place of occurrence as Dairy. PW-1 accepted that it was correct to say that there are several Dairies where buffaloes are kept near her residence but there were no such dairies near the place where her mother used to work at the house of Smt. Chamoli. PW-1 stated that in and around the days of occurrence of the incident, she was working in two houses, but she did not know the house numbers and the gali wherein they were situated. She stated that it was wrong to suggest that the occurrence of rape had taken place at any of the aforesaid two houses. She also denied the suggestion that no occurrence had taken place at the dairy of appellant, Mahender, or that appellant, Mahender, had not committed rape upon on her. She stated that she was not deposing falsely at the instance of her mother or Smt. Chamoli.

16. PW-2, Smt. Sudha (mother of the prosecutrix) has stated on oath that she knew appellant, Mohinder, who was running a milk dairy and keeping buffaloes near the house of Smt.Chamoli. As per PW-2, she used to work as a maid servant in the house of Smt.Chamoli and that her daughter (victim) used to go to her house for studies. PW-2 has stated that on 20.1.2007, while she was working in the house of Smt.Chamoli, her daughter came to her and told that while she had gone to the dairy of Mohinder, at around 1:30 noon, appellant, Mohinder asked her to put the

empty metal bucket in his room. At that time when her daughter had gone to do so, appellant dragged her inside and raped her. While this incident was narrated by her daughter, Smt.Chamoli was also present there and she had also heard the complaint of her daughter. As per PW-2, Smt.Chamoli had informed the police telephonically. The police came to them and accompanied to the dairy of Mohinder, but he could not be found there. Thereafter police took them to the police station, where the statement of her daughter (victim) was recorded.

17. In the cross-examination by learned counsel for the appellant, PW-2, deposed that she has two children, namely, one son and one daughter. Her son is two years elder to her daughter (victim). PW-2 denied the suggestion that the age of the prosecutrix was more than 18 years at the time of the incident. She further stated that her daughter (victim) used to remain with her or with Smt.Chamoli and that she was not working anywhere. PW-2 stated that no one had tutored her about the date of the incident and further that she had come to the court on her own and no body had escorted her. When her daughter victim had narrated the incident to her and Smt.Chamoli, soon after the occurrence, her daughter had named the appellant, Mohinder and had also described the place of occurrence as the dairy of Mohinder. Further when Smt.Chamoli had telephonically informed the PCR, she had named the accused as Mohinder and the place of occurrence as dairy of Mohinder. Police had recorded her statement. PW-2 further deposed that she had told the name

of the appellant to the doctor, at the time of medical examination of her daughter. She denied the suggestion that she did not know the name of the appellant till the medical examination of her daughter. And that it was wrong to suggest that she did not know the name of the appellant even till the recording of the statement of her daughter by the Magistrate. PW-2 also denied that the appellant present in the Court had not committed rape with her daughter, victim or that some other unknown person had raped her daughter. She further stated that this was not a case of mistaken identity and she has not falsely implicated the appellant at the instance of Smt.Chamoli and local police. PW-2 on seeing the salwar, Ex.PW-1, submitted that she was not sure whether the said salwar was the same which her prosecutrix, daughter, was wearing at the time of the occurrence.

18. PW-3, Dr. Monika (Senior Resident, GTB Hospital Delhi) deposed in her examination-in-chief that on 20.1.2007, at about 5:30 pm prosecutrix, daughter of Ashok Rai, aged 11 years was brought for her medical examination by a lady constable, Police Station Khajori Khas. Mother of the victim, namely, Smt.Sudha was also accompanying the victim. The alleged history was given by the victim herself and the same is mentioned in the MLC. On examination no marks of injury were found on the body of the prosecutrix. PW-3 further stated that on local examination, external genetalia was healthy and hymen was intact. Smears were made from vulva and slides were handed over to the lady

constable. Salwar of the prosecutrix was also sealed and handed over to the lady constable. This victim was further advised for bone x-ray. As per PW-3, the MLC (Ex.PW-3/A) was prepared by her and bears her signatures at point (A).

19. In the cross-examination by counsel for the appellant, PW-3 deposed that at the time of medical examination, mother of the prosecutrix was also present. PW-3 further stated that it was wrong to suggest that age of the prosecutrix was 18 years.
20. PW-4, Smt.Pushpa Chamoli has deposed in her examination-in-chief that she runs a school under the name and style of RD Convent School, Sonia Vihar, Delhi. Smt. Sudha used to work in her school, in the year 2007. On 20.1.2007 Sudha was present in her house and daughter of Sudha namely, victim, came weeping to her house. Her mother was also present in the house, where she was doing the domestic work. Her mother brought the victim before PW-4. PW-4, stated that at that time, she noticed that the clothes of victim were dirty. The victim informed her about the detail of the incident which had occurred to her and she also named the appellant. Thereafter PW-4 informed the PCR in the presence of the victim and her mother. PCR officials came to their house and thereafter she along with the victim and her mother along with the police officials of PCR went to the house of the appellant, who was not present there at that point of time, however, the mother of the appellant was there. After some time local police also came at the spot. As per PW-4, from the spot they along with the police came to the police station and

thereafter they came to GTB hospital along with lady constable, Laxmi. In GTB hospital the victim was medically examined and her MLC was prepared by the doctor and a case was registered by the police on the statement of the victim and the statement of PW-4 was also recorded by the police. PW-4 further stated that she saw the appellant, Mohinder for the first time in the Court today. PW-4 was cross-examined by the learned counsel for the appellant, wherein she deposed that after the incident Sudha was residing in her house for a period of 2-3 months for security purposes. She stated to not have any record of Smt. Sudha was working in her house or in the school. During hearing the incident, prosecutrix disclosed the name of the appellant as well as the place of the incident. She stated that it was incorrect to suggest that she was deposing falsely or that at the time of the incident, the prosecutrix was aged about 18 years.

21. PW-5, Constable Gianender, deposed on oath that on 26.01.2007, he was posted in police Station Khajuri Khas, PW-5 affirmed that the appellant was arrested on a secret information received by him along with PW-6 and HC Jagpal Singh while they were on patrolling duty on the area. As per PW-5, he was sent with the appellant to GTB Hospital, so as to get him medically examined. After the examination, the Doctor, had given him two sealed parcels, which were handed over by him to ASI Sunita who seized the same vide memo, Ex.PW-5/A. Learned APP for the State re-examined this witness, wherein he stated that it was correct to say that the appellant had produced one bed-sheet

and one steel bucket from his house and the same were taken into possession vide memo, Ex.PW-5/B. PW-5 further identified the unsealed metal bucket, Ex.P-2, as the same which was produced by the appellant. The appellant also identified the bed sheet, as Ex.P-3. In the cross-examination by counsel for the appellant, PW-5 stated that it was correct to say that in his statement under Section 161, Cr.P.C. he had not stated that one bucket and bed sheet were produced by the appellant from his house. PW-5 however, denied the suggestion that he was deposing falsely with respect to identification of the bucket and the bed sheet.

22. PW-6, SI Satender Tomar, deposed on oath that on 26.01.2007, he was posted at Police Station Khajuri Khas at about 7.30 a.m., when he was present near Zero Pushta, Nanak Sar Picket, an informer met him and gave information that the person involved in a rape case would come from third Pushta from Cronica Road and if a raid is conducted he could be apprehended. On this information, a trap was raid and about 8.50 a.m., the appellant was apprehended vide arrest memo, Ex.PW-6/A, and his personal search was conducted vide Ex.PW-6/B, and he made his disclosure statement, Ex.PW-6/C. PW-6 was cross-examined by the counsel for the appellant wherein he denied that no such information was received by him or that he was deposing falsely.
23. PW-9, ASI Sunita, deposed that on 20.01.2007, she was posted at Police Station Khajuri Khas. On that day, D.D. No.14-A was given to her for investigation of this case and she along with Ct. Satish

and lady Ct. Laksmi went to Bhagatji ka Mandir, Sonia Vihar, Delhi, where the complainant (victim); her mother, Sudha; and Smt. Chamoli met them. From the spot they all went to house No.B-1502, Gali No.21. PW-9 stated that she recorded the statement of the victim, as Ex.PW-1/A and she along with lady Constable Lakshmi, the mother of the victim and Smt. Chamoli went to GTB Hospital for the medical examination of the victim. Thereafter, she obtained the MLC of victim and lady constable handed over her three sealed parcels which were seized by her vide Memo Ex.PW-8/A. Further on 26.01.2007, she had seized one bed sheet and bucket from the house of the appellant vide Memo Ex.PW-5/B. PW-9 also identified the said case property *interalia* bucket and the bed-sheet. As per PW-9, during the course of the investigation she had also moved an application for Test Identification Parade (TIP) of the appellant on 12.02.2007, but the appellant had refused to participate in the Test Identification Parade.

24. I have heard learned counsel for the parties, perused the material on record and gone through the evidence of the witnesses. The contentions of learned counsel for the appellant may be summed up as under:

- a. evidence of the prosecutrix (victim, PW-1) is neither reliable nor trustworthy.
- b. even if the testimony of PW-1 is believed, the only case which is made out against the appellant is under Section 354, IPC.
- c. admittedly, the victim did not know the name of the appellant, and it is a case of mistaken identity.
- d. victim was known to extract money from persons.
- e. age of the prosecutrix has not been established.
- f. PW-4 is only a chance witness.

- g. *salwar* produced before the Court, did not belong to the victim and is inadmissible as evidence.
- h. scientific evidence does not support the case of the prosecution

25. The contention of learned counsel for the State may be summed up as under:

- a. the evidence of victim is material, reliable and trustworthy and further the testimony of this victim was unshaken in the cross-examination.
- b. victim has completely described the incident and identified the appellant and is not a case of mistaken identity.
- c. sole testimony of the victim, if reliable, can be the ground for conviction of the accused.
- d. prosecution stands corroborated by the scientific as well as medical evidence.
- e. blood sample of the appellant was taken and according to the MLC, appellant is capable of performing sexual intercourse.
- f. appellant had refused to take part in the Test Identification Parade (TIP) and also refused to give his semen sample. Both these facts certainly incriminate him.

26. The first submission of learned counsel for the appellant is that PW-1, victim is unreliable as there are vital discrepancies in her statement and that no offence under Section 376 of the IPC is made out. Mr. Rohatgi, learned counsel for the appellant further submits that the reading of the statement of the victim would not show that there was any penetration and at best only a case under Section 354 of the IPC is made out. It is trite law that penetration is a *sine qua non* for establishing the offence of rape. But it has also been simultaneously held that complete penetration with emission of semen and rupture of hymen is not necessary. Even a slight penetration in vulva with or without

violence is sufficient to constitute the offence of rape. In the case of **Aman Kumar and Another Vs. State of Haryana**, reported at **(2004) 4 SCC 379**, it has been held as under:

“6. The offence of rape occurs in Chapter XVI IPC. It is an offence affecting the human body. In that chapter, there is a separate heading for “sexual offences”, which encompass Sections 375, 376, 376-A, 376-B, 376-C and 376-D. “Rape” is defined in Section 375. Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. Sections 376-A, 376-B, 376-C and 376-D. The fast sweeping changes introduced reflect the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is “the ravishment of a woman, without her consent, by force, fear or fraud”, or as “the carnal knowledge of a woman by force against her will”. “Rape or raptus” is when a man hath carnal knowledge of a woman by force and against her will (Co Litt 123 b); or, as expressed more fully, “rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will”. (Hale PC 628) The essential words in an indictment for rape are *rapuit* and *carnaliter cognovit*; but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit*, are not sufficient in a legal sense to express rape. [1 Hen. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628)] In the crime of rape, “carnal knowledge” means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation. (*Stephen’s Criminal Law*, 9th Edn., p. 262) In *Encyclopaedia of Crime and Justice* (Vol. 4, p. 1356), it is stated “... even slight penetration is sufficient and emission is unnecessary”. In *Halsbury’s Statutes of England and Wales* (4th Edn.), Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.”

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 Haryana¹.] To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

27. Applying the aforesaid principles laid in **Aman Kumar** (*supra*) to facts of this case, the statement of the victim, does not leave any room for doubt that there was penetration in this case. PW-1 (victim) in her statement has clearly stated that in the year 2007 at about 1:30 p.m., she had gone to make dung cakes in the dairy of appellant, Mohinder. When she was making dung cakes, appellant, Mohinder, called her and asked her to put empty bucket in his room and when she went to the room the appellant, the appellant caught hold of her by her hand and dragged her inside his room, pressed her breast by putting his hands inside her clothes, forcibly laid her on his bed and when she tried to raise a noise, he shut off her mouth with his hands, untied her salwar and removed the same. The appellant unchained his pants, took out his penis and inserted the same in the place of her passing urine. It pained her a lot, as a result of which, she raised a noise, on which the appellant ran away from there threatening to kill her in the event she disclosed this incident to

¹ (1979) 1 SCC 212 : 1979 SCC (Cri) 252

anyone. The submission of learned counsel for the appellant that the act, which has been described, cannot be termed as rape, is fallible inasmuch as the prosecutrix has categorically stated that the appellant inserted his penis in the place of her passing urine and it pained her a lot, which would clearly show penetration and can be not termed as attempt to rape.

28. There is also no force in the contention of learned counsel for the appellant that the age of the victim was Eighteen years at the time of the incident of rape. When the statement of the prosecutrix (victim) was recorded under Section 164 of the Cr.P.C., the learned Magistrate has categorically noted that the age of the prosecutrix was Eleven years. Even PW-3, Dr. Monika, Sr. Resident, GTB Hospital Delhi, has stated in the MLC that the age of the prosecutrix was Eleven years. PW-3 further denied the suggestion that the prosecutrix was of Eighteen years of age. In any case, it is not the defence of the appellant that the victim had consented for sexual intercourse.

29. Learned counsel for the appellant has next submitted before me that the identity of the appellant is in doubt in view of the fact that the victim did not name him at the first opportunity available when she was taken for her medical examination before the Doctor nor she named the appellant in her statement made under Section 164 of the Cr.P.C. Although PW-1 had stated in her evidence before the Court that she had not given the name of the appellant to the Doctor who had prepared her MLC and further it was correct that she did not know the name of the

appellant, who had committed rape upon her, at the time of her recording of her statement under section 164 Cr.P.C. However, a careful reading of the statement made by the victim before the Magistrate, under section 164 Cr.P.C., would show that the victim had clearly described the sequence of events at the time when she was raped, and had further stated that she could easily identify the culprit, if he was brought before her. During trial, when the victim was being cross-examined by the counsel for the appellant, a court question was put to the victim: *"Did you know the accused of rape by face?"* The victim replied in affirmative to this question and stated *"Yes. I knew the accused of rape by face. He is present in the Court and his name is Mohinder."* This shows that the victim clearly identified the appellant as the culprit. The victim also deposed in her cross-examination that the police had recorded her statement, Ex.PW-1/A on her dictation and not at the dictation of anybody else. She learnt the name of appellant as Mohinder, as people were addressing him by that name. She came to know the name of the appellant after many days of the occurrence. PW-1 also denied the suggestion that no occurrence had taken place at the dairy of appellant, Mohinder or that appellant, Mohinder, had not committed rape upon on her. Further, in my considered opinion, the statement made by the appellant under Section 313 of Cr.P.C., automatically dispels any false notions, as to the correctness of the identification by the victim and whether the appellant was known to the victim or not. The appellant had stated under

Section 313 of the Cr.P.C., that the prosecutrix (victim) was in the habit of extracting money by making false allegations against innocent persons, and when the appellant had refused to pay the money, he was falsely implicated in this case. The appellant has not only failed to lead any evidence in support of his contention that an eleven year old minor girl (victim) used to extract money in such a manner, but the very fact that the appellant has alleged against the victim goes to show that he knew the victim and he was present at the time of the incident. As already observed in the cross-examination by counsel for the appellant, the victim denied the suggestion that she did not know the name of the appellant, Mohinder, or that the appellant, Mohinder, (present in Court) had not committed rape upon her, or there was some unknown person. In fact in the later portion of her cross-examination, the victim has categorically stated that she knew the appellant by face and *"he is present in the Court"*. The victim further identified her statement, Ex.PW-1/B, and admitted her signatures at point 'A'. The victim further identified the metal bucket, as the same, which appellant Mohinder had asked her to put in his room. Merely because the salwar, which was produced in the Court was of large size and admittedly could not be the size of the victim, that by itself alone cannot be a ground to disbelieve the case of the prosecution. In any case this salwar was neither identified by the victim or her mother. Any mix up of the salwar by the prosecution cannot be of any help to the appellant. The victim has been consistent in her

statement recorded under Section 164 of the Cr.P.C. as well as the statement given by her in evidence before the Court. The victim denied that she was a tutored witness. She has withstood the cross-examination and there is no room for doubt that the victim has correctly identified the appellant as the person who committed the heinous crime of rape upon her, ravished her physically and left a mental scar forever. Soon after the statement of the victim was recorded, the police had visited the house of the appellant, who was not found; but his mother was available. This would also show that the victim was aware and correctly identified the person and place of occurrence. The appellant can, thus, gain no advantage from the fact that the victim did not name appellant before the doctor at the time of recording of the MLC.

30. It is settled proposition of law that a victim of rape is not an accomplice; her testimony can be acted upon without corroboration in material particulars; a victim of rape is treated at a higher pedestal than an injured person; and a conviction in a rape case can safely be awarded on the sole testimony of the prosecutrix. The only *caveat* here is that her version should be reliable, trustworthy and should inspire confidence. In case the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony. In the case of ***Madho Ram and Anr. Vs. The State of UP*** reported at ***AIR 1973 SC 469***, the Apex Court observed that:

“The only rule of law is the rule of prudence, namely, the advisability of corroboration should be present in the mind of the judge or the jury, as the case may be. There is no rule of practice that there must, in every case, be corroboration before the conviction can be allowed to stand.”

In the case of **State of Rajasthan Vs. N.K.**, reported at **(2000) 5 SCC 30** the Supreme Court has observed:

“A plethora of decisions by this Court as referred to above would show that once the statement of the prosecutrix inspires confidence and is accepted by the Courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the Courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor’s report would not be fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence.”

31. Similarly, in **State of Rajasthan Vs. Biram Lal**, reported at **(2005) 10 SCC 714**, the Supreme Court held that if the sole testimony of the prosecutrix is free from blemish and implicitly reliable, then a conviction can be recorded on that basis. It was observed as follows:

“It is not the law that in every case version of the prosecutrix must be corroborated in material particulars by independent evidence on record. It all depends on the quality of the evidence of the prosecutrix. If the Court is satisfied that the evidence of the prosecutrix is free from blemish and is implicitly reliable, then on the sole testimony of the prosecutrix, the conviction can be recorded. In appropriate cases, the Court may look for corroboration from independent source or from the circumstances of the case before recording an order of conviction.”

32. In the case of **State of Punjab v. Gurmit Singh** reported at **(1996) 2 SCC 384**, regarding a rape victim, the Apex Court held:

“8. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a

humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable.....”

“21. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.” *[Emphasis supplied]*

“22. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the

interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence."

33. In the case of ***State of Punjab*** (*supra*), the Apex Court has observed that the court should be sensitive while dealing with a case involving sexual molestation. Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A word of caution has come to ensure that during cross-examination when the victim is required to repeat again and again the details of the rape incident, the Court should not sit as a silent spectator, to allow the victim to be harassed, humiliated, while she is asked to repeat her traumatic experience. In the facts of this case, it is seen that the victim has clearly described the incident and to say that a further detailed account should have been given, which would show penetration is not a requirement, the victim could not have been allowed to be humiliated and called upon to narrate her experience in further details. In the same vein every latitude was given to the appellant to test the veracity of the prosecutrix and the credibility of her version through cross-examination. I find the version of the victim to be reliable and trustworthy. Soon after the incident of rape, the victim informed her mother (PW-2) at

the house of Smt. Chamoli, who lost no time and immediately reported the matter to the police. The police witnesses have also deposed that an information regarding commission of rape was received by the Duty Officer of Police Station Khajuri Khas, through Constable Satbir- No.1910, PCR. Without any delay the victim was taken to GTB hospital for her medical examination. This fact stands affirmed by PW-3, Dr. Monika (Senior Resident, GTB Hospital, Delhi) who has deposed that on 20.1.2007, at about 5:30 pm, prosecutrix, daughter of Ashok Rai, aged 11 years was brought for her medical examination by a lady constable, Police Station Khajori Khas. Mother of the victim, namely, Smt.Sudha was also accompanying the victim. PW-3 has also deposed that the alleged history of rape by someone was given by the victim herself, who had not taken bath and not changed clothes since then. PW-1 has also been corroborated by PW-2, Sudha, the mother of the victim, who has also stated against the appellant that he is responsible for having raped her daughter. PW-2 stated that on 20.1.2007, when she was working in the house of Smt. Chamoli, her daughter had told her, that while she (victim) had gone to the dairy of Mohinder, for making dung cakes, at about 1:30 p.m. the appellant asked her daughter (victim) to put the empty metal bucket in his room. When her daughter had gone to do so, appellant Mohinder, dragged her daughter inside the room and thereafter raped her. While this incident was being narrated by her daughter, Smt. Chamoli was also present there and had heard the complaint of her daughter.

Smt. Chamoli informed the police on the telephone and thereafter the police officials came and accompanied them to the dairy of appellant, Mohinder, but he was not found there. PW-2 withstood the cross-examination and was unshaken in her testimony that her daughter has informed her about the incident that the appellant was responsible for having raped her daughter. PW-4, Smt. Chamoli, has also corroborated the case of the prosecution that PW-1 (victim), had informed about the incident to her mother (PW-2), in her (PW-4) presence. There is no merit in the contention of learned counsel for the appellant that simply because PW-4 is a chance witness, her version is to be discarded.

34. I have carefully perused the medical as well as the scientific evidence on record. Learned counsel for the appellant has submitted that there is nothing on record to connect the commission of crime with the appellant. There is nothing to suggest that the semen which was detected in the vulva of the victim was that of the appellant and further as per the MLC, there was no injury on the person of the victim and the hymen of the victim was intact. On the contrary, learned counsel for the State has submitted that it is the appellant, who had refused to give his semen sample. Although I find that as per the MLC of the victim, there was no injury mark and the hymen of the victim was intact, however, I am not convinced by the contention of the counsel for the appellant that this *factum* is proof enough that no rape was committed. In '*the Essentials of Forensic Medicine*' by

Dr. K.S. Narayan Reddy, 25th Ed., Ch. 16 (Virginity, Pregnancy and Delivery), it has been stated that merely because the hymen is intact, it does not connote that a girl has not been subjected to sexual intercourse. Relevant portion reads as under:

“Medico-legal Aspects: The presence of un-ruptured hymen is a presumption, but is not an absolute proof of virginity. The diagnosis of virginity is difficult and in many cases a physical examination of the genital organs may not be helpful. With an intact hymen, there are true virgins and false virgins. The hymen is present always in a virgin in some form or other, but very rarely may be absent congenitally. The principle signs of virginity are: (1) An intact hymen. (2) A normal condition of the fourchette and posterior commissure. (3) A narrow vagina with rugose walls. These signs taken together, may be regarded as evidence of virginity but taken singly they cannot be so regarded.

The hymen is usually ruptured at the time of the first coitus, and at first only presents a torn appearance. Hymen may not be ruptured even after repeated acts of coitus if it is loose, folded and elastic, or thick, tough and fleshy, which permit displacement, distortion and stretching without rupture. Cases have been recorded of women having sexual relations, of pregnant women and even prostitutes in whom the hymen was intact. In women who are used to coitus, and in those who have borne children, the hymen is destroyed and small, round, fleshy projections or tags, known as carunculae hymenates or myrtiformes are formed round the hymenal ring.”

35. Further in the case of ***Ranjit Hazarika Vs. State of Assam***, reported at **(1998) 8 SCC 635**, the Apex Court has observed that merely because there were no injuries on the person of the victim and the hymen was intact, does not lead to a corollary that there was no coitus. It was held as under:

“5. The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on “no reasons”.

36. In another case, ***B.C. Deva v. State of Karnataka***, reported at **(2007) 12 SCC 122**, in spite of the fact that no injuries were found on the person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Apex Court upheld the conviction of the accused.

“18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the

gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted."

37. Taking into consideration the facts of this case in terms of the observations contained in ***Essentials of Forensic Medicine*** (*supra*); ***Ranjit Hazarika*** (*supra*); ***B.C. Deva*** (*supra*), to lay down a general proposition that where there are no injuries or that the hymen is intact, connotes that no penetration has taken place and a finding of acquittal is bound to be given, would be an incomplete interpretation of the law surrounding the offence of rape. As also observed in the foregoing paras., even a slight penetration in vulva with or without violence is sufficient to constitute the offence of rape. In this case, not only in the statements under Section 161, Cr.P.C. and 164 Cr.P.C. but also in the evidence before the Court the victim has clearly described the incident and has also identified the appellant as a culprit. Even at the time of the examination in the hospital, as per the MLC, the victim had herself given her history of having been subjected to rape by someone in the afternoon of that day. Thus the submission of learned counsel for the appellant that the MLC of the victim did not show any fresh injuries and that the hymen was intact, can be of no help to the appellant in view of the fact that the testimony of the victim is reliable and trustworthy. Further, the scientific evidence placed on record clearly corroborates the case of the prosecution that the victim had

been subjected to rape by the appellant. The vaginal swabs of the victim were sent for examination to the Forensic Science Laboratory (FSL) and as per the report, Ex.PW-9/E, human semen was detected on Exhibits 1, 2, 3, and 5. Exhibits 1 and 2 are the two micro slides that were prepared by the doctor, after collecting smears from the vulva at the time of the examination of the victim. The two slides were prepared without any delay and human semen has been detected in the vulva. Exhibit 5, the bed sheet, which was spread on the bed at the time of commission of rape and on which the alleged incident took place, had been recovered at the instance of the appellant, and was also found positive for semen. This also connects the appellant with the commission of offence as per section 27 of the Evidence Act. In the case of ***Nisar Khan Vs. State of Uttaranchal reported at (2006) 9 SCC 386***, it was held as under:

“It is now well-settled principle of law that the recovery pursuant to the disclosure statement made by the accused under Section 27 of the Evidence Act is admissible in evidence. In *Dhananjay Chatterjee v. State of W.B.*² it is held that the entire statement made by an accused person before the police is inadmissible in evidence being hit by Sections 25 and 26 but that part of his statement which led to the discovery of the articles is clearly admissible under Section 27 of the Act. It is also held that the Court must disregard the inadmissible part of the statement and take note only of that part of his statement which distinctly relates to the discovery of the articles pursuant to the disclosure statement made by the accused. It is further held that the discovery of the fact in this connection includes the discovery of an object found, the place from which it is produced and the knowledge of the accused as to its existence.

² (1994) 2 SCC 220 : 1994 SCC (Cri) 358.

7. In *Golakonda Venkateswara Rao v. State of A.P.*³ this Court reiterated the view and held that the discovery statement of an accused leading to recovery of crime articles from concealed place, even though the discovery statement and the recovery memo did not bear the accused's signature, the fact of recovery from the well and dug out was from a place which was pointed out by the appellant and, therefore, such discovery was voluntary. That the recovery was in consequence to the information given was fortified and confirmed by the discovery of the apparel worn and skeletal remains of the deceased and, therefore, the information and statement cannot be held to be false."

38. In the MLC of the appellant, it has been stated that blood sample of the appellant, Mohinder, was collected, but semen sample could not be collected. In the circumstances of this case, the fact that the appellant had not only failed to give his semen sample, but also refused for the Test Identification Parade, certainly nails the appellant. Taking into consideration the evidence of the victim, which is consistent, reliable and trustworthy, which by itself can be the sole ground for conviction, however, her evidence stands fully corroborated by the medical and scientific evidence as well as the fact that the appellant had refused the TIP, no semen sample was given; and having regard to the settled position of law, I am convinced that the appellant is responsible for the heinous act of having raped an Eleven year old minor girl (victim).
39. Accordingly, judgment dated 13.01.2009 and order on sentence dated 17.01.2009, passed by the learned Additional Sessions Judge, Delhi, in FIR No. 37/07, PS Khajuri Khas, under section

³ (2003) 9 SCC 277 : 2003 SCC (Cri) 1904.

376, Indian Penal Code, 1860, is upheld. I find the present appeal to be without any merit and the same is accordingly dismissed.

August 11th, 2009
'msr//'

G.S. SISTANI, J.