
(2010) 02 BOM CK 0050
In the Bombay High Court
Case No : Criminal Appeal No. 159 of 2004

Kailash Laxman Khamkar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-02-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 122, 313, 342, 366, 366A

Citation : (2010) CriLJ 3255 : (2010) 1 Crimes 792 : (2011) 7 RCR(Criminal) 548

Hon'ble Judges : S.C. Dharmadhikari, J

Bench : Single Bench

Advocate : B.G. Tangsali, for the Appellant; A.T. Jhaveri, APP, for the Respondent

Final Decision : Allowed

Judgement

S.C. Dharmadhikari, J.—The appellant is the original accused in Sessions Case No. 282 of 1998, which was on the file of the District and Sessions Court, Thane. The appellant challenges the judgment and order dated 31st December 2002 delivered by the Third Additional Sessions Judge, Thane convicting him for the offence punishable under fine of Rs. 2000/-. In default, he was to suffer R.I., for two months.

2. The appellant is also convicted for offences punishable u/s 376 and 377 of IPC and sentenced to suffer R.I. for Ten Years and fine of Rs. 5000/-. In default, he was to suffer R.I. For six months more for each of the offence. The appellant is acquitted from offence punishable u/s 342 of IPC. Both convictions and sentences are under challenge in this appeal.

3. The subject criminal case arose out of a complaint made by the complainant who is mother of the victim. It was alleged that the complainant and the accused are neighbours. They are residing in a slum colony. The victim was about 6 to 7 years of age at the time of incident. The incident had taken place on 15th October 1997. It is alleged that when the complainant was at home and taking

rest in the afternoon, she woke up at about 5.00 p.m., when she came to know that her daughter (victim) who had come back from the school was called by the accused to his house under the pretext that some goods were to be brought for him. Therefore, the mother - complainant went to the house of the accused. She noticed that the door was closed from inside. Her other daughter Diksha pushed the door. At that time, the victim came out of the house. She was weeping. Her frock was wet. The accused was found only on underwear. Thereafter, the complainant took the victim to her house, made enquiries, whereupon the victim told that the accused raped her as well as had anal intercourse. It is also alleged that the accused kidnapped the victim by inducing her and detained her and committed the aforementioned act. Therefore, the FIR came to be lodged by the complainant Hirabai, who is mother of the victim. The victim was sent for medical examination. The spot panchanama was prepared on the next date. Statements of witnesses were recorded. Clothes of the victim and underwear were seized. The Medical Officer collected the usual samples and articles and the same were forwarded for chemical analysis. The reports were received. After completion of investigation, the accused was charge sheeted.

4. After committal of the case, the charges were framed. Accused pleaded not guilty to the charges. His defence was of total denial. According to him, there was enmity between the complainant and the accused on account of supply of electricity as well as drawing of tap water. Therefore, he is falsely involved in the case.

5. The charge was framed in this case by the trial court on 16th August 2001. It reads thus:

I, V.V. Palnitkar, III Addl. Sessions Judge, Thane do hereby charge you;

Kailas Laxman Khamkar, Khamkar Chawl, Ramchandra Nagar No. 1, Behind Labhesh Building, Wagle Estate, Thane

as follows:

On 15.10.97 in between 17-30 to 18-00 hours at Ramchandranagar No. 1 within the jurisdiction of Wagle Estate police station, Thane you had kidnapped Reshma D/o complainant Hirabai Sawant a minor aged 6 years with an intention or knowing that she would be likely to force to have sexual intercourse with another and thereby committed offence punishable u/s 366(A) of IPC and within my cognisance.

At the same date, time and place you have wrongfully confined said Reshma in your house and thereby committed offence punishable u/s 342 of IPC and within my cognisance.

Thirdly, at the said date, time and place you had committed rape on said Reshma and thereby committed offence punishable u/s 376 of IPC and within my cognisance.

Fourthly, at the said date, time and place you had voluntarily carnal intercourse with said Reshma against the order of nature and thereby committed offence punishable u/s 377 read with 511 of IPC.

In the alternative at the said date, time and place you had attempted to commit rape on the said Reshma and also attempted to have carnal intercourse with her against the order of nature and thereby committed offence punishable u/s 376, 377 read with 511 of IPC and within my cognizance .charge.

6. To prove the charges, the prosecution examined as many as five witnesses. The defence did not examine any witnesses. After closure of evidence, the learned Judge heard oral arguments and, thereafter, rendered his judgement of conviction and sentence as afore recorded.

7. It is this decision which is challenged by the appellant accused in appeal.

8. Mr. Tangsali learned Counsel appears for the appellant and invites my attention to the deposition of PW-1 and contends that the date of incident is 15th October 1997. The victim is stated to be born on 22nd June 1989. Mr. Tangsali then took me through the depositions of PW-2 and that of the victim who was examined as PW-3. He submits that the incident has taken place allegedly on 15th October 1997 which was a Saturday. The victim was a school going child. The victim returned home after half-day school. On Saturday normally and ordinarily the schools are half day. The incident, according to PW-1 is allegedly of 5.00 p.m., whereas the victim was already at home at 2.30 p.m. Mr. Tangsali submitted that from the deposition of the important witnesses of prosecution, it is apparent that the version is full of inconsistencies and material contradictions. The father of the victim to whom the incident was narrated went to the house of the accused but that is not narrated and set out in the deposition of PW-2. When the complaint itself alleges that the complainant went to the house of the accused along with other daughter Diksha and it is Diksha who pushed the door of the appellant's house so as to let both the complainant and herself in, then non examination of both father and sister is fatal. Mr. Tangsali submits that except mother of the victim, who is the complainant, none was examined. He submits that PW-2 is the complainant and the victim has been examined as PW-3. Apart from them, the other witness is the Vice Principal of the School and she has deposed only about the date of birth. However, the Medical Officer/ Doctor and the I.O., has been examined by the prosecution. Their deposition would show that there is no sign of forceful sexual assault or intercourse. The report of the Chemical Analyser and the Doctor shows that the semen was not detected. The findings as far as blood group are concerned are also inconclusive. He has invited my attention to the medical report, chemical analyser's report and the report of vaginal swab to urge that in this case, the appellant has been falsely involved. This is a case where parties are residing in slum area. The rooms and houses inhabited by them are close to each other. If such an incident has taken place and indeed statements of various persons were recorded by the prosecution, then, none has been examined. On the other hand, from the

suggestions and questions during the course of cross examination, it has appeared on record that the accused used to provide electricity and water to the complainant. The accused was recovering charges for the same. There was dispute between the accused and complainant over payment of charges and drawing of electricity supply and water. It is on account of such disputes which are common in a slum colony that the accused has been framed in a false case. Mr. Tangsali submits that the essential ingredients of Section 366, 376 and 377 are not satisfied.

9. Mr. Tangsali submits that it is pertinent to note that the trial court has acquitted the appellant accused of the charge of wrongful confinement (Section 342 IPC). Mr. Tangsali submits that the incident has allegedly taken place in a closed area/ premises. According to the complainant, the door was closed. If the appellant is acquitted of the charge of wrongfully confining and the incident has allegedly taken place in a closed premises/ area, then, the version of the complainant and victim is unreliable and untrustworthy. There is material contradiction inasmuch as what the victim and the complainant allege are offence punishable u/s 376 and 377 of IPC. In other words, when the complainant and the victim states that the appellant ravished the victim, she is not sure as to whether the act complained of would fall u/s 376 or not and that is the reason that the prosecution also proceeded to charge the applicant u/s 377 of IPC. If such are the state of allegations, then, it is inconceivable that the appellant can be convicted for both offences. Mr. Tangsali finally invited my attention to the opinion of the Doctor and his deposition together with the contents of his report to submit that the Doctor has not noticed anything by which the court can conclude that an offence punishable under the above sections has been committed. In these circumstances, this is a fit case where the judgement and order deserves to be set aside and the accused be set at liberty.

10. On the other hand, Ms. Jhaveri appearing for prosecution submitted that the charge in this case is serious. The victim is a minor. Ordinarily the victim would not like to involve the accused in a false case. She submits that from the date of the incident and on the date when the trial commenced and evidence was recorded, there are bound to be some inconsistencies and errors. Nobody would recollect the incident with complete details after a lapse of nearly five years. However, that does not mean that the prosecution case is totally false. On vital and material ingredients of the offences, the prosecution has led over whelming evidence and proved its case. She submits that medical report in this case is not conclusive and decisive. She submits that the report would only prove medical condition and the opinion of the doctor on examination of the patient. The Doctor cannot depose as to whether an offence has been committed or not. Therefore, whether rape and unnatural intercourse has been committed or not is for the court to decide and nothing turns on the contents of the report. She submits that the incident has taken place in the afternoon. The victim returned from school and was induced by the appellant accused to come to his house where at he committed the aforesaid act. The victim has come and narrated that incident to

her mother and naturally they both waited for the father to return home. Even the father was informed about the incident and considering that it was delicate and sensitive matter, it took sometime for them to approach the police station. Therefore, there was some delay in approaching the police station. This delay is not fatal. The prosecution has immediately taken the necessary steps which are required to prove its case. It has investigated the matter promptly by recording statements and thereafter, forwarded the seized articles for examination and report. In such circumstances and when ultimate finding and conclusion is in consonance with the oral and documentary evidence on record, then, this Court should not interfere with the conviction and sentence. She submits that as far as rape is concerned, it is not just a physical condition but a crime which completely demolishes or destroys the victim and her family. The victim is a minor girl and when her version itself is enough to bring home the charge, then, all the more this Court should not interfere.

11. Both Counsel have relied upon certain decisions and rulings to which I will have an occasion to refer during the course of this judgement.

12. In the light of the rival contentions, the only question that falls for determination is whether the judgement and order of the trial court is legal and proper and can be sustained or not.

13. For answering this question, it would be necessary to refer to the oral evidence.

14. The prosecution has examined one Manisha Pradip Marathe. She states that she is Vice Principal of the school and she has produced the record of the school for the purpose of proving the age of the victim. She has stated that the victim was studying in VIII standard in E division. She has taken admission in the school, according to this witness, only in the academic year 200 1-02. She has also produced the school leaving certificate of the earlier school. She confirms the date of birth as 22nd June 1989.

15. In my view, it is not necessary to refer to this evidence in further details because that the victim is a minor is something which is not seriously disputed.

16. The deposition of PW-2 is important. PW-2 is the mother of the victim. She is a 40 year old lady. She is working as a maid servant. She states that today the victim is of 13 years of age. Five years prior to her deposition being recorded, the victim returned from school at 5.00 pm. When PW-2 woke up from her sleep, she noticed that the victim was not there in the house. She enquired from another daughter Diksha. She was informed that the accused had called the victim. Thereafter, the PW-1 told Diksha to ascertain whether the victim was at the house of the accused. The other daughter Diksha went towards the house of accused, PW-2 followed her and they both found that the door was closed. They knocked at the door but the accused did not open it. Thereafter, the accused opened the door and she noticed that the victim was drenched in water. She has narrated as to what was informed by the victim to her, thereafter.

17. In the cross examination of this witness, it has come on record that the mother of the accused is old and sick and she remained in the house. A suggestion was given that because of ill health ,the mother of the accused is confined to the house. It has come on record that because of her illness neighbouring women go to her almost daily for chit-chatting. It has also come on record that the brother of the accused resides on the first floor in the same tenement where the accused resides. The brother of the accused has two sons who used to play in the house of the accused. PW-2 admitted that she leaves the house in the morning but during the relevant period she was not doing any work. She admits that the houses in the slum locality are adjoining each other. Then she clarifies that there is one room between her house and that of the accused. A suggestion was given to her that even if one speaks in low voice and tone, it can be heard in the adjoining house. She denies this suggestion. She then admits that there is one road adjoining her house and that of the accused. The road is busy with traffic. Children play there. Wagle Estate police station is at very short distance (walking distance). Thereafter, she denies the suggestion that the husband / father of the victim comes back from work at about 9.00 pm. She states that he comes back at about 5.00 pm. The incident was narrated to him and after some discussion, they went to police station. In her further deposition she states as under:

It is true that my Advocate told me how to depose before the Court as I was inexperienced in the court matter. It is true that accused is a contractor in house building. It is not true that at the time of incident the accused used to leave house in the morning for his business and used to come back in the evening. It is true that at the time of incident we had taken electric supply from the house of accused on rent. It is true that for some period we punctually paid the rent. It is true that sometimes we used to pay a lumpsum rent for 2-3 months due to shortage of money. It is true that during the period of incident the accused used to quarrel with us on account of electric rent. It is true that he had disconnected electric supply before this incident. Although I feel bad I did not quarrel with him. I took electric supply from someone else. It is true that there was only one tap from which myself and the accused used to draw water. It is true that there used to be quarrels between me and accused on account of tap water. Witness says that there used to be quarrels between all who were drawing water from the tap. It is true that Meera my another daughter had good relations with accused. She used to call the accused as Mama i.e. Maternal uncle. It is true that I used to get angry as Meera was talking with the accused. It is true that there was quarrel between me and accused as there used to be talk between Meera and accused.

18. Thereafter, all suggestions about the other daughter Diksha witness. She states that she has not filed a false case and to a pertinent suggestion, that she is deposing falsely due to previous quarrels it is denied by her.

19. PW-3 is the victim who has stated that the date of incident is 15th October 1997. She came back, according to her, from school at about 2.30 pm, kept her

school bag in the house, whereafter, the accused called her to his house. She states that he was alone in the house. Her further deposition reads thus:

...Thereafter, the accused removed my clothes, he removed his clothes he made me to sleep and he slept over my body. Then the accused made up down movements. Firstly the accused made me to sleep with my chest down. Then he slept over my body and made forward and backward movements at my backside and then he repeated the movements at my front side after he made me to sleep with face upwards. He had inserted his private part in my person i.e. My private parts i.e. Anus Vagina. I had pain at my private parts and anus at that time. When the door was knocked I opened it and found my mother outside. My mother took me to our house. I narrated the incident to my mother. Sometimes thereafter my father came back from his work. My mother narrated the incident to my father and thereafter he had been to the accused. The accused tried to assault my father and thereafter, we had been to police station where a complaint was filed. I was sent to hospital.

20. In the cross examination of the victim, she states that the day of incident was Saturday. Therefore, the school was upto 2.30 pm. She denies that she was playing with the friends after returning from school. She denies that it is not true that she was playing and accused came from the front side and when the accused came inside her house, he shouted at her. She admits that he shouted when he was at his house. Thus, to a suggestion that all that transpired between her and the accused was that he shouted at her and therefore, the victim called her mother, the victim answers it is not true. She denied the suggestion that she attended the school on the next day as usual. She stated that she was in hospital on the next day. She states that she went to the police station on 2/3 occasions after the incident. In her cross examination, she states as under:

...It is true that I had no experience in the court matter. My Advocate told me how to depose. It is not true that whatever I have deposed was because of the instructions given by my Advocate. Doctor had examined me when I was sent to hospital. It is not true that my statement was not recorded by police. It is not true that I falsely deposed all about the incident on the say of my parents and our Advocate. It is not true that I never had been the house of accused and that I falsely deposed about the incident. It is true that I am angry with the accused as he shouted at me. It is not true that accused was not in his house on the day of incident. It is not true that I was never taken to police station and that no enquiry was made with me. It is true that there were quarrels between accused and we family members.

21. PW-4 is the Doctor/ Medical Officer, who has in his examination- in- chief stated that there was nothing abnormal noticed on the examination of the victim. He also stated that he has taken vaginal swab. He confirms the contents of the certificate issued. The certificate has been marked in evidence as Exh. 35.

22. In the cross examination, he states that he has mentioned in the certificate

that clinically there were no signs of penetration. He admits that there were no external injuries on the person of the victim.

23. The next witness is the Investigating Officer who has stated that he had been attached to Wagle Estate police station in October 1997 and PSI Jadhav recorded the FIR and investigation was handed over to him. Mr. Jadhav arrested the accused. However, he states that he visited the place of incident but could not draw the panchanama and it was accordingly drawn on 16th October 1997. He states that he has recorded the statement of relevant witnesses and he has attached the clothes of victim and sent the accused for medical examination. Blood sample was also collected but the other sample could not be collected. He has stated that he recorded the statement of Diksha i.e. Sister of the victim. He also collected the medical certificates. He produced the office copy of the forwarding letter for the purpose of analysis. He produced chemical analysis reports which are exhibited as Exhs. 43 to 46. He states that he has recorded statement of victim. Thereafter, he collected the semen sample of accused and it was sent to chemical analyser on 12 th January 1998.

24. In the cross examination, which was held after the witness was recalled for cross examination, he admits that the victim did not state before him that she came back from school at 2.30 pm. She had stated in her statement that accused was alone in the house. She did not state before him that the door was opened after it was knocked. Nor did she state that after arrival of her father her mother narrated the incident to him, he went to the accused and there was quarrel between her father and the accused. The suggestion, that there was quarrel between the accused and father of the victim and, therefore, false FIR was filed, is denied by him.

25. This is the oral evidence and as far as the documents are concerned, the school leaving certificate has been exhibited. I have already observed that with regard to the same, there cannot be any dispute. The medical certificate which is exhibited on record reads thus:

age 6 years r/o. Ramchandra Nagar Wagale Estate, Thane on 15.10.97 at 11.25 pm at Civil Hospital Thane. She was referred by Wagale Estate Police Station vide C.R. No. I273/97 and was brought by Smt. H.B.Bhoye B. No. 3482. My findings are as follows:

Moderatory built Pulse 82/.. RIS/) COS/) HAN Teeth 5/5 PIA/) Height 110 cms. copy Exh.35. Weight 16 kgs.

Secondary Sexual characters not developed No external injury found on her body No external injury found on external genitals No semen stain found No external injury found around anal region Labia Majora Labia Minora health Hymen intact No redness or tenderness Pevianal swab and vaginal swab taken and sent for C.A. X-ray No. 9349 dt. 17.10.97 taken.

OPINION

1. Clinically there are no signs of forceful sexual intercourse 2. Her age is about seven years.

26. Mr. Tangsali has placed considerable reliance upon the findings and particularly about their being no redness or tenderness on her body and no external injuries around anal region, absence of semen stains and external injury to genitals. What is also come on record is the letter dated 12th January 1998 addressed by the Forensic Laboratory, State of Maharashtra to Senior Inspector Ingale. The three parcels containing the clothes of the victim and the accused showed that neither blood nor semen is detected on Exh. 1, 2 and 3. As far as the report dated 9th January 1998 with regard to the results of vaginal swab, it has been stated that no semen is detected in Exh. 1 and 2. The semen report is dated 5th March 1998 and even the results thereof are that the blood group of Exh. 1 cannot be determined. Therefore, they are inconclusive. As far as the other report dated 5th March 1998 which is submitted / forwarded after three articles have been sent, including blood samples of the accused, it has been stated that neither the semen nor vaginal fluid is detected and the blood group of the accused is A+.

27. The letter which is dated 12th January 1998 forwarding these samples to the laboratory are concerned, it is also exhibited. It is clear from the same that the answers were sought for on specific queries. The queries are enlisted in this letter. If this letter together with reports are perused, it is clear that the date of the incident is 15th October 1997 but the reports were being forwarded and submitted till 5th March 1998. The net result of the above material on record would indicate that the trial Judge was not completely convinced by the version of the prosecution insofar as the confinement and the incident itself. When the learned Judge framed points for determination, he has held that the prosecution has failed to prove that the victim was wrongfully confined at the house of the accused. It is rather curious that the prosecution version is that the incident took place in the house of the accused. The witnesses examined by the prosecution have themselves stated that the victim returned from the school and after leaving her school bag in the house went out of her house and to the house of the accused. She was called by the accused to his house and that is how she went to his house. The door was closed and after knocking and opening the door and entering the house, the accused was found so also the victim. The victim was totally drenched in water. If this is the version of the prosecution itself and which version has been completely disbelieved by the learned Judge by holding that the evidence is not sufficient to bring home the case within the ambit of Section 342 of IPC (Wrongful confinement), then, the entire version of the prosecution becomes doubtful. In this behalf, the learned Judge has recorded a finding in the negative but held that the prosecution proves that the appellant accused kidnapped the victim with an intention or knowing that she would be likely to be forced to have sexual intercourse with him. It is clear that the findings in this behalf are contradictory and inconsistent. If the incident had taken place in the house of the accused and if the prosecution fails to bring home

the charge of wrongful confinement, then, it is not clear as to how point No. I has been answered in the affirmative. As far as kidnapping is concerned, the provision in IPC is clear. Section 366 reads as under:

366:- Kidnapping, abducting or inducing woman to compel her marriage etc. - Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

28. A bare perusal of this section would indicate that the kidnapping or abduction of any woman with a view to compel her for marriage etc. is covered by this section. In the instant case, this provision has not been applied because although the victim is a woman in this case, she being minor, Section 366A has been invoked. Now, a perusal of the section would indicate that if the minor girl is induced to go from any place or to do any act with an intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine. The title to the Section is procurement of minor girl. The essential ingredient is inducement of a minor girl to go from any place or to do any act with intent that such girl may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another. The minor must be proved to have been induced to go or to do something. The entire discussion and observation on this point is kidnapping of the victim. The learned Judge is not clear about which provision the prosecution is relying upon. If the charge is u/s 366A then "Kidnapping" is not the essential ingredient. The learned Judge failed to notice the difference between Section 366 and Section 366A of IPC. While kidnapping, abduction is a part of the offence u/s 366, its latter part, viz., "inducement" is the only common ingredient in Section 366 and Section 366A IPC. The findings in para 8 to 10 of the impugned order show that the difference in the provisions noticed above has been completely overlooked by the learned Judge. There is a misdirection in law and non application of mind.

29. The learned Judge has relied upon the version of PW-1 and the victim to hold that the charge u/s 366A has been proved. However, the learned Judge has while disbelieving prosecution version on the charge of wrongful confinement surprisingly relied upon it for recording a conviction for this offence. The learned Judge has not taken into consideration the contradictions with regard to the quarrels between families, slum colony within which they are residing, the

specific case put by the appellant that the quarrel over electricity and water are reason for making false complaint against him. The evidence has not been scrutinised in the light of the material contradictions and inconsistencies. The learned Judge has not even made any reference to the statement of the accused recorded u/s 313. The learned APP has relied upon the answers given by the accused where he admits that he was a neighbour of the victim. She has also relied upon the answer given to Question No. 11 in the statement recorded u/s 313 and the answer given to question No. 16 and 17. But, in answer to question No. 19, the appellant had stated that there was a quarrel between him and the witness Hirabai (PW-1) on account of taking tap water and electricity connection and, therefore, false case is filed against him. It is this version, which has been consistently placed in the forefront by the appellant and which has been completely omitted from consideration. The learned Judge has not noted the backdrop in which the criminal proceedings came to be instituted. The learned Judge has while holding that the charge u/s 366A is proved relied upon the very version which he discards when he renders negative finding on point No. 2. Weightage and credence is given to the version of only two witnesses while completely omitting from consideration the deposition of PW-5. PW-5 has stated in terms that certain things were not told when the complaint was lodged. Further, the learned Judge completely lost sight of the fact that the incident had taken place about five years back prior to the depositions being recorded. While it is true that when such serious offences are alleged, the time gap may not be necessarily fatal. However, when the version of the interested witnesses in this case alone is made the foundation for rendering the positive finding and when the prosecution failed to examine the other witnesses in the slum colony including the sister of the victim and the father who were stated to be very much aware of the incident and present at site, then, all this assumes significance. The contradictions in the statements of PW-1 and the victim about the date and time of the incident that the door of the house being knocked and opened by the accused and complete absence of the incident being narrated to the father by the mother coupled with non-examination of the sister and father of the victim, are not noticed at all.

30. In *Pandurang Sitaram Bhagwat Vs. State of Maharashtra*, the Supreme Court has observed that the law reports are replete with cases where false charges are made. It is not unknown that for such quarrels and disputes, parties resort to filing of criminal cases.

31. In this case, I am aware of the fact that the charge also is that the prosecution does not rest its case on Section 376 alone. The prosecution itself has alleged that the accused is guilty of the offences punishable u/s 376 and 377 of IPC. It is true that such a charge in a given case can be levelled and framed. However, both acts are separate offences. If sexual intercourse forcibly with a woman and that too a minor is an offence punishable u/s 376 and unnatural intercourse is independently made an offence u/s 377, then the version of the victim when both charges are levelled i.e. The Act of rape and unnatural

intercourse would not necessarily be conclusive to hold that the charges are proved. The medical evidence and the reports of chemical analyser assume some significance. In this case, the samples have been collected nearly two months from the incident and the analysis report has been forwarded a good five and half months after the date of incident. The findings therein do not conclusively show that either of the offences have been committed. The charge u/s 375 can be proved by demonstrating that the case falls in the explanation to Section 375. However, there has to be evidence of at least intercourse and penetration so as to bring it within the case of the explanation. In the instant case, even that is not conclusive, leave alone, reliable and trustworthy. Rape constitutes sexual intercourse with a woman. The explanation states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Section 377 of IPC presupposes carnal intercourse against the order of nature. It has similar explanation. However, intercourse is necessary ingredient in both the offences. That itself is not proved in this case.

32. In two decisions of the Supreme Court delivered and reported in the same volume viz Aman Kumar and Another Vs. State of Haryana, and Koppula Venkat Rao Vs. State of Andhra Pradesh, somewhat identical controversy fell for determination. The Supreme Court holds that to constitute an offence of rape, it is not necessary that there should be complete penetration. Partial penetration is sufficient. The depth of penetration is immaterial but the sine qua non of the offence of rape is penetration. If that itself is not established and proved, then, the charge cannot be said to be established. In these two cases the principles outlined are as under:

5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice.

6. The offence of rape occurs in Chapter XVI of 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 Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. 376-A, 376-B, 376-C and 376-D. The fast sweeping changes introduced reflect the legislative intent to curb with 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 a the carnal knowledge of any woman, above the age of particular years, against her will: or of a woman will under that age, with or against her will (Hale p.C. 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 la, 9 Edw. 3, 26 a (Hale P.C. 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 (Stephens Criminal Law 9th Ed., p.262). In "Encyclopedia of Crime and Justice" (Volume 4 page 1356), it is stated ".... even slight penetration is sufficient and emission is unnecessary in Halsburys" Statutes of England and Wales (Fourth Edition) Volume 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 high 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 (C & K 893). It is well known in the medical world that the examination of smegma loses of importance after twenty four hours of the performance of the sexual intercourse. See Dr. S.P. Kohli, Civil Surgeon, Ferozepur Vs. High Court of Punjab and Haryana, . In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of general organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation ,sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus, a relatively less forceful penetration may not give rise to injustice ordinarily possible with a

forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz., labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. 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 u/s 376, IPC.

33. From a perusal of these decisions, it is apparent that the prosecution there tried to argue that at least the attempt to commit these offences should be held to be proved. The Supreme Court has even discussed that aspect (*Aman Kumar v. State of Haryana*) and held that the plea regarding applicability of Section 376 read with 511 of IPC needs careful consideration. Paras 8 and 9 of the decision are important for this purpose. They read thus:

8. The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be

distinguished from an intention to commit; and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motive which suggests the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences u/s 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.

34. Thus, in order to find an accused guilty of an attempt to commit rape, the Court has to satisfy itself that the accused when he laid hold of the victim, not only desired to gratify his passions upon her person, but that he intended to do so at all events and notwithstanding any resistance on her part. The Supreme Court has cautioned all concerned that indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, then such materials must exist. Importantly, surrounding circumstances many times throw beacon light on that aspect.

35. If the instant case is considered in the backdrop of aforementioned principles, then, I am afraid that the prosecution has failed to prove the charge either u/s 376 and 377 of IPC, so also u/s 376 read with 511 of IPC.

36. In para 12 of the impugned judgement the learned Trial Judge has observed thus:

12. It was then submitted that the C.A. Reports Exh. 43 to 45 also do not support prosecution case as neither semen was found nor blood was detected in the samples sent to the Chemical Analyser which rule out possibility of rape. In my opinion, this argument also deserves a brand or rejection because it has nowhere come on record from the evidence of Reshma that semen was discharged. As stated earlier there was no injuries on the person of the victim and therefore there is no question of presence of blood on her clothes. Moreover, she has deposed that accused had removed her clothes at the time of incident. The victim was examined at about 11.25 pm i.e. More than six hours after the incident and therefore, possibility of finding of any semen in the vaginal swab had become remote. Witness Hirabai also deposes that victim told her that accused had asked her to wash the clothes and that she noticed the victim in a wet condition. Therefore, it is quite probable that the accused might have asked the victim to wash the clothes as well as private parts and therefore, no stains

were found. Considering all these circumstances, I am of the opinion that absence of any semen or blood in the sample sent to C.A. is hardly material. Evidence of Reshma is corroborated by her mother Hirabai in as much as Reshma made immediate disclosure to her about the incident of rape and unnatural intercourse. Although it is admitted by the prosecution witnesses that there used to be quarrels between accused and Hirabai on account of supply of electricity and drawing of tap water, it does not appear probable that Hirabai or the parents of the victim would falsely implicate the accused in such a heinous crime at the cost of future of the victim. Had they desired to file a false case, they could have easily done so by adopting some other provisions of law. Hirabai herself could have filed a false complaint of rape instead of filing a false complaint through her minor daughter. That would have been very easy for her. Therefore, merely because there were quarrels between Hirabai and the accused it cannot readily be inferred that the accused is falsely implicated in this case.

37. In my view this was a case where the learned Judge ought to have gravity of the charges leads one to record hasty conclusions. That should be avoided at all costs because the prosecution has to prove its case beyond reasonable doubt. Ultimately, this is a case of liberty of individual and one cannot lose sight of the fact that sometimes people are dragged into false cases unnecessarily. This was a case where the inherent contradictions have not been noticed and rather omitted from consideration. The Trial Court has ignored and brushed aside vital omissions and failed to take into account the admissions in the cross examination. When para 12 has been reproduced by me, it is only to demonstrate that the learned Judge was aware of the contradictions and inconsistencies and when he has partially held against the prosecution, then, all the more the judgement under challenge cannot be sustained.

38. In the result, the appeal succeeds. The judgement of conviction and sentence rendered by the trial court is set aside. The accused is acquitted. It is unfortunate that the accused had undergone the sentence to a substantial extent. He was sentenced 10 years RI by the judgement of the trial court which is rendered on 31st December 2002. It is pertinent to note that the appellant accused was on bail through out trial. This Court after this conviction and sentence, although, admitted the appeal did not grant him bail. It is unfortunate that a young man has lost precious seven years of his life in custody. The Court cannot beyond expressing its anguish and displeasure in such cases, do anything more. This case is an example where it is necessary that appeals of those in custody are taken up for hearing and disposed of expeditiously. However, the pressure on the courts leads to delay and the results are for all to see. Let this case be taken as a test case and hereafter the appeals of those who are in custody are given priority. It is not necessary to say anything more.