

(2009) 01 AP CK 0002

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 1007 of 1999

Public Prosecutor, High Court of A.P.

APPELLANT

Vs

Radhakrishna Nagesh

RESPONDENT

Date of Decision : 23-01-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 235(1), 235(2), 313, 428

Evidence Act, 1872 — Section 118

Penal Code, 1860 (IPC) — Section 363, 375, 376, 376(2), 511

Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(2)

Citation : (2009) 1 ALD(Cri) 391 : (2009) 2 ALT(Cri) 1 : (2009) CriLJ 1870 :
(2010) 6 RCR(Criminal) 2750

Hon'ble Judges : G.V. Seethapathy, J

Bench : Single Bench

Advocate : Addl. Public Prosecutor, for the Appellant; Masthan Naidu Cherukuri,
for the Respondent

Final Decision : Allowed

Judgement

G.V. Seethapathy, J.—This criminal appeal is directed against the judgment dated 11-2-1999 in S. C. No. 260 of 1998 on the file of the Principal Assistant Sessions Judge, Tirupati, wherein, the respondent herein/accused was found not guilty of the offences under Sections 363 and 376(2)(f) of I.P.C. and was acquitted thereof u/s 235(1), Cr.P.C.

2. Heard the learned Additional Public Prosecutor for the appellant-State and the learned Counsel for the respondent-accused. Perused the records.

3. The case of the prosecution in brief is as follows:

The accused was working as a ball picker in S.V. University Tennis Court, Tirupati, and as such he was having custody of the key of the storeroom situated to the southeast of the tennis court, wherein, tennis net and other articles are stored. The victim girl A. Haritha, is aged 11 years and she belongs to Scheduled Caste.

Her mother Sampurnamma is working as maid servant in the red-buildings attached to the S.V. University.

On 7-9-1997 at about 7.00 p.m., the accused saw the victim girl Haritha, standing alone outside the red buildings and called her to come along with him. At first she refused but the accused enticed her by purchasing gold colour plastic bangles and took her to the store room near Tennis Court, opened the lock and took her inside the room and committed rape on her against her will and under threat of assault.

One Narayanaswamy, rickshaw puller, who was waiting at Gate No. 3 of S.V. University, keeping his rickshaw by the side of the gate, noticed the accused taking the victim girl into the room and became suspicious and tapped on the door several times. The accused did not open the door. After further tapping, the accused opened the door. Narayanaswamy saw the victim girl weeping. The accused slammed the door. Narayanaswamy suspecting that the accused might have done something to the minor girl bolted the door from outside and ran to the de facto complainant-S. M. Ramesh-PW 1, Sub-Inspector of Police, Traffic P. S., Tirupati, who was on the road near NCC Office traffic point and informed him. Immediately, S. M. Ramesh, Sub-Inspector of Police, along with another Traffic R. S. I. R. Sivanandakishore PW 4, and PC 2435-Ch. Ramakrishna, accompanied Narayanaswamy to the said room, opened the bolt from outside and found the victim girl and she complained of pain in her vaginal region.

The Sub-Inspector S. M. Ramesh took the victim girl and the accused to SVU Camps PS and gave complaint Ex. P.1, based on which, FIR Ex. P.7 was registered in Cr. No. 31 of 1997 under Sections 363 and 376(2)(f), I.P.C. and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

PW 10 the Sub-Inspector of Police, SVU Campus PS, arrested the accused at 10.30 p.m. and seized his cut drawer containing seminal stains and the accused was sent to SV. RR GG Hospital, Tirupati, for medical examination. The victim girl was sent to Government Maternity Hospital, Tirupati for medical examination and also for assessment of age, after seizure of the skirt under a cover of mahazar. The Assistant Director, RFSL, Anantapur, after analysis of the material objects, detected semen on the clothes of the victim and on the underwear of the accused and also in the vaginal swabs collected and preserved by the Medical Officer. After completion of the investigation, the Inspector of Police-PW 12 filed charge-sheet against the accused for the offences under Sections 363 and 376(2)(f), I.P.C.

4. On appearance of the accused before the Court, the learned Principal Assistant Sessions Judge, Tirupati to whom the case was made over, framed charges under Sections 363 and 376(2)(f) of I.P.C. and was acquitted thereof u/s 235(1), I.P.C., for which, the accused pleaded not guilty.

5. In support of their case, the prosecution examined PWs. 1 to 12 and marked

Exs. P. 1 to P.9 and MOs. 1 to 3. PW 1 is the Sub-Inspector of Police, Traffic, who reached the scene of offence on being informed by PW 3 and opened the room, took the accused and victim girl-PW 2 to SVU Camps PS and gave complaint Ex. P. 1. PW 2 is the victim girl Haritha; P W 3 Narayanaswamy, rickshaw puller, who noticed the accused taking the girl inside the room and suspecting some foul play by the accused, bolted the room from outside and informed PW 1 and brought him to the spot; PW 4 was the then R. S. I., Traffic PS, who accompanied PW 1 to the scene of offence. PW 5 is the mother of PW 2; PW 6 is the Assistant Director of Physical Education, who identified the accused as ball picker in the Tennis Court; PW 7 is the mediator for the seizure of the skirt (langa)-M. O. 1 from PW 2 under a cover of mahazar Ex. P. 3 and also mediator for the mahazar Ex. P. 2. He did not fully support the prosecution and turned hostile and denied that police seized underwear MO 3 from the accused in his presence under Ex. P. 2. PWS is the Professor of Forensic Medicine, S.V. Medical College, Tirupati, who on requisition from the police, examined PW-2-victim girl and determined her age as between 10-11 years and issued Ex. P4 certificate to that effect. PW"9 was the then Assistant Professor in Maternity Hospital, Tirupati, who examined the victim girl and gave certificate Ex. P. 5 and also gave final opinion after receiving clinical examination" report Ex. P. 6. PW 10 was the then Sub-Inspector of Police, SVU Campus PS, who received Ex. P. 1 report from PW 1 and registered FIR Ex.P.7; PW 11 was the Inspector of Police, Tirupati (Urban), who conducted investigation, examined witnesses and seized MO 1 langa and plastic bangles MO 2 from PW 3 under mahazar in the presence of PW 7 and another and sent PW 2 to the Government Maternity Hospital, Tirupati for medical examination and also seized MO 3 underwear from the accused under mahazar Ex. P. 2 and arrested the accused and sent him to the SV RR GG Hospital, for medical examination and also visited the scene of offence on the same night and prepared rough sketch Ex. P. 8 and filed charge-sheet after completion of the investigation. PW 12 was the C M. O., SV RR GG Hospital, who examined the accused and issued certificate Ex. p. 9. On completion of the prosecution evidence, the accused was examined u/s 313, Cr.P.C. The accused did not adduce any evidence oral or documentary:

6. On consideration of the evidence available on record, the learned Principal Assistant Sessions Judge, Tirupati, found the accused not guilty of the offences with which he was charged and acquitted him thereof giving benefit of doubt. Aggrieved by the same, the State preferred the present appeal.

7. Learned Additional Public Prosecutor appearing for the appellant-State would contend that the trial Court acquitted the accused on flimsy and-trivial grounds ignoring the fact that the accused was caught red handed immediately after the occurrence and that the medical evidence on record also corroborated the prosecution case. She would further submit that P.W.2 victim is a young girl, aged 11 years and had absolutely no motive to resort to any false implication and P.W.3 is an independent witness, who corroborated the prosecution case and brought PW.1 and PW.4 to the spot and got the accused apprehended immediately after the occurrence and the trial Court lacked necessary sensitivity

in appreciating their evidence. She would further submit that the absence of any injuries on the person of the victim girl was immaterial and the medical evidence coupled with the report of Chemical Analyst on the material objects MOs. 1 and 3 and other items collected and preserved by the Medical Officers, clearly supported the prosecution version, pointing to the cape of the victim girl.

8. Learned Counsel for the respondent-accused on the other hand would seek to justify the acquittal recorded by the trial Court on the ground that the seizure of drawer MO.3 from the accused was not duly proved and the blood group of semen of the accused was not determined and there was delay of more than three months in sending the statements recorded u/s 161, Cr.P.C. to the Court and the statement of the victim girl-PW.2 was not sent to the Court along with FIR and no injury was found on the male organ of the accused. He would further contend that when two views are possible, the benefit should go to the accused and the order of acquittal cannot be reversed.

9. The case of the prosecution is that on 7-9-1997 at about 7 p.m. the accused who is a ball picker in the tennis court situated in SVU Campus, enticed the victim girl PW.2, who was a minor, aged about 11 years and purchased plastic bangles for her on the road and took her to the store room attached to the tennis court and committed rape on her. It is further alleged that PW.3 rickshaw puller, who was waiting out side Gate No. 3 of S.V. University, along with" his rickshaw as usual, noticed the accused taking the victim girl-PW.2 to the room and suspecting some foul play, he also went there and found the door bolted from inside and on his knocking the door, the accused opened the same, peeped out and abused PW.3 and slammed the door on his face, whereupon, PW.3 bolted the door from outside and informed PW. 1 -Traffic Sub-Inspector, who was on bandobst at the traffic point near Gate No. 3 and that PW. 1 along with another traffic RSI-PW.4 and traffic constable Ch. Ramakrishna accompanied PW.3 to the spot and took the accused into custody and brought him along with the victim girl PW.2 to SVU Campus PS and produced him before PW. 10-Sub Inspector of Police, along with complaint Ex.P1, which was registered as FIR Ex.P.7 in Cr. No. 31 of 1997.

10. The prosecution relies upon the direct evidence of PW.2-victim girl herself to prove the occurrence, besides circumstantial evidence of PWs. 1, 3 and 4, apart from the medical evidence. It is a case, where according to the prosecution, the accused was caught almost red handed immediately after the occurrence at the scene of offence itself. PW.2-victim girl was aged 11 years by the date of offence, and was working as maideservant in the staff quarters of SPW College, known as "Red Building. PW.5 is the mother of PW.2, who was also working as maidservant in the same quarters. PW.8 is the Professor of Forensic Medicine, SV Medical College, Tirupati and on the requisition by the police, he examined PW.2 for determination of her age. He testified that on physical, dental and radiological examination, he was of the opinion that the age of the girl Haritha was between 10 and 11 years and he issued Ex.P4 certificate to that effect. The testimony of

PW.8 coupled with Ex.P.4 would establish the fact that PW.2 victim girl was aged about 10 or 11 years by the date of the occurrence.

11. As seen from the deposition of PW.2, the learned Principal Assistant Sessions Judge conducted a preliminary examination and from the answers given by PW.2, he recorded satisfaction that the witness was having mental maturity to answer the questions in a rational way. It is in the evidence of PW.2 that she knew the accused by his name and he used to escort the children to the school. In the cross-examination PW.2 reiterated that previously she has seen the accused, as he was bringing the children from their houses to the school and back. From the evidence of PW.2, it is clear that the accused was not a stranger, but was a known person. The identity of the accused is therefore not in dispute.

12. PW.2 testified that on that day at about 7.30 p.m. she was taken by the accused promising to buy some bangles to her and after purchasing bangles, the accused took her to the room in tennis court and closed the door and lifted her langa, removed his pant and under wear and laid her on the floor and passed liquid like starchy substance into her private part. The learned Assistant Sessions Judge on observing demeanour of the witness, recorded in the Janta Panjola, CASS v. Daulat Ram, Kishori Lale deposition that when the Additional Public Prosecutor was trying to elicit what exactly the accused did, the witness was feeling very much shy to answer the questions. The testimony of PW. 2 would however disclose that the accused took her inside the room and removed his pant and under wear and lifted her langa and laid her on the floor and ejaculated into her vagina. It is also in the evidence of PW.2 that meanwhile an auto driver came and knocked the door and the accused abused him in filthy language and later the police came and took them to the police station. She identified MO. 1 langa, which she was wearing at the time of offence. The testimony of PW.2 in spite of her tender age is clear and categorical and is not discredited in any manner in the cross-examination. Nothing is elicited in the cross-examination so as to suggest any infirmities or inconsistency in her version. The testimony of PW.2 being cogent and free from any infirmities is certainly entitled for due weight and credence. There is absolutely no motive suggested as to why she should falsely implicate the accused and that too making such allegation of rape.

13. In " Aman Kumar and Another Vs. State of Haryana, " the Apex Court held as follows:

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice of the crime. There is no rule of law that her testimony cannot be acted upon 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.

14. In "Sri Narayan Saha v. State of Tripura AIR 2005 SC 1452" the Apex Court held as follows:

A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Indian Evidence Act, 1872 nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness u/s 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding, the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting the evidence.

15. PW.3-rickshaw puller corroborated by deposing that on noticing the accused taking away PW.2 into the room, he followed them knocked her door and when the accused peeped out, he questioned him what he was doing and the accused replied in filthy language and again closed the door. Then PW.3 bolted the door from outside. He further testified that while he was proceeding to the police station, he noticed PW. 1 and other police personnel at the traffic junction at the road and informed PW. 1 and brought PW.1, PW.4 and another constable to the scene of offence and PW. 1 opened the door and they noticed the girl weeping and they all took the accused and the victim girl to the police station. PW.3's evidence would disclose that he has been keeping his rickshaw at Gate No. 3 of S.V. University Campus since 15 years and he had prior acquaintance with the accused as a ball picker in the tennis court and also with PW.2 and her mother who was working as maidservant in the "red buildings".

16. The rough sketch Ex.P8 prepared by the Investigation Officer-PW. 11 would show that the tennis court is abutting the compound wall of SVU Campus and is situated in between Gate No. 2 and 3 and the traffic point No. 1 is near Gate No. 3 on Tirupati - Chandragiri Road. Ex.P8 further shows that the storeroom, which

is the scene of offence, is abutting the compound wall in the tennis court, and the same is spoken to by PW.2. It is in the evidence of PW.3 that after bolting the door from outside, while he was proceeding to the police station, he noticed PW. 1 and other police personnel at the traffic junction and he informed PW. 1 about the incident.

17. Having regard to the proximity of Gate No. 3 to the scene of offence and also the traffic point* the testimony of PW 3 noticing the accused taking the girl into the room and then informing PW 1 at the traffic point about the incident, cannot be doubted. The testimony of PW 3 is also not discredited in any manner in the cross-examination. It is suggested to PW 3 that he had some disputes with one Murugesh, another rickshaw puller and the accused supported the said Murugesh, and therefore, PW 3 bore grudge against the accused and foisted a false case against him due to enmity with the accused. PW 3 denied the suggestion and stated that he does not know Murugesh at all. It is highly improbable and hard to believe that even if PW 3 had any disputes with Murugesh or accused, he would have falsely implicated the accused in a case like the present one, victimizing PW 2.

18. The testimony of PW 3 is corroborated by PW 1, who testified that on that night at about 7.30 p.m. he was on duty at the traffic point No. 1 near SVU Campus PS, in connection with an impending visit of the Chief Minister and PW 3 came and informed him about the incident and PW 1 along with PW 4 another R. S. I. and one Ramakrishna, Traffic Police Constable, went to the spot and noticed the door bolted from outside and that he opened the door and found the accused and PW 2 inside the room and the girl was weeping and groaning. It is also in the evidence of PW 1 that when he enquired the girl, she informed that she was brought by Nagesh-accused on the pretext of purchasing some bangles and that he brought her into the room, laid her on the ground and pulled her skirt, removed his pant and under wear and tried to insert his penis into her vagina. It is also in the evidence of PW 1 that PW 2 further informed him that in the meanwhile, another person came and questioned the accused and the accused threatened him and the said person closed the door and went away. PW 1 also identified the accused as the person, who was found inside the room along with the girl. He also testified that he brought the accused and the girl to the police station and he lodged report Ex. P. 1 In Ex. P. 1 also PW 1 has narrated the whole incident and the contents of Ex. P. 1 duly corroborated the testimony of PW 1. The testimony of PW 1 would disclose that he reached the spot immediately after he was informed by PW 3 at about 7.30 p.m. Ex. P. 1 would disclose that the complaint was lodged at 8 p.m. Thus PW 2 has narrated the incident to PW 1 in the presence of PW 3 and PW 4 almost immediately after the occurrence. PW -4-RSI also corroborated the testimony of PWs. 1 and 3 on almost all the material particulars. He however, did not identify the accused, but stated that he can identify the victim girl. As the identity of the accused is not in dispute and the accused was caught at the spot immediately after the occurrence and his identity having been established by the evidence of PWs. 1 to 3 and PW 10-Sub-

Inspector of Police, before whom, he was produced by PW 1 while giving Ex. P. 1, the fact that PW 4 failed to identify the accused in the Court at the time of evidence is of no consequence. The conduct of PW 2 narrating the incident to PW 1 immediately after the occurrence specifying the overt acts on the part of the accused in the way she could at the young age of 11 years, is yet another circumstance, which corroborates the prosecution version. It is the evidence of PW 3 that he does not know to read or write Telugu, and as such the complaint Ex.P. 1 came to be lodged by PW 1, as the victim was of tender age. It is in the evidence of PW 5, mother of PW 2, that while she was searching for her daughter, she was informed by a constable that her daughter was at the police station and then she rushed there and found her daughter weeping and when she questioned PW 1, she informed her about the incident. The testimony of PW 5 also corroborates the prosecution case and PW 5 also noticed the accused in the police station when she went there at about 8.30 p.m.

19. PW 11-the Investigating Officer deposed that after examining PW 2 and recording her statement, he sent PW 2 for medical examination. He also deposed that he arrested the accused and sent him for medical examination. PW 9 the then Assistant Professor of Gynaecology in Government Maternity Hospital, Tirupati, testified that on the same day at about 9.30 p.m. she examined PW 2 and collected vaginal swab and vaginal washings and after receiving report Ex. P. 6 of the Chemical Analyst, she gave certificate Ex. P. 5. The testimony of PW 9 would show that there was tenderness on the private part of PW 2. PW 9 deposed that the private parts were tender to touch and this is an indication of attempt to rape the victim girl and considering the age of the victim and on seeing private parts, which were tender to touch, she could say that there was an attempt to rape on the person of the victim girl. She further deposed that as the private parts were tender to touch, it could be presumed that considerable force was used to cause tenderness. In the cross-examination, she reiterated that on examination, she found expression of pain on the face of victim, which was due to tenderness. The testimony of PW 9 coupled with Ex. P. 5 would however disclose that there was no marks of violence on the body of PW 2 and the hymen was intact and there was no laceration or congestion on fourchette and there were no foreign body found in vagina and there were no seminal stains on the private parts. From these observations of PW 9, the learned Counsel for the respondent-accused would contend that the medical evidence does not support the allegation of rape.

20. It is to be noted that PW 2 was a young girl, aged about 10 or 11 years. The direct evidence of PW 2-victim girl herself is that the accused removed his pant and underwear and pulled" her skirt down, laid her on the ground and ejaculated into her vagina. MO 1 is the langa of PW 2, which she was wearing at that time and PW 11-Investigating Officer seized the same under cover of mahazar Ex. P3 along with plastic bangles MO 2 in the presence of mediator-PW 7. PW 7 testified to the seizure of langa from PW 2 in his presence under Ex. P. 3 (appears to be noted mistakenly, as Ex. P. 2 in the deposition of PW 7). PW 7 did not however,

sup-port the prosecution regarding seizure of MO 3 underwear from the accused under mahazar Ex. P. 2, The testimony of PW 11 however shows that he seized MOs 1 and 2 from PW 2 under mahazar Ex. P. 3 and the drawer MO 3 from the accused under Ex. P. 2, all in the presence of PW 7 and another on the same right at about 10.30 p.m. The factum of seizure of MOs 1 to 3 under Exs. P. 2 and P. 3 from PW 2 and the accused is sufficiently established by the testimony of PW 11 and the failure on the part of PW 7 to fully support the prosecution regarding the seizure of MO 3 from the accused is not of much consequence. The testimony of PW. 7 and PW 11 coupled with Ex. P. 3 would however establish that MO 1 langa was seized from PW 2 on the same night. Ex. P.6 FSL report would disclose that the semen and spermatozoa were detected on the langa MO 1 and also on the drawer MO 3 and the vaginal swab and vaginal wash collected by PW 9 from PW 2. Ex. P. 6 would further disclose that the semen detected was of human origin. The presence of semen and spermatozoa both on MO 1 langa, which PW 2 was wearing, and MO 3 underwear, which accused was wearing corroborate the testimony of PW 2 that the accused in fact ejaculated during the course of commission of offence.

21. PW 12 C. M. O. of SV RR GG Hospital, Tirupati testified that on the same night at about 11.50 p.m. he examined the accused and noticed matting of pubic hair and seminal stains near and around genitals of the accused. He further deposed that seminal stains found near and around the genitals was indicative of an act of sexual intercourse. PW 12 issued certificate Ex. P. 9 to that effect. The presence of seminal stains near and around the genitals of the accused besides matting of pubic hair as noticed by PW 12 also corroborates the testimony of PW 2 that there was an ejaculation on the part of the accused at the time of the offence. The medical evidence of PWs 9 and 12 coupled with Exs. P. 5, 6 and 9 amply support the prosecution case, the absence of injuries on the person of PW 2 and the accused notwithstanding. It is to be noted that PW 2 was aged only 11 years and therefore, she was too young to resist or struggle resulting in injuries on her person and also she was too young to cause any injuries on the person of the accused.

22. In Narayanamma (Kum) Vs. State of Karnataka and Others, , the apex Court held that "the absence of injuries on the back of the prosecutrix can be of no consequence even if the field was having stones on the surface". In the above case also the victim girl was aged about 14 years and she was subjected to rape in the fields, where there was a standing jowar crop. It was also held that "the prosecutrix being below the age of consent, the accused persons cannot escape their liability merely because no marks on their person suggesting resistance could be found".

23. It is well settled that absence of injuries on the person of the victim girl is of no consequence. The possibility of victim sustaining external injuries depends upon a variety of factors including the amount of force used against her. the extent of resistance offered by her, the intensity of the struggle that ensues, the

terrain of the surface on which the offence was committed, and the age of the victim girl and so on. In a case like the present one where the victim girl is a child, aged 11 years and she being too young to offer any resistance and the offence having taken place inside the room, the possibility of PW 2 sustaining any injuries on her person, simply does not exist. There was no occasion for sustaining injuries on her private parts also, because of interruption to the intercourse by the intervention of PWs. 1, 3 and 4. There was possibility of PW 2 sustaining injuries on her private parts had there been complete penetration by the accused, but it was not to be and hence PW 9 found tenderness at the vaginal region, which in her opinion, was indicative of use of considerable force. The absence of injuries on the person of PW 2 and the hymen remaining intact does not therefore, rule out the possibility of rape.

24. Nevertheless the medical evidence of PW 9 and PW 12 would corroborate the direct evidence of PW 2 victim girl to the effect that the accused laid her on the floor and ejaculated into her vagina. The presence of semen and spermatozoa in the vaginal area and also wash collected from PW 2 by PW 9, besides presence of semen and spermatozoa on the clothes MOs 1 and 3 proves the fact that the accused did ejaculate into PW 2. The observation of PW 9 that there was tenderness in the vaginal region of PW 2 is indicative of the accused coming into physical contact with PW 2 and applying considerable force on her private parts, resulting in tenderness thereof. The absence of any rupture of hymen is also immaterial in the facts and circumstances of the case, as the evidence on record would disclose that there was interruption to the completion of the act of sexual intercourse with the intervention of PWs 1, 3 and 4. Nevertheless, the act of the accused coming into physical contact with vagina of PW 2 and ejaculating into PW 2's vagina is sufficient to constitute the offence of rape as defined u/s 375, I.P.C. Explanation to Section 375, I.P.C. states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

25. It is well settled that complete penetration is not necessary to constitute an offence of rape. In "Aman Kumar and Another Vs. State of Haryana," the Apex Court held as follows:

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 valva 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, I.P.C.

26. In M/s. Meera and Company, Ludhiana etc. Vs. Commissioner of Income Tax, Punjab, J and K and Chandigarh, Patiala, , the apex Court held that we do not think that the prosecutrix's evidence can be examined by picking one sentence in the cross-examination to find out whether she is a truthful witness or not?" In the above case also, the victim girl was aged 13 years and she stated that there has been penetration into vagina whereas the doctor who examined the

prosecutrix stated that there was no mark of violence on her private parts and the hymen was intact and on examination of vaginal smear no living or dead sperm was found on the slide and therefore she opined that no definite opinion could be given regarding the attempt to sexual intercourse. It was also a case where an order of acquittal passed by the Sessions Judge was set aside by the High Court. When the accused was convicted for the offence u/s 376, I.P.C. read with 511, I.P.C., the apex Court on reappraisal of the evidence of prosecutrix held as follows:

It is thus apparent from the entire reading of the prosecutrix's evidence that the accused had rubbed his penis with the vagina of the prosecutrix and tried to penetrate but could not succeed in penetrating and ultimately got himself discharged and the hot semen fell on the thighs of the prosecutrix. The statement made by the prosecutrix on which Mr. Jain relied might have been made on account of the inexperience of the young girl who was being subjected to sexual harassment for the first time and the same cannot be read in isolation bereft of what she stated just previous to the aforesaid statement. Having given our anxious consideration and having scrutinized the evidence of the prosecutrix we are in agreement with the High Court that her evidence is that of a truthful witness, which gives an account of the incident that happened to a rustic girl who was traumatized on account of sexual harassment meted out to her by none other than her own school Headmaster. Her evidence can be inhesitatingly accepted by the Court and has rightly been accepted by the High Court for sustaining a conviction for the charge under attempt to commit rape.

27. In the above case, it was found on evidence that there was no penetration as such and semen was not found inside the vagina but was only on the thighs of the girl and therefore, the accused was convicted only for the offence u/s 376 read with 511, I.P.C. But in the present case, the medical evidence on record showed the presence of semen in the vaginal smear and vaginal wash and the existence of semen inside the vagina of PW 2 pre-supposed penetration.

28. The learned Assistant Sessions Judge further observed that the absence of injuries on the male organ of the accused is a strong point to the innocence of the accused. Here again the trial Court failed to appreciate the fact that penetration was only partial and was not complete because of the interruption to the act and so there was no possibility for the accused to sustain injury on his male organ.

29. In *Koppula Venkat Rao Vs. State of Andhra Pradesh*, , the apex Court while explaining the distinction between committing the offence and attempt to commit the offence of rape held as follows:

The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. In the above case, even according to the prosecution, the accused ejaculated before actual intercourse. However, the trial Court and the High Court

convicted the accused for the offence u/s 376, I.P.C. and the apex Court altered the same to Section 376, I.P.C. read with 511, I.P.C. on the ground that the commission of actual rape has not been established. It was held that "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.

30. In the present case, the conduct of the accused in enticing the girl on the pretext of purchasing bangles and taking her to the room adjacent to the tennis court and closing the door of the room, removing her langa and his own pant and underwear and laying her on the ground and ejaculating into her vagina establishes all the ingredients of the intention, preparation, attempt and completion of the offence on the part of the accused. The fact that even when PW 3 knocked the door and interrupted, the accused has not given up, but abused PW 3 and slammed the door on his face, is clearly indicative of his determination to gratify his lust, as otherwise, on the intervention of PW 3, the accused in the normal course should have given up and fled from the scene.

31. In the light of the reappraisal of the evidence, it is now to be seen as to whether the acquittal of the accused by the trial Court is justified?

32. As seen from the impugned judgment, the learned Assistant Sessions Judge, held that the testimony of PW 2 victim girl lacks credibility and inadmissible on the ground that in the cross-examination she stated that PW 3 tutored her to depose in the case. PW 2 of course stated in the cross-examination that Narayanaswamy-PW 3 tutored her to depose in any particular manner or to depose in the manner she did. The learned Assistant Sessions Judge appears to have ignored the fact that PW 2 is a child witness, aged around 10 or 11 years and a victim of heinous crime and was in fact feeling shy to answer certain inconvenient and embarrassing questions pertaining to the occurrence. Therefore, her evidence needs to be appreciated with some sensitivity and at any rate she cannot be treated on par with an adult witness. The learned Assistant Sessions Judge observed that PW 2's evidence is liable for rejection because of her admission that she was tutored by PW 2. It is unfortunate that the whole testimony of PW 2 is sought to be appreciated by placing undue importance on the statement of PW 2 in the cross-examination that she was tutored by PW 3. and forgetting that there is absolutely no reason as to why PW 2 should oblige PW 3 at all and that too in a case like the present one, wherein, the accusation made has the effect of impacting very badly on her own honour, self-esteem and future prospects. No girl would come forward and oblige any person to enable him to settle scores with some other person by crying rape. The learned Assistant Sessions Judge, totally ignored the fact that the accused was caught almost red handed on the spot in the company of PW 2 and directly taken to the police station from there.

33. The testimony of PW 2 is sought to be discredited on another ground that her

evidence is silent about her informing the incident to PW 1 at the scene of offence. Here again the trial Court failed to appreciate the fact that PW 2 is a child witness and the standards applicable for appreciation of her evidence are different from those usually applied in the case of an, adult witness. A child witness cannot be expected to reveal the whole incident in a comprehensive manner or by way of a graphic description with sequential narration. She would only answer the questions that are put to her and in fact PW 2 was feeling shy to answer some of them as noted by the learned Assistant Sessions Judge himself. The failure on the part of the learned Additional Public Prosecutor to elicit the complete information from PW 2 by putting all the necessary and relevant questions cannot be pitted against PW 2's veracity. It is also not her evidence that she has not narrated the incident to PW 1 and PW 3 at the spot when they came and no such admission is also elicited in her cross-examination. The observation of the learned Assistant Sessions Judge that PW 1's claim that PW 2 narrated the incident to him at the spot lacks corroboration because PW 2 is silent on that aspect is clearly erroneous. The evidence of PW 3 would disclose that PW 1 made enquiries with PW 2 at the spot, though he stated that he does not know what she told to PW 1. It is not as though PW 1 for the first time stated that PW 2 narrated the incident at the scene of offence itself. Even at the earliest point of time PW 1 stated in his report Ex. P. 1 which was given within half an hour of the incident, that when he enquired PW 2, she narrated the incident. The testimony of PW 1 about PW 2's narration of the incident to him at the spot itself is thus corroborated by the contents of Ex. P. 1 also. The learned Assistant Sessions Judge has miserably failed to appreciate the evidence of the victim girl PW 2 in a proper way and chose to reject her evidence on flimsy and trivial grounds.

34. The observation of the learned Assistant Sessions Judge that PW 10-Sub-Inspector of Police though registered the case did not try to record the statements of PWs 1 to 3, who were available and he does not explain the reason for the same, has no bearing. The incident occurred at about 7.30 p. m. The complaint Ex. P. 1 was lodged at 8.00 p.m. and the FIR was registered immediately thereafter by PW 10 and PW 10 handed over the investigation to PW 11. It is in the evidence of PW 11 that he received express FIR from PW 10 at 8.20 p.m. and he examined PWs. 1 and 2 and recorded their statements and effected seizure of M. Os. 1 to 3 under Exs. P. 2 and P. 3 at 10.30 p.m. and sent PW 2 and the accused for medical examination and PW 2 was examined at 9.30 p.m. on the same night by PW 9 and the accused was examined by PW 12 at 11.50 p.m. and in the meanwhile, at 11.30 p.m. PW 11 inspected the scene of offence and prepared rough sketch Ex. P. 8. Thus it can be seen that it is a case where the investigation was done swiftly and almost completed on the same night itself. It is not as though the statements of the witnesses were recorded long after the incident. PW 11 recorded the statements of PWs 1 to 4 within couple of hours after the incident. There is nothing wrong on the part of PW 10 in handing over the investigation to a senior officer PW 11-Inspector of Police in view of the

gravity of the offence.

35. The learned Assistant Sessions Judge further observed that the statements of the witnesses were not immediately sent to the Court and they were sent only on 28-1-1998 and sending statements to the Court at a belated stage has the effect of losing the spontaneity of the statements and benefit of doubt should be given to the accused. As seen from the evidence of PW 11, the accused was produced before the Magistrate at 11.15 p.m. on 8-9-1997. The fact that the statements recorded u/s 161, Cr.P.C. were sent to the Court on 18-1-1998 does not prove fatal to the prosecution case, when in fact, nothing is elicited in the cross-examination either by way of contradictions or omissions to show that there are any material discrepancies or variations or that the witnesses have resorted to any improvement or embellishment while giving evidence. The statements recorded u/s 161, Cr.P.C. do not constitute substantive evidence. They can be made use of only for the purpose of eliciting the contradictions so as to discredit the testimony of witnesses by saying that their evidence is either inconsistent with or contrary to their earlier statements during the investigation. When no such omissions or contradictions are elicited, it only show that the testimony of the witnesses is consistent and is not at variance with their earlier version during the investigation. When that is so, instead of relying upon such evidence, the same cannot be thrown out on the ground that the statements were not furnished to the Court immediately after they were recorded. The question of giving any benefit of doubt to the accused on that score does not simply arise, especially in a case like the present one where the possibility of any false implication is totally ruled out.

36. The appreciation of medical evidence on record by the trial Court is also to say the least, improper. The trial Court appears to have been carried away by the fact that on medical examination of PW 2 it was found that the hymen was intact and there was no laceration or congestion on fourchette and that PW 9 stated that there can be other reasons as well for the tenderness on the private parts. Such narrow and pedantic approach is uncalled for in a case like the present one.

37. Yet another ground on which the trial Court placed heavy reliance is that the prosecution failed to establish that the semen and spermatozoa found on MO. 1 langa and MO.3 drawer and the vaginal swabs and vaginal wash was that of the accused. Ex. P.6 FSL report clearly showed that the semen and spermatozoa were in fact found in all the above items and it was human in origin. In Ex. P6, it is of course, stated that the blood group of the semen could not be determined. The trial Court strongly relied upon the said circumstance and held that there was no evidence to link the accused with the seminal stains found on MOs. 1 and 3 and other items. It is to be noted that the entire evidence, direct, circumstantial, medical and forensic available on record has to be read and has to be appreciated as a whole but not in isolation. The medical evidence being opinion evidence has to necessarily yield to the direct evidence. The medical and forensic evidence would only corroborate the direct evidence. There can be no

better direct evidence than that of the victim girl PW 2 herself. The testimony of PW 2 categorically establishes that the accused did ejaculate into her vagina and she felt presence of semen, which of course, she described in her own words as "starchy like liquid". The langa MO 1 of PW 2 and the drawer MO 3 of the accused were found stained with semen. Even the vaginal secretion and vaginal washings collected by PW 9 from PW 2 also were found to contain semen. PW 2 categorically deposed that it was the accused who took her inside the room and committed the offence. Her version is corroborated by Circumstantial evidence of PWs 1 and 3. The accused was caught red handed on the spot while in the company of PW 2, because of timely intervention of PW 3 and his presence of mind to bolt the door of the room from outside. Under those circumstances when semen was found inside the vagina of PW 2, the guilt of the accused is amply established and failure to determine the blood group of semen is of no consequence. The finding of the trial Court that the prosecution failed to establish the link between the accused and the semen found on MOs. 1 and 3 and other items is clearly erroneous.

38. The trial Court also erred in observing that the prosecution has not duly established the seizure of MOs. 1 and 3. The evidence of PW 7 and PW 11 proves seizure of MO. 1 under Ex. P. 3 and the evidence of PW 11 establishes seizure of MO. 3 under Ex. P. 2. It is not even suggested to PW 11 in the cross-examination that MO 3 does not belong to the accused. The failure on the part of the prosecution to send the samples of pubic hair of the accused, which are said to have been collected by PW 12 for chemical analysis is also not of much consequence, as the evidence of PW 12 shows that there was matting of pubic hair and presence of semen stains near and around the genitals of the accused.

39. The trial Court also erroneously placed undue importance to the correction in the date mentioned in Ex. P. 9 certificate issued by PW 12. A perusal of Ex.P. 9 would show that the date "3" is corrected as "7" while noting the time and date at which the accused was first seen by PW 12. In the same sentence, the date is again noted correctly as "7-9-1997" while noting the time of the examination as 11.50 p.m. Giving importance to such trivialities in a case like the present one involving grave sexual offence committed against a girl child only exposed the lack of required sensitivity on the part of the trial Court while appreciating the evidence.

40. Further observation of the trial Court that there was considerable gap between the time of the offence and examination of the accused by PW 12 and possibility of the accused passing urination or having bath cannot be ruled out, is also erroneous. In fact, the accused was examined by PW 12 within few hours after the incident and the possibility of the accused having bath is ruled out, as he was taken to the police station directly from the spot and from the police station, he was sent for medical examination. The various observations detailed supra in the impugned judgment only show that the trial Court has failed to properly appreciate the evidence, the way it ought to have especially in a case

like the present one and the erroneous approach adopted by the trial Court ignoring certain vital aspects, and attaching undue importance to certain trivialities has clearly led to miscarriage of justice. It is no doubt true as contended by the learned Counsel for the respondent-accused that an order of acquittal cannot be easily reversed unless there are compelling reasons and substantial grounds. When on reappraisal of the evidence, which the appellate Court is bound to do, it is found that the finding of the trial Court: is result of improper and inadequate appreciation of the evidence available on record, leading to grave miscarriage of justice, the appellate Court is empowered and is also duty bound to reverse the order of acquittal.

41. The evidence on record clearly established that the accused has taken the victim girl PW 2 inside the room attached to the tennis court, which was under his control as can be seen from the evidence of PW 6 Assistant Director of Physical Education, SV University and bolted the door from the inside and committed the offence of rape against PW 2. The fact as borne out by the evidence on record that semen was found in the vagina of PW 2 coupled with tenderness on her private parts as noticed by PW 9 would necessarily lead to the conclusion that the accused had made physical and forcible contact with the vagina of PW 2 through his male organ and ejaculated. The said overt act is sufficient to constitute offence of rape u/s 375, I.P.C. rendering the accused liable for punishment u/s 376, I.P.C.

42. Having regard to the fact that the offence is committed against PW 2, a young girl of 11 years, the accused is found guilty of the offence u/s 376(2)(f), I.P.C. As the evidence on record established that the accused has enticed PW 2 minor girl, aged 11 years and took her away on the promise of purchasing bangles and took her to the scene of offence with an intention to commit rape on her, he is found guilty of the offence u/s 363, I.P.C. as well..

43. In the circumstances and for the reasons stated above and on reappraisal of the evidence available on record, it is held that the impugned judgment dated 11-2-1999 in SC No. 260 of 19,9,8 on the file of the Principal Assistant Sessions Judge, Tirupati is wholly unsustainable and the same is accordingly set aside. The accused is found guilty of the offences under Sections 363 and 376(2)(f), I.P.C. and is convicted for the same u/s 235(2), Cr.P.C.

44. In the circumstances and having regard to the gravity of the nature of the offences, the accused is sentenced to undergo rigorous imprisonment for a period of three (3) years and also pay fine of Rs. 1,000/- (Rupees one thousand only) and in default of payment of fine, he shall undergo simple imprisonment for three (3) months, for the offence u/s 363, I.P.C. The accused is also sentenced to undergo rigorous imprisonment for ten (10) years and also pay fine of Rs. 2,000/- (Rupees two thousand only) and in default of payment of fine, he shall undergo simple imprisonment for six (6) months, for the offence u/s 376(2)(f), I.P.C. The substantive sentences of imprisonment shall run concurrently. The accused is entitled for set off u/s 428, Cr.P.C. The bail bonds of the accused shall

stand cancelled. The learned Principal Assistant Sessions Judge, Tirupati, shall issue necessary warrant against the accused for serving the remaining part of the sentence.

45. In the result, the criminal appeal is allowed accordingly.