
(2012) 07 CAL CK 0256
In the Calcutta High Court
Case No : CRA No. 138 of 1986

Shibnandan Lal

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 10-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 319, 376, 44, 511

Citation : (2012) 4 CALLT 61

Hon'ble Judges : Mrinal Kanti Sinha, J

Bench : Single Bench

Advocate : Jaharlal De, Mr. Saibal Bapuly and Mr. Suranjan Mondal, for the Appellant; Rituparna De, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Justice Mrinal Kanti Sinha, J.—This appeal has been directed against the Judgment and Order passed by Sri Anwar Hossain, learned Additional District and Sessions Judge, Durgapur, in Sessions Case No.221 of 1984 (Sessions Trial No.3 of 1985) on 11th March, 1986, whereby the said learned Additional District and Sessions Judge, Durgapur, convicted the appellant/accused under Sections 376/511 of the Indian Penal Code, 1860, and sentenced him to suffer rigorous imprisonment for 5 (Five) years and to pay a fine of Rs.2000/-, in default to suffer rigorous imprisonment for 6 (six) months more in Sessions Case No.221 of 1984 (Sessions Trial No.3 of 1985) arising out of Durgapur P.S. Case No.31 of 25.12.1982. It was the case of the prosecution that the defacto complainant/informant Smt. Parul Mukherjee, wife of Sri Manas Mukherjee, residing at 12/18, Rahimpath under P.S. Durgapur, District-Burdwan with her family members lodged a complaint at Durgapur Police Station on 25.12.1982 alleging therein that on 25.12.1982 her daughter Sadhana Mukherjee aged about 9 years and reading in class III reported to her at about 8 A.M. in the morning that she was feeling serious pain in her urinal passage and getting trouble at the time of urinating and on being asked she stated that about 15 days before she went to

the quarter of Shibnandan Lal bearing No.12/24 on the upper floor of their quarter and then she was raped by force by Shibnandan Lal, who also threatened to kill her in case she stated about the matter to anybody. Then on Thursday, 23rd December, 1982 while the daughter of the informant Sadhana went to the upper floor to call on her son at 9 A.M., then the said Shibnandan Lal caused her to enter in his room by force and raped her after laying down her on the bed and also threatened to kill her if she stated about that matter to anybody. The daughter of the defacto complainant/informant did not disclose the matter to anybody out of fear, but the informant stated the matter then and there to her husband's younger brother Kartik Mukherjee and to Bose Babu, Sannyal Babu and many others of their "Para", who heard about the incident from her daughter also. On 25.12.1982 at about 8.30 in the morning the informant, her brother-in-law asked the said Shibnandan Lal about the incident when said Lal being angry abused them and threatened them. The informant narrated the incident to her husband as soon as he returned back from the market, who also heard about the incident from his daughter. So, the informant lodged an F.I.R at Durgapur Police Station u/s 376 of the Indian Penal Code to that effect on 25.12.1982 at 18:30 hours.

2. After receiving the said F.I.R of the informant Durgapur P.S. Case No.31 dated 25.12.1982 was initiated and the matter was endorsed to a police officer for investigation. After investigation police submitted charge-sheet against the accused under Sections 376/511 of the Indian Penal Code. Then charge was framed against the appellant/accused under Sections 376/511 of the Indian Penal Code, which was read over and explained to the appellant/accused, who pleaded not guilty and claimed to be tried. Thereafter prosecution witnesses were examined and cross-examined, and then the appellant/accused was examined u/s 313 of the Code of Criminal Procedure, 1973.

3. Initially, the defence wanted to examine defence witness, but subsequently declined to examine any defence witness by filing an application. From the trend of cross-examination as well as from the examination of the accused u/s 313 of the Criminal Procedure Code the defence case appeared to be the denial of the prosecution case. It was also the case of the defence that this is a false case and the appellant/accused has falsely been implicated in this case. It was also the case of the defence that said Sadhana Mukherjee committed theft of money amounting to Rs.10/- from the appellant/accused and as a counter blast to the said allegation of the theft of money from the quarter of the appellant/accused, the appellant/accused has falsely been implicated in the said case.

4. Thereafter hearing the arguments of the parties the learned Additional District and Sessions Judge, Durgapur, concerned delivered the Judgment finding the accused guilty for the alleged offence and convicted him and sentenced him to suffer rigorous imprisonment for 5 (Five) years and to give a fine of Rs.2000/- and in default to suffer rigorous imprisonment for 6 (six) months more in the said Sessions Case No.221 of 1984.

5. Being aggrieved by and dissatisfied with the aforesaid judgment and order of conviction and sentence passed by the learned Additional District and Sessions Judge, Durgapur, the appellant/accused has preferred the present appeal in this Court.

6. It is to be considered whether the learned Judge was correct in his finding that the appellant/accused committed the alleged offence, and whether and how far the learned Additional District and Sessions Judge, Durgapur was correct and legally justified in passing the impugned order of conviction and sentence against the appellant/accused.

7. Mr. Bapuly, Learned counsel appearing for the appellant/accused has submitted that there is reference of two incidents of rape in the F.I.R and while father, mother and the informant's daughter have stated about the case of rape, then the daughter of the informant has stated about an attempt to commit rape at the time of her evidence, while the Doctor found no sign of rape, after examining the daughter of the informant. It has also been stated that the daughter of the informant made a statement u/s 164 of the Criminal Procedure Code and the said statement has not been produced, nor the learned Magistrate concerned, who recorded her statement u/s 164 of the Criminal Procedure Code, has been examined in this case, nor the said statement recorded u/s 164 of the Code of Criminal Procedure has been marked exhibit, though that is a vital piece of evidence, and the daughter of the informant signed on the said statement u/s 164 of the Code of Criminal Procedure. Non-production of such material document speaks against the genuineness of the prosecution case. No information was given at the Police Station nor any F.I.R. was lodged at the police station regarding the first incident which allegedly took place about 15 days back and the present incident has also been intimated at the police station about two days after. That delay in lodging the FIR has not also been explained. As per the evidence of P.W.2 said Sadhana Mukherjee on one occasion when she went to the quarter of the accused for slippers, then the accused caught hold of her and caused her lie down on his cot, rubbed his penis in her vagina and discharged whitish substance in her vagina, and the accused caused her naked, and the accused tied her mouth with the help of a Dhuti and he used the same cloth at the time of commission of the offence on two occasions, but she did not sustain any bleeding injury and she did not show the place of occurrence to police, and she stated to the Magistrate that after the first incident she reported everything to her mother and in view of such contradictory statement of the said P.W.2 it is doubtful if she was ever raped by the accused or not.

8. Mr. Bapuly, learned counsel for the appellant/accused has also submitted that it also appears that most of the P.Ws. are closely related with the said daughter of the informant and her evidence has not also been corroborated by the medical evidence also. With reference to the decision reported in Aman Kumar and Another Vs. State of Haryana, learned counsel for the appellant/accused has submitted that in order to come to a conclusion that the conduct of the accused

was indicative of a determination to have sexual intercourse positive materials must exist and surrounding circumstances many times beacon light on that aspect and when there is no material to show that the accused was determined to have sexual intercourse in all events, then the offence cannot be said to be an attempt to commit rape and attract culpability under Sections 376/511 of the Indian Penal Code, but the case may be an incident of indecent assault upon the woman. Learned counsel has also submitted with reference to the decision reported in 2002 Supreme Court Cases (Cri) 592 in the case of Dilip and Another Vs. State of Madhya Pradesh that though it is well settled that the sole testimony of the prosecutrix could be acted upon and made the basis of conviction without being corroborated in material particulars, yet the sole testimony of the prosecutrix which is contradicted by the medical evidence as well as the version given by P.Ws, cannot be relied upon and the rule about the admissibility of corroboration should not be ignored by the Courts in sexual offences.

9. On the other hand Ms. De, learned counsel for the respondent/State has submitted that the evidence of the victim girl aged about 9 years proves that there was an attempt to commit rape and in such case no further evidence including medical evidence is required to be considered when the statement of the victim has been corroborated by other witnesses, and relatives of the victim will not try to cover up the case and relieve the actual offender, and any lacunae in the investigation cannot deviate the prosecution case which is otherwise proved, and the sole testimony of a victim girl in such case is sufficient to convict the accused. In such a case under Sections 376/511 of the Indian Penal Code sentence of five years imprisonment cannot be regarded to be excessive as the victim was below 12 years in age. In view of the circumstances of the case there was no delay in lodging of the F.I.R and chances of false implication by relative witnesses can be ruled out, and uncertainty in medical evidence about rape does not make conviction illegal since the medical examination was held sometimes after the incident, and opinion of attempt to rape given by an in-experienced medical officer aged about 20 years in a case was not accepted by the court, and the victim girl being unmarried and suffering the agony of traumatic experience, and future chances for getting married and settling down in a respectable family was completely shattered and non-rupturing of her hymen was not much material and in such case misplaced sympathy to the accused by imposing an inadequate sentence would not be appropriate and conviction can be based on the sole testimony of the prosecutrix without any corroboration if her testimony is otherwise worthy of credence, though corroboration of medical evidence can be insisted upon where such evidence is forth-coming, and irregularity and illegality about investigation should not be treated as a ground to reject the prosecution case and any discrepancy found in the evidence of the witnesses cannot affect the credibility of the witnesses and there is bound to be some discrepancies between the narration of the witnesses when they speak at details and corroboration of evidence with mathematical niceties cannot be expected in criminal cases, and minor im?balancement there may be but narration by reason

therefore should not render the evidence of witnesses incredible. In support of her various submissions learned advocate for the respondent/state has relied upon the decisions reported in (2009) 3 SCC (Cri) 96 in the case of Ashok Surajlal Ulke Vs. State of Maharashtra, 1992 SCC (Cri) 598 in the case of Madan Gopal Kakkad Vs. Naval Dubey and another and AIR 1999 Supreme Court 3717 in the case of Leelaram (D) through Duli Chand Vs. State of Haryana and another.

10. It appears that the matter was reported at the police station on 25.12.1982 at 18:30 hours and the alleged incident took place on 23.12.1982 at 9 hours and 15 days before that. In support of its case the prosecution examined 14 P.Ws. P.W.1 Smt. Parul Mukherjee is the informant here and as per her evidence on 23.12.1982 the incident took place and her daughter Sadhana complained of pain in her private part or vagina on 25.12.1982 and on being asked about that her daughter reported the matter to her. P.W.2 is the alleged victim girl Sadhana Mukherjee, daughter of P.W.1, who has stated about the incident of 23.12.1982 and about another incident, which took place about 15 days before that date. P.W.3 Manas Mukherjee is the husband of P.W.1 and father of P.W.2. As per his evidence he was in the market and after his return from the market P.Ws.1 and 2 narrated the incident to him. P.W.4 is a police constable, who took Sadhana Mukherjee and the accused to Bidhannagar Hospital for medical examination on 26.12.1982 and took medical report and file containing vaginal swab to police station and made over the same to Darogababu. P.W.5 has been tendered by the prosecution, whose cross-examination has been declined by the defence. P.W.6, Kartik Chandra Mukherjee is the brother of P.W.3 Manas Mukherjee to whom the matter was told by his elder brother and Boudi on 25.12.1982 after his return from the market. P.W.7 Shantipada Ghosh is a resident of Rahimpath Mouza, who knows both the parties, and the matter was narrated to him by his wife as well as by the P.W.1. P.W.8 Ashim Kumar Sanyal has been tendered by the prosecution, whose cross-examination has been declined by the defence. P.W.9 put his signature on the seizure list by which police seized some papers on 23.6.1983, which has been marked as Exbt. 2/2. P.W.10 Smt. Alaka Bose is the medical officer attached to Durgapur Steel Plant Hospital, who issued the birth certificate showing birth of a female baby of Parul Mukherjee on 5.5.1974. P.W.11 Rishikesh Dalal, is S.I. of police, who recorded the statement of Smt. Parul Mukherjee on 25.12.1982, filled up the formal FIR and started Durgapur P.S Case No.31 on 25.12.1982 u/s 376 IPC, and endorsed the case to S.I. M.L. Singha for investigation. P.W.12 Doctor P.N. Chatterjee was the Sub-Divisional Medical Officer -cum-Superintendent of Bidhannagar Hospital, and as per his evidence on 26.12.1982 he examined one Shibnandan Lal aged 40 years Hindu Male of 12/24 Rahimpath Mouza and found that he was capable of sexual intercourse, but he found no injury on his private part, and on 26.12.1982 he examined one Sadhana Mukherjee aged 9 years Hindu female daughter of Manas Mukherjee of 12/18 Rahimpath, P.S Durgapur, Burdwan at 4 P.M. and found no mark of rape and no mark of injury on her private part and there was no foreign body in her private part and vaginal swab was sent though police constable

1906., but he has been declared hostile as he could not identify the girl he examined, though he knew as M.O that it was his duty to note down the identity mark of the victim girl and there is no note in his report that he took consent of the girl before examination. P.W.13 M.L. Singha is S.I of police, who investigated into the case receiving the same from Sri S.K. Dalal, and during investigation he visited the place of occurrence and examined the witnesses, drew up sketch map of the place of occurrence, arrested the accused Shibnandan Lal, sent the accused and the victim girl to SDM hospital through constable 1906, forwarded the accused and victim girl to Court, whose statement u/s 164 Cr.P.C was recorded, received a container in which the semen of the accused was preserved by the doctor, but as he could not complete the investigation he made over the case to O.C Durgapur P.S.. P.W.14 has deposed that he is S.I of police and on 23.12.1983 he took charge of the case, seized birth certificate from Smt. Parul Mukherjee, examined some witnesses and submitted charge-sheet against the accused under Sections 376/511 of the Indian Penal Code.

11. In this case it appears from the evidence of P.Ws that P.Ws. 1, 2, 3, the informant party, and the accused live in the same building and while the informant party live in the groundfloor, then the appellant/accused lives in the first floor of the same building. It is not also disputed that the daughter of the informant was a minor girl of about 9 years and she had a younger brother at the relevant time and the appellant/accused was about 40 years old having his wife and two sons living with him in the same house and the sons of the informant and the appellant/accused had visiting terms between themselves, and on one occasion the daughter of the informant or P.W.2 had been to the quarter of the accused for fetching slippers of her brother.

12. It also transpires from the evidence of P.W.2, said victim Sadhana Mukherjee that on one occasion when she went to the quarter of the appellant/accused and entered into the room of the accused, then the accused suddenly caught hold of her and caused her to lie down on his cot, made her naked and laid flat on her body and putting his penis in her vagina rubbed the same and discharged whitish substance from his penis and at that time put cloth into her mouth and the accused threatened to kill her in case she disclosed the incident to her parents or anybody else and the P.W.2 got pain injury in her vagina thereby which was also swollen.

13. It also transpires from the evidence of P.W.2 that the accused tied her mouth with cloth at the time of second incident and attempted to push his penis into her vagina but he could not succeed but after rubbing his penis on her vagina the accused discharged whitish substance from his penis and brought one wet cloth and rubbed her vagina thereby, and such sort of incident took place about 15 days prior to that incident, but she did not disclose anything to her mother about that out of fear as the accused threatened her. It also transpires from her evidence that as she could not respond to nature's call or urinating normally and felt pain at the time of sitting, standing and walking, so she was compelled to tell

everything to her mother two days after the incident. Thus it appears that the P.W.2 has given a vivid picture of the incident and has narrated the incident in a natural and clear way and so there is no reason to disbelieve her evidence.

14. It also appears that her evidence regarding the incident has fully been corroborated by her mother as P.W.1, who has also deposed that on 25.12.1982 her daughter P.W.2 Sadhana Mukherjee complained of pain in her private part, that is vagina, and on being asked her daughter stated to her that on 23.12.1982 she went to the quarter of the accused Shibnandan Lal to fetch the slippers of her son Biswajit aged about 3/4 years then the accused forcibly dragged her inside the room, caused her lie down on his bed, bolted the door from inside, opened the half pant of her daughter causing her completely naked and rubbed his penis on the vagina of her daughter and discharged some whitish substance in her vagina and threatened her daughter for not disclosing the matter to anybody and in case of disclosure he would kill her and her daughter also told her that the accused committed offence of the same nature about 15 days ago in the said room and P.W.1 examined the private part of her daughter P.W.2 and found some reddish colour there caused to due the rubbing of penis and she along with her husband's brother went to the quarter of the accused and asked the accused about the matter, but he drove them away abusing them, and thereafter P.W.1 narrated the incident to her husband after he returned back from the market and she also narrated the incident to her husband's brother Kartick Mukherjee, Sannyal Babu, Bose and many others of their locality. P.W.1 has also deposed that the accused has got his wife, daughter and sons, but the family members of the accused were not present in his quarter at the relevant time. P.W.1 also noticed that her daughter's movement was not in normal condition.

15. As per the evidence of P.W.3, father of the P.W.2 and husband of P.W.1, on 25.12.1982 he was in the market and on his return from the market his wife P.W.1 and daughter P.W.2 narrated the incident to him and P.W.3 has also deposed that he has seen the injury in the vagina of his daughter, and the injury was reddish in colour.

16. P.W.6 being P.W.1s husband's brother has also deposed that on 25.12.1982 returning back from market he came to know from his elder brother and boudi that the accused committed rape upon Sadhana Mukherjee, and then they went to the quarter of the accused and the "Para" people advised them to take recourse of law and they went to Thana and narrated the matter to police there.

17. Said "Bose" mentioned by P.W.1 has deposed as P.W.7 that on 25.12.1982 he was in his quarter of Rahimpath bearing No.12/22 and then his wife told him that the accused Lal committed rape on Sadhana Mukherjee alias Mamani, and the wife of Manas Mukherjee or P.W.1 also told them for getting redress of the matter coming to their quarter shedding tears.

18. So it appears that these P.Ws have narrated the incident clearly and have

fully corroborated one another. It has been stated by the defence that most of these P.Ws. are closely related to one another, but relatives are not always incredible witnesses, and when in this case the alleged incident took place inside the room in absence of any other person besides the said victim and the accused, then presence of any other witness as eye witness was not expected there. Moreover there is no such rule that the solitary evidence of the said victim cannot be relied upon, rather it may be presumed that the victim of such a case and her relatives would not spare the real culprit and would not let him go unpunished, but they would be eager to see that the real culprit is brought to book and punished. In this case all these P.Ws. have identified the accused and there is no dispute regarding his identification by the P.Ws. as his neighbours. As such there is no reason to disbelieve the evidence of the P.Ws.

19. It is an established principle of law that in such a case even the sole testimony of the prosecutrix can be acted upon and can be made basis of conviction, but besides that in this case the evidence of P.W.2 has been corroborated by other P.Ws. in material particulars. Though it has been pointed out by the learned counsel for the defence that the said incidents allegedly took place on 23.12.1982 and 15 days before that, but no reason has been assigned by the prosecution as to why nothing was stated by the P.W.2 to her parents or anybody else, yet it appears from the evidence of P.W.2 that she did not state that matter earlier out of fear as the accused threatened to kill her in case she disclosed that matter to her parents or anybody else, and she stated about that when she felt severe pain and inconvenience in urinating and she also apprehended shame and fear or rebuke from her parents also in case she disclosed that matter immediately after the said incidents. Such reason or explanation is not un-acceptable. Learned Trial court also has made correct observation in that regard.

20. Now it is to considered how far the medical evidence has corroborated the prosecution case. In this regard it appears from the evidence of P.W.10 that as a Medical Officer of Durgapur Steel Plant Hospital she issued a birth certificate, which she has proved and which has been marked Exbt.4, and has deposed that from the said certificate it appears that Parul Mukherjee gave birth to a female baby on 5.5.1974 and thereby it has been proved that the said female baby of P.W.1 was aged about 8/9 years in December, 1982. Further as per the evidence of P.W.12 he being the Sub-Divisional Medical Officer-cum-Superintendent of Bidhannagar Hospital examined Shibnandan Lal, S/o Late Ramdrisan Lal aged 40 years Hindu male of 12/24 Rahimpath, P.S. Durgapur on 26.12.1982 and found that he was capable of sexual intercourse, but found no injury on his private part. P.W.12 has further deposed that on 26.12.1982 he examined one Sadhana Mukherjee, 9 years Hindu female, daughter of Manas Mukherjee of 12/18 Rahimpath, P.S. Durgapur, Burdwan, at 4 P.M. and found (1) no mark of rape, and (2) no mark of injury on her private part and there was no foreign body in her private part and vaginal swab was sent through police constable No.1906, but his report does not show when he completed the examination nor he has

noted down the identity mark of the girl he examined, though as M.O. he had a duty to note down the identity mark of the victim girl, nor P.W.12 noted in his report that he took consent of the girl before examination. So, it appears from the evidence of P.W.12 that he did not examine the said Sadhana Mukherjee properly as an alleged victim of rape though he was duty bound to examine her properly as M.O. and to submit his report with all the required informations regarding the allegation of rape upon her, and thereby he has failed in his duty as M.O. and as such much reliance cannot be placed upon his opinion in that regard, but one thing is clear and evident from his evidence that he actually examined the P.W.2 on 26.12.1982 with the allegation of rape upon her and he also examined the accused Shibnandan Lal on the same date and found that he was capable of sexual intercourse. It has also been rightly found by the learned Trial Court in view of evidence of said P.W.12 that it is difficult to believe the said doctor's evidence.

21. In fact in this case it appears from the evidence of the P.Ws that the accused actually intended to commit rape upon the P.W.2 finding her alone in his quarter in absence of his family members when she came near his room in search of her younger brother's slippers and took preparation to commit rape upon her by lying down her on his bed, making her naked or half naked by opening her wearing pant, lay flat upon her body, rubbed his penis on her vagina and attempted to push his penis into her vagina, but could not succeed and in the meantime ejaculated and discharged whitish substance on her vagina. As such it appears that there was an intention and preparation of the appellant/accused to commit rape upon P.W.2 and there was an attempt to commit rape, but due to ejaculation before the actual commission of rape the offence of rape could not have been committed but it has been proved by sufficient reliable evidence beyond all reasonable doubt that the appellant/accused has actually committed the offence of attempt to commit rape upon the P.W.2, though he actually intended to commit rape upon her and was unsuccessful due to ejaculation and this is a clear case of attempt to commit rape upon the P.W.2, and in doing that the appellant/accused caused pain and hurt or injury in her private part or vagina.

22. As per Section 319 of the Indian Penal Code whoever causes bodily pain, disease or hurt or injury or infirmity to any person is said to cause "hurt", and as per Section 44 of the Indian Penal Code the word "injury" denotes any harm whatever illegally caused to any person in body, mind, reputation or property. As per the evidence of P.Ws.1, 3 also P.W.2 stated about serious pain in her vagina to them after the said incident and they also saw reddish mark or injury in her vagina. Pain is a personal feeling and it may not always be possible for others including a doctor to feel pain of others, but it is an injury or hurt. It cannot also be denied that by the said act of the appellant/accused the P.W.2 and his parents sustained severe mental agony and injury.

23. There was no reason for false implication of the appellant/accused in this

case and unless the said incident really happened there was no reason of initiation of such a case. No such case has been pleaded or proved by evidence of the accused that due to any proven enmity he has falsely been implicated in this case, and the defence case that due to the allegation of theft of Rs.10/- only against P.W.2 this case has falsely been initiated against him is too feeble a defence which has neither been supported by any defence witness nor has any other leg to stand. Learned Trial court has also found in this regard that it has not been disclosed in evidence that the accused person was an enemy of the parents of the victim girl or their terms were strained. It is not also believable that a minor girl aged about 9 years or her parents would initiate a false case against the accused at the cost of her chastity and social reputation. No such case has also been pleaded or proved by evidence that the P.W.2 was tutored to make out and depose about a false story of rape against the accused by her parents, rather the parents of our Indian society always think for better future, reputation and chastity of their daughter. In this regard learned Trial court has rightly observed that :-

In our country, in our present society parents, poor or rich, are always thinking for the better future and chastity of their daughter, their daughter's chastity is much more precious to a girl than any other articles of the world. Even a minor girl will never agree to bring false charge in respect of sexual torture on her against a person. Similarly no parent would dare to bring false charge of rape or sexual torture on their daughter considering their family reputation.

There is sufficient force in this observation.

24. Learned counsel for the appellant/accused has argued that the prosecution has not proved the statement of the P.W.2 recorded u/s 164 of the Code of Criminal Procedure, though the signature of P.W.2 therein has been proved and marked Exbt. and the learned Magistrate concerned who recorded the statement of the P.W.2 u/s 164 of the Code of Criminal Procedure has not been examined. On the other hand learned counsel for the respondent/State has submitted that the P.W.2 has stated about the incident in her statement recorded u/s 164 of the Code of Criminal Procedure and somehow that statement has not been proved as the learned Magistrate could not be examined but the prosecution case has been proved beyond all reasonable doubt by the evidence of other P.Ws. and documents.

25. In this regard it appears that when the prosecution case has otherwise been proved by sufficient reliable evidence of the P.Ws. and documents beyond all reasonable doubt, then non-examination of the learned Magistrate concerned or non-exhibiting the contents of the statement recorded u/s 164 of the Code of Criminal Procedure would not be able to take away the intrinsic truth of the prosecution case. The accused himself has not also been able to deny his presence at the place of occurrence at the relevant time rather has mentioned during his examination u/s 313 of the Code of Criminal Procedure that She (P.W.2) herself requested him to save her as she would withdraw the case and

then he said "What I know_____ do that which you like better", but he did not deny the alleged incident then though he had talk with her. Moreover though the appellant/accused stated then that he would give defence evidence, yet lateron he did not adduce any such defence evidence.

26. There might have some minor discrepancies here and there and the witnesses might have given some exaggerated version and might have imported some embroidery, but the said minor discrepancies or exaggerations or embroideries would not be able to take away the intrinsic truth of the prosecution case in view of the fact that the evidence of the witnesses regarding presence of the appellant/accused at the place of occurrence at the relevant time has not been disputed and those are not so much vital and so the evidence of the said victim girl should be believed and corroboration is not sine qua non for conviction in a rape case, though in this case the evidence of P.W.2 has sufficiently been corroborated by her parents, P.Ws. 1 and 3 and other P.Ws. In this regard learned Trial court has also rightly observed that :-

It is true that in this case there are some contradictions but these contradictions are not sufficient enough to sweep away the prosecution case.

It is also the duty of the court to extract the grain from the chaff.

27. It has been held by the decision reported in Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another, that discrepancies found in the ocular account of two witnesses, unless they are so vital, cannot affect the credibility of the evidence of the witnesses and there is bound to be some discrepancies between the narrations of different witnesses when they speak on details and any irregularity or even an illegality during investigation should not be treated as a ground to reject the prosecution case. In this case there is no such vital discrepancy in the evidence of the P.Ws. for which their entire evidence can be disbelieved and there was also no such irregularity or illegality during investigation of this case for which the entire prosecution case is liable to be rejected.

28. It has been decided by the decision reported in Aman Kumar and Another Vs. State of Haryana, that it is well settled that a prosecutrix having been a victim of the offence of rape is not an accomplice after the crime ad there is no rule of law that her testimony cannot be acted upon without corroboration in material particulars and an attempt to commit rape 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. In this case in view of the evidence of P.W.2 it appears that the appellant/accused took some action which shows that he was determined to have sexual connection with her and as such that was a case of attempt to rape and not merely a case of indecent assault or outraging modesty of P.W.2.

29. It appears from the decision reported in 2002 SCC (Cri) 592 in the case Dilip and another Vs. State of M.P also that it is well-settled that the sole testimony of

the prosecution witness could be acted upon and made the basis of conviction without being corroborated in material particulars. In this case the evidence of P.W.2, though has not fully been corroborated by the medical evidence of the doctor concerned, whose reliability is not beyond doubt in view of his evidence and who made the medical examination of the P.W.2 without due care, yet has been corroborated by her parents and other witnesses, who are natural witnesses and to whom the incident was narrated.

30. It has been held by the decision reported in (2009) 3 SCC (Cri) 96 in the case of State of Uttar Pradesh Vs. Shobhanath and others that chances of false implication by related witnesses can be ruled out and the near relations would make all endeavour to see that the actual culprit is punished.

31. It has been held by the decision reported in Ashok Surajlal Ulke Vs. State of Maharashtra, that in a case of rape the fact that the FIR had been lodged after a little delay is of very little significance. In view of the circumstances of this case also any little delay in lodging the FIR is of very little significance.

32. It appears from the decision reported in 1992 SCC (Cri) 598 in the case of Madan Gopal Kakkad Vs Naval Dubey and another that in case of rape conviction can be based on the sole testimony of the prosecutrix without any corroboration if her testimony is otherwise worthy of credence. In this case it appears that there was no reason to disbelieve the evidence of P.W.2, which was also corroborated by the evidence of her parents and others.

33. It also appears that in view of the said offence that taking advantage of the loneliness of the P.W.2 and the advantage of her tender age the appellant/accused attempted to commit rape upon her actually making preparation for that intending to commit rape, the sentence imposed upon him by the learned Trial court was not at all improper or unjust or excessive.

34. Having regard to the submission of the learned counsel for the parties, evidence, materials on record and other circumstances it appears that the prosecution case that the appellant/accused actually attempted to commit rape upon the P.W.2 on the alleged date, time and place has been proved by sufficient reliable evidence beyond all reasonable doubt and as such the learned Trial court was legally correct in his finding that the appellant/accused has committed the said offence, and was fully correct and legally justified in passing the said order of conviction and sentence against the appellant/accused for the offence under Sections 376/511 of the Indian Penal Code, and such offender being a menace to the society should be punished sufficiently and as such there is no reason to interfere with the said finding of the learned Trial Judge. The appeal is without any merit and it fails.

35. Accordingly, the instant appeal bearing CRA No.138 of 1986 is dismissed. The said judgment of conviction and sentence affirmed.

36. The appellant is directed to surrender before the learned Trial court within

one month from the date of communication of this order to serve out the sentence awarded by the learned Trial court for the offence punishable under Sections 376/511 of the Indian Penal Code. The learned Trial court is directed to secure his presence according to law for serving out the sentence if the appellant fails to surrender within the aforesaid one month. The said fine amount of Rs.2000/-, if realised, be paid to the said victim girl as compensation.

37. Let a copy of this judgment along with the Lower Court Record be sent to the learned Trial court immediately for information and necessary action. Urgent photostat certified copy of this judgment be given to the parties, if applied for, on compliance of necessary formalities.