
(2009) 03 DEL CK 0196
In the Delhi High Court
Case No : Criminal A. No. 40 of 2009

Sumit Gupta

APPELLANT

Vs

State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 374, 428
Penal Code, 1860 (IPC) — Section 354, 376, 506

Citation : (2009) ILR Delhi 10 Supp

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : V.K. Shukla, for the Appellant; Lovkesh Sawhney, for the Respondent

Final Decision : Allowed

Judgement

G.S. Sistani, J.—The present appeal has been filed u/s 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, "Cr.P.C."). The appellant has impugned the judgment dated 22.12.2008 and order on sentence dated 03.01.2009, passed by the Additional Sessions Judge, Delhi, in Sessions Case No. 25/06, FIR No. 244/04, Sections 376/506 of the Indian Penal Code, 1860 (hereinafter referred to as, "IPC"), Police Station, Welcome. By virtue of the above said judgment dated 22.12.2008 the appellant was found guilty of the offence of rape. Vide order on sentence dated 03.01.2009, the appellant was sentenced to undergo Imprisonment for a term of seven (7) years for the offence punishable u/s 376, IPC. Out of this total period of seven years, the appellant was to undergo two (2) years of Rigorous Imprisonment (hereinafter referred to as, "R.I.") and five (5) years of Simple Imprisonment (hereinafter referred to as, "S.I."). The appellant was also to pay a fine of Rs. 2,000/-, and in default of the payment of fine, to undergo S.I. for fifteen (15) days. Further, the appellant was found guilty of the offence u/s 506, IPC and sentenced to undergo six (6) months of Imprisonment, out of which the appellant was to undergo fifteen (15) days of R.I. and the rest of the term as S.I. It was also held that the benefit of Section

428, Cr.P.C. be given to the appellant, and out of this period, half of the sentence be counted against RI and half against SI. Both the sentences awarded u/s 376 and 506, IPC were to run concurrently.

2. Brief facts of the case as noted by the trial Court are that:

On the night of 30.7.2004 (mid-night) when prosecutrix [name withheld] was sleeping on the roof of her house with her family members, accused gagged her mouth and brought down her to his room, down stairs. Accused bolted the door from inside and after opening the cord of the Salwar of the prosecutrix committed rape with her. Further, accused had threatened and intimidated her in case she disclosed about the incident to her parents. In the meantime, her parents started the search of their daughter, prosecutrix. Father of the prosecutrix got spared his daughter from accused. Thereafter, the matter was reported to the police, accordingly a DD entry was got made. On receipt of DD No. 34A Ex.PW- 6/A, ASI Raj Pal Singh and Ct. Bhagat Singh proceeded to the house of prosecutrix. On reaching there prosecutrix and her parents met them. They produced the accused Sumit Gupta with the alleged history of rape committed with the prosecutrix. Statement of prosecutrix, Ex.PW-2/A was recorded and after making endorsement vide Ex.PW-6/B ASI Raj Pal Singh sent rukka to the Police Station through Ct. Bhagat Singh for the registration of the case. In the mean time, spot was inspected and site plan vide Ex.PW-6/C at the instance of prosecutrix was prepared. After sometime Ct. Bhagat Singh came back to the spot with copy of FIR and original rukka. One lady constable also reached there.

3. The prosecution has examined thirteen (13) witnesses whereas two witnesses have been examined by the defence. The statement of the appellant was also recorded u/s 313, Cr.P.C. wherein he denied all the allegations levied against him and stated that he had been falsely implicated in this case.

4. The First Information Report recorded at the instance of the prosecutrix reads as herein, "[o]n 2nd floor Sumit Gupta resides with his brother Manish Gupta as tenant. We also live in this house as tenant. Due to having failed in class 9th and illness my parents had discontinued my studies and had got my name struck off my name from the school. Sumit Gupta used to have roving eyes towards me and used to make signals many a times about which I had told my parents, who had scolded him many a times. Due to summer season, I along with my parents and brother was sleeping upon the roof of the house. Sumit Gupta also sleeps on the roof about which my parents had asked him not to sleep on the roof of the house who had said that he too is a tenant in this house. In the night of 29/30.7.2004 I was sleeping on the roof along with my parents and brother and on the roof of this house Sumit Gupta was also sleeping. At about 12:45 AM in the night I felt that somebody was waking me up and my eyes suddenly opened, then I saw that Sumit Gupta is standing nearby cot. I immediately tried to raise alarm then Sumit Gupta closed my mouth by keeping his hand on my mouth and whispered in my ear bringing his mouth near it and said that if you will raise an

alarm then I will kill you. Sumit Gupta closing my mouth, brought me forcibly from the roof of the house to 2nd floor, threw me on the bed and taking out my salwar raped me forcibly and told me that if I tell about this to my parents then he will kill me and after opening the latch he turned me out of the room. Holding my salwar I came to my parents and told them everything. My parents apprehended Sumit Gupta and my father made a call upon phone No. 100...."

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

6. PW-1, Sh. Satish Jain (father of the prosecutrix) has deposed that on 29.7.2004, in the night time, he was sleeping on the roof of his house. His daughter (prosecutrix) (name withheld) aged 17 years was also sleeping on the roof. PW-1 deposed that he was a tenant in the said house on the ground floor and that the appellant was a tenant on the second floor of the house. His younger daughter (name withheld) told his wife that the prosecutrix was not available on her bed and his wife woke him up. He went down stairs to see if the prosecutrix had gone to the toilet. He could not trace the prosecutrix. PW-1 further deposed that his son was with him. The appellant asked his son as to what had happened. His daughter was in the room of the appellant. The appellant spared his daughter and the prosecutrix came out holding her "salwar". His daughter (prosecutrix) told him that she had been raped by the appellant to which she had resisted but the appellant did not agree. PW-1 further deposed that his daughter told him that the appellant had raped her in his room and thereafter he informed the police. In cross-examination by learned Counsel for the appellant, PW-1 deposed that the house is three storeyed and the appellant used to live on the second floor and that he used to live on the ground floor. PW-1 further deposed that "[m]y entire family was sleeping on the roof as it was summer season. Accused alone was sleeping on the roof Accused used to live with his brother." PW-1 deposed "[m]y statement was not recorded by the police. I had told the police that rape was committed by my daughter. I did not tell that my daughter was teased by the accused." PW-1 denied the suggestion that his daughter (prosecutrix) went to the room of the appellant of her own accord.

7. PW-2, the prosecutrix, deposed that on 29.7.2004, she was living in Gorakhpark on the ground floor of the house and that the appellant alongwith his brother Manish used to live on the second floor of the same house. PW-2 deposed that the appellant used to stare her and her father had rebuked him a number of times. On the day of incident she was sleeping on the roof of the house with her family members. She was sleeping on a cot. PW-2 deposed that she felt that someone was standing nearby her cot and the appellant was standing there. The appellant gagged her mouth and took her down stairs to his room. The appellant bolted the door from inside, opened her salwar and raped her. She went upstairs holding her salwar and informed her parents. Tinku and her father were on the roof. The appellant threatened her that in case she disclosed about it to her parents, he will kill her. PW-2 deposed that her parents

called the police. Her statement, Ex.PW-2/A was recorded by the police and which bears her signatures at point "A". She was got medically examined. PW-2 also identifies her "salwar", Ex.P-1 as the same which she was wearing at the time of the incident. In her cross-examination by learned Counsel for the appellant, PW-2 deposed that the police reached their house within five minutes. She told the police about the rape. The police recorded her statement there and she signed the same. PW-2 deposed that it was correct that she was on speaking terms with the appellant before the incident. She was sleeping on the roof by the side of her father. She was sleeping in between her parents. PW-2 further deposed that she did not raise any alarm because the appellant had threatened that if she wakes up her parents, he will kill her. PW-2 deposed that she did not raise any alarm from the roof till reaching the room of the appellant. At this stage a question was put to PW-2, and which is reproduced below:

Q. When the accused opened the cord of your salwar why you did not cry at that time?

The question asked thrice but the witness did not reply.

8. PW-2 further deposed that it was wrong to suggest that she had gone with the appellant at her own consent and when she was coming out of his room, she found her father awake and as such she narrated a false story of rape to her father. PW-2 denied the suggestion that the appellant had not committed rape with her or that she had been deposing falsely.

9. PW-3, Poonam Jain, wife of Sh. Satish Jain, (mother of the prosecutrix) deposed that on the intervening night of 29.07.2004 and 30.07.2004, she was living in the aforesaid house on the ground floor and the appellant was living with his brother on the second floor of the house. PW-3 deposed that she along with her husband and other family members were sleeping on the second floor's roof. Her daughter (prosecutrix) aged 16 years, was also living with them on the roof on a cot and the appellant was also sleeping on the roof. At about 12.00 p.m. and 12.30 p.m. the appellant came near the cot of her daughter and took her to his room after gagging her mouth. Appellant removed the Salwar of her daughter and also removed the clothes and committed rape with her daughter. Her younger daughter, namely, Shikha Jain, woke up and told her that that the prosecutrix was not on her cot. They searched for the prosecutrix in the toilets and then she heard the noise of Sumit who asked her son Tinku as to what had happened. Her daughter came out from the room of the appellant. The prosecutrix told her that she was raped by the appellant and her husband informed the police. Her daughter (prosecutrix) was got medically examined and the report was lodged by her with the police.

10. In her cross-examination by learned Counsel for the appellant, PW-3 deposed that she and the appellant were tenants in the house. Achal Jain with his wife Kusum and Manoj Jain with his wife Madhu Jain, were also living as tenant in the said house. She further deposed that when her [younger] daughter woke her up,

she came to know that the prosecutrix is not on her cot. PW-3 denied the suggestion that her daughter was in love with the appellant or that they wanted to marry or that the appellant was not agreeable to them and for any such reason he has been falsely implicated in the case.

11. PW-6, ASI Raj Pal Singh, P.S. Welcome, deposed that he was posted as ASI at Welcome. On receipt of DD No. 34A, he joined Ct. Bhagat Singh in the investigation of this case. He recorded the statement of the prosecutrix, Ex. PW2/A, and obtained her signature at point A after the same had been read over to her. He made his endorsement, Ex.PW6/B, and sent rukka to the Police Station. PW-6 further deposed that he interrogated the appellant and arrested him vide arrest memo Ex.PW-4/B and conducted his personal search vide memo Ex.PW4/C. In his cross-examination by learned Counsel for the appellant, PW-6, deposed that he recorded the statements of prosecutrix and her parents only. He did not record the statement of any other neighbour or inmate of the building either on the date of occurrence or thereafter. PW-6, further deposed that he had not seized the bed sheet of the room in which the incident was alleged to have taken place.

12. PW-10, Dr. S. Kohli, CMO, GTB Hospital, deposed that he has seen the MLC exhibited as Ex.PW6/E, which was prepared by Dr. Subhash and that he identified the handwriting and signature of Dr. Subhash at point A on the MLC. PW-10 deposed that as per the opinion given by Dr. Subhash there was nothing to suggest that the patient could not perform sexual intercourse. In his cross-examination by the counsel for the appellant, PW-10 deposed that as per the MLC, semen sample could not be produced and only blood sample was handed over to the Constable in a sealed cover.

13. PW-11, Dr. Seema Sharma, Sr. Gynae, GTB Hospital, Delhi has deposed that on 30.07.04, during her posting as a Sr. Gynae, she had examined the prosecutrix, daughter of Satish Jain, brought by Constable Kamlesh at about 6:30 a.m. with an alleged history of sexual assault. PW-11 deposed that "on examination there was no mark of injury was present. On local examination hymen was intact, no sign of bleeding was found. I advised her for x-ray bony age. Smear from vulvae are taken and two glass slides alongwith the undergarments in sealed parcels were handed over to the police." PW-11 deposed that the MLC, EX. PW-6/D which was already exhibited, was in her handwriting and bears her signature and is correct. In her cross-examination by learned Counsel for the appellant, PW-11 deposed that "[According to this MLC there was no sign of rape found on the person of the [prosecutrix]]".

14. DW-1, Ms. Madhu Jain, w/o Manoj Jain, (tenant in the said building) deposed that in July, 2004, prosecutrix was residing in the house with her father as a tenant on the ground floor, she was a tenant on the first floor and the appellant was a tenant on the second floor. DW-1 deposed that she was sleeping during summers on the roof of the house on the night of 29/30.07.2004. She woke up by hearing the noise and saw that the father of the prosecutrix was scolding his

daughter as to where was she going in the night and if she was going to the room of the appellant and thus the prosecutrix could not reach the room of the appellant. Prosecutrix and her father were also sleeping on the roof. Prosecutrix was a girl of unstable mind. She used to enter in the rooms of male persons and on two or three times had entered in the room of his brother-in-law (Jeth) who had turned her out from his house. She further deposed that Sumit had no affair with prosecutrix as per her knowledge and no incident of rape or alleged rape or molestation by Sumit with prosecutrix had taken place on the night of 29/30.07.2004. She also deposed that the incident may be between 1.30 to 2.00 a.m. of the night. The police had not taken her statement. In her cross-examination by the counsel for the State, DW-1, deposed that all the tenants were sleeping on the top of the roof. DW-1, voluntarily deposed that the appellant was sleeping in the room but not on the roof. DW-1 stated that the appellant occasionally slept on the roof top. DW-1 further deposed that when the appellant was arrested by the police in the present case, she did not go to the police station to tell the SHO that the appellant was falsely implicated by the police in the present case. She voluntarily further deposed that as nobody had asked her to come to the police station or to enquire from her. However, she denied the suggestion that she was deposing falsely to save the appellant from prosecution of the present case. She further denied the suggestion that appellant was not having a good character and he was in the habit of teasing the prosecutrix on earlier occasion also.

15. DW-2, Ms. Kusum Jain, w/o Sh. Achal Kumar Jain, deposed that the appellant was her tenant in the year 2004. She further deposed that she used to frequently visit the above house and that Madhu Jain is her Bhabhi. DW-2 deposed that she knew the appellant Sumit since childhood and he was a boy of very good character. She used to go in the above house almost daily and at times she used to stay there in the night also. On the night of the incident i.e. 29/30.07.2004, she was sleeping in the house of her Bhabhi. She further deposed that on that date she and her Bhabhi were sleeping on the roof and that she had not seen any incident of the prosecutrix coming out of the room of the appellant on that night. She woke up after hearing the commotion and noise of the voice of father of the prosecutrix, scolding her as to where was she going in the middle of the night. The time was nearly 12 in the night. DW-2 deposed that the father of the appellant on his own called number 100 from the phone of a neighbour in spite of their telling him not to do so. DW-2 further deposed that the prosecutrix is of unstable mind and mentally not fit and that she used to go on her own to any place or any where. The appellant had no affair with the prosecutrix and had never tried to molest her. DW-2 has denied that on the night of 29/30.04.2009 the appellant had made any attempt either to molest or rape the prosecutrix in his room.

16. In her cross-examination by the learned Counsel for the State, DW-2 deposed that the appellant was mentally unstable and was getting treatment from GTB Hospital, and this was told to her by the mother of the prosecutrix. She

denied the suggestion that she was deposing falsely to save the appellant as he belonged to her native village. She further denied the suggestion that she did not stay at her premises during the night of 29/30.04.2004. She further deposed that she did not go to the police station and told the SHO that the appellant has been falsely implicated in the present case. She voluntarily deposed that the policeman who had arrested the appellant had made an enquiry from her and she had told him that the incident of alleged rape was false.

17. Learned Counsel for the appellant submits that both the judgment and the order on conviction passed by the learned ASJ are perverse, arbitrary and based on whims, conjectures and possibilities. In fact the appellant has been convicted in the absence of any evidence against him and the judgment is against law and facts of the case. It is the case of the learned Counsel for the appellant that the prosecutrix has alleged that when she was sleeping in-between her parents and beside her sister and brother on the roof of the third floor of the house measuring thirty seven sq. ft., and where other inmates of the house were also sleeping, therefore it was not possible for the appellant, to wake her up, gag her mouth and take her to his second floor rented tiny accommodation. More so, when there is no allegation of holding of any weapon by the appellant.

18. Learned Counsel for the appellant submits that if it is assumed that the incident actually took place, then the prosecutrix could have raised an alarm, or could have shouted and cried for help. Further if she was being taken by the appellant to his second floor room, then while going there also she could have raised an alarm, or the prosecutrix could have even raised an alarm inside the room. The threat by closing the mouth is imaginary and is not possible. Learned Counsel submits that as per the statement of the mother of the prosecutrix, the younger brother of the appellant, Manish was also in the room where the prosecutrix was allegedly taken. However, there is no possibility that a person would dare to commit rape with a girl in front of his own real younger brother.

19. It was next contended by learned Counsel for the appellant that except the parents of the prosecutrix, the I.O. did not examine any other inmates of the building who were also sleeping on the roof on the night of the alleged incident. So much so that he did not even examine the brother and sister of the prosecutrix, nor were they produced in the Court. Similarly, the brother of the appellant was not examined. The FIR of this case was lodged on the basis of the oral testimony of the prosecutrix, yet her statement was not recorded u/s 164, Cr.P.C., which clearly establishes that the report was lodged only at the instance of the father of the prosecutrix. It is stated that a possibility cannot be ruled out that the father of the prosecutrix was holding a grudge against the appellant and thus wanted to implicate him. He submits that though the intimation over the phone to the police was about teasing, which was duly recorded by the police in its D.D., but by the time the girl was taken to the Police Station, a rape case was registered against the appellant, which was clearly an afterthought of the father of the prosecutrix.

20. Learned Counsel for the appellant submits that even if the story of the offence of rape is true, then the prosecutrix may have also resisted and there should have been signs of resistance and injuries. However, in the instant case, no injuries or even bruises were found on the person of the prosecutrix or on the appellant herein. In the medical examination, the hymen of the prosecutrix was found intact and PW-11, the doctor, in her statement before the Court, completely ruled out the possibility of rape. Furthermore, the underwear of the prosecutrix and the half pant worn by the appellant along with vaginal smears slides were sent for examination and were found negative for semen. There was only a "salwar", allegedly worn by the prosecutrix, which was found positive for semen. Learned Counsel for the appellant submits that the Apex Court in the case of *Sadashiv Ramrao Hadbe Vs. State of Maharashtra and Another*, has held that presence of semen on even the undergarment could only raise some suspicion on the conduct of the appellant, and when no injury is found on the body or private part of the prosecutrix, the appellant was entitled to acquittal. It is contended by the learned Counsel that the undergarments of the prosecutrix were not found positive for semen and as such a finding that the "salwar" was found positive for semen, has no significance in light of the fact that the girl was living with her married mother and the "salwar" could have been worn inadvertently or may be deliberately, semen was put on the "salwar" at the instance of the father of the prosecutrix, so as to falsely implicate the appellant.

21. Learned Counsel for the appellant has further assailed the judgment on the ground that neither there is any allegation by the prosecutrix nor has the doctor opined that there was any penetration or even an attempt of penetration by the appellant. Whereas, to constitute an offence of rape, penetration is sine qua non. The Apex Court in the case of *Aman Kumar v. State of Haryana* reported at 2004 SCC (Cri.) 1266 has held that if in the evidence of the prosecutrix or Doctor, there is no specific mention of penetration, then the offence of rape is not made out. Moreover, the independent witnesses (DW-1 and DW-2) have clearly stated that no such incident of rape/molestation had ever taken place. The prosecutrix and her parents were examined and there are major contradictions in the three statements of PW-1, PW-2 and PW-3, which itself show that no such incident, as alleged, had taken place.

22. Per Contra, learned Counsel for the State submits that the case against the appellant has been established beyond any shadow of doubt. Learned APP submits that it is not necessary that the victim should have raised an alarm when the appellant came near her cot, for the reason that different persons react differently in such a situation, especially when the appellant had threatened her that if she would raise an alarm, he will kill her. It is contended by him that the version of the prosecutrix, that rape was committed upon her by the appellant, is duly supported by the evidence of her mother and father. There is no requirement that the victim should have described the incident in detail, to show that how she had been raped. Furthermore it is submitted by him, that it is not necessary that in all cases of rape, rupture of hymen takes place. There is

scientific evidence to show the presence of semen on the "salwar" of the girl. Learned APP submits that the sole statement of the victim can be the basis of conviction and to look for corroboration is only a rule of prudence and even otherwise also medical evidence is only an opinion. He relies upon the case of Anil Kumar Vs. State of U.P., in support of his plea that in case oral evidence is credible and cogent then medical evidence cannot be relied upon.

23. The arguments of learned Counsel for the appellant can be summarized as under:

(1) The allegations of rape are false. The surrounding circumstances belie the case of rape set up by the prosecution.

(2) As per the MLC no rape was committed on the victim.

(3) Medical and scientific evidence do not support the case of the victim.

(4) The prosecutrix has not alleged any penetration by the appellant or even an attempt of penetration.

(5) The independent witnesses DW-1 and DW-2 have clearly stated that there is no incident of rape, which took place on the fateful night.

24. The argument of learned APP for the State can be summarized as under:

1. The evidence of the prosecutrix is reliable and does not require any corroboration.

2. The evidence of the victim is duly supported by the evidence of her parents.

3. It is not necessary to describe the incident in detail and medical evidence is only an opinion.

25. In this case, the prosecutrix along with her family members, used to live as a tenant on the ground floor of a three storey building. On the midnight of 30.07.2004, the prosecutrix was sleeping on the roof of the said tenanted building, along with her family members i.e. her mother, father, sister and younger brother. Other tenants of the very building were also sleeping on the roof of the said house. While the prosecutrix was sleeping on the cot, she felt that someone was standing near her cot. She found the person to be the appellant, who threatened her to not raise any alarm. Thereafter, the appellant gagged her mouth, took her down-stairs to his room, bolted the room from inside, opened her "salwar" and raped her. The examination-in-chief of PW-2, the prosecutrix is reproduced below:

[o]n 29.7.2004, I was living in Gorakhpark on the ground floor of the house. The accused alongwith his brother Manish used to live on the second floor of the same house. The accused used to stare at me and my father rebuked him a number of times. On the day of incident I was sleeping on the roof of the house with my family members. I was sleeping on a cot. I felt that someone was standing near my cot. The accused present before the Court was standing there.

He gagged my mouth and took me down stairs. He took me to his room. He bolted the door from inside. He opened my salwar and raped me. I went upstairs holding my salwar and informed my parents. Tinku and my father were on the roof. The accused threatened me that in case I disclosed about it to my parents, he will kill me. My parents called the police. My statement, Ex.PW-2/A was recorded by the police which bears my signatures at point "A". I was got medically examined.

26. In the case of Madho Ram and Another Vs. The State of U.P., , the Apex Court observed that:

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

It would also be useful to reproduce the observations of the Supreme Court in the case of State of Punjab Vs. Gurmit Singh and Others, . Regarding a rape victim the Apex Court held:

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

21. ...It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember

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

22. ...The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.

27. Thus in the case of State of Punjab (supra), the Apex Court has observed that the court should be sensitive while dealing with a case involving sexual molestation. Rape is not merely a physical assault, it is often destructive of the whole personality of the victim. A word of caution has come to ensure that during cross-examination when the victim is required to repeat again and again the details of the rape incident, the Court should not sit as a silent spectator, to allow the victim to be harassed, humiliated, while she is asked to repeat her traumatic experience. In the same vein the Apex Court has also held that every

latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination. There is no quarrel with the proposition of law that a victim of rape is not an accomplice; her testimony can be acted upon without corroboration in material particulars; a victim of rape is treated at a higher pedestal than an injured person; and a conviction in a rape case can safely be awarded on the sole testimony of the prosecutrix. But the caveat here is that her version should also be reliable, trustworthy and should inspire confidence and in case the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony. Coming to the facts of this case, it is observed that a bare reading of the testimony of PW-2, prosecutrix would show that on the fateful night, she was sleeping in-between her parents, when the appellant allegedly woke her up, gagged her mouth and took her down-stairs to his room. In my considered opinion, the testimony of the prosecutrix is unreliable and unbelievable and the whole incident seems to be highly improbable. On the fateful night, the victim was admittedly sleeping on the roof by the side of her father and in-between her parents. Other family members and tenants were also sleeping on the roof. The roof of the plot measured at about 37 sq. feet, so there cannot be much distance between the cots of persons sleeping on the roof. In this backdrop the version of the victim is that the appellant was standing near her cot in the night, gagged her, took her down stairs and thereafter raped her. The version of the victim is also that she did not raise an alarm on her being woken up and taken downstairs from the roof where she was sleeping in the presence of her entire family.

28. To a question put to PW-2, prosecutrix, no reply was given by her. The question reads that:

Q. When the accused opened the cord of your salwar, why you did not cry, at that time.

A. The question was asked thrice, but the witness did not reply.

29. At any stage, the prosecutrix did not raise any alarm or cried for help, except after the alleged rape had been committed upon her. As per the version by the prosecutrix, after she had been raped by the appellant, she came to the roof, and informed her parents about rape having been committed upon her. PW-2 stated:

He opened my Salwar and raped me. I went upstairs holding my salwar and informed my parents. Tinku and my father were on the roof.

30. It is pertinent to note that although PW-1, father of the prosecutrix has supported the case set up by the prosecution, but there is a material contradiction between the version given by PW-1 (father of the prosecutrix) and PW-2 (prosecutrix) with regard to the fact as to when did he get to know about rape. Relevant portion of the testimony of PW-1 is reproduced hereunder:

The accused asked my son Tinku as to what had happened. My daughter was in the room of the accused. He spared my daughter and she came out holding her

"SALWAR". My daughter told me that she had been raped by the accused which she had resisted but the accused did not agree.

31. In her cross-examination by learned Counsel for the appellant, PW-2 has stated:

I was sleeping on the roof by the side of my father. I was sleeping in between my parents. I did not raise alarm because accused had threatened, if I woke up my parents, he will kill me. I did not raise any alarm from the roof till reaching the room of the accused.

32. Thus it is seen that in the cross-examination, the prosecutrix says that she did not raise any alarm because the appellant had threatened her that if she woke up her parents, he would kill her. It has been submitted by the learned Counsel for the State that different people react differently in similar situations. Be that as it may, according to the version of the prosecutrix, she got so scared by the alleged threat extended by the appellant, that instead of crying for help, she got up from her cot and quietly went to the room of the appellant. I find the version of the prosecutrix to be absolutely unnatural and false on account of the fact that she being a matured sixteen year old girl, sleeping in-between the comfort and safety of her parents, got scared by the alleged utterance of an unarmed person that she ought to go with him, else she would be killed. Even if the prosecutrix had voiced a single word or even whispered, her father and mother sleeping next to her would have woken up or, other family members of the prosecutrix who were also sleeping on the same roof may have woken up. Even if that may not be so, other tenants of the said building, who were also sleeping on the roof of the said building, may have woken up. According to DW-1, Ms. Madhu Jain, w/o Manoj Jain (a tenant in the same building), in July, 2004, the prosecutrix was residing in the house with her father as a tenant on the ground floor, and that she was a tenant on the first floor and the appellant was a tenant on the second floor. DW-1 has deposed that on the night of 29/30.07.2004, she was sleeping on the roof of the building as it was summer season. And that the prosecutrix and her father were also sleeping on the roof. She woke up by hearing some noise and saw that the father of the prosecutrix was scolding his daughter as to where was she going in the night. DW-1 has stated that the prosecutrix was a girl of unstable mind and she used to enter the rooms of male persons and earlier, two or three times, she had entered in the room of her brother-in-law (Jeth) who had turned her out. DW-1 has further deposed that the appellant had no affair with the prosecutrix and as per her knowledge, no incident of rape or molestation by the appellant had taken place on the night of 29/30.07.2004. She also deposed that the police had not taken her statement.

33. DW-2 (land-lady), Ms. Kusum Jain, w/o Sh. Achal Kumar Jain, deposed that the appellant was her tenant in the year 2004. According to DW-2, she knew the appellant since childhood and he was a boy of very good character. She further deposed that she used to frequently visit the above house and at times she also

used to stay there in the night. On the night of the incident i.e. 29/30.07.2004, she was sleeping along with DW-1 on the roof of the said building and that no such incident of rape had taken place. In her cross-examination DW-2 has deposed that the prosecutrix was of unstable mind and that she used to go on her own to any place or anywhere. And that the prosecutrix was getting her treatment done from GTB Hospital, and this fact was told to her by the mother of the prosecutrix. DW-2 denied the suggestion that she was deposing falsely to save the appellant and further denied the suggestion that she did not stay at her premises during the night of 29/30.04.2004.

34. In the case before me, both DW-1 and DW-2, who along with the prosecutrix and her family members were also sleeping on the small roof of the said building, have completely denied the happening of any incident of teasing by the appellant, much less that of rape. Rather they have gone on to say that the prosecutrix, was of unstable mind. It would be relevant to note that in the case of State of Haryana Vs. Ram Singh, the Apex Court has held that defence witnesses are entitled to the same weight as that of prosecution witnesses. The Court observed:

Incidentally, be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses on a par with that of the prosecution.

35. The two defence witnesses, were cross-examined at length, but they did not budge from their stand that the appellant was innocent and have withstood the cross-examination.

36. For the reasons stated above, I do not find the version of the prosecutrix to be reliable, hence the appellant cannot be convicted solely on the testimony of the prosecutrix. I would not hesitate to add herein that in such circumstances where the testimony and the version of the prosecutrix are difficult to accept, the Court must look at evidence which may at least lend assurance to the testimony of the victim. In the judgment of the trial court various judgments of the Apex Court have been noticed, but reluctantly, I am compelled to notice that while referring to and reproducing the portions of the judgment(s), the learned trial Judge has failed to apply the same to the facts of this case. While relying solely on the testimony of the prosecutrix the Court is duty bound to examine such testimony minutely, carefully and with great caution and if there is any doubt the Court must immediately look for corroboration (corroboration from witnesses, medical evidence or other scientific evidence). This is the precise situation in this case.

37. According to PW-11, Dr. Seema Sharma, a senior gynaecologist of GTB Hospital, who had prepared the MLC Ex.PW-6/D of the prosecutrix, there was no mark of injury present on the person of the prosecutrix, when she had examined

her. PW-11 has further testified that on local examination she found the hymen of the prosecutrix to be intact and there were no signs of any bleeding being found. The original MLC Ex.PW-6/D of the victim reads, "No mark of injury or love bite on body. Hymen intact No tear or bleeding." In her cross-examination, PW-11 deposed that according to the MLC, no sign of rape was found on the person of the victim. It is also of significance in this case, that the half pant of the appellant, underwear of the appellant and the prosecutrix, and the vaginal smear slides of the prosecutrix were sent for chemical examination to the Forensic Science Laboratory (FSL). However, except the "salwar" of the prosecutrix, which had tested positive for semen, the glass slides, the half pant and the underwear of the appellant as well as that of the prosecutrix, all were found negative for semen test. In the case of *Yerumalla Latchaiah v. State of M.P.* reported at (2006) 9 SCC 713, the Apex Court allowed the appeal of the accused on the ground that the evidence of the prosecutrix was belied by the medical evidence. In *Yerumalla Latchaiah* (supra) the age of the victim was 8 years at the time of the alleged incident. The victim was examined by the doctor, and who stated in her evidence that no injury was found on any part of the body of the victim much less on her private parts. Hymen was found intact and the doctor had stated that there was no sign of rape. In the medical report it was stated that vaginal smears were collected and examined microscopically, but no sperm was detected. The Apex Court, finding the evidence of the victim unreliable, acquitted the appellant. In view of the observations of the Apex Court, and reading them in the light of the facts of the case before me, I find the medical evidence as well as the forensic evidence, completely negating the version of the prosecutrix.

38. Penetration in a rape is a *sine qua non* for the establishment of the offence. Although it has been held that complete penetration with emission of semen and rupture of hymen is not necessary. A slight penetration in vulva with or without violence is also sufficient to constitute the offence of rape. It would be useful to refer the relevant portions of para 7 of *Aman Kumar and Another Vs. State of Haryana*, :

7. Penetration is the *sine qua non* for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see *Joseph Lines*, IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. See *Dr. S.P. Kohli, Civil Surgeon, Ferozepur Vs. High Court of Punjab and Haryana*, .

39. In the case of *Kanpur Electricity Supply Co. Ltd. Vs. Shamim Mirza*, the conviction of the accused was altered from Section 376, IPC to Section 354, IPC. In the statement of the victim, what was said, was that the accused had thrown her on the ground, put off his "pajama", lifted her "ghagra" and committed rape on her. In the medical examination it was found that there was absence of

injury on the private parts of the prosecutrix and the prosecutrix had also not specifically stated about the act of penetration, but had used the term that he committed rape on her. Thus it is seen that there are such instances wherein the victim has described the act of the accused as an act of rape upon her, however, a close reading of the evidence of the victim brought light the fact that though she had not been raped. This also stems from the fact that many a time, people do not understand the meaning of rape, and an act of molestation is loosely and casually described as an act of rape. It was held in *Premiya alias Prem Prakash* (supra) that on reading the evidence of the prosecutrix it was clear that the appellant had outraged her modesty but had not raped her. In the case of *Aman Kumar* (supra) it was observed: "[significantly, the evidence of the prosecutrix and the doctor does not specifically refer to penetration...." The purpose of referring to the case of *Premiya alias Prem Prakash* (supra) and *Aman Kumar* (supra) in the facts of this case is to highlight that where neither the evidence of the prosecutrix nor the doctor specifically refer to penetration, a further doubt is created that rape has not been committed. Rather in the case before me, the doctor has categorically opined that no signs of rape were found on the person of the prosecutrix.

40. In the case of *Sadashiv Ramrao Hadbe Vs. State of Maharashtra and Another*, , the Apex Court found the version of the prosecutrix unsupported by medical evidence and the surrounding circumstances belied the case set up by her. It would be useful to reproduce relevant paragraphs of the case.

6. We have carefully considered the evidence in this case. On a careful scrutiny of the entire evidence in this case, we are of the view that the prosecution evidence has so many contradictions and the whole incident seems to be highly improbable. The prosecutrix and her husband had been staying at a village about 30 km away from the clinic of the appellant. They came to the appellant's clinic and the prosecutrix after meeting the doctor with her child, again wanted to meet the doctor. She was allegedly taken to a room adjacent to the main room occupied by the doctor. This room was small in dimension and in the room there was a table which was having a height of 34 inches and breadth of 20 inches. The prosecutrix was asked to lie down on the table and, according to the prosecutrix, first the doctor meddled with her private parts and thereafter committed sexual intercourse. When the accused touched her private parts and inserted his fingers, she did not raise any objection, nor did she get up from the table. The prosecutrix has no case that she raised any objection by shouting or tried to get up from the table so as to prevent the assault on her. It may be noticed that so many patients were waiting outside and they could not have been far-off from the room wherein the prosecutrix was allegedly sexually assaulted by the appellant. She told that her mouth was closed by the appellant.

7. The doctor, who examined the prosecutrix at about 3 p.m., did not find any injury on her body. There was only swelling on the upper lip but the prosecutrix had no case that this swelling on the upper lip was caused during the course of

the incident. There were no injuries on her private parts and the doctor who had examined her was unable to give any opinion about the sexual intercourse allegedly taken place. It is important to note that vaginal swab was collected by the doctor and it was sent for chemical examination. Exhibit 43 is the pathological report and it shows that microscopic examination of the vaginal swab showed desquamated cervical cells and few co-oxalate crystals and fluid but no spermatozoa was found. The swab of vagina was taken on the same day and if any sexual intercourse had taken place in all probabilities, the vaginal swab would have contained some spermatozoa. The absence of these sperm casts a serious doubt on the prosecution version.

9. ...If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

10. In the present case there were so many persons in the clinic and it is highly improbable that the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able-bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbabilise the prosecution version.

12. It is true that the petticoat and the underwear allegedly worn by the appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some suspicion on the conduct of the appellant but not sufficient to prove the case, as alleged by the prosecution.

13. The Sessions Court as well as the High Court had not taken into consideration the absence of spermatozoa in the vaginal swab of the prosecutrix. It may also be noticed in the FI statement. In this case the prosecutrix had not given the full description of the incident allegedly taken place but when she was examined in court she had improved her version.

41. In the case of Sadashiv Ramrao Hadbe (supra), the prosecutrix, her husband and her small child had come to the clinic of the doctor (appellant therein) and the allegation was made that the doctor had raped her. The Sessions Court as well as the High Court had convicted the doctor. The Apex Court however observed that the surrounding circumstances of the case were such that the sole testimony of the prosecutrix could not be relied upon. It was also observed that since many persons were present in the clinic, it was highly improbable that the appellant would have made a sexual assault on the patient, who had come to him for her examination. The Court was of the opinion that it was highly

improbable that the prosecutrix could not have made any noise or get out of the room without being assaulted by the doctor. As per the medical evidence it was observed that there was no injury on the body of the prosecutrix or her private parts. The doctor, who had examined the prosecutrix, was unable to give any opinion about any sexual intercourse. Finding that the case set up by the prosecutrix was improbable and unlikely to happen, and besides that there were no injuries on her body, the Apex Court allowed the appeal.

42. The facts of the case of Sadashiv Ramrao Hadbe (supra) are somewhat similar to the facts of the present case at hand. Herein, the prosecutrix was sleeping in-between her parents on the small roof of her house measuring 37 sq. ft., where not only her family members were sleeping but also other tenants of the building were sleeping. It is highly improbable that the appellant threatened her and yet nobody heard him. The conduct of the prosecutrix is also doubtful keeping in view the fact that despite there being number of persons who were sleeping by her side and the appellant was unarmed, she did not raise any alarm. Rather as stated above, her version is unbelievable. There are contradictions between her version and that of her father. Moreover, it is questionable that she was raped in a room where the younger brother of the appellant was also sleeping. In the light of all this, it was imperative for the trial court to have looked for corroboration, in the form of medical and scientific evidence. As per the medical evidence given by PW-11, the doctor, no sign of rape was found on the person of the victim. The hymen of the victim was intact, there was no sign of any blood, and no marks or injuries were present over her body. In the scientific evidence no semen was found on the half-pant of the appellant or his underwear and no semen was found in the underwear of the victim as well. Semen was also not found in the vaginal smear slides sent for chemical examination. The only explanation possible for semen to have been found on the "salwar" of the victim is that she could be sharing the same with her mother, a married lady. Moreover, according to the Forensic Report, what has been stated is that the semen found on the "salwar" is of human nature, but that does not mean that the semen found was of the appellant. No semen sample of the appellant was collected to verify whether the semen on the "salwar" was of the appellant or not. It may be noticed that conviction in a false rape case casts a stigma on the character and reputation of an innocent man and causes suffering which is no less than suffering of a rape victim.

43. For the reasons aforesaid, I find no case having been made out against this appellant u/s 376/506, IPC. Accordingly, the judgment dated 22.12.2008 and order on sentence dated 03.01.2009, passed by the Additional Sessions Judge, Delhi, in Sessions Case No. 25/06, FIR No. 244/04, Sections 376/506, IPC, P.S. Welcome, Delhi, are set aside.

44. The appeal is allowed. The appellant, if in jail, be released forthwith, if not required in any other case.