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**(2009) 05 BOM CK 0038**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 192 of 1990**

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| The State of Maharashtra | Vs | APPELLANT  |
| Suresh Shankar Jadhav    |    | RESPONDENT |

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**Date of Decision :** 07-05-2009

**Acts Referred:**

Bombay Children Act, 1948 — Section 57  
Criminal Procedure Code, 1973 (CrPC) — Section 313  
Penal Code, 1860 (IPC) — Section 354, 375, 376, 376A, 376B  
Sexual Offences Act, 1956 — Section 44

**Citation :** (2009) 05 BOM CK 0038

**Hon'ble Judges :** Swatanter Kumar, C.J.; S.C. Dharmadhikari, J

**Bench :** Division Bench

**Advocate :** P.S. Hingorani, app, for the Appellant; M.K. Kocharekar, for the Respondent

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## Judgement

Swatanter Kumar, C.J.—The Accused Suresh Shankar Jadhav was charged for an offence punishable u/s 376 of the Indian Penal Code hereinafter referred to as the "Code" and Section 57 of Bombay Children Act, 1948. The learned Trial Court, vide its judgment dated 30th November, 1989, found the accused not guilty and acquitted him of the charge abovereferred.

The State being aggrieved from the said judgment of acquittal recorded by the Trial Court (IIInd Additional Sessions Judge, Satara) filed an application for leave to appeal which was granted by a Division Bench of this Court on 25th June, 1990. The case came up for regular hearing before another Division Bench of this Court and the Court, vide its Judgment dated 4th May, 2007 upheld the order of the Trial Court acquitting the accused of the offence punishable u/s 376 of the Code, however, convicted him for an offence punishable u/s 376 read with Section 511 of the Code as well as Section 57 of the Bombay Children Act. The Court sentenced the accused u/s 376 read with Section 511 of the Code to suffer rigorous imprisonment for a period of five years and to pay fine of Rs. 3,000/in default to suffer rigorous imprisonment for three months. The Court also

sentenced the accused u/s 57 of the Bombay Children Act to suffer rigorous imprisonment for two years and to pay fine of Rs. 1,000/in default to suffer rigorous imprisonment for one months. This judgment of the Court was assailed by the accused in appeal before the Supreme Court where the leave was granted and Criminal Appeal No. 1454 of 2007 was heard and the same was disposed of by passing the following order:

THE Appeal abovementioned being called on for hearing before this Court on the 22nd day of October, 2007, UPON perusing the record and hearing counsel for the parties herein, THIS COURT, inter alia, PASS the following ORDER:

XXXXX XXXXX XXXXX

Having heard the learned Counsel for the respective parties, we are inclined to remit the matter to the High Court for a fresh decision, but we also make it clear that the appellant before us shall be given a specific date by the High Court on which date he shall appear so that the matter can be taken up and disposed of. The impugned judgment is thus set aside on the aforesaid ground alone and the matter is remitted to the High Court for fresh consideration. The appeal is, accordingly, disposed of. Since the appellant has surrendered on 5th July, 2007 and there is an order of acquittal in his favour, he shall be set at liberty forthwith and the appeal may proceed before the High Court.

AND THIS COURT DOTH FURTHER ORDER that this Order be punctually observed and carried into execution by all concerned

2. Resultantly, upon remand, this Appeal has come up for hearing before this Bench. Various contentions have been raised, the merit or otherwise of which can be examined by this Court but before that, reference to the facts of case of prosecution would be necessary.

3. The case of the prosecution reflect that the victim, lodged a complaint with Vaduj Police Station on 11th August, 1987 stating that a person from her village by name Suresh Shankar Jadhav had committed rape on her at 1.30 p.m. Thereafter, First Information Report was recorded. This complaint came to be registered as Crime No. 78 of 1987 u/s 376 of the Code and Entry No. 18 was made in the Station Diary. The victim was examined during the trial as P.W.7 where she stated the facts which are quite in line with the complaint lodged by her. The prosecutrix was studying in 7th standard. Her father is a Tailor, brother Mahesh is a Painter and elder sister Manjusha was doing household work. According to her, on 11th August, 1987, she along with her brother and sister was going to Balubai Devi of Umbarda. She was going on cycle with her brother. They all met in the temple Balubai. They were returning while walking upto Umbarda, when Suresh Shankar Patil was coming from behind on his cycle. Brother of the prosecutrix asked Suresh Patil to carry her on his cycle. She was sitting on the bar of cycle and he had kept some books etc. on the carrier of the cycle. The accused instead of dropping the victim on the hillock of the road, carried her to his house. The house was locked. The accused asked her to wait

there with his books and went to bring key from his land. After nearly 5 to 10 minutes, he returned and after opening the lock, he entered into the house and called the victim and told her that he would provide her with groundnuts. She went to the house of the accused. According to the victim, the accused closed the door, caught hold of her, made her lie on the ground on the gunny bag, and after lifting her parkar, lowering her nicker and removing his pant, he inserted his penis in the private part of the victim. Because of this, there was bleeding from her private part. There was some whitish liquid and blood spread over on gunny bags and her clothes which were wiped out by the accused by using paper from exercise book and threw it near the door. Thereafter, he released the victim and opened the door. When the victim was wearing the clothes, her brother came. Her brother inquired from her as to what had happened. When the accused was asked by her brother, the accused told him that the victim was eating groundnuts in the house and then she went back with her brother to the house.

4. On reaching their house, her brother told her mother that something strange must have happened. Her mother asked her what was the matter and then she told about the incident to her mother. She even washed her clothes and in the evening she went to the Police Station with her mother to lodge the complaint. To prove this version of the victim, the prosecution examined 12 witnesses including the Investigating Officer, Doctor, the panchas, brother and mother of the victim and the victim herself, amongst other witnesses.

5. The learned trial Court had framed charge against the accused for committing an offence punishable u/s 376 of IPC and u/s 57 of the Bombay Children Act vide charge dated 23rd October, 1989 (Exhibit 3). Upon completion of the prosecution evidence, statement of the accused was recorded u/s 313 of the Criminal Procedure Code (Exhibit 4) wherein the accused stated that the prosecution story was false. Finally, the learned trial court came to the conclusion that the prosecution had failed to prove its case beyond reasonable doubt and consequently, acquitted the accused of both the offences. As already noticed, the State has preferred present appeal against the judgment of acquittal of which leave has been granted by the court. It is contended on behalf of the State that the learned trial court has ignored the relevant piece of oral as well documentary evidence. The evidence of the expert (Doctor PW 11) was in total contradiction to the other evidence and ought not to have been relied upon solely to acquit the accused. It is also argued in the alternative while relying upon the judgment of the Supreme Court in the case of *Premiya @ Prem Prakash v. State of Rajasthan* 2008 All MR (Cri) 3203 (SC) that the offence u/s 354 read with Section 511 had been proved and the learned trial court in any case should have convicted the accused for that offence. The statement of the prosecutrix was fully corroborated and supported by the statement of other witnesses i.e. Investigating Officer as well as the report of the Chemical Analyser (Exhibit 41). As such, there was no justification before the learned trial court to acquit the accused of a heinous crime like raping a minor girl. However, on the other hand, it is contended while relying upon *Ghurey Lal v. State of U.P.* 2008 All MR (Cri.) 2873 on behalf of the

respondent accused that in case of an acquittal, normally the Appellate Court should not interfere. It is also contended that there was expert and other evidence which has been rightly taken note of by the learned trial court in addition to the fact that the FIR itself was lodged after great delay and that justifies the acquittal of the accused and as such this Court should not interfere in the finding of the judgment under appeal.

6. At the very outset, we may look into the reasons recorded by the learned trial court for acquitting the accused. While making reference to the statements of the victim and other witnesses, it placed great emphasis on the evidence of PW11 Dr. Ashok Jagannath Pawar who stated that there has to be injuries on the body and private parts of the victim and it was difficult to admit small finger in the private part of the victim and pain has to be there where penis penetrated in a private part by force and there has to be rupture of the hymen which was not noticed by him during the medical examination. While relying upon the judgment of Ramdas Bhikaji Chaudhari Vs. Sadanand and Others, and particularly referring to the evidence of the doctor, the trial court observed:

If we see evidence of doctor, who examined complainant, it is quite contrary to the evidence of complainant that accused committed rape on her by inserting his penis in her private part completely. It is submitted that witnesses may lie, but the circumstances do not. If, there was profused bleeding from the private part of the complainant, injuries bound to occur on the private part as stated by doctor. When there was no such injuries, there must be bleeding from her private part. Further, it is submitted that vagina cavity was of small and it was difficult to admit a small finger.

7. The Court also noticed that the Investigating Officer had not taken the victim to the Public Health Centre which was only at the distance of one furlong from the Police Station and had taken the victim to Satara Civil Hospital. Primarily based on these two factors, the Court recorded judgment of acquittal.

8. We are unable to accept the reasoning recorded by the learned trial court for variety of reasons which we shall shortly discuss in some detail. The victim was examined as PW7 and her statement is at Exhibit 22. The court noticed that the witness was studying in the 7th standard and was aged nearly 13 years. After asking her some formal questions, her statement was recorded. She stood by her version as given in the FIR Exhibit 23 and stated that on asking of her brother, the accused had made her to sit on the rod of the cycle and instead of dropping her at the house at Hillock, took her to his place. The house was locked. He asked her to wait with the books which he was carrying at the carrier of his cycle. He returned after 5/10 minutes with the key and asked her to come to his house saying that he will give her groundnuts. She followed the accused. He closed the door. After removing her clothes, accused committed rape on her by inserting his penis into her private part. Blood came out from the private part of the victim and there was whitish liquid as well. Her brother had come near the house of the accused while she was wearing her parkar. According to her, her

clothes as well as clothes of the accused contained blood and semen which was also cleaned by accused by using paper from the exercise book. The accused told the brother of the victim that she was taking groundnuts. Then she went to her home. Upon enquiry by her mother, she told the incident and then they went to the Police Station at about 7.30 in the evening where her complaint was recorded and FIR was registered as Exhibit 23. It may be noticed that in the crossexamination, a question was put to the victim that she had sexual intercourse with the accused even earlier to which she answered as follows:

Still I have not attained M.C. There was no occasion of incident of sexual intercourse with me any time prior to the incident with anybody. All love me in the house as I was youngest member in the house.

She admitted that she did not bite the accused or scratched her fingers over the accused and she stated that she tried to escape which the accused did not permit.

9. Her version has been fully supported by her brother who was examined as PW8 (Exhibit 24). According to her brother, he had requested the accused if he could carry the victim on his cycle who answered in the affirmative and victim was sitting on the rod of the cycle. He asked the accused to drop her near a Tekada (hillock). The accused carried the victim with him. When the brother of the victim reached home, he found that she had not reached the house. He, therefore, enquired with the mother and then went to the fields of the accused where nobody was there and then went to the house of the accused and when he entered the house of the accused, he saw the accused coming out in a lungi and when he made enquiry from him, he told that victim was eating groundnuts and he saw that she was wearing 'parkar'. On enquiry with the victim as to what had happened, she did not speak and was crying. He took the victim on his cycle to his house when victim told her mother what had happened. Both these witnesses had identified the clothes which the accused was wearing on the date of occurrence and the victim also identified the lungi and other items which were recovered from the house of the accused. The mother was also examined as PW10 (Exhibit 29) who supported the case of the prosecution. Despite the lengthy crossexamination, nothing material came out from evidence of these three witnesses.

10. Three panchanamas, one dated 11th August, 1987 and two others dated 12th August, 1987 were proved by PW2, PW5 and PW6 respectively. The place of incident was shown by the victim and from the house it was noticed that there were baskets, four gunny bags filled with groundnuts and the groundnuts had come out of the gunny bags. The blood stained paper was recovered from behind the door. It had reddish and white colours. The gunny bag was found with the mark "Jai Kishan". All these items were recovered vide panchanama Exhibit 11. It was proved by PW2 Sudhakar. The clothes of the prosecutrix were recovered by panchanama Exhibit 13. Vide Exhibit 15, the clothes of the accused viz. pant which was blood stained and an old underwear were seized and Lungi of the accused having 23 blood stains was recovered by Exhibit 16 on 18th August,

1987. All these recoveries were made in the presence of panchas PW2, PW3, PW4 and PW5. The cycle was also recovered and seized vide panchanama Exhibit 18 and the accused was arrested and upon his arrest, personal search was conducted in the presence of pancha PW6. All these panchas have supported the recoveries and stood by their respective statements. PW6 Shingade has even stated that clothes of the accused were stained with blood which were recovered from his person at the time of his arrest.

11. Vide letter Exhibit 37, the Investigating Agency had sent the clothes, paper, the old gunny bag, lungi and tubes containing the blood samples and semen of the accused for Chemical Analysis. The report of the Chemical Analyser was received by the Investigating Agency and is proved in accordance with law in court on 29th January, 1988 (Exhibit 41). Relevant portion of the report reads as under:

12. From the bare reading of the above report, it is clear that Exhibit 1 the paper was stained with blood and semen and it was the same paper which was recovered from the site in question. Blood was detected at Exhibits 1,2,3,4,5,6,7 and 8 which was stated to be the human blood. The blood group of accused Suresh Shankar Jadhav was 'A' and that of the prosecutrix was 'B' and Exhibit 1, the paper was found with semen of Group 'A'. This was the report of the Chemical Analyser which largely supported the case of the prosecution except to the extent where it noticed that it was not possible to give a determinative finding.

13. The only evidence that did not fully support the case of the prosecution was the statement of the doctor which has been heavily relied upon by the learned trial court. According to the said doctor (witness No. 11 Exhibit 13), prosecutrix was brought to the hospital by the police and he had examined her. He did not notice any external injuries. Hymen was intact. The doctor stated that upon examination the age of the girl was found to be between 8 to 11 years. The Medical Officer also stated that semen and blood stains get washed away, if they are washed. He also stated that bleeding is possible from private part by mere penetration by penis though hymen is not torn. He also admitted that he had not collected the swab in the case. The statement of the doctor does suggest that the hymen was not torn and there were no external injuries on the body of the victim. Firstly, it is difficult to rely upon this expert witness as there seems to be apparently some contradiction and some unreliability in the statement of this witness. Doctor himself has stated that it is possible that there could be bleeding by insertion of the penis in the private part of the female without rupture of hymen. Secondly, there was hardly any occasion for the doctor to record in report Exhibit 31 that it was not a case of rape merely because there were no bodily injuries and there was no discharge from the Vagina and hymen was intact. The reliance by the learned trial court mainly upon the statement of this witness is not justifiable. The statement of the expert witness should be read with the other ocular and documentary evidence on record of the case. Merely

because there is some doubt created by the expert's evidence in the case of prosecution it may not necessarily justify passing of an order of acquittal. In the present case, the statement of all the other witnesses and the circumstantial evidence clearly and without doubt indicate and establish the guilt of the accused.

14. We may examine the law laid down by the Supreme Court in relation to various aspects of the present case.

15. It may be noticed that the victim was examined by another doctor after two days of the occurrence of the incident and she had complained of severe back ache. This doctor was also produced as witness No. 9 at Exhibit 25. The doctor of course, admitted that he had not examined her on the point of view of rape but stated that she had come to him on 14.8.1987 and again on 15.8.1987. He had collected the blood sample and given it to the police. He stated that the yadi (letter) of the police described it to be a case of rape and that the victim was complaining of back pain and he gave her medical treatment and opined that such pain is possible in the case of rape. Merely because the victim was not examined at the Primary Health Centre but was taken to Civil Hospital later will not support defence of the accused and it cannot be attributed to the victim who had suffered on account of offence committed by the accused. This could hardly create doubt in the case of the prosecution. The Civil Surgeon had asked the PSI as to why prosecutrix was not examined in the Primary Health Centre and it had come on record that there was no female doctor available, therefore, victim was not instantaneously examined. Whatever may be the reason but certainly this cannot be a ground for giving benefit of doubt to the extent of acquittal of accused in the case.

16. It is a settled principle now that sole statement of a victim can be made the basis of conviction of an accused and in a given case it may not be even necessary to have corroboration from other sources provided the court finds that statement of the witness satisfies the judicial conscience. Statement of prosecutrix in rape case is not less reliable than that of the injured witness. It would be more so where it is supported by the statement of other witness as well as expert evidence. In the case of *State of Punjab Vs. Gurmit Singh and Others*, , the Supreme Court while stating the above principle of law even cautioned that in cases involving sexual molestation, the court should deal with such cases with utmost sensitivity and even minor contradiction or discrepancies would not be sufficient to attach unreliability to the statement of the victim. In the case of *Ranjit Hazarika Vs. State of Assam*, while following the above judgment, the Supreme Court further emphasized the need for reliance to be placed upon the statement of the prosecutrix and held as under:

6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned Counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad.

The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In *State of Punjab v. Gurmit Singh* to which one of us (Anand, J.) was a party, while dealing with this aspect observed: (SCC pp. 39596, para 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. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable." We are in agreement with the aforesaid view.

17. In the case of *State of Punjab Vs. Ramdev Singh*, , the Supreme Court emphasized and while interfering with the judgment of acquittal by the High Court stated that the greater sense of responsibility is needed to be provided in cases of charges of sexual assault on women, particularly of tender age and children. The court even went to the extent and held that this is a crime against basic human rights and violates the protection under Article 21 and court should deal with cases of sexual offences sternly and severely to protect constitutional command. In the case of *Dinesh @ Buddha Vs. State of Rajasthan*, , the Supreme Court reiterated the principle that corroboration is not a sine qua non for evidence of the victim which could be the basis for conviction. Once as a whole, there is sufficient circumstantial and other evidence, conviction cannot be avoided. In that case, a girl of 12 years was raped and the court held thus:

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

9. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery.

18. In the case of State of T.N v. Ravi alias Nehru (2006) 10 SCC 534, the court held thus

17. In Encyclopedia of Crime and Justice (Vol.4) at p. 1356, it is stated:

...even slight penetration is sufficient and emission is unnecessary.

18. It is now well accepted principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is also well accepted principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence. A woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she were an accomplice. (See State of Punjab v. Gurmit Singh.)

19. So also in Ranjit Hazarika v. State of Assam this Court observed that no rupture of hymen or the absence of injury on the victim's private parts does not belie the testimony of the prosecutrix.

20. The evidence of a victim of sexual assault stands on a par with the evidence of an injured witness. Just as a witness who has sustained an injury is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offender is entitled to great weight, absence of corroboration notwithstanding. (See Bharwada Bhoginbhai hirjibhai v. State of Gujarat.)

19. As far as undue emphasis placed by the learned trial court on the statement of the doctor is concerned, it is also a settled principle that where the statement of the prosecution is corroborated by other evidence and inspires confidence, then even no examination of the doctor and nonproduction of doctor's report in an offence u/s 376 of the IPC would not be fatal to the case of the prosecution. ( State of M.P. Vs. Dayal Sahu, ). Similarly, in the case of State of Rajasthan Vs. Biram Lal, , the Supreme Court again took the view that nonproduction of Chemical Analyser's report may at best deprive the prosecution of the corroborative evidence but where other evidence is sufficient, it would not in any way prejudice the case of the prosecution particularly when the evidence of the prosecutrix is duly supported and corroborated by other witnesses.

20. In a more recent judgment in the case of B.C. Deva @ Dyava Vs. State of Karnataka, the Supreme Court took the view that even where a medical evidence did not disclose evidence of sexual intercourse and where there were no injury marks on the body of accused or the prosecutrix but the evidence of the prosecutrix and other witnesses was found to be cogent, reliable, convincing and trustworthy, the conviction was the correct conclusion. The court held as under:

18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the

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

19. Though the FSL Report marked as Ext. C1 pertaining to the undergarments of the accused and the victim did not contain any seminal stains, yet the said report cannot be given any importance because the underwear of the accused was taken into possession by the police on the next day of the incident when he was arrested. There is no evidence brought on record to show that the accused handed over the same underwear to the police, which he was wearing on the day of incident or he had handed over some other underwear which was seized under mahazar (Ext. P5) by the police. The possibility of absence of seminal stains on petticoat of the prosecutrix which she was wearing at the time of the incident, could not be ruled out due to the fact that the petticoat got drenched in the water and the seminal stains might have been washed away.

21. A very pertinent principle was stated by the Supreme Court in the case of Madan Gopal Kakkad Vs. Naval Dubey and Another, where the court indicated that the medical evidence by itself could be defective and could not be relied upon in its entirety and held thus:

34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

35. Nariman, J. in Queen v. Ahmed Ally while expressing his view on medical evidence has observed as follows:

The evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion.

36. Fazal Ali, J. in Pratap Misra v. State of Orissa has stated thus:

....(I)t is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix.

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty first Edition) at page 369 which reads thus:

Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

38. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

Sexual intercourse.- In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

39. In Encyclopedia of Crime and Justice (Vol.4) AT PAGE 1356, it is stated:

...[E]ven slight penetration is sufficient and emission is unnecessary.

40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of Section 44 of the Sexual Offences Act, 1956. Vide (1) R. v. Hughes;

(2) R. v. Lines and R. v. Nicholls.

41. See also Harris's Criminal Law, (Twenty second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of California reads thus:

Rape; essentials Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however, slight, is sufficient to complete the crime.

43. The First Explanation to Section 375 of Indian Penal Code which defines 'Rape' reads thus:

Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

44. In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha v. Emperor*; (2) *Abdul Majid v. Emperor*; (3) *Mst. Jantan v. Emperor*; (4) *Ghanashyam Misra v. State*; (5) *Das Bernard v. State*. In *re Anthony* it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In *Gour's The Penal Law of India*, 6th Edn. 1955 (Vol. II) page 1878, it is observed, "Even vulvae penetration has been held to be sufficient for a conviction of rape."

22. In the light of these principles, we have to examine the facts of the present case. There is no doubt that other witnesses including the report of the Chemical Analyser have fully corroborated the statement of the victim in its entirety. Merely because there are some small discrepancies or improvement in the statements would be no ground to disbelieve the statement of the victim and give advantage of acquittal to the accused. The doctor's statement is not the ultimate test to prove case of rape. The court could not rely upon the statement of doctor when the entire case of the prosecution is otherwise supported by a cogent, reliable and trustworthy evidence. There is no reason as to why the prosecutrix should come out with false story at this tender age and suffer the pain and agony of being subjected to such a heinous offence. According to the doctor the hymen was not torn and there was no apparent injuries on the body of the victim.

23. The doctor has nowhere stated that upon examination, he was of the opinion that there was no penetration of in any nature whatsoever in relation to the victim. Merely because hymen was not torn and there was no bodily injury by itself would be no ground to reject the case of the prosecution particularly in view of unequivocal and trustworthy statement of the victim and the other witnesses and more particularly in view of the statement of the panchas and Chemical Analyser's report Exhibit 41.

24. The evidence in the present case sufficiently and undoubtedly indicates towards the guilt of the accused leaving no scope to grant benefit of doubt to the accused. The accused had taken the victim on his cycle at the request of the brother of the victim but instead of dropping her at the stated place, took her to his house and then raped her. The blood stained clothes of the accused, the papers torn from an exercise book which was stained with blood and semen were recovered and subjected to Chemical Analysis which fully corroborates the statement of the victim. It is interesting to note that in the statement made by the accused u/s 313 of Criminal Procedure Code, he alleged that the case of the prosecution was false but even opted to offer no explanation as to the fact that blood and semen of the same group as that of the accused was found on the clothes and papers. Even he denied in answer to question No. 38 that his blood

group was

`A". Question No. 40 he answered as follows:

Q.40 : It is in evidence that your semen was collected and was sent to C.A. It also content blood group `A", what you have to say?

A. :It is false.

25. This shows that the accused has just taken a stand of total denial during the trial before the court. We are unable to accept this behaviour of the accused that he even denied collection of semen and blood which was established by independent witness i.e. the doctor.

26. The Investigating Officer has provided a complete chain of events which resulted in commission of the crime which is duly supported by trustworthy evidence. The purpose of section 313 Criminal Procedure Code is to put the evidence to the accused and provide him an opportunity of explaining his conduct or offer his case truthfully before the court. It is difficult for the court to lose sight of the fact that here is a girl victim of the age of 11 to 13 years who has been subjected to such sexual assault by the accused. The accused was known to the family of the victim and that is why the brother of the victim requested him to carry her on his cycle and requested that she be dropped at the spot which the accused did not accede to and opted to take her to his house where he committed rape upon her. The reliance placed by the counsel appearing for the respondent upon the judgment of the Supreme Court in a case of Ghurey Lal (supra) is hardly of any help to the accused. It is true that Supreme Court has held that the finding of acquittal cannot be lightly interfered by the appellate court but has carved out the exception where the court should not hesitate to convert acquittal into conviction in the facts and circumstances of the given case. Some of the circumstances spelt out by the Supreme Court are:

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.

27. In our considered view, the trial court has ignored the circumstantial evidence including the report of the Chemical Analyser as well as evidence of other witnesses without stating any appropriate reasons. It will be a case of grave miscarriage of justice if the accused who has committed a rape upon 8 to 11 years old girl is permitted to go scot free just because some part of the doctor's statement does not support the case of the prosecution. The presence of semen of blood group of the accused on some of the incriminating articles seized was a sufficient proof which fully corroborate the statement of the victim as well as other witnesses. The trial court should have examined the cumulative

effect of the entire ocular and documentary evidence placed before it.

28. The accused was also charged with an offence u/s 57 of the Bombay Children Act, 1948 which Act was in force as on the date of commission of offence viz. August, 1987. On the same evidence, the petitioner has to be held guilty of commission of the said offence inasmuch as he has indulged in immoral behaviour with the girl under the age of 18 years and is liable to suffer imprisonment as described thereunder. The age of the girl has been proved beyond doubt to be under 18 years and we have already found that accused had committed rape upon the victim.

29. In view of our above detailed discussion, we are of the considered view that the accused is guilty of the offence punishable u/s 376 of IPC and Section 57 of Bombay Children Act, 1948 and the question of considering the alternative argument that the accused should be punished u/s 354 read with Section 511 of IPC does not require any further consideration. As we find that the accused is guilty of offence u/s 376 of IPC and Section 57 of Bombay Children Act, 1948, we direct the matter be listed for awarding quantum of sentence. Order accordingly.