Bombay High Court Rajesh Namdeo Mhatre vs State Of Maharashtra on 23 April, 2002 Equivalent citations: 2003 (2) ALD Cri 37, 2002 BomCR Cri, 2002 (4) MhLj 266 Author: D Bhosale Bench: G Patil, D Bhosale JUDGMENT D.B. Bhosale, J. 1. The four appellants/original accused Nos. 2 to 5 in three connected Appeals and Suo Motu Application No. 1 of 1998, viz. (1) Rajesh Namdeo Mhatre, (2) Dilip Mahadeo Surve, (3) Ashok Prafulla Naik, and (4) Chandrakant Ganpat Patre, were convicted by the Addl. Sessions Judge, Greater Bombay, in Sessions Case No. 860 of 1994. The appellants were originally charged and tried for the offences under Sections 376(2)(g), 341 read with Section 34, Section 506 read with Section 34 and Section 366 read with Section 34 of the Indian Penal Code along with three other accused, viz. original accused Nos. 1, 6 and 7, who were acquitted of all the aforesaid offences. The appellants alleged to have committed rape on Suman Bhimrao Banpate during the intervening night of 22nd August, 1993 and 23rd August, 1993 between 12.15 a.m. and 2.30 a.m. on the terrace of the building at Koyana colony situate within the jurisdiction of R.C.F. Police Station. 2. The appellants were sentenced to undergo R.I. for seven years for the offence punishable under Section 376(2)(g) of the Indian Penal Code and to pay a fine of Rs. 500/- each, in default to further undergo R.I. for one year and for the offence punishable under Section 341 of the Indian Penal Code, they were sentenced to suffer 3 years R.I. The accused No. 4, in addition, was sentenced to suffer R.I. for three years and to pay a fine of Rs. 200/-, in default to further undergo one week's R.I. for the offence under Section 363 of the Indian Penal Code. All sentences imposed against the appellants/accused were to run concurrently. 3. This Court, while admitting the Appeals on 16th February, 1998, had issued a suo motu notice of enhancement to all the accused, probably, because the learned Addl. Sessions Judge while imposing the sentence under Section 376(2)(g) of the Indian Penal Code imposed lesser punishment than 10 years without recording adequate and special reasons in the judgment, as required under proviso to Sub-section (2) of Section 376 of the Indian Penal Code. 4. Since all the three connected Appeals and the Suo Motu Application arise from a common judgment, they were heard together and are being disposed of by this common judgment. 5. We may state, in brief, the prosecution case unfolded during trial. The prosecutrix Suman Bhimrao Banpate, a widow having four children, was working as waiter in Dinus Bar at Vashi Naka. Her duty hours were 6 p.m. to 11.45 p.m. She used to return home by 12 midnight and on her way back to home, pick up her friend Anita, who was also working as waiter in Hardip Bar. On 22nd August, 1993 the prosecutrix, as usual, hired an autoriksha for returning home at 11.45 p.m. When she was proceeding towards Hardip Bar to pick up Anita, her autoriksha was intercepted by two persons. These two persons were subsequently identified as the appellant No. 3 and original accused No. 1. The two persons got into the autoriksha, they slapped the driver, sat next to her and asked the driver to proceed towards Koyana colony. The autoriksha was taken near one building in Koyana colony. The driver of the autoriksha was threatened at the point of knife and was asked to leave the place. The prosecutrix claims to have requested the said two persons to release her and allow her to go home as she was getting

late and her children were waiting for her at home. Those two persons did not pay any heed to her request and took her on the terrace of the building where five other persons were already there and who were consuming beer. These seven persons, were subsequently identified as original accused Nos. 1 to 7. It is alleged that the four appellants out of the seven persons committed rape on her. Around 2.30 a.m. the police went on the terrace of the building who were on patrolling duty and at the relevant time were in search of one accused by name Parmar. The prosecutrix narrated the incident to P.W. 3, Tulshiram Udemale, a police constable. All the seven persons on the terrace, including the present appellants/accused, were arrested on the spot and were taken to the police station along with the prosecutrix. The prosecutrix lodged F.I.R. at 6.15 a.m. on 23rd August, 1993. The offence came to be registered against all the seven accused. The investigation was set in motion by P.W. 9 Omprakash Jedia. He arrested all the accused persons, drew panchanama of the scene of offence, recovered the clothes of the prosecutrix and the accused persons which were they wearing at the relevant time, referred them for medical examination and recorded the statements of various witnesses. The identification parade was also conducted so as to enable P.W. 6 watchman to identify the original accused No. 1 who was seen by him on the said fateful night. The recovered articles were sent to the Chemical Analyser. After completion of the investigation, the chargesheet was submitted on 25th November, 1993 in the Court of the Additional Chief Metropolitan Magistrate, 11th Court, Kurla and the case was committed to the Court of Sessions on 15th December, 1993. The charge was framed on 1st August, 1997 to which the accused pleaded not guilty and claimed to be tried. The defence of the accused was of total denial and false implication at the instance of the police. The specific defence disclosed by the accused persons during the cross-examination of the prosecutrix P.W. 1 was that she concocted the case against the original accused No. 1 at the instance of Senior Police Inspector and his subordinate officer Mr. Pardeshi to harass him and the other accused since they were friends of accused No. 1. 6. The prosecution examined as many as nine witnesses, amongst whom were P.W. 1 Suman Banpate, the prosecutrix; P.W.3 Tulshiram Udamale, the police constable who arrested the accused while on patrolling duty; P.W.4 Shridharrao Patil, the Medical Officer who examined the prosecutrix and the accused persons; P.W. 6 Jaganath Kedari, the watchman of Koyana colony; P.W.7 Shripad Nikam, the S.E.M. who held the identification parade; and P.W.9 Omprakash Jedia, the Investigating Officer. P.W.2 Chandrakant Gerud, P.W.5 Ramesh Shah and P.W.8 Sadashiv Pujari were the panch witnesses. On appreciation of the oral evidence led by the prosecution and the material placed on record, the appellants were held guilty of wrongfully restraining the prosecutrix Suman and for committing gang rape on her between 12.15 and 2.30 a.m. on 23rd August, 1993. The appellant No. 3/original accused No. 4, was also held guilty for kidnapping the prosecutrix. Feeling aggrieved by the impugned judgment, the appellant No. 1, filed Criminal Appeal No. 319 of 1998, accused Nos. 3 and 5 filed Appeal No. 375 of 1998, and accused No. 4 filed Appeal No. 385 of 1998. 7. We have heard Mr. Naik, learned counsel for the appellant No. 1, Mr. Panna, learned counsel for rest

of the appellants and Mr. Singhal, learned Assistant Public Prosecutor for the State at considerable length. With the assistance of the learned counsel for the parties, we have meticulously gone through the depositions of the witnesses and perused the various Exhibits proved by the prosecution to substantiate its case. The learned counsel appearing for the accused pleaded for clean acquittal and in the alternative pleaded a case of consent. As against this, Mr. Singhal, learned Assistant Public prosecutor submitted that the prosecution has proved beyond all reasonable doubts the charges levelled against the appellants and prayed for dismissal of the Appeals. 8. In these Appeals before we consider the case on merits, we would like to deal with the submission of Mr. Panna, who strenuously urged that the statement of the prosecutrix (Exhibit-17) recorded on 23rd August, 1993 at 6.15 a.m. cannot be treated as F.I.R. According to him, the statement (Exhibit-17) is nothing but the statement under Section 161 of the Criminal Procedure Code, 1973 (for short, "Cr.P.C") which cannot be used for corroboration. If we accept the submission of Mr. Panna, it would change the whole complexion of the prosecution case. Hence we would like to deal with it at the very inception. It is the case of the prosecution that on 23rd August, 1993 at 2.30 a.m. when P.W.3 went on the terrace he found there the prosecutrix and seven accused involved in the present case. On being enquired from the prosecutrix, she disclosed the alleged incident of rape on her by the accused persons and, therefore, P.W.3 apprehended all the accused and brought them to the police station along with the prosecutrix. P.W.9, Investigating officer, has stated that the prosecutrix was allowed to calm down since she was perturbed due to the alleged incident and her statement was recorded at 6.15 a.m. The offence was registered against all the accused and the investigation was started thereafter. Mr. Panna, learned counsel for the appellant Nos. 2 to 4, submitted that an investigation starts from the moment the information relating to the commission of cognizable offence is given to the officer and he takes some step towards investigation. According to him, in the present case, the information of the alleged incident was given by the prosecutrix to P.W. 3 on the terrace itself and on the basis of that the investigation was started with the arrest of all the accused. He further submitted that the information given to P.W.3 was the First Information and he ought to have reduced it in writing and since that was not done, there is no FIR in the present Case. 9. Mr. Panna, further invited our attention to the deposition of P.W. 3 who, in the cross examination, has stated that his statement was recorded on 23rd August, 1993 at 4.30 a.m. We perused the original deposition of P.W. 3, to verify whether timing "4.30 a.m." mentioned in the cross is correct or there was any typographical error in mentioning the time. We found that it was correctly recorded. On the basis of this, Mr. Panna, submitted that the statement of P.W.3 recorded at 4.30 a.m. has not been produced on record by the prosecution. He submitted that atleast the statement of P.W.3 recorded at 4.30 a.m. ought to have been treated as F.I.R. In order to ascertain whether such statement of P.W.3 was recorded at 4.30 a.m., we perused the case diary which show that the statement of P.W. 3 and other constables were recorded by P.W.9 after recording of the statement of the prosecutrix, arrest of accused persons and drawing of panchanama of

scene of offence. It is, thus, apparent from the case diary that the time 4.30 a.m. recorded in the cross examination of P.W. 3 was an error and that cannot be taken into account while considering the submission of Mr. Panna that the statement of the prosecutrix recorded at 6.15 a.m. cannot be treated as F.I.R. 10. Coming to the submission of Mr. Panna, that this is a case of no FIR, since the information given by the prosecutrix was not reduced in writing by P.W. 3, we deem it proper to see the relevant provisions of Criminal Procedure Code Section 154 empowers "officer in charge of a police station" to reduce in writing by him or under his direction, an information given orally to him relating to the commission of a cognizable offence and comply with the other formalities contemplated under this provision. "Officer in charge of a police station", as defined under Section 2(o), includes the officer in charge of the police station and in his absence, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable. The definition of "officer in charge of a police station" specifically excludes constables. Plain reading of Section 154 read with Section 2(o) is clear and, in our opinion, it means an officer in charge of a police station or police officer who is next in rank to such officer alone can record the F.I.R. disclosing cognizable offence. The police constable, attached to the police station, in his own right, has no authority of law to record F.I.R. In view of this P.W. 3 who was police constable cannot be said to have had power to reduce in writing the information of the cognizable offence given by the prosecutrix on the terrace. Moreover, according to Mr. Singhal, learned Assistant Public Prosecutor, the investigation was not started till after recording of the statement of the prosecutrix at 6.15 a.m.. Mr. Panna, learned counsel for the appellants could not point out as to what investigation, in his submission, was carried out by the investigating officer before recording the statement of the prosecutrix. As a matter of fact, perusal of the station diary and the case diary show that the investigation was carried out only after recording of the statement of the prosecutrix at 6.15 a.m. The entries in the station diary clearly indicates that the statement of the prosecutrix was recorded at 6.15 a.m., at 6.30 a.m. the accused were arrested at 7.15 a.m. the panchnama of scene of offence was drawn and thereafter the other investigation was carried out including recording of the statements of P.W.3 and other constables who apprehended the accused on the terrace. P.W.9 has categorically stated that no writing had taken place before recording of the F.I.R. at 6.15 a.m. We are unable to agree with Mr. Panna, that the investigation started right from the moment the prosecutrix disclosed the cognizable offence on the terrace to P.W.3. Mr. Panna, in support of his submission, placed reliance on the decision of the Apex Court in the case of H. N. Rishbud v. State of Delhi . In this report, the Apex Court has recorded that "the investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code." We are at a complete loss to understand as to how this proposition would support the submission of Mr. Panna. In our view, there is absolutely nothing in the evidence to suggest that the investigating officer took up the investigation of the case before recording of the statement of the prosecutrix at 6.15 a.m. On the contrary, the evidence of the prosecutrix, P.W.3

constable and P.W. 9 Investigating Officer coupled with the station diary and the case diary indicate that the investigation was taken up after recording of the statement of the prosecutrix. We do not see anything wrong in law in treating the statement of the prosecutrix recorded on 23rd August, 1993 at 6.15 a.m. as, F.I.R. Moreover, we cannot ignore that this plea was not raised before the trial Court. In view of this, we have no hesitation in rejecting the submission of Mr. Panna that the statement of the prosecutrix cannot be treated as F.I.R. and used for corroboration. 11. Perusal of the evidence of P.W. 1 Suman, reminded us a decision of the Apex Court in the case of Vadivelu Thevar v. The State of Madras and Chinniah Server v. The State of Madras . The Apex Court in the report has classified an oral testimony into three categories: namely (1) wholly reliable (2) wholly unreliable (iii) neither wholly reliable nor wholly unreliable. In the first and second category, the Court should have no difficulty in coming to its conclusion either way and it may convict or may acquit on the testimony of a single witness. It is in the third category of cases that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. The Apex Court in the case of Alilmollah and Anr v. State of W.B. reported in 7996 SCC (Crimes) 1028 reiterated that the corroboration is required when the witness is only partly reliable or in other words not wholly unreliable. Similarly, it is a sound and well established rule of law that the Court is concerned with the quality and not with the quantity of evidence necessary for proving or disproving the fact. In the present case, at the outset, we are of the view that the prosecutrix P.W. 1 falls in the third category, namely neither wholly reliable nor wholly unreliable and in view thereof it is incumbent that while appreciating the evidence of the prosecutrix, we may have to look for some assurance of her statement to satisfy our conscience, since she is a witness who is interested in the outcome of the charge levelled by her. The following observations made by the Apex Court in the case of State of Punjab v. Gurmit Singh while dealing with the case under Section 376 of the Indian Penal Code in para 7 of the report are clear enough for our guidance. "7. .. .. 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 at par with the evidence of an injured witness and to an extent is even more reliable. . . .". 12. The testimony of P.W. 1 prosecutrix has been assailed mainly on the ground that it suffers from infirmities such as omissions and contradictions which, according to the defence, has made her whole evidence shaky and unreliable. However, in our view, the contradictions and omissions relied upon by the appellants, are minor or insignificant in nature and do not make her evidence wholly unreliable. It certainly requires corroboration or assurance of her statement from the other evidence adduced by the prosecution. However, before we consider as to whether the other evidence lend support or not, it would be appropriate to make reference to the contradictions and omissions in the evidence of P.W. 1 upon which the appellants placed heavy reliance to

discredit her testimony. 13. P.W.I, has stated that while she was proceeding to pick up her friend Anita at 11.45 p.m. on 22nd August, 1993, her autoriksha was intercepted by two persons, whereas in the F.I.R., she has stated that it was intercepted by three persons, out of which one person did not board the riksha and left the place. After reaching the building in Koyana colony, she has stated that the autoriksha driver was threatened at the point of knife and was asked to leave. However, in F.I.R. she did not make reference to pointing of knife at the driver. When confronted, in cross-examination, she was stated to have said that to the police and could not assign any reason for not recording it in F.I.R. She has further stated that when the police arrived on the terrace, they broke open the door of the terrace which was locked. This also appears to be an improvement made by her. However, P.W. 3 has categorically stated that the door was open when they entered the terrace. Similarly, she has also stated that after reaching the building, the five other accused came there and they took her to the terrace of the building. In the F.I.R. she appears to have told that when she reached the terrace she found five persons already there and they were consuming beer. These contradictions and omissions, in our opinion, would loose its effect, if her evidence in respect of main allegation stands proved or gets sufficient corroboration from other evidence. Insofar as changing of clothes and handing them over to the police is concerned, initially she has stated in the cross-examination that she went home, collected her clothes, came back to the police station, changed the clothes in the police station and handed them over to the police. In the later part of the cross-examination, she has admitted that she went home and changed her clothes there and brought them wrapped in a bundle and handed over the same to the police at police station. P.W.3 Tulshiram, the constable and P.W. 2 the panch witness do not support her first version. According to them, the clothes were changed at the police station. We propose to consider whether these contradictions and improvements really affect the veracity of her evidence. 14. The learned counsel appearing for the appellants, placed heavy reliance, on the history given by P.W. 1 to Dr. Patil, P.W.4 and pleaded that the different story given by P.W. 1 throws serious doubt on the credibility of this witness. P.W. 1, told the medical officer, P.W. 4 Dr. Patil, that after the alleged incident she ran down from the terrace to R.C.F. police station and made a complaint, when the accused were asleep. In cross, she has denied to have given such history to the medical officer. In further cross-examination, she has denied the suggestion that she of her own ran down from the terrace and went to the R.C.F. Police Chowki and narrated the incident to the Police. The history written down by P.W.4, appears to be a result of communication gap or misunderstanding. The prosecutrix had no reason whatsoever to give such history to the doctor. Medical history recorded by the doctor (Exhibit-24) in our view, becomes doubtful document. The history recorded by the doctor, therefore, cannot be made a ground to discard the evidence of the prosecutrix. There is also an inconsistency in the evidence of PW1 regarding the arrival of police on the terrace. In the examination-in-chief she has stated that police reached the terrace at 2.30 a.m. whereas in the cross-examination she claims to have given signal to the police from the

terrace. P.W. 3 in his testimony, supports the version of signalling by P.W. 1. It is significant to note that the appellants could not dispute that the police did reach the terrace at 2.30 a.m. during that fateful night. On the basis of the contradictions and the omissions referred to above, the learned counsel for the appellants strenuously urged that P.W. 1 has no regard for the truth and her evidence deserves to be rejected outright. 15. We have meticulously gone through the evidence of the prosecutrix P.W. 1 and also the F.I.R. and evidence of P.Ws. 3 and 4 in particular which, according to the prosecution, corroborates her testimony on all material points. The identification of the accused persons on the terrace has been seriously disputed by the appellants. It is true that the prosecutrix in her examination-in-chief has stated that on account of the darkness she could not see the faces of the accused persons and, therefore, the doubt was raised as to how she could identify the accused persons in the police station. To appreciate the criticism, it would be beneficial to quote paras 4, 5, and 6 of the examination-in-chief of P.W. 1, which reads thus : "4. Witness refuses to identify the accused persons as being the persons who were present at the terrace. She states that on account of the darkness, it is not possible for her to see their faces. Accused are staring at her and seems to be scared. Accused were taking the beer. They also asked me to take the beer. I was scared of them. Four persons out of the seven persons removed my clothes and committed rape on me. 5. Police arrived on the terrace. I was asked to hide behind the water tank. Police arrived on the terrace by breaking open the door of the terrace which was locked. Police happens to enquire with me I narrated the incident. All the seven persons were arrested on the spot. And we all went to the police station. I had seen the accused at the police station. I did inform the police at the relevant time, regarding the overtact of the each accused. 6. Accused No. 4 Ashok Naik, accused No. 1 Sunil Bhosale were the two persons who initially came in the autoriksha. Accused No. 6 Raju Daki was on the Terrace. Accused Nos. 2, 3, 4, 5 committed rape on me. Accused Nos. 1, 6, 7 were sitting on the terrace of the building." The learned Judge has observed the demeanor of the witness. It appears that P.W. 1. was scared of the accused persons. Keeping that in mind, when we examined her cross examination, we found that there was a bright moonlight on the terrace and the darkness on the terrace was not total. She has clearly stated in cross-examination that it was not possible to see anything at far distance but she could see things which were near to her. Similarly, though it is recorded in her examination-in-chief that she refused to identify the accused persons, we cannot ignore the observations made by the learned Judge in para 8 of the impugned judgment, recording that the prosecutrix identified the accused Nos. 1 and 4 in the Court as being the persons who kidnapped her and all the appellants as persons, committed rape on her. This indicates that though at initial stage P.W. 1 refused to identify the accused persons, she appears to have had identified them in the Court. Moreover, the specific overtact of each of the accused persons at the relevant time was informed by her to the police. In our opinion, that was possible only because P.W. 1 could see the accused on the terrace itself. Furthermore, P.W. 3 has corroborated her testimony by saying that on the terrace itself he was informed

by the prosecutrix as to which of the five persons committed rape on her. P.W. 3 has also specifically stated that there was bright moonlight on the terrace and everything was clearly visible. The F.I.R. also supports her testimony, wherein she has stated that there was bright moonlight on the terrace and she could see the persons on the terrace. Totality of the circumstances, insofar as identification of the accused persons is concerned we have no hesitation in holding that the prosecutrix had sufficient opportunity to identify the accused persons on the terrace in the bright moonlight and particularly in view of the fact that she was in the company of the seven accused persons for more than two hours. 16. The P.W. 1, when went on the terrace, she found five other accused were already there, consuming beer. The four persons out of seven removed her clothes and committed rape on her. She identified each of them and narrated their individual roles when at 2.30 a.m. the police went on the terrace. Though there is a contradiction as to how the police, went on the terrace, whether on their own or they were called by P.W.I by signalling, the defence could not dispute that the police did reach the terrace and apprehended all the accused at the spot of the scene of offence. Therefore, in our opinion, no significance could be attached to this contradiction. Further, it has not been disputed that P.W. 3 while on patrolling duty and in search of one accused Parmar, went on the terrace. After reaching the terrace, the contradiction as to how they entered the terrace, whether by breaking open the door or the door was open, also would be insignificant, since it has not been disputed that P.W. 3 and other constables entered the terrace and apprehended all seven accused persons at the spot. It is very significant, to note that the accused persons did not dispute that they were apprehended by the police on the terrace. As a matter of fact, the evidence of P.W. 3 insofar as going on the terrace is concerned, appears to be absolutely natural. P.W. 3, further corroborates the testimony of the prosecutrix, insofar as information given by her, of the alleged act of rape committed by the accused persons. He further corroborates her testimony in respect of the specific role played by different accused persons. It is true that there are some contradictions but, in our view, they are not of substantial character so as to discredit the testimony of P.W. 1. Her deposition on all material points is also corroborated by first information report (Exhibit-17). 17. It is true, that there is a discrepancy in respect of number of accused persons committing rape on her. In the F.I.R, P.W. 1 has stated that five accused persons viz. original accused Nos. 1 to 5, committed rape on her and 6th was about to commit rape just before police reached the terrace. However, in her deposition, she has attributed the act of rape only to the present appellants, viz. original accused Nos. 2 to 5 and she has excluded accused No. 1. No explanation whatsoever has come forward from the prosecution as to why she excluded the accused No. 1 which ultimately led the learned Sessions Judge to give him benefit of doubt. But, in our view, that by itself would not falsify the allegation of rape against the present appellants. 18. Coming to the medical evidence, we are of the view that it corroborates the testimony of P.W, 1 in all respects. The statement of P.W. 1 was recorded at 6.15 a.m. on 23rd August, 1993 and she was examined by the doctor at 4.30 p.m. The doctor has opined that the injuries on the person of

the prosecutrix indicate that she was subjected to sexual assault. According to doctor the injuries were caused within 24 hours. He has denied that the injuries on the person of the prosecutrix were possible by fall with face downwards and if dragged on small pebbles. The doctor on her examination found following injuries: 1) Two linear cregentric red colour abrasions on the right side chest front 2.00 cm from midline 2.5 cm below right collar bone, 0.9 cm x 0.8 cm and 0.5 cm apart within convex border towards breast. 2) Three linear cregentric red colour abrasion on the right side chest front 1 cm lateral to ext. injury No. one a) 0.9 cm b) 0.7 cm, c) 0.8 cm one below another oblique plane and (a) and (b) 0.5 cm apart and (b) and (c) 0.4 cm apart with convex border towards breast. 3) Two linear abrasion red colour on the right axilla on anterior axillary bold, oblique, 1.00 cm length. 4) Two linear abrasions red colour on thick side breast upper medial quadrant, one below another, 0.5 cm apart 1.00 x 0.7 cm respectively. 5) Linear abrasion on left side chest front 4.0 cm from midline, 2.0 cm below left collan bone 100 cm length. 6) Two linear abrasion, red colour on the left breast upper medial quafront in one plan 1.0 cm x 0.9 cm c 0.5 cm apart with convex border toward nipple. 7) Multiple small contusion redish blue colour over trunk back size 1.1 cm x 1.0 cm to 0.9 cm x 0.7 cm. Looking to the nature of the injuries, we have no hesitation in holding that the injuries suffered by the prosecutrix were the result, of resistance. In other words, the injuries clearly indicate that the prosecutrix was subjected to sexual assault. Existence of the injuries on the person of the prosecutrix, in our opinion, inevitably point to the guilt of the appellants. 19. The defence placed heavy reliance on the report of the Chemical Analyser, in respect of vaginal smear of the prosecutrix where no semen was detected, to say that no rape was committed by the accused on the prosecutrix. It is significant, to note that there is no cross-examination of the doctor on this aspect. It is not disputed that the prosecutrix was widow and was having four children. The possibility of disappearance of semen cannot be ruled out particularly in view of the fact that the vaginal smear was collected by the Doctor after more than 14 hours of the alleged incident. The evidence of the doctor and his opinion, in our view, is sufficient to hold that the prosecutrix was subjected to sexual assault. 20. Mr. Singhal, learned Assistant Public prosecutor also placed reliance upon the suggestion made to the prosecutrix in the cross-examination by the defence to say that the presence of the prosecutrix and the accused persons on the terrace thereby stands proved. Mr. Panna, however, in opposition, submitted that the suggestions put in the cross-examination are no evidence at all against the accused persons and the prosecution cannot use them to fill in the gap in the evidence of the prosecution. In support, he placed reliance on the decision of this Court in the case of Radhesham s/o Govardhan Bhagat v. The State of Maharashtra reported in 2000 ALL MR (Cri)) 52. In the report, this Court in para 22 held thus: “Moreover, the suggestions made in the cross examination of the prosecution witnesses cannot be used to fill in the gaps in the evidence of the prosecution. Burden lies on the prosecution to prove guilt, of the accused”. 21. It is true that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence as held by the Apex Court in Sharad B. Sarda v. State of Maharashtra . In

para 150 of the report, the Apex Court has made reference to the consistent view taken in various judgments that where various links in the chain are in themselves complete then false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional links it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or plea which is not accepted by the Court. In the light of the observations made by the Apex Court in the case of Sharad Sarda, (supra) we are of the view, that though the suggestion made in the cross-examination is not evidence but certainly they may be called into aid only to lend assurance to the prosecution case, particularly when other evidence establishes the guilt of the accused. We have already observed that the evidence of P.W. 1 stands corroborated by F.I.R. as also the evidence of P.Ws. 3 and 4 on all material points. In view thereof the suggestion made by the defence could be used to lend assurance to the prosecution case. The observations made by the Supreme Court while appreciating the evidence in the case of Rakesh Kumar alias Babli v. State of Haryana are worth noting. The Apex Court in para 9 of the report held thus : "In his cross-examination, P.W. 4, Sube Singh, stated that the accused Dharam Vir, was wearing a shirt of white colour. It was suggested to him on behalf of the accused that Dharam Vir was wearing a shirt of cream colour. In answer to that suggestion, P.W. 4 said"It is not correct that Dharam Vir accused was wearing a shirt of cream colour and not a white colour at that time." The learned Sessions Judge has rightly observed that the above suggestion at least proves the presence of accused Dharam Vir, on the spot at the time of occurrence." In view of this, we have no hesitation in holding that the suggestion made by the defence in the cross-examination lend assurance to the prosecution case. 22. The defence in the cross-examination of the prosecutrix, probably to support their alternative, case of consent, elicited the following answers to the questions in the form of suggestions made to the witness : "It is not correct to say that on the date of the incident, also I voluntarily accompanied the two persons with a view to earn an extra money. It is not correct to say that those two persons did not threaten me and intimated and forcibly took me to the terrace." "It is not correct to say that I, voluntarily slept on the terrace and offered myself for sexual intercourse. I was made to sleep near the tank of water. There were some scratches on my back. It is not correct to say that on my own I ran down to the terrace and went to the R.C.F. police chowky. I narrated the incident to the R.C.F. Police chowky." The prosecution mainly placed reliance on the aforesaid suggestions made in support of their case. These suggestions, in our view, lend assurance to the prosecution case. 23. We are at a complete loss to understand as to why the learned Addl. Sessions Judge acquitted the original accused Nos. 1 and 6 and also 7 for that matter. Once having come to the conclusion that all original accused were present on the terrace and played some or the other roll, in the alleged incident, each of them deemed to have committed gang rape within the meaning of Sub-section (2) of Section 376 of the Indian Penal Code. Explanation (1) to Clause (g) of Sub-section (2) of Section 376 appears to have

been totally ignored by the trial Court. The observations made by the Apex Court in the case of Pramod Mohto and Ors. v. State of Bihar while considering somewhat similar situation, are sufficient enough for our guidance. "Once it is established that the appellants had acted in concert and entered the house of the victims and thereafter raped P.W. 1 Jaibom Nisa, then all of them would be held guilty under Section 376 of Indian Penal Code in terms of explanation (1) to Clause (g) of Sub-section (2) of Section 376 irrespective of whether she had been raped by one or more of them" . In the present case though it has come on record that the accused Nos. 1, 6 and 7 were also active, though they did not actually raped P.W. 1, the learned Addl. Sessions Judge could have convicted them taking recourse to explanation (1) to Clause (g) of Sub-section (2) of Section 376 of the Indian Penal Code. Unfortunately, the State has not filed the appeal against the order of acquittal. We are, therefore, unable to pass any order against the original accused Nos. 1, 6 and 7. 24. The evidence of the prosecutrix was also challenged on the ground that the prosecutrix was a woman of loose character and, therefore, her testimony was not safe to convict the appellants. P.W.I was cross-examined by the defence wherein they also tried to demonstrate that the prosecutrix was of questionable character, working in the beer bar and used to offer herself for sexual intercourse for making money. She has denied to have had sexual relation with other persons prior to the incident and after the death of her husband. At the outset, we are of the view that this submission is devoid of any merit. The character and reputation of the victim has no bearing or relevance in the matter of adjudging the guilt, of the accused for imposing punishment under Section 376. The observations of Apex Court in the case of State of Haryana v. Premchand and Ors. reported in 1990 SC 558 in para 10 are worth noting. "10. ... ... this Court was of the view that the character or reputation of the victim has no bearing or relevance either in the matter of adjudging the guilt of the accused or imposing punishment under Section 376, Indian Penal Code. We would like to state with all emphasis that such factors are wholly alien to the very scope and object of Section 376 and can never serve either as mitigating or extenuating circumstances for imposing the sub-minimum sentence with the aid of the proviso to Section 376(2) of the Indian Penal Code." In view of this, in our opinion, the submission of the learned counsel for the appellants that the prosecutrix was of questionable character, has absolutely no relevance and needs no consideration. 25. Mr. Panna, learned counsel for the appellants submitted that even if it is assumed that the appellants had committed sexual intercourse with the prosecutrix, it was with her consent. At the outset, the injuries on the person of the prosecutrix rule out the possibility of consent. Mr. Panna submitted that the absence of injuries on the private part of the prosecutrix and accused as well, support the defence theory of consent. Admittedly, the prosecutrix was widow and mother of four Children. In view thereof, merely because there were no injuries on her private part it would not be possible to infer her consent. In case of gang rape the victim is not expected to have given continuous resistance resulting in sustaining numerous injuries even on private part of her body. However, in the present case, the injuries mentioned by the doctor are sufficient to infer that

the prosecutrix was subjected to sexual assault and there was resistance by the prosecutrix. Mr. Panna, in support of his submission placed reliance on the decision of the Apex Court in a case of Pratap Mishra and Ors. v. State of Orissa . In the report the Apex Court observed that "the Courts below appeared to have presumed that the allegation of rape was proved without there being sufficient evidence and without even examining the possibility of consent which was not only present in this case but almost proved and probabilised by the circumstances discussed by us and which appeared from the prosecution evidence itself. This decision of the Supreme Court is of 1977, i.e. much before the introduction of Section 114A of the Indian Evidence Act. This section was inserted by the Act 43 of 1983. Section 114A reads thus:"114A. Presumption as to absence of consent in certain prosecutions for rape. – In a prosecution for rape under Clause (a) or Clause (b) or Clause (c) or Clause (d) or Clause (e) or Clause (g) of Sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent." 26. Under this provision, once the sexual intercourse by the accused is proved and if the woman alleged to have been raped states before the Court that she did not consent, the Court shall presume that she did not consent. In other words, the Court is required to presume that there is no consent, once the prosecutrix states that she did not consent. Then it is for the accused to prove that the woman consented to the sexual intercourse. In other words, no burden is placed on the prosecution to adduce any evidence after proving the sexual intercourse and that the prosecutrix did not give her consent, to the sexual intercourse. However, if the accused succeeds in rebutting the presumption of no consent, the prosecution may adduce evidence. In the present case, we are of the considered view that the appellants have not rebutted the presumption of no consent. 27. Insofar as the attachment, of the clothes of the victim and the accused under the panchanama is concerned, the learned Addl. Sessions Judge did not place reliance on that evidence in view of several infirmities. The evidence of the panchas and the panchanama coupled with the statement of the doctor P.W.4, in our opinion, suffers from serious infirmities. The doctor after examining the prosecutrix and the accused persons in the certificates mentioned that the clothes were already changed and collected by the police. The medical examination of the prosecutrix was done at 4.30 p.m. on 23rd August, 1993 and of the seven accused parsons was carried out between 4 to 6.30 p.m. on 25th August, 1993. On the medical certificates issued by the doctor it has been specifically mentioned that the clothes on the person of P.W. 1 and of accused were already changed and collected by the police. Whereas the panchanama of the attachment of the clothes insofar as the prosecutrix is concerned was recorded after her examination by the doctor, i.e. between 7.45 and 8.30 p.m. on 23rd August, 1993. The panchanama and evidence of panch shows that the clothes were changed at the police station in the next room, when they were present at the police station. Similarly, the panchanama of the attachment of the clothes of the accused persons was drawn between 5 and 6.25

p.m. on 25th August, 1993, i.e. after their medical examination. This infirmity alone is sufficient to discard the evidence of the attachment of the clothes and consequently the report of the Chemical Analyser thereof. 28. For the reasons stated above, we, on reappreciation of the entire material on record and taking into consideration the arguments addressed on behalf of the parties, are satisfied that the prosecution has proved the guilt of the appellants beyond all reasonable doubts that they committed the offences punishable under Sections 376(2)(g) and Section 341 of the Indian Penal Code and in addition the appellant no-3/original accused No. 4 has committed offence punishable under Section 363 of the Indian Penal Code. We accordingly affirm the impugned judgment. However, the Learned Sessions Judge has committed grave error in imposing three years sentence under Section 341. The maximum sentence provided under that provision is one month, simple imprisonment. In view thereof, we modify the sentence imposed under Section 341 and each of the appellants is hereby sentenced to suffer simple imprisonment for a period of one month for the offence punishable under Section 341 of the Indian Penal Code. Insofar as the sentence, imposed on all the appellants is concerned, we are not inclined to enhance the same having regard to the age of the appellants, passage of time and that the State did not file appeal for enhancement of the sentence and also against the acquittal of other accused. Consequently, the suo motu application for enhancement of sentence issued by this Court stands disposed of with no orders. All the Criminal Appeals stand dismissed.