Madan Gopal Kakkad vs Naval Dubey And Anr on 29 April, 1992

Equivalent citations: 1992 SCR (2) 921, 1992 SCC (3) 204

Author: S.R. Pandian

Bench: S.R. Pandian, M. Fathima Beevi

PETITIONER:
MADAN GOPAL KAKKAD

Vs.

RESPONDENT:
NAVAL DUBEY AND ANR.

DATE OF JUDGMENT29/04/1992

BENCH:
PANDIAN, S.R. (J)
BENCH:
PANDIAN, S.R. (J)
FATHIMA BEEVI, M. (J)

CITATION:
1992 SCR (2) 921 1992 SCC (3) 204
JT 1992 (3) 270 1992 SCALE (1)957

ACT:
Indian Penal Code, 1860 :
Ss. 375, 376-Rape-Accused-Medical graduate-Causing slight penetration into vulva of 8 years girl without rupturing hymen-Medical evidence indicating hymen intact, abrasion on medial side of labia majora and redness around labia minora-Offence-Whether constituted rape-Trial court not accepting prosecution evidence recorded acquittal-Appeal against acquattal-High Court held victim's evidence satisfactory and found sufficient corroboration on material aspects, believed extra-judicial confession of accused being voluntary not obtained by force, coercion etc., but accepted victim's evidence in part, convicted accused under s. 354 and sentenced him to fine of Rs. 3000 only-Legality of-Conviction altered to one under s. 376 by Supreme Court.
penology-Sexual assault on female children-Accused committed rape on 8 years girl-Conviction-Sentence to commensurate with gravity of offence.
Indian Evidence Act, 1872 :
S. 24-Extra-judicial confession-Corroboration-Whether necessary.
S. 45-Expert opinion-Medical witness-Evidence of-

Whether of advisory character-Legal opinion of witness as to nature of offence-Whether can be accepted.

Code of Criminal Procedure, 1973 :

S. 378-Appeal against acquittal-High Court's jurisdiction-Whether plenary and unlimited to review the entire evidence.

^ The respondent, a medical graduate, was indulged in gratifying his animated passions and sexual pleasures by sexually assaulting and molest-

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ing young girls.

HEADNOTE:

The victim girl (PW. 13) aged about 8 years was the daughter of the neighbour of the respondent. She was a friend of respondent's niece and both the children used to play together. According to the prosecution case, on the fateful day when respondent's niece and PW. 13 with her younger brother were playing in respondent's drawing hall, and there was no one else in the house, the respondent sent his niece with younger brother of PW. 13 outside. He bolted the door from inside, completely stripped off himself, made PW. 13 completely naked and asked her to do fellatio. Thereafter he slightly inserted his penis into her vulva and lay over her. After sometime he freed the child. While she was leaving the drawing hall, the respondent threatened her not to disclose his affairs to anyone. She, however, narrated the incident to respondent's niece.

In the evening PW. 13 told her mother (PW. 6) that the respondent had asked her to suck his private part. She did not narrate the whole incident out of fear. The next day when PW. 13 and respondent's niece were talking of the incident, their friend PW. 12 came there. PW. 13 narrated the incident to her and other girl friends. On the third day, PW. 13 told the entire incident to her mother who conveyed it to her neighbours PWs. 9 and 10 on telephone. At about 9 p.m. when the appellant (PW.5), the father of the victim girl, returned home and learnt about the occurrence, he accompanied by PWs. 7,9 and 10 went to respondent's house, but he was not there and they informed the brother and sister-in-law of the respondent of the purpose of their visit. They all waited there till midnight when the respondent came. The respondent, assessing the situation, voluntarily confessed his crime. He admitted that he raped PW. 13 and also committed the same crime on earlier occasions with his niece and other minor girls, but being a doctor he had been careful enough not to rupture their hymen. The brother of the respondent begged of PW. 5 and others not to do anything till the arrival of his parents. Next morning when respondent's parents reached, he again admitted his abominable crime of sexual assault on PW. 13.

It took 2-3 days more to PW. 5 to get a written complaint (Ext. P.7) lodged with the police through PW. 8. The police investigation culminated in the trial of the respondent for an offence of rape committed on PW. 13.

The trial court held that the prosecution against the respondent was launched due to some enmity between the two families and that the

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prosecution did not adduce any acceptable evidence for holding the respondent guilty of offence under s. 376 IPC. It accordingly acquitted the respondent.

The State filed an appeal an against the acquittal before the High Court. The complainant-appellant also filed a criminal revision challenging the legality of the order of acquittal. On the basis of an artical relating to the incident published in a foreign magazine, a petition was addressed to the Chief Justice of India with a copy to the Chief Justice of the High Court concerned and on its basis another criminal revision petition was registered. The High Court disposed of all the three cases by a common judgment. It accepted the oral testimony of prosecution witnesses and the extra-judicial confession made by the respondent. It, however, held the respondent guilty of an offence under s. 354 IPC and sentenced him to pay a fine of Rs. 3,000 only. The complainant-appellant filed the appeal by special leave to this Court. The State did not file any appeal.

It was contended on behalf of the appellant that the High Court erred in holding the respondent guilty of a minor offence under s. 354 IPC when all the necessary ingredients to constitute an offence punishable under s. 376 IPC had been satisfactorily established; and the sentence of fine alone imposed was grossly inadequate and not commensurate with the gravity of the offence committed by the respondent.

Allowing the appeal and setting aside the judgment of the High Court, this Court,

HELD : 1. The prosecution has satisfactorily established its case that the respondent committed rape on PW. 13 by proving all the necessary ingredients required to make out an offence of rape punishable under Section 376 IPC. [p. 947 B]

2. When the evidence of PW. 13-that the respondent put his male organ inside her vagina and clutched her and thereafter she suffered pain-is taken with the evidence of medical officer who found an abrasion on the medical side of labia majora and redness present around the labia minora with white discharge even after 5 days, it can be safely concluded that there was partial penetration within the labia majora or the vulva or pudenda which in the legal sense is sufficient to constitute the offence of

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rape. Moreover, the respondent himself confessed twice admitting the commission of rape without rupturing the hymen which confession is not disbelieved by the High Court. [p.

946 C; E-F]

3.1. The evidence of PW. 13 is amply corroborated not only by the medical evidence and the evidence of PW. 12 but also by the plenary confession of the respondent himself. [p. 947 A]

3.2 Even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the `probabilities factor' does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [pp. 939 GH; p. 940 A]

Rameshwar v. State of Rajasthan, [1952] SCR 377; Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, [1988] 3 SCC 217; Krishan Lal v. State of Haryana, [1980] 3 SCC 159, referred to.

4.1 In order to constitute an offence of `Rape' as envisaged by the first Explanation to s. 375 IPC, while there must be penetration in the technical sence, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. [p. 945 D-H]

Parikh's Textbook of Medical Jurisprudence and Toxicology; Encyclopedia of Crime and Justice (Vol.4) at page 1356; Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12; Harris's Criminal Law (Twenty Second Edition) at page 465; Gaur's "The Penal Law of India" 6th Edn. (Vol. II) p. 1678; Code 236 of Penal Code of California, referred to.

R.v.Hughes, [1841[9 C & P 752; R.v. Lines, [1844] 1 Car & Kir 393; R.v. Nicholls, [1847] 9 LTOS 179; Natha v. Emperor, 26 Cr.L.J. [1925] page 1185; Abdul Majid v. Emperor, AIR 1927 Lahore 735 (2); Mussammat Jantan v. The Crown, [1934] Punjab Law Reporter (Vol. 36) p. 35; Ghanashyam Mishra v. State, [1957] Cr.L.J. 469 AIR 1957 Orissa 78; D. Bernard v. State, [1974] Cr.L.J. 1098; Prithi Chand v. State of Himachal Pradesh, [1989] 1 SCC 432; In re Anthony, AIR 1960 Mad. 308, referred to.

4.2 In the instant case there is acceptable and reliable evidence that

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there was slight penetration though not a complete penetration. [p. 946 B]

4.3. The medical officer was of the opinion that the abrasion measuring one and a half inches in length found on the medial side of the labia majora and the redness around the labia minora could have been caused on the date of incident. [pp. 942 H; 943 A]

Merely because the inexperienced medical officer has opined that it was an attempt to commit rape, probably on the ground that there was no sign of complete penetration, her legal opinion as to the nature of the offence committed

by the respondent cannot be accepted. (p. 943 CD]

4.4. 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. [p. 943 D-F]

R. v. Ahmed Ali, 11 WR Cr. 25; Pratap Misra v. State of Orissa, AIR 1977 SC 1307, referred to.

Medical Jurisprudence and Toxicology, (Twenty First Edition) by Modi, referred to.

5. Law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. However, the confession of the respondent is amply corroborated by the evidence of the victim (PW. 13) whose testimony in turn is corroborated by PWs. 5, 6, 7, 9 and 10 and also by the medical evidence. [p. 939 B-C]

Piara Singh v. State of Punjab, [1978] 1 SCR 597, referred to.

6. In view of s. 378 of the Code of Criminal Procedure, 1973 (corresponding to s. 417 of the old Code), in cases of appeals against acquittal as a matter of jurisdiction, the whole case is at large for review by the High Court both as to the facts and the law and it is clothed with the plenary

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powers to go through the entire evidence and to come to its own conclusions of guilt or otherwise of the indicted persons as the established facts warrant and to award appropriate sentence which will be commensurate with the gravity of the offence in case of conviction.

[pp. 940 DE; 941 EF]

Sheo Swarup and others v. King Emperor, AIR 1934 PC 227 (2) Wilayat Khan & Others v. State of U.P., AIR (2), 1953 S.C. 122; Surajpal Singh and others v. The State, [1952] SCR 193; Tulsi Ram v. The State, AIR 1954 S.C.I.; Aher Raja Khima v. State of Saurashtra, [1955] 2 SCR 1285; Radha Kishan v. State of U.P., [1963] Supp. 1 SCR 408; Jadunath Singh and others, etc. v. State of Uttar Pradesh, [1971] 3 SCC 577; Dharam Das v. State of U.P., [1973] 2 SCC 216; Barati v. State of U.P., [1974] 4 SCC 258 and Sethu Madhavan Nair v. State of Kerala, [1975] 3 SCC 150, referred to.

7.1. The findings of the High Court, rendered in exercise of its appellate jurisdiction are findings of fact which cannot be reopened in appeal especially when the respondent has not challenged those findings and when there is absolutely no reason muchless compelling reason for

holding that those findings are either in utter disregard of the evidence or unreasonable and perverse or any part of the evidence in favour of the respondent is jettisoned. [p. 936 FG]

7.2. Although the High Court was fully satisfied with the evidence of the victim PW. 13 and found sufficient corroboration on all material particulars from the evidence of PWs. 5, 6, 9, 10 and 12 and held the extrajudicial confession given by the respondent as true and made voluntarily and not obtained by any inducement, coercion or threat and that there could be penetration without rupture, yet, having accepted the entire prosecution evidence in toto, it committed an error in entertaining a doubt with regard to the accusation of rape holding that there was no sign of injuries and that the offence was not one punishable under s. 376 IPC or under s. 376 read with s. 511 IPC but only one under s. 354 IPC.

[p. 936 A-C]

7.3. The High Court even after observing that "the respondent's activities were menace to the neighbours" has shown a misplaced sympathy to the respondent which has led to the miscarriage of justice. The finding that the offence is one of outraging the modesty of woman for which sentence of imprisonment is not compulsory is erroneous and untenable.

[p. 942 A-C]

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8. Having regard to the seriousness and gravity of the repugnant crime of rape perpetrated on PW. 13 who was 8 years old on the date of the commission of the offence, while convicting the respondent under Section 376 IPC he is sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 25,000 to the victim girl.

[p. 948 B-C]

9. Though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of the rape and are not able to offer resistence and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilised society should be mercilessly and inexorably punished in the severest terms. [p. 948 EF]

A.R. Antulay v. R.S. Nayak and Another, [1988] 2 SCC 602 at page 673, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 447 of 1988.

From the Judgment and Order dated 5.9.1986 of the Madhya Pradesh High Court in Criminal Appeal No. 1023/83.

Ms. Pinky Anand and D.N. Goburdhan for the Appellants. B.P. Singh and umanath Singh for the Respondents. The Judgment of the Court was delivered by S. RATNAVEL PANDIAN, J. The factual matrix leading to the filing of this appeal which is quite simple gives an account of a sordid and obnoxious incident wherein the respondent, a medical practitioner who had created a private hell of his own was gratifying his animated passions and sexual pleasure by sexually assaulting and molesting young girls not only in utter disregard of the universal moral code, human dignity, his professional ethics and values but also in flagrant violation of the law of the country.

The brief facts of this shameless intrigue as unravelled by the prosecution at the trial are as follows:

> The respondent/accused who just then graduated from the Medical College was staying with the family consisting of his parents, his brothers, his sister-in-law Smt. Tara Dubey and niece Richa Dubey, who is the daughter of the respondent's step-brother Niraj Dubey, in Adarsh Nagar, Jabalpur. His father Bhagwan Dass Dubey (DW-2) was a retired Professor and his sister-in-law Tara Dubey (DW-1) was a lecturer. His another elder brother at the relevant time of this occurrence was working as Superintendent of Police in Rajgarh District. Opposite to his house at some distance Satish Bhasin (PW-9) and Sapna Bhasin (PW-10) were residing with their minor daughter Priti. Within the same locality 3 or 4 houses away from the house of the respondent/accused, the appellant Madan Gopal Kakad (PW-5) was living with his wife, a German lady, by name, Elesabeth Kakad (PW-6), his sister Veera (PW-7) and his minor daughter Tulna Sheri (PW-13), a girl aged about 8 years and his younger son Pulkit. The family members of the respondent and PW-5 were on cordial relationship making frequent visits to the houses of each other.
>
> Tulna Sheri (PW-13) the unfortunate victim in this case was studying in the third standard in St. Joseph Convent along with her class-mate Richa Dubey. Tulna used to come frequently to the house of the respondent to play with Richa Dubey and her other girl friends. Tarun Lata Joshi (PW-12) was living with her father who was a tenant in the house of PW-5.
>
> According to the prosecution, the respondent who had a crush on young girls used to develop friendship with the girls who used to come to his house to play with his niece Richa Dubey by narrating interesting stories from comic books. On the day of this deplorable incident, i.e. on 2.9.1982 at about 4 or 5 p.m. Richa Dubey called Tulna (PW-

13) stating that her mother wanted her. Accordingly Tulna wearing underwear and jeans accompanied by her younger brother Pulkit went to the house of Richa, but found none except the

respondent. The respondent found fault with Tulna for having come there in jeans accompanied by her brother. When the two girls, namely, Tulna and Richa started playing in the drawing room, the respondent whispered something in the ears of Richa, who then told Tulna that she had been asked by her uncle (the respondent) to take Pulkit outside and narrate him some stories and that the respondent would `make love', presumably meaning that he would tell some lurid tales of sex to her thereby stimulating immoral thoughts so that Tulna might fall a prey to his lewd and lascivious behaviour. As soon as Richa went outside taking Pulkit, the respondent bolted the door from inside, completely stripped off himself; removed the jeans and underwear of Tulna and made her naked and asked Tulna to do fellatio, that is to suck his penis. Thereafter the respondent cuddled and pined Tulna close to him, and slightly inserted his penis into her vulva and started sucking her lips. Within a few seconds, he ejaculated and freed the girl from his clutches and thereafter put on his pyjamas and asked Tulna to wear her jeans. Again the respondent longing for his lascivious passion, laid down Tulna on a sofa in his drawing room and remained lying on her and closed her mouth so that the girl could not scream. A little later after wetting his sexual appetite he got up; opened the door allowed the girl to go out. While the girl was leaving the drawing hall, the respondent threatened her not to disclose his affair to anyone, otherwise his elder brother who is a high ranking police office would mercilessly beat her parents. Tulna came out of the room and told Richa as to what all happened inside the room.

In the evening of that day she told her mother (PW-6) that the respondent was a dirty fellow and he had asked her to suck his private part, to which PW-6 instructed not to go to the house of respondent thereafter. However, Tulna did not narrate the entire episode to her mother on the day of the incident evidently out of fear. When Tulna again narrated this incident to Richa, the latter told her that her Chacha, referring to respondent, was like a dog and that he used to do the same thing with her also by stripping of her whenever she came from the school and whenever she was lying on her bed and further told that the respondent when asked as to why Tulna and Priti are in fair complexion, her chacha replied that their complexion is fair because they sucked his male organ and that if Richa also did the same thing she would also become very fair in her complexion. PW- 12, Tarun Lata Joshi, who was present nearby seeing Tulna and Richa whispering each other asked them what was the matter. Tulna narrated the incident to her and other girl friends. On the next day, seeing the respondent standing near the gate of his house Tulna repeated the same remark to her mother (PW-6). Thus on the third day, Tulna told her mother the entire incident which took place in the drawing hall of the house of the respondent on 2.9.1982.

On hearing this horrid episode, PW-6 was very much annoyed and conveyed this painful and jarring piece of information to PW-7 (Veera). Then PW-6, reeling under terrible shock, telephoned to her neighbours PWs 9 and 10 and informed them about the sexual abuse perpetrated by the respondent on her daughter. At about 9.00 p.m. the appellant, Madan Gopal (PW-5) came to his house and learnt about the occurrence. Faced with the traumatic situation, the helpless panic stricken parents who have been so deeply disturbed by the dehumanising act of the respondent rushed with boiling blood to the house of the respondent accompanied by PWs 7, 9 and 10 and searched for the respondent, but could not find him there. They then informed the purpose of their visit to the elder brother and sister-in-law of the respondent who told PWs 5 and 6 that the respondent had gone to a cinema hall and they would send the respondent's younger brother to fetch him. All those including

the rightful indignanted parents of victim Tulna, assembled in the house of the respondent, kept waiting till mid night. The respondent after returning from the theatre realising that the entire atmosphere was thick with the charge of sexual molestation against him and finding him in culde-sac voluntarily confessed his crime stating that he had raped Tulna and also had committed the same kind of sexual assault on earlier occassions with Richa, Priti and other girls of that locality, but being a Doctor he had been careful enough not to repture their hymen. When PW-5 on being acerbated and mentally perturbed on hearing the confessional statement rushed towards the respondent to attack him, respondent's brother and sister-in-law fell at the feet of PW-5 and pathetically beseeched not to do anything till the arrival of the parents of the respondent in the next morning.

Coming to know to the arrival of the father of the respondent Bhagwan Dass (DW-2) with his wife on the next morning, Madan Gopal, (PW-5) along with PWs 6, 9 and 10 met DW-2 who took strong objection for PW-5's behaviour on the last night. When PW-5 informed DW-2 that his son (respondent) had raped his minor daughter Tulna, DW-2 was not prepared to believe their accusation. Thereafter at the request of PW 5, he called his son and questioned him. Though the respondent first abjured his complicity, however, admitted his abominable crime of sexual assault on Tulna. Thereupon Bhagwan Dass gave his stick to Madan Gopal and said that it was for PW 5 either to show mercy or to give corporeal punishment as he deemed fit and also made an earnest appeal to PW-5 not to precipitate any action against his son. Presumably, PW-5 and his family members thinking that the police might not take any action against the respondent since his brother was a Superintendent of Police and his family was wielding a high influence in that area and also fearing that any publicity of this incident would bring only a disrepute to their family and that the future life of their daughter would be completely shattered, suffered in silence for 2 or 3 days, without approaching any authority. However, on 7.9.1982 PW- 5 mustered his strength and decided to lodge a criminal complaint against the respondent. Accordingly, he handed over a written complaint Ext. P-7 to his friend. Subhash Bhujbal (PW-8) and got it delivered at the police station. On the strength of Ext. P-7 a case was registered by the SHO of Goprakhpur Police Station (PW-11) and the investigation was entrusted to ASI (PW-14). During the course of the investigation the victim Tulna (PW-13) was examined by Dr. Chitra Tiwari (PW-4) on 7.9.82 on being sent by the police. According to PW-4 there was an abrasion on the medial side of Labia Majora about 1-1/2" in length, redness present around the labia minora with a white discharge, and hymen was intact and admitted tip of little finger. PW-4 has opined that an attempt to rape had been made. Ext. P-6 is the medical certificate. PW-4 has further stated that she prepared a slide for confirmation of the white discharge found around labia minora. In the cross-examination she has deposed that the white discharge was not flowing out, but it was at the same place where she noticed the redness and the discharge could have been as a result of infection which itself could have caused the redness found around labia minora. Further she has stated that she did not find any crest on labia majora. The Chemical Examiner after examination of the slide, sent his report Ext. P-13 which did not reveal any seminal stains in the virginal smear. PW-2, a Medical Officer examined the respondent on 13.9.82 and found him as a virile person with well built body capable of performing sexual inter-course, but found no injuries on his person. The Investigating Officer after examining all the witnesses and completing the investigation filed the charge sheet against the respondent for the offence of rape punishable under Section 376 IPC.

The respondent took his trial on the indictment that he committed rape on Tulna between 4 and 5 p.m. on 2.9.82 in the drawing hall of the house of respondent. The totality of the evidence on the basis of which the prosecution rests its case consists of three categories, namely, (1) the oral testimony of the PW-13 corroborated by PWs 6 and 12; (2) the extra-judicial confession made by the respondent on two occassions; and (3) the medical evidence. Of the witnesses examined Tulna (PW-13) alone speaks about the actual commission of rape on her. Though Tulna reported this unpleasant incident to Richa immediately after coming out of the drawing hall, Richa has not been examined by the prosecution obviously for the reason that Richa is none other than the niece of the respondent himself. The next set of corroborating witnesses who speak about the victim's reporting about the incident are PW 6 and 12. On the evening of the date of incident even though Tulna reported to her mother that the respondent was a bad man and that he asked her to suck his penis, she did not reveal the other part of the incident relating to the commission of the rape obviously fearing that her parents would beat her. It was only on the third day, the mother (PW-6) came to know from Tulna about the actual incident, presumably after the victim girl started reporting this incident to PW-12 and to her other playmates. The second category of evidence is the extra-judicial confession made by the respondent before PWs 5, 6, 7, 9 and 10 in the house of the respondent himself after he had been sent for from the cinema hall. According to the above witnesses, this confession was made not only in their presence, but also in the presence of the respondent's brother and sister-in-law (DW-1). (It is but natural that the brother and sister-in-law of the respondent would not figure as witnesses on the side of the prosecution and depose against the respondent.) According to the witnesses the confession made by the respondent was thus:

> "I have raped the girl, but I have not ruptured her hymen. You should not be perplexed, I know what are my limits, I am a doctor. You need not to go to any doctor."

Thereafter on the next day morning the respondent made the similar confession before his parents in the presence of PWs 5, 6, 9 and 10 when PW-5 asked the respondent to tell the truth before his father by catching hold of him. On the two occasions the respondent confessed in English "I have raped the girl but not ruptured her hymen". The last category of the evidence is that of the Medical Officer (PW-

4), who examined the victim girl Tulna on 7.9.1982 and opined that there was an attempt of rape on Tulna.

The Trial Court for the discussions made in its judgment arrived at a conclusion that the prosecution launched against the respondent on account of some enmity between the two families and that the prosecution has not adduced any acceptable evidence for holding the respondent guilty of the offence under Section 376 IPC and consequently acquitted the respondent. The reasons, assigned by the Trial Court for such a conclusion are based on its following findings:

> (1) The evidence of PWs 5, 6, 7, 9 and 10 is highly tainted and as such no safe reliance can be placed on their testimony.

(2) The extra-judicial confession which the respondent had retracted cannot be said to be free from threat, coercion or promise.

(3) The extra-judicial confession as such seems to be unnatural and it is wholly the product of an illegal advice and false fabrication. (4) The evidence of the victim (PW-13) is not corroborated by other independent evidence. (5) The First Information Report has been belatedly lodged and there is no reasonable explanation for such a delay.

On being aggrieved by the judgment of the Trial Court acquitting the respondent, the State preferred an appeal before the High Court challenging the order of acquittal. It is seen from the judgment of the High Court that the complainant who is the appellant before this Court also filed a revision in Criminal Revision No. 596/83 questioning the legality of the order of acquittal and further one Jay Rao of New York (U.S.A.) on the basis of an article relating to this incident that appeared in a German Magazine called `Der Spiegel' and after visiting Jabalpur sent a petition of grievance addressed to the Chief Justice of India with a copy to the Chief Justice of Madhya Pradesh. On the basis of this petition, another revision in criminal Revision No. 599/83 was registered. The High Court disposed of the State appeal and the two criminal revisions by a common judgment, whereby it allowed the State appeal for the reasons assigned therein accepting the oral testimony of the prosecution witnesses particularly of PWs 6, 12 and 13 and the extra- judicial confession made by the respondent. Now separate orders were passed in the criminal revisions. However, the High Court found the respondent guilty of the offence only under Section 354 IPC and sentenced him to pay a fine of Rs. 3,000, in default to suffer simple imprisonment for 6 months and also directed a sum of Rs. 2,000 out of the fine amount if collected to be paid over as compensation to PW-5.

The State has not preferred any appeal before this Court. However, the father of the victim girl, namely PW-5, feeling aggrieved by the judgment of the High Court has filed this criminal appeal mainly on two grounds, namely, (1) The High Court has erred in finding the respondent guilty of a minor offence under Section 354 IPC when all the necessary ingredients to constitute an offence punishable under Section 376 IPC have been satisfactorily established; (2) that the sentence of fine alone imposed by the High Court under Section 354 IPC for this serious offence is grossly inadequate and is not commensurate with the gravity of the offence committed by the respondent. When the matter came up for admission before this Court on 25.8.88, the following order was made:

"Special leave granted, confined to the nature of the offence and the sentence to be awarded."

It is pertinent to note that the respondent has not challenged the findings of the High Court by filing an appeal and as such the findings of the High Court rendered with reference to the evidence adduced by the prosecution and the conviction based upon those findings have reached their finality so far as the respondent is concerned.

Before pondering over the question with regard to the nature of the offence and the quantum of punishment to be awarded, we feel that it is necessary to recall some of the findings of the High Court.

1. The High Court after observing, "there is no reason as to why a small innocent girl would have laid such a serious charge against the respondent, if it was not true", held that the evidence of Tulna has been materially corroborated by her friend Tarun Lata (PW 12).

2. Referring to the confession of the respondent, it has been held by the High Court, "Though there can be penetration without rupture, the absence of any sign of injuries, negatives a case of rape with a small girl".

3. As regards the evidence of Tulna, the Court has held thus, "The statement of Tulna can be safely accepted to the extend that the respondent after undressing himself and Tulna, asked her to suck his organ and he then lay over her. She has been fully corroborated by her mother Elsbeth, father Madangopal, friend Tarun Lata and neighbours Satish and Sapna. They have no axe to grind against the respondent. No adverse inference can be drawn for lodging the report 5 days after the incident."

4. Then referring the corroboration required to the extra judicial confession made by the respondent on two occasions, the High Court has recorded the following observation:

> "After realising that his misdeeds have been exposed and he can no longer hide himself, he had not option but to confess. This was only option left when he was cornered by his own neighbours and relations.....There was no question of any coercion or inducement in presence of his family members in his own house.....The confession was nothing but by way of repentance for the wrongs done to the young girls and other girls. It appears that the respondent was a perverted person and was satisfying his sexual urge by outraging modesty of young girls who fell easy prey to his designs."

5. Commenting on the finding of the Trial Court as regards the confession, the High Court has said, "The evidence of extra-judicial confession has not been accepted because the witnesses have not repeated like parrots in the same words what the respondent had uttered but the substance is the same i.e. the respondent confessed that he had violated (sic) the girl but not ruptured her hymen. Whether the witnesses said the same thing in Hindi or English would not make any difference".

6. Coming to the probity question of the evidence of Tulna, the Court said thus:

> "Although she was a child, she had modesty alright and was ashamed to tell everything to her mother. She was also not sure what would be the reaction of her mother. Therefore, there was hesitation on her part. But she did tell to her classmate Richa and also to her friend Tarunlata (PW 12) about it on the next day. Tarunlata has corroborated her,.....We are also satisfied that Tarunlata has deposed regarding what she was told by Tulna....."

The above findings and observations made by the High Court clearly show that the High Court was fully satisfied with the evidence of the victim Tulna (PW 13) and found sufficient corroboration on all material particulars from the evidence of PWs 5, 6, 9, 10 and 12 and that the extra- judicial confession given by the respondent was true and it was not obtained by any inducement, coercion or threat but on the other hand it was voluntarily made and that there could be penetration without rupture. Having accepted the entire evidence adduced by prosecution in toto, the High Court nonetheless entertained a doubt with regard to the accusation of rape holding there was no sign of injuries and held that the offence is not one punishable under Section 376 IPC or under Section 376 read with 511 IPC but only one under Section 354 IPC on the ground that the respondent has outraged the modesty of Tulna by "feeling pleasure in getting him and the victim made necked, asking unwary minor girls to fiddle with his organ" taking advantage of the absence of the other adult family members in his house. Coming to the question of sentence, the High Court gave the following reason:

> "The learned Govt. Advocate has nothing to say about the sentence. There can be no doubt that the act of the respondent is most reprehensible, he was attempting to corrupt innocent and unwary minor girls and his activities were menace to the neighbours, but since he is now gainfully employed and there is nothing to show that he is indulging in his nefarious activities, no useful purpose will be served by again sending him to jail and sentence of fine will meet the ends of justice."

As we have pointed out in the preceding part of this judgment, the findings of the High Court, rendered in exercise of its appellate jurisdiction are findings of fact which in our opinion cannot be reopened in this appeal especially when the respondent has not challenged those findings and when there is absolutely no reason muchless compelling reason for holding that those findings are either in utter disregard of the evidence or unreasonable and perverse or any part of the evidence in favour of the respondent is jettisoned. However, we would like to point out that the trial court has allowed some inadmissible evidence to be let in by the prosecution which evidence has also been taken note of and discussed by the Courts below, such as the statement alleged to have been made by Richa (not examined) to Tulna about the respondent's abnormal sexual behaviour with her despite the fact she falls within the prohibited degree of consanguinity and the evidence touching the character of the respondent that he has sexually assaulted not only Richa and Priti but also a number of minor girls. We, while analysing and evaluating the evidence and considering the findings of the High Court quo the sexual assault committed on PW 13 by the respondent, proceed only on the basis of the evidence legally permissible without being influenced by the inadmissible evidence and some of the observations made thereon by the Courts below. Before expressing our independent opinion on the evidence, we give a brief background of the status of the witnesses and the cordial relationship between the family members of the respondent and the witnesses.

The material prosecution witnesses are all highly educated and respectable people of the same locality within which the houses of the respondent and the witnesses are situated. PW 5, the father of the victim girl had been in Germany working in the field of journalism for nearly 18 years and he is well conversant with English, Germany and Hindi languages. His wife PW 6 is a German lady who after having settled in India has learnt to speak in Hindi. PW 7, who is the sister of PW 5, is also a

well educated lady working as a Teacher in a School. PW 6 was enjoying the facility of a telephone connection in his house. PW 9, a Contractor and his wife PW 10, who are the parents of Priti are very respectable people enjoying a high social status and having their house near about the house of the respondent, provided with all modern facilities including telephone etc. It is said that the people in that locality inclusive of the family members of the respondent used to visit their house to make use of their telephone. In that way the family members of the respondent, PWs 5, 9 and others were having a very close and cordial relationship till this incident occurred. As earlier pointed out, respondent's father was a retired Professor and his elder brother was then occupying a key position in the Police Force in the rank of a Superintendent of Police posted in the district of Rajgarh during the relevant period. His sister-in-law (DW-1) was a Lecturer and his uncle was a leading lawyer. It is said that the family of the respondent was wielding high influence in that area. There is absolutely no evidence, even to remotely suggest, that there was any enmity or any kind of misunderstanding between the families of the respondent and PW 5 till this incident to raise the accusing finger against the respondent either by the little innocent girl (PW 13) or by PW 5 and to make this ignoble allegations at the risk of their family honour and the future prospects of PW 13. Of course, the respondent has suggested a motive against PW 5 evidently drawing the same from the fertility of his imagination that Tulna had told him that her parents were getting money for spying for German Embassy and PW 5 after coming to know of this disclosure of spying has fabricated this false story of molestation of his minor daughter fearing that he would be exposed to criminal prosecution by the respondent's brother, the Superintendent of Police which defence theory on the face of it has to be thrown overboard and which in fact did not find acceptance at the hands of the High Court.

Ms Pinky Anand, the learned counsel appearing for the appellant having thoroughly marshalled the facts, presented her persuasive submissions so eloquently in an effective and at the same time in a very supplicatory manner by taking us through the entire evidence very meticulously and pleaded that the spine-chilling facts and the circumstances surrounding the case do demand the interference of this Court with the judgment of the High Court so that the wrong done due to the erroneous conclusion of the High Court may be remedied. Though Ms Pinky Anand initially put forth her arguments on two alternative grounds, namely, that the conviction should be altered into one under Section 376 IPC or the sentence of fine imposed for the conviction under Section 354 IPC which is grossly inadequate should be enhanced. But she left out the alternative argument and stressed the first part of her submission that the offence made out is nothing short of rape punishable under Section 376 IPC. At one point of time, she feebly stated that at least the offence will be falling under Section 376 read with 511 IPC on the opinion of PW 4, if not under Section 376 IPC which submission she completely gave up subsequently and proceeded vehemently contending that the offence of rape within the definition of Section 375 is clearly made out.

The learned counsel appearing for the respondent took much pain in strenuously opposing the plea, articulated by Ms Pinky Anand and in supporting the impugned judgment. He urged that the conclusion arrived at by the High Court is the reasonable and plausible one and, therefore, that conclusion need not be disturbed.

Though it is not necessary for us to enter upon a reappraisal or reappreciation of the evidence since the findings of fact of the High Court have not been challenged, yet we after most carefully and

closely scrutinis-

ing the galaxy of the proven facts, have no hesitation in agreeing with the High Court that the extra-judicial confession made by the respondent which is not shown to have been obtained by coercion, promise of favour or false hope etc. is plenary in character and voluntary in its nature acknowledging his guilt-i.e. the gravely incriminating fact of the commission of rape on Tulna-in precise and explicit words. This confession has been made in presence of a body of person on two occasions inclusive of the family members of the respondent as well as PWs 5, 6, 9 and 10. PW 7 was present only on the first occasion along with other witnesses. As ruled by this Court in Piara Singh v. State of Punjab, AIR 1977 SC 2274 = [1978] 1 SCR 597 law does not require that the evidence of an extra-judicial confession should in all cases be corroborated. However, coming to the facts of the case, the confession of the respondent is amply corroborated by the evidence of the victim (PW 13) whose testimony in turn is corroborated by PWs 5, 6, 7, 9 and 10 and also by the medical evidence.

As regards the evidence of PW 13 relating to the incident, the High Court has accepted only one part of the accusations, namely, that the respondent asked Tulna to be an active agent of oral copulation by sucking his penis, notwithstanding the fact that the High Court without any compunction has accepted the evidence of PW 13 as being substantially corroborated and the extra-judicial confession of the respondent as being free from any vice and held that "it is beyond comprehension that the complainant would have laid a false and reckless charge against the respondent by involving his own minor daughter Tulna in such unsavoury incident for nothing not caring about her future and his own reputation and honour. There is no reason as to why a small innocent girl would have laid such a serious charge against the respondent, if it was not true." In our considered view, the High Court was not at all justified in reaching a distorted conclusion which has resulted in miscarriage of justice.

On a careful scanning of the entire records, we have no reservation in accepting the evidence of PW-13 in its entirety and the extra-judicial confession of the respondent which clearly makes out a case for an offence under Section 376 IPC, the reasons for which we will discuss infra.

There are a series of decisions to the effect that even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the `probabilities factor' does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. Vide Rameshwar v. State of Rajasthan, [1952] SCR 377; Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, [1988] 2 SCC 217; Krishan Lal v. State of Haryana, [1980] 3 SCC 159.

We shall now briefly deal with the principles regarding the powers of the High Court to review the evidence while examining an order of acquittal sitting in its appellate jurisdiction.

An appeal against acquittal provided under Section 378 of the Code of Criminal Procedure falls under Chapter XXIX under the caption "Appeals". This Chapter covers Sections 372 to 394. Whilst

Section 374 deals with the `Appeals from Convictions', Section 377 deals with the `Appeal by the State Government against sentence'. As stated above Section 378 of the new Code (corresponding to Section 417 of the old Code) gives the High Court full power to review at large the evidence upon which the order of acquittal was founded and to reach its own conclusions upon that evidence either by reversing the order of acquittal or disposing of the same otherwise as facts therein warrant. In other words, the High Court is clothed with the plenary powers to go through the entire evidence and to come to its own conclusions as warranted by the facts of the case concerned but, of course, subject to certain guidelines laid down by the judicial pronouncements. The Privy Council in Sheo Swarup and others v. King Emperor, AIR 1934 PC 227 (2) in dealing with the power of the High Court to review the evidence and reverse the acquittal held thus:

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a seeing the witnesses."

In Wilayat Khan & Others v. State of U.P., AIR 1953 S.C.122 this Court while examining the scope of Sections 417 and 423 of the Code pointed out that even in appeals against acquittal, the powers of the High Court are as wide as in appeals from convictions. See also Surajpal Singh and others v. The State, [1952] SCR 193; Tulsi Ram v. The State, AIR 1954 S.C.I; Aher Raja Khima v. State of Saurashtra, AIR 1956 S.C. 217 = [1955]2 SCR 1285; Radha Kishan v. State of U.P., AIR 1963S.C.822 = [1963] Supp. 1 SCR 408 holding that an appeal from acquittal need not be treated different from an appeal from conviction; Jadunath Singh and others, etc. v. State of Uttar Pradesh, [1971] 3 SCC 577; Dharam Das v. State of U.P., [1973] 2 SCC 216; Barati v. State of U.P., [1974] 4 SCC 258 and Sethu Madhavan Nair v. State of Kerala, [1975] 3 SCC 150.

We think it not necessary to swell this judgment by recapitulating all the decisions on this point, but suffice to say that this Court has consistently taken the view that in cases of appeals against acquittal as a matter of jurisdiction, the whole case is at large for review by the High Court both as to the facts and the law and that the true legal position is that however circumspect and cautious approach of the High Court may be in dealing with those appeals by exercising its plenary and unlimited statutory powers, the Court is undoubtedly to reach its own proper conclusions of guilt or otherwise of the indicted persons as the established facts warrant and to award appropriate sentence which will be commensurate with the gravity of the offence in case of conviction.

Reverting to the instant case, if the conclusion of the High Court that the offence made out is only punishable under Section 354 IPC, is scrutinised with reference to the evidence adduced by the prosecution and tested in the light of the above principles of law laid down by this Court, in our view, the conclusion under challenge is not a reasonable and justifiable one since the totality of the evidence demonstrably establishes a graver offence. Moreover, the sentence of fine alone imposed by the High Court even assuming that the offence is punishable under Section 354 is grossly inadequate and is not commensurate with the serious nature of the offence. Of course, this question of the inadequacy of sentence under Section 354 does not come within the purview of our consideration because we proceed on the footing that the offence is not a mere outraging the modesty of woman but much more than that. Further, we are constrained to hold that the High Court even after abserving that "the respondent's activities were menace to the neighbours" has shown a misplaced sympathy to the respondent which is patently reflected from the penultimate paragraph of its judgment and which has led to the miscarriage of justice. The impugned finding that the offence is one of outraging the modesty of woman for which sentence of imprisonment is not compulsory is erroneous and untenable.

The next crucial question that arises for our consideration is whether the proved facts establish the offence of rape or only attempt to commit rape. Before the High Court, the learned Government Advocate appears to have urged that the offence was punishable under Section 376 read with 511 IPC though the charge was for a specific offence of rape punishable under Section 376 IPC.

The medical officer, PW 4 who then only 28 years old, on examining the victim after 5 days of the incident i.e. 7.9.82 has given her opinion as follows:

> "From the above findings, it seems an attempt to rape has been made."

In the cross-examination, the following answer is brought out from the medical officer, PW 4:

> "I concluded about attempt to rape, on account of abrasion and redness on labia majora and minora respectively."

It is true that this medical officer who could not have gained much experience by that time has given her opinion that the abrasion found would have been less than 2 days' duration which opinion of course is not precise but approximate and probable. Though the prosecutor who conducted the case before the trial court has not put any question clarifying her opinion in the re-examination, it has been clearly brought out in the cross-examination itself that the medical officer was basing her opinion on the abrasion found on labia majora and minora. It means that the medical officer was of the opinion that the abrasion measuring one and a half inches in length found on the medial side of the labia majora and the redness around the labia minora could have been caused even on 2.9.82. By this opinion, PW 4 has given a margin of 5 days in fixing the probable duration of the injury. The defence counsel has not further pursued and put any question clarifying the subsequent answer given by the medical officer regarding the duration of the injury.

Though in the grounds of appeal, it is specifically stated that all ingredients for constituting an offence within the ambit of Section 375, punishable under Section 376 IPC are made out, alternatively a hesitant plea is made that the offence at any rate would not be less than Section 376 read with 511 IPC. We also prima facie were of the opinion that the offence may be punishable under Section 376 read with 511 IPC but after deeply going through the evidence, we have no hesitation in holding that the offence is nothing short of rape punishable under Section 376 IPC. Merely because the inexperienced medical officer has opined that it was an attempt to commit rape, probably on the ground that there was no sign of complete penetration, we are not inclined to accept PW 4's legal opinion as to the nature of the offence committed by the respondent.

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.

Nariman, J. in R v. Ahmed ali 11 WR Cr. 25 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."

Fazal Ali, J. in Pratap Misra v. State of Orissa, AIR 1977 SC 1307 = [1977] 3 SCC 41 has stated thus:

".....it is well settled that 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."

We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurispurdence 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 sufficent 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."

(emphasis supplied) 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."

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

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

In Halsbury's Statutes of England and Wales (Forth Edition) Volume 12, it 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 R v. Hughes, [1841] 9 C & P 752 ; R v. Lines, [1844] 1 Car & Kir 393 and R v. Nicholls, [1847] 9 LTOS 179.

See also Harris's Criminal Law (Twenty Second Edition) at page 465.

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."

The First Explanation to Section 375 of India Penal Code which defines `Rape' reads thus:

> :Explanation-Penatration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistant 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 Natha v. Emperor, 26 Cr. L.J. [1925] page 1185; Abdul Majid v. Emperor, AIR 1927 Lahore 735 (2); Mussammat Jantan v. The Crown, (1934) Punjab Law Reporter (Vol.36) page 35; Ghanashyam Mishra v. State, (1957) Cr.L.J. 469 = AIR 1957 Orissa 78; D. Bernard v. State (1947) CR.L.J. 1098. In re Anthony, AIR 1960 Mad. 308 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 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape."

Reference also may be made to Prithi Chand v. State of Himachal Pradesh, [1989] 1 SCC 432 though the facts therein are not similar to this case.

In the case on hand, there is acceptable and reliable evidence that there was slight penetration though not a complete penetration. The following evidence found in the deposition of PW 13 irrefragably proves the offence of rape committed by the respondent:

> "Nawal uncle untied his pyjama and took out his male organ and put it inside my vagina and clutched me.....Nawal Chacha put his male organ inside my vagina and since it was fat it kept slipping out. After that my vagina was paining."
>
> ".....When Nawal Uncle held apart, then there was some white liquid coming out from his male organ... ....
>
> "Nawal Chacha pressed my mouth so I could not scream."

In the cross-examination, the following answer is given:

> "I suffered pain by what Nawal Chacha did....."

When the evidence of PW 13 is taken with the evidence of medical officer who found an abrasion on the medial side of Labia Majora and redness present around the Labia Minora with white discharge even after 5 days, it can be safely concluded that there was partial penetration within the labia majora or the vulva or pudenda which in the legal sense is sufficient to constitute the offence of rape. Moreover, the respondent himself has confessed twice admitting the commission of rape without rupturing the hymen which confession is not disbelieved by the High Court. The respondent is a medical officer who has got the practical knowledge of the anatomy of a human being and the tender sexual organ of a young girl and who must have been quite aware of the implication of his confession having fully understood the meaning of the word `rape'. Therefore, as admitted by the respondent himself, he without forcibly and completely penetrating his penis into the vagina of PW 13 had slightly penetrated within the labia majora or vulva or pudenda without rapturing the hymen and thereby his lust after emission of semens. In this context, it is not necessary to enter into any nice discussion as to how far the male organ has entered in the vulva or pudenda of PW 13 since it is made clear that there was penetration attracting the provisions of Section 375 IPC. The evidence of PW 13 is amply corroborated not only by the medical evidence and the corroborating evidence of PW 12 but also by the plenary confession of the respondent himself.

From the above discussion, we unreservedly hold that the prosecution has satisfactorily established its case that the respondent has committed rape on PW 13 by proving all the necessary ingredients required to make out an offence of rape punishable under Section 376 IPC.

In the result, we set aside the judgment of the High Court convicting the respondent under Section 354 IPC and sentencing him to pay a fine of Rs. 3,000 instead convict the respondent under Section 376 IPC.

What would be the quantum of punishment that would meet the ends of justice in the facts and circumstances of the case, is the next question for our consideration.

It is very shocking to note from the judgment of the High Court that the Government Advocate did not address on the question of sentence. The High Court thought of imposing fine only on the ground that the respondent "is now gainfully employed and there is nothing to show that he is indulging in his nefarious activities". We regret to say that we are not able to understand the above reasons which are not in conformity with the concept of sentencing policy in a grave case of this nature.

We are told at the bar that the victim who is now 19 years old, after having lost her virginity still remains unmarried undergoing the untold agony of the traumatic experience and the deathless shame suffered by her. Evidently, the victim is under the impression that there is no monsoon season in her life and that her future chances for getting married and settling down in a respectable family are completely married.

Though the State has kept silence after the disposal of the appeal by the High Court, the helpless panic stricken father of the victim (PW 13) with a broken heart has entered the portals of this Court and is tapping the door, crying for justice.

It will be appropriate to refer the following observation of Ranganath Mishra, J (as he then was) in his separate concurring judgment sitting in the Seven-Judges Bench in A.R. Antulay v. R.S. Nayak and Another, [1988] 2 SCC 602 at page 673:

> "No man should suffer because of the mistake of the Court.....Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."

Accordingly, we, having regard to the seriousness and gravity of this repugnant crime of rape perpetrated on PW 13 who was then 8 years old on the date of the commission of the offence in 1982, while convicting the respondent under Section 376 IPC sentence him to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 25,000 in default to suffer rigorous imprisonment for 1-1/2 years. The fine amount of Rs. 25,000 if realised shall be paid to the victim girl who is now a major. If the fine amount of Rs. 3,000 imposed by the High Court which we have set aside, has already been paid that amount shall be adjusted with the fine amount now imposed by us.

"JUSTICE DEMANDS, THE COURT AWARDS"

Before parting with the judgment, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offences committed on children. This is due to the reasons that children are ignorant of the act of rape and are not able to offer resistence and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilised society should be mercilessly and inexorably punished in the severest terms.

We feel that Judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand.

The appeal is allowed accordingly.

R.P. Appeal allowed.