Radhakrishna Nagesh vs State Of A.P on 13 December, 2012

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Bench: Gyan Sudha Misra, Swatanter Kumar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1707 OF 2009

Radhakrishna Nagesh …Appellant

Versus

State of Andhra Pradesh …Respondent

J U D G M E N T

Swatanter Kumar, J.

1. The present appeal is directed against the judgment dated 23rd January, 2009 passed by the Division Bench of the High Court of Judicature at Hyderabad, Andhra Pradesh whereby the order of acquittal dated 11th February, 1999 passed by the Trial Court was reversed. The appellant, while impugning the judgment under appeal, raised the following contentions: -

> 1. The High Court could not have interfered with the judgment of acquittal of the Trial Court which was very well-reasoned, based upon proper appreciation of evidence and was in consonance with the settled principles of law. The High Court, thus, has exceeded its jurisdiction by interfering with the judgment of acquittal of the Court of Sessions.
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> 2. There are serious contradictions between the ocular and the medical evidence which materially affect the case of the prosecution.

Therefore, the accused is entitled to a reversal of the judgment of the High Court.

3. There was no sexual intercourse between the appellant and the victim. The prosecution has not been able to establish any link between the commission of the alleged offence and the appellant.

4. The case of the prosecution is based upon the sole testimony of the victim. All these circumstances, examined cumulatively, entitle the accused for an order of acquittal.

5. Lastly, the punishment awarded to the accused is too harsh.

2. These contentions have been raised with reference to the case brought on record by the prosecution. The factual matrix of the case as per the prosecution is:

3. The accused/appellant was working as a ball picker in S.V. University tennis court, Tirupati, and in that capacity he was having the custody of the key to the storeroom situated on the south-east of the tennis court. The tennis net and other articles were stored in this place. On 7th September, 1997 at about 7.00 p.m., the accused saw a girl named A. Haritha, who was standing alone outside the red building. It may be noticed, that the mother of the victim girl, namely Sampuramma, PW5, was working as a maid-servant in the red building attached to the University.

4. A. Haritha, the victim belonged to the Scheduled Caste category and was about 11 years of age at the time of the incident. The accused asked her to come along with him. At first she refused but the accused enticed her on the pretext of purchasing gold colour plastic bangles. When she agreed to accompany him, he bought her the bangles and then took her to the store room near the tennis court, the key to which he was possessing. He opened the lock and took the victim inside the room and committed rape on her against her will. In fact, he even threatened to assault her. One Narayanaswamy, PW3, a rickshaw puller, who was waiting by the side of Gate No. 3 of the S.V. University noticed the accused taking the victim into the store room and thus, became suspicious. He went to the store room and tapped the door several times. However, the accused did not open the door at first, but upon further insistence of PW3, he did so. PW3 saw the victim girl weeping. The accused slammed the door. Suspecting that the accused might have done some wrong to the minor girl, Narayanswami, PW3 bolted the door from outside and ran to inform the authorities and/or the police. On his way he met Sub-Inspector of Police, Traffic P.S., Tirupati, Sh. S.M. Ramesh, PW1, who was standing near the NCC Office traffic point and informed him of the incident. Immediately, PW1 along with another Traffic R.S.I, R. Sivanandakishore, PW4, accompanied by PW3 went to the said storeroom, opened the door from outside and found the victim girl A. Haritha. She complained of pain in her vaginal region. PW1 took the victim girl as well as the accused to the SVU Campus Police Station and made a complaint, Ex. P.1, based upon which FIR, Ex. P.7 was registered under Sections 363 and 376 (2)(f) of the Indian Penal Code 1860 (for short 'IPC') and Section 3(2)(v) of the Schedule Castes and the Schedule Tribes (Prevention of Atrocities) Act, 1989.

5. Upon this report, Sub-Inspector of Police, B. Katamaraju, PW10 undertook the investigation. The accused was sent to the SV RR GG Hospital, Tirupati for medical examination. The victim girl was sent to the Government Maternity Hospital, Tirupati, for the same purpose and also for the assessment of her age. Certain articles, including the cut drawer of accused containing seminal stains, skirt of the victim girl etc. were seized and were sent to the laboratory. The Assistant

Director, RFSL Anantpur, after analysing the material objects, detected semen on the clothes and on the vaginal swabs of the victim, collected and preserved by the Medical Officer, and also on the underwear of the accused. The Investigating Officer recorded the statement of various witnesses and completed the investigation. Upon completion of the investigation, the Inspector of Police, PW11 presented a report under Section 173(2) of the Code of Criminal Procedure 1973 (for short 'the CrPC) for offences under Sections 363 and 376 (2)(f) of IPC. As the alleged offences were triable exclusively by the Court of Sessions, the accused was committed to the Court of Sessions, where he faced the trial. The prosecution examined 12 witnesses being PW1 to PW12 and exhibited documents P1 to P9 and material objects (M.Os.) 1 to 3 in its effort to bring home the guilt of the accused. As already noticed the Trial Court vide its judgment dated 11th February, 1999 held the accused not guilty of any offence and acquitted him. While recording the finding of acquittal, the Trial Court found certain material improbabilities and contradictions in the statements of the witnesses. Since we have to deal with the judgment of reversal of an order of acquittal, it will be useful for us to notice some relevant extracts of the judgment which would indicate as to what really weighed with the Trial Court while granting acquittal to the accused.

"32) In the evidence of P.W.3, he says that he does not know what P.W.2 informed to P.W.1 when he made enquiries. The evidence of P.W.4 is of no use. As seen from his evidence, it is manifest that he is unable to identify the accused person who was present in the court on the date of his giving evidence. Even he has not divulged anything about P.W.2 informing the incident to P.W.1. As such, the evidence of PW.1 that the victim girl narrated the incident to him, is not corroborated by any one of the witnesses.

33) It is an admitted fact that at the scene of offence, P.W.1 did not prepare any statements, and he simply brought both the accused and P.W.2 to the Police Station. But, it is (sic) not unnatural on the part of P.W.1 and other police personnel who went to the scene of offence without any pen or papers on their hand, as it is evident from the evidence of P.W.3 that immediately after informing the incident to P.W.1 they went to the scene of offence. In such case we cannot expect P.W.1 to procure paper and pen to prepare any statement on the spot. Hence, in this context, the version of learned counsel for accused, that as P.W.1 failed to record any police proceedings or statement at the spot, cannot go against the prosecution case.

34) Nextly, it may be pointed out that though P.W.10 the S.I. of the Police registered the case, he did not try to record the statements of P.Ws 1 to 3 though they were available at that juncture. Till arrival of P.W.11, the Inspector of Police, the statements were not recorded. When P.W.10 himself registered the case, why he has not recorded the statements of the witnesses available at the spot, was not explained by him., it is only P.W.11 who received express F.I.R. from P.W.10 recorded statements of P.Ws. 1 and 2, and later sent the victim girl to the hospital for medical examination.

35) When coming to the evidence of P.W.2, though she narrated the incident and stated in her chief – examination that the accused removed his pant and underwear and laid her on the floor and passed liquid like urine in her private part, her admission in the cross-examination that Narayanswamy P.W.3 tutored her to depose in this case and also at the request of P.W.1, she deposed about purchasing of bangles by the accused and taken her to the room, makes her entire

evidence lack of credibility and inadmissible.

36) In this context, the learned counsel for accused submitted that in view of the particular admission made by P.W.2 that she was tutored by P.W.3, the evidence of P.W.2 becomes worthless and inadmissible. In this regard, he placed reliance upon a decision reported in "Ramvilas and others, Appellants. Vs. State of Madhya Pradesh, Respondent" (1985 Crl.L.J. Page 1773), wherein Their Lordships held that, when the statement was narrated to the witness just before entering into the witness box, the evidence of such witness is inadmissible in view of section 162 Cr.P.C. because the fact remains that it was narrated to the witness for the purpose of giving evidence at the trial and that tantamounts to making use of the statement at the trial which is prohibited by section 162 Cr.P.C.

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38) When coming to the evidence of P.W.3, it goes to show that he noticed the accused taking away a minor girl along with him to the tennis court. Though he suspected some foul play, he did not try to prevent the accused from taking the girl into the room of tennis court. This conduct of P.W.3 is not natural in those circumstances.

39) The evidence of P.W.5, the mother of victim girl goes to show that she came to know the incident after the victim girl and the accused were brought to Police Station. Hence, she is also not a direct eye-witness.

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43) Hence, it is manifest that for sustaining tenderness on the private parts of the victim girl, there could be some other reasons and those reasons are not ruled out by P.W.9. Admittedly, in the wound certificate furnished by her under Ex.P.5, she has not mentioned that there was an attempt on the person of P.W.2 victim girl. Further, there is no record to show that she obtained acknowledgment from the police for handing over the material objects collected by her at the time of examination. She collected vaginal swab and also vaginal washings. Further, on her examination, she found the hymen of the victim girl was intact and there was no laceration or congestion on fourchette.

59) But, in this case on hand, the evidence of P.W.2 the prosecutrix is of no avail in view of her admission that she was tutored by P.W.3 before her giving evidence. Hence, the above said citation also cannot be made applicable to the present facts of the case.

70) In this case, what is important is, that, though P.W.2 narrated the incident and stated that the accused took her to the tennis room and passed urine like substance on her private part, her own admission that she was tutored by P.W.3, demolishes the credibility of the victim girl. Hence, when the very direct evidence is doubtful in nature, the evidence of P.W.3 that he saw the accused taking away the girl along with him, and also P.W.1 and other noticing the victim girl along with the accused in the tennis court room, it also not much helpful.

71) Further as seen from the record, though P.Ws. 1 to 5 were examined by P.W.11 on the date of incident itself, all the said statements were sent to the court only on 28.1.1998. The alleged occurrence is on 7.9.1997. Hence, the sending statements to the court at a belated stage, has the effect of losing the spontaneity of the statements and further, admittedly the statement of P.W.2 recorded by P.W.1 was also not read over to her. Hence, in these circumstances, the benefit of doubt should be given to the accused. Hence, this point is answered against the prosecution."

6. Besides the above, the Trial Court had also expressed its doubt in relation to the authenticity of Ex.P.9, the wound certificate of accused, issued by the Chief Medical Officer, SV RR GG Hospital, Dr. V.V. Pandurana Vittal, PW12. There were certain corrections as referred to in paragraph 52 of the judgment in this regard. The High Court disturbed the above judgment of the Trial Court and found the accused guilty under Sections 363 and 376(2)(f) of IPC and convicted him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1000/- and in default of payment, to undergo simple imprisonment for three months under Section 363 of IPC. Accused was sentenced to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs.2000/-, and in default of payment, to undergo simple imprisonment for six months for the offence under Section 376 (2)(f) of IPC. The substantive sentences were directed to run concurrently.

7. Aggrieved from the judgment of conviction and order of sentence passed by the High Court, the accused has filed the present appeal.

8. We would prefer to discuss the first argument advanced on behalf of the appellant as the last because it would primarily depend upon the view we take upon appreciation of the evidence and the case of the prosecution in its entirety.

9. The second contention on behalf of the appellant is that there is a clear conflict between the medical evidence and the ocular evidence which creates a serious doubt in the case of the prosecution. To buttress this contention, reference has been made to the statement of PW2, the prosecutrix, where she states that she was subjected to rape, but according to the doctor, PW9 and the Medical Report, Ext. P.5, neither was she subjected to sexual intercourse nor was there any penetration.

10. PW2 was 11 years old at the time of occurrence, while she was 12 years old, when her statement was recorded in the Court. After the Court was convinced of the fact that she is competent to make the statement, the same was recorded. In her statement, she stated that she was working as a maid in the staff quarters of S.V. University, known as the red building. According to her, she knew the accused and he was in the habit of escorting children to the school. The accused had taken her to the tennis court, promised her that he would buy bangles for her and after purchasing the bangles the accused took her to a room in the tennis court. The accused closed the door of the room, lifted her langa, removed his own pant and underwear, put her on the floor of the room and passed liquid like urine into her private parts. In the meanwhile, she stated that she felt the starch in her private parts. At that time, one rickshaw puller, PW3 came and knocked at the door. The accused abused him in a filthy language and later the police came to the room. She further narrated that it was PW1 who had taken her and the accused to the police station, where she was examined by the Police.

11. Her langa was seized by the police and was sent to hospital for examination. She stated that her mother was also working as a maid in the red building itself. We must notice that despite a lengthy cross- examination, she stood to her statement and did not cast any doubt on the statement made by her in her examination-in-chief. When she was taken to the hospital, she was examined by Dr. G. Veeranagi Reddy, PW8, who stated that he was working as a Professor of Forensic Medicine in the S.V. Medical College, Tirupati and that on 13th September, 1997, he had examined a girl A. Haritha for the purposes of finding out her age. He stated as follows:-

> "2. On physical mental and radiological examination I am of the opinion of that the age of Haritha is between 10 and 11 years. Ex. P.4 is the certificate."

12. She was also examined by Smt. Dr. P. Vijayalakshmi, Assistant Professor in Maternity Hospital, Tirupati, PW9 on 7th September, 1997. According to PW9, the girl had washed herself after the incident. PW9 made the following remarks:- "There are no marks of violence nape of neck, front and back of the body. The abdomen was soft. Liver and spleen not palpable. The breasts are not developed. There was no axilliary pubic hair. The hymen was intact. No laceration or congestion in fourchette, the parts were tender to touch, which according to the doctor was an indication of attempt to rape with the girl." The doctor, PW9 also stated that considering the age of the victim and on seeing that the parts were tender to touch, she could say that there was an attempt to rape the victim girl A. Haritha. Since, according to PW9, the girl had washed herself after the incident, the doctor had to reserve her final opinion till the Chemical Analyst's Report (FSL Report). The vaginal swab and washing were preserved for chemical analysis. The FSL Report was Ext. P.6, while the Wound Certificate of victim girl was Ext. P.5. According to the FSL Report, semen was detected on Items 1, 2, 4, 5 and 6 and the same was of human origin. Saliva of human origin was detected on Item No. 3. The Chemical Analyst also detected semen and spermatozoa on Item Nos. 1, 2, 4, 5 and 6 and on Item No. 3 saliva was found.

13. Item No. 1 was torn brown colour polyester langa with dirty stains which the girl was wearing. Item No. 2 was a torn grey colour mill made cut drawer with dirty stains which the accused was wearing. Item No. 3 and Item No. 4 were the turbid liquid which was present on the cloth and in a bottle respectively. Item No. 5 was a cotton swab and Item No. 6 were two glass slides which were sent for opinion and via FSL Report, Ext. P.6, the opinion was received.

14. From the above evidence, it is not feasible to state with certainty that there is any conflict between the medical and the ocular evidence. One cannot find any fault in the statement of Dr. P. Vijyalakshmi, PW9, who waited to give her final opinion till she received the FSL Report. According to her, an attempt to rape the young girl was made, while according to PW2, she was subjected to rape and the accused person had discharged some liquid like urine in her private parts.

15. It is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the Court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution.

16. The absence of injuries on the back and neck of the victim girl can safely be explained by the fact that she was lured into the offence rather than being taken by using physical force on her. The preparation, attempt and actual act on the part of the accused is further clear from the fact that he had purchased bangles which he had promised to her and thereafter had taken her into the tennis court store room, the key of which was with him. This is also corroborated from the fact that even vide Ext. P.3, the langa as well as the bangles, coated with golden colour were recovered by the Investigating Officer, S.M. Khaleel, PW11.

17. An eleven year old girl and that too from a small place and serving as a maid could hardly be aware of such technicalities of law in relation to an offence of sexual assault. She felt very shy while making her statement in the Court, which fact was duly noticed by the Court in its Order dated 9th November, 1998.

18. In order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions. Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report, would not by itself substantiate the plea of contradiction or variation. Absence of injuries on the body of the prosecutrix, as already explained, would not be of any advantage to the accused.

19. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of Dayal Singh and Others v State of Uttaranchal [(2012) 7 SCALE 165] "29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In Kamaljit Singh v. State of Punjab [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held, "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. 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 examining 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 opinion is accepted, it is not the opinion of the

medical officer but that of the Court. {Plz. See Madan Gopal Kakad v. Naval Dubey & Anr. [(1992) 2 SCR 921 : (1992) 3 SCC 204]}."

20. In light of the above settled canon of criminal jurisprudence, we have no hesitation in concluding that we find no merit in the contention raised on behalf of the appellant with regard to discrepancy in the medical and the ocular evidence.

21. Further, it is argued by the appellant that there is no direct evidence connecting the accused to the commission of the crime and that there was no penetration, therefore, the accused has not committed the offence punishable under Section 376 IPC. As already noticed, the prosecution had examined nearly 12 witnesses and produced documentary evidence on record including Medical and FSL Report in support of its case.

22. Firstly, there is no reason for the Court to disbelieve the statement of PW2 that she knew the accused and that the accused incited her and lured her to buying bangles and then took her to the storeroom where he committed rape on her even threatened her of physical assault. PW3, the rickshaw puller who was standing at the gate of the University, had seen the accused taking the young girl towards the tennis court store room. Suspecting that he would do something wrong with the girl, he went to the room and knocked the door. The door was not opened by the accused, however, he persisted with the knocking. Thereafter the accused opened the door and abused him, but PW3 maintained his presence of mind and bolted the door from outside, leaving the accused and the prosecutrix inside the room and went to report the matter. On his way, he met PW1, S.M. Ramesh, Sub- Inspector of Police, Traffic P.S., Tirupati who accompanied him to the store room, brought both the accused and the victim to the police station, got an FIR registered on his own statement, the investigation of which was conducted by PW11, S.M. Khaleel, the Inspector of Police.

23. We see no reason as to why this Court should disbelieve the statements of PW1, PW2, PW3, PW5 and PW11, particularly when they stood the lengthy cross-examination without any material damage to the case of the prosecution.

24. According to the medical evidence and statements of PW8 and PW9, the victim was 11 years old at the time of occurrence and her private parts were tender to touch. The doctor, PW9 had reserved her final opinion awaiting the FSL Report. According to the FSL Report, the langa of the girl as well as the drawer of the accused were containing semen of human origin. The slides which contained the swab taken from the vagina of the girl also showed presence of semen of human origin. It may be noticed that these reports, in relation to Items 1, 2, 4, 5 and 6 came despite the fact that the girl had washed herself after the occurrence.

25. The mere fact that the hymen was intact and there was no actual wound on her private parts is not conclusive of the fact that she was not subjected to rape. According to PW9, there was a definite indication of attempt to rape the girl. Also, later semen of human origin was traceable in the private parts of the girl, as indicated by the FSL Report. This would sufficiently indicate that she had been subjected to rape. Penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The Explanation to

Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case. The Court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl.

26. At this stage, we may make a reference to the judgments of this Court which would support the view that we have taken. Firstly, in the case of Guddu @ Santosh v. State of Madhya Pradesh [(2006) Supp. 1 SCR 414], where the Court was dealing with somewhat similar circumstances, this Court made a finding that the High Court had failed to notice that even slight penetration was sufficient to constitute the offence of rape and upheld the conviction of accused, though the sentence was reduced. It held as under:-

> "It is not a case where merely a preparation had been undergone by the appellant as contended by the learned Counsel. Evidently, the appellant made an attempt to criminally assault the prosecutrix. In fact, from the nature of the medical evidence an inference could 'also have been drawn by the High Court that there had been penetration. The High Court failed to notice that even slight penetration was sufficient to constitute an offence of rape. The redness of the hymen would not have been possible but for penetration to some extent. In Kappula Venkat Rao (supra), this Court categorically made a distinction between the preparation for commission of an offence and attempt to commit the same, in the following terms:
>
> Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it, and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measure necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offence under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be

decided on the facts of each case.

(Emphasis supplied)"

27. Secondly, in the case of Tarkeshwawr Sahu v. State of Bihar (now Jharkhand) [(2006) 8 SCC 560], the Court held as under:-

> 10. Under Section 375 IPC, six categories indicated above are the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. This Court had an occasion to deal with the basic ingredients of this offence in State of U.P. v.

Babul Nath. In this case, this Court dealt with the basic ingredients of the offence under Section 375 in the following words: (SCC p. 34, para 8) "8. It may here be noticed that Section 375 IPC defines rape and the Explanation to Section 375 reads as follows:

> 'Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.' From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the

doctor who examined her." xxxxx xxxxx xxxxx xxxxx

12. The word "penetrate", according to Concise Oxford Dictionary means "find access into or through, pass through".

13. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC.

28. In light of the above judgments, it can safely be concluded that there was limited penetration due to which probably the hymen of the victim girl was not ruptured. The Court should adhere to a comprehensive approach, in order to examine the case of the prosecution. But as regards the facts and circumstances of the present case, the presence of the element of mens rea on part of the accused cannot be denied. He had fully prepared himself. He first lured the girl not only by inciting her, but even by actually purchasing bangles for her. Thereafter, he took the girl to a room where he threatened her of physical assault as a consequence of which the girl did not raise protest. This is why no marks of physical injury could be noticed on her body. Absence of injuries in the context of the present case would not justify drawing of any adverse inference against the prosecution, but on the contrary would support the case of the prosecution.

29. It will be useful to refer to the judgment of this Court in the case of O.M. Baby (Dead) by L.Rs. v. State of Kerala [JT 2012 (6) SC 117], where the Court held as follows:-

"16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration

(b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances

> appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

14. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case of State of Punjab v. Gurmit Singh (1996) 2 SCC 384 and has found reiteration in a recent judgment in Rajinder @ Raju v. State of H.P. (2009) 16 SCC 69, para 19 whereof may be usefully extracted:

> 19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent."
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> 30. Reference can also be made to the judgment of this Court in the case of State of Himachal Pradesh v Asha Ram [AIR 2006 SC 381].
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> 31. Thus, as per the facts and circumstances of the present case, there is a direct link of the accused with the commission of the crime. Such conclusion can well be established by the statement of the witnesses, the recoveries made, the Medical Report and the FSL Report. It does not leave any doubt in our mind that the accused has committed the offence with which he was charged.
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> 32. Still, another argument was advanced to contend that the conviction of the appellant cannot be based on the sole statement of prosecutrix PW2, because it is not reliable. We have already discussed above at some length that there is nothing on record to show that the statement of PW2 is either unreliable or untrustworthy. On the contrary, in light of the given facts, the statement of PW2 is credible, truthful and, thus, can safely be relied upon.
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> 33. Statement of PW2 is fully corroborated by the statements of PW1 and PW3. They are independent witnesses and have no personal interest or motive of falsely implicating the accused or supporting the case of the prosecution. PW2 is a poor

> young girl who works as a maid servant. PW3 coming to her rescue and PW1 reaching the spot without any delay, saved the girl from further assault and serious consequences. Firstly, the High Court has not based the conviction of the accused solely on the statement of PW2. Even if it were so, still the judgment of the High Court will not call for any interference because the statement of PW2 was reliable, trustworthy and by itself sufficient to convict the accused, by virtue of it being the statement of the victim herself.
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> 34. Lastly, coming back to the first contention raised on behalf of the accused, it is true that the appellate Court has to be more cautious while dealing with the judgment of acquittal. Under the Indian criminal jurisprudence, the accused has two fundamental protections available to him in a criminal trial or investigation. Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation. Both these facets attain even greater significance where the accused has a judgment of acquittal in his favour.

A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication. But then, this has to be established on record of the Court.

35. When we mention about the Court being cautious, it does not mean that the appellate Court cannot disturb the finding of acquittal. All that is required is that there should be a compelling rationale and also clear and cogent evidence, which has been ignored by the Trial Court to upset the finding of acquittal. We need not deliberate on this issue in greater detail. Suffice it to notice the recent judgment of this Court in the case of Ravi Kapur v. State of Rajasthan [JT 2012(7) SC 480], where the Court, after discussing various other judgments of this Court held on the facts of that case that interference with the judgment of acquittal by the High Court was justified. The Court explained the law as under:-

> 37. Lastly, we may proceed to discuss the first contention raised on behalf of the accused. No doubt, the Court of appeal would normally be reluctant to interfere with the judgment of acquittal but this is not an absolute rule and has a number of well accepted exceptions. In the case of State of UP v. Banne & Anr. [(2009) 4 SCC 271], the Court held that even the Supreme Court would be justified in interfering with the judgment of acquittal of the High Court but only when there are very substantial and compelling reasons to discard the High Court's decision. In the case of State of Haryana v. Shakuntala & Ors. [2012 (4) SCALE 526], this Court held as under :
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> "36. The High Court has acquitted some accused while accepting the plea of alibi taken by them. Against the judgment of acquittal, onus is on the prosecution to show that the finding recorded by the High Court is perverse and requires correction by this Court, in exercise of its powers under Article 136 of the Constitution of India. This Court has repeatedly held that an appellate Court must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to such accused under the fundamental

principles of criminal jurisprudence, i.e., that every person shall be presumed to be innocent unless proved guilty before the court and secondly, that a lower court, upon due appreciation of all evidence has found in favour of his innocence. Merely because another view is possible, it would be no reason for this Court to interfere with the order of acquittal.

37. In Girja Prasad (Dead) By Lrs. v. State of M.P. [(2007) 7 SCC 625], this Court held as under:-

"28. Regarding setting aside acquittal by the High Court, the learned Counsel for the appellant relied upon Kunju Muhammed v. State of Kerala (2004) 9 SCC 193, Kashi Ram v. State of M.P. AIR 2001 SC 2902 and Meena v. State of Maharashtra 2000 Cri LJ 2273. In our opinion, the law is well settled. An appeal against acquittal is also an appeal under the Code and an Appellate Court has every power to reappreciate, review and reconsider the evidence as a whole before it. It is, no doubt, true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the Trial Court. But that is not the end of the matter. It is for the Appellate Court to keep in view the relevant principles of law, to reappreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence in consonance with the principles of criminal jurisprudence."

38. In Chandrappa v. State of Karnataka [(2007) 4 SCC 415], this Court held as under:-

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

39. In C. Antony v. K.G. Raghavan Nair [(2003) 1 SCC 1], this Court held :-

"6. This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court. (See Bhim Singh Rup Singh v. State of Maharashtra1 and Dharamdeo Singh v. State of Bihar.)"

40. The State has not been able to make out a case of exception to the above settled principles. It was for the State to show that the High Court has completely fallen in error of law or that judgment in relation to these accused was palpably erroneous, perverse or untenable. None of these parameters are satisfied in the appeal preferred by the State against the acquittal of three accused."

38. In the present case, there are more than sufficient reasons for the High Court to interfere with the judgment of acquittal recorded by the Trial Court. Probably, this issue was not even raised before the High Court and that is why we find that there are hardly any reasons recorded in the judgment of the High Court impugned in the present appeal. Be that as it may, it was not a case of non-availability of evidence or presence of material and serious contradictions proving fatal to the case of the prosecution. There was no plausible reason before the Trial Court to disbelieve the eye account given by PW2 and PW4 and the Court could not have ignored the fact that the accused had been duly identified at the place of occurrence and even in the Court. The Trial Court has certainly fallen in error of law and appreciation of evidence. Once the Trial Court has ignored material piece of evidence and failed to

> appreciate the prosecution evidence in its correct perspective, particularly when the prosecution has proved its case beyond reasonable doubt, then it would amount to failure of justice. In some cases, such error in appreciation of evidence may even amount to recording of perverse finding. We may also notice at the cost of repetition that the Trial Court had first delivered its judgment on 24th June, 1999 convicting the accused of the offences. However, on appeal, the matter was remanded on two grounds, i.e., considering the effect of non-holding of test identification parade and not examining the doctor. Upon remand, the Trial Court had taken a different view than what was taken by it earlier and vide judgment dated 11th May, 2006, it had acquitted the accused. This itself became a ground for interference by the High Court in the judgment of acquittal recorded by the Trial Court. From the judgment of the Trial Court, there does not appear to be any substantial discussion on the effect of non-holding of the test identification parade or the non-examination of the doctor. On the contrary, the Trial Court passed its judgment on certain assumptions. None of the witnesses, not even the accused, in his statement, had stated that the jeep was at a fast speed but still the Trial Court recorded a finding that the jeep was at a fast speed and was not being driven properly. The Trial Court also recorded that a suspicion arises as to whether Ravi Kapur was actually driving the bus at the time of the accident or not and identification was very important.
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> 39. We are unable to understand as to how the Trial Court could ignore the statement of the eye-witnesses, particularly when they were reliable, trustworthy and gave the most appropriate eye account of the accident. The judgment of the Trial Court, therefore, suffered from errors of law and in appreciation of evidence both. The interference by the High Court with the judgment of acquittal passed by the Trial Court does not suffer from any jurisdictional error."

36. Reverting to the facts of the present case, the High Court has recorded reasons while interfering with the judgment of acquittal by the Trial Court. We may also notice that the Trial Court attempted to create a serious doubt in the case of the prosecution on the basis of the statement of PW3, that he does not know what PW2 narrated to PW1, when he made inquiries. We do not think that this was a proper way to appreciate the evidence on record.

37. The statement of a witness must be read in its entirety. Reading a line out of context is not an accepted canon of appreciation of evidence.

38. Another aspect of the statement of PW3 which the Trial Court had a doubt with, was, as to how PW3 had noticed the accused taking away the minor girl along with him to the tennis store room and how he suspected some foul play.

39. PW3 admittedly was a rickshaw puller and was standing at the gate of the University. The tennis store room was quite near to the gate. PW3, quite obviously knew the accused as well as PW2. The conduct of PW3 in the given circumstances of the case was precisely as it would have been of a person of normal behaviour and was not at all extra-ordinary in nature, particularly in the late hours

of evening.

40. Still, another fact that was taken into consideration by the Trial Court while acquitting the accused was that Ext. P.5 neither showed any injuries on the body nor reflected that rape was attempted on the victim. In our considered view, the course of appreciation of evidence and application of law adopted by the Trial Court was not proper. It was expected of the Trial Court to examine the cumulative effect of the complete evidence on record and case of the prosecution in its entirety.

41. Equally without merit is the contention that Ext. P.5 which was authored by PW9 upon examination of the victim neither recorded any injuries on her person nor the fact that she was raped. It is for the reason that PW9 had not recorded any final opinion and kept the matter pending, awaiting the FSL Report. Furthermore, in Ext. P.5, she had noticed that her parts were tender to touch. The vaginal swabs and vaginal wash were taken and slides were preserved. She was also sent to the hospital for further examination. Thus, Ext. P.5 cannot be looked into in isolation and must be examined in light of other ocular and documentary evidence. In the peculiar facts and circumstances of the case, it was not even expected of PW1 or the Investigating officer PW11 to examine the victim particularly in relation to her private parts. Absence of such recording does not cause any infirmity to the case of the prosecution much less a reason for acquitting the accused.

42. In our considered opinion, the learned Trial Court has failed to appreciate the evidence on record cumulatively and in its correct perspective by ignoring the material piece of evidence and improper appreciation of evidence. It has recorded findings which are on the face of it unsustainable. This error was rightly corrected by the High Court, and we see no reason to interfere with the judgment of conviction recorded by the High Court.

43. We find no merit in the present appeal and the same is dismissed.

.....J. (Swatanter Kumar) .....J. (Gyan Sudha Misra) New Delhi, December 13, 2012