Criminal Appellate
PRESENT: The Hon'ble Justice Ashim Kumar Banerjee
AND
The Hon'ble Justice Kishore Kumar Prasad
Judgment On : 19-02-2010.
CRIMINAL APPEAL No. 160 of 2004
Brojen Biswas & Another
Vs
The State of West Bengal

Point:
Rape: A finding of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix - Indian Penal Code- S.376

Fact: This appeal is directed against the judgment and order of conviction passed by the Ld. Special in a Sessions Trial by which the appellants were convicted for the offences punishable under Sections 457/376 (2) (g) of the Indian Penal Code.

Held: It is now well settled that a finding of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborative evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape stated on oath that she was forcibly subjected to the sexual intercourse, her statement will normally be accepted even it is uncorroborated unless the material on record requires drawing of an inference that there was consent or that entire incident was improbable or imaginary. It is also well settled that the absence of injuries on the private part of the prosecutrix will not itself falsify the case of rape, nor construed as evidence of consent. (Paragraph – 8)
Therefore, the absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed . (Paragraph – 13)
If judicial conscience is satisfied as to the credibility of the deposition and the say of the prosecutrix, then a fossil formula of insisting upon corroboration to the say of the prosecutrix would be unnecessary impediment in dispensation of justice. It is true that the offence of gang rape is punishable with rigorous imprisonment for a term, which should not be less than ten years but it may be for life and shall also liable for fine. (Paragraph – 14)

Cases cited: Viswanath & Ors. vs. State, Represented by Inspector of Police, Tamil Nadu 2008 AIR SCW 3246
Santosh Kumar Vs. State of M.P. 2006(8) J.T.S.C. 171
Madan Gopal Kakkad V. Naval Dubey, 1992(30 JT (SC) 270
Karmal Singh Vs. State of M.P. 1995 AIR SCW 3644

Dhanj Singh Vs. State of Punjab 2004 (3) SCC 654.
(State of Orissa vs. Thakara Besra, reported in (2002) 9 SCC 86
State of Himachal Pradesh –vs- Prem Singh 2009 Criminal Law Journal 786 State of U.P. –vs- Manoj Kumar Pandey AIR 2009 SC 711
Moti Lal v. State of M.P., 2008 Cri.L.J. 3543,

Present:
Mr. Partha Sarathi Bhattacharya, ……For the appellants.
Mr. Subir Ganguly …… For the State.
Heard on : 1.2.2010.
Judgment on : 19.2.2010.

Kishore Kumar Prasad, J.

1. This appeal is directed against the judgment and order of conviction dated. 17.2.2004 passed by the learned Special Judge –cum- Additional Sessions Judge, Cooch-Behar in Sessions Trial No. 7(2)02 arising out of Sessions Case No. 47/2000 by which the appellants were convicted for the offences punishable under Sections 457/376 (2) (g) of the Indian Penal Code.
The appellants were heard on the question of sentence on 19.2.2004 and thereafter by an order passed on the same day, that is, on 19.2.2004 they were sentenced to suffer rigorous imprisonment for ten years as also to pay fine of Rs. 5000/- each in default of payment of fine to undergo Simple Imprisonment for one year each for the offence punishable under Section 376(2)(g) of the Indian Penal Code. They were also sentenced to suffer Simple Imprisonment for two years as also to pay fine of Rs. 5,000/- each in default of payment of fine to undergo Simple Imprisonment for another one year each for the offence punishable under Section 457 of the Indian Penal Code.
The sentences awarded to the appellants punishable under Sections 376(2)(g)/457 of Indian Penal Code were ordered to run concurrently.

2. Being aggrieved by the judgment and orders of conviction and sentences passed by the learned Trial Judge, the appellants have preferred the present appeal.
The prosecution version as unfolded during trial in a nutshell is as follows: -
The prosecutrix, P.W. 1 (her name is not being mentioned herein as per directives of the Hon'ble Apex Court) was the resident of Putimary within the limits of Ghoksadanga P.S., District. Cooch-Behar. The prosecutrix is a married woman having a male child aged eight years and a female child aged five years at the time of incident. The appellants belonged to same village and they were not

strangers to the prosecutrix.

3. On 25.7.1997 at about 12.00 hours at night, the appellants taking advantage of the absence of the husband of the prosecutrix entered into her bedroom by cutting " Khayas sticks" fencing wall while she was sleeping there along with minor son Sujan Mondal and minor daughter Sima Mandal. Thereafter, the appellants raped her forcibly one after another by pressing her month. After commission of rape, the appellants threatened the prosecutrix to kill her in case of her disclosure about the fact of rape to her husband or to anybody.

Gopal Mondal (P.W. 3), the husband of the prosecutrix at that time was at Malda for his business of vegetable. One day after the incident at about 10 a.m., he returned to his house and then the prosecutrix narrated the entire incident to him. Gopal Mondal informed the incident to the local Panchayat. Pradhan of Panchayat called a Salish but the appellants did not attend in the Salish. Panchayat expressed its inability to do anything and asked P.W. 3 to lodge complaint at Police Station. The prosecutrix and her husband came to Ghoksadanga Police Station on 1.8.1997 and lodged complaint, scribed by one Nripendra Chandra Barman.

At Police Station, Ghoksadanga, on the basis of First Information Report of the prosecutrix, a case being No. 45/97 dated. 1.8.97 under Sections 457/376(2)(g) was registered against the appellants. Sub-Inspector P. Gautam (P.W. 7), the then Officer in charge of Ghoksadanga took up investigation himself. He in course of investigation sent the victim for clinical examination, visited the place of occurrence, prepared sketch map of the place of occurrence, recorded the statement of available witnesses, collected medical examination report of the prosecutrix, arrested the appellants and sent the minor son of the prosecutrix to learned Sub Divisional Judicial Magistrate, Mathabangha for recording his statement under Section 164 of Code of Criminal Procedure and subsequently on 19.11.1997 he made over the charge of his case to S.I., K.G.Dutta (P.W.6) in view of his transfer to another police station.

In course of investigation, the appellants too had undergone potency test conducted by Dr. T.K.Roy (P.W. 9) who on clinical examination found the appellants capable of sexual intercourse.

4. On completion of investigation, the appellants were charge-sheeted and put on trial after committal of the case to the Court of Sessions.

In the Trial Court, charges under Sections 376(2)(g)/457 of Indian Penal Code were framed against the appellants. The appellants pleaded not guilty and claimed to be tried.

In the Trial Court, the prosecution examined as many as nine witnesses, material amongst them is the prosecutrix (P.W.1), her husband (P.W. 3) and her minor son (P.W. 2). Apart from leading oral evidence, the prosecution also tendered and proved a large number of exhibits which were marked as

exhibit 1 to 5.

5. Though the appellants were examined under Section 313 of the Code of Criminal Procedure, yet there was no adduction of evidence by the appellants. The defence version as it appears from the trend of cross examination of P.Ws. and suggestion thrown to the witnesses as well as from the answer given by the appellants in reply to their examination under Section 313 of the Code of Criminal Procedure was that the appellants have been falsely implicated in this case out of political rivalry.

Learned Trial Judge disbelieved the defence version. The learned Trial Judge after considering the oral and documentary evidence and hearing the learned counsel for the parties passed orders of conviction and sentences as indicated above.

6. Learned counsel appearing on behalf of the appellants contended that the prosecution has failed to prove its case by adducing cogent and convincing evidence. Learned counsel further contended that the entire prosecution case rests on the testimony of the prosecutrix and as such her uncorroborated testimony should not have been relied upon by the learned Trial Judge. Learned counsel also urged that the investigation is perfunctory as the materials witnesses have not been examined by the Investigating Officer nor called on the witness box at the time of trial and their non-examination is fatal to the prosecution case. With reference to the medical report marked as “X” for identification (not exhibited), the further submission made by the learned counsel was that the medical evidence totally belies the prosecution case as the doctor has not found any injury on the private part of the prosecutrix. Last but not the least submission was that the delay in lodging the First Information Report has not been satisfactorily explained. Alternatively, it was contended by the learned counsel for the appellants that assuming without accepting the case of the prosecution that the appellants had participated in the alleged crime, the period of imprisonment already undergone by the appellants for a period of six years would meet the ends of justice.

7. Per contra, the learned counsel appearing for the State-respondent supported the impugned judgment. It was argued that the learned Trial Court had adequately discussed the evidence on record and had assigned adequate reasons for recording its finding of the guilt for the offences with which the appellants were charged and no case has been made out for this Court to interfere with the impugned judgment. Learned counsel further contended that the evidence of the prosecution is quite natural and the same is not suffering from any infirmities. Learned counsel also contended that apart from the prosecutrix, the witnesses namely, the husband (P.W. 3) and the minor son (P.W.2) of the prosecutrix also corroborated the version of the prosecutrix regarding the mode and manner of the incident.

We have given our anxious and thoughtful consideration to the respective contentions of the learned counsel for the parties. We have perused

the evidence both oral and documentary tendered and proved by the prosecution to substantiate its case and the impugned judgment.

8. The entire perusal of the record shows that the prosecution case rests on the testimony of the prosecutrix and her minor son as also on the testimony of P.W3, her husband to whom she had disclosed about the alleged offence of sexual assault committed on her by the appellants immediately after his arrival to his residence from Malda on 26.7.1997 at about 10 a.m. that is on the next day of the incident.

It is now well settled that a finding of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborative evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape stated on oath that she was forcibly subjected to the sexual intercourse, her statement will normally be accepted even it is uncorroborated unless the material on record requires drawing of an inference that there was consent or that entire incident was improbable or imaginary. It is also well settled that the absence of injuries on the private part of the prosecutrix will not itself falsify the case of rape, nor construed as evidence of consent.

9. In the present case, the prosecutrix is an illiterate, rustic residing in the most backward area of our country and her evidence is required to be appreciated with this background.

P.W.1, the prosecutrix deposed inter alia as follows: -

“ Gopal Mandal is my husband. He runs business of vegetables. He used to go to Maldah, Siliguri by train for business. About 4 ½ years ago at about 12 hours (night) my husband went to Maldah by train by taking vegetables for sale. At that time I was sleeping in my bed alongwith my one son and one daughter. Sy son Sujan Mandal was then aged about 8 years and my daughter Sima Mandal was aged about 5 years. Both are alive at present. While I was sleeping the accused Brojen Biswas and Krishna Mandal entered into my room by cutting ‘Khayas sticks’ fencing wall of my room and at first accused Brojen pressed by mouth and accused Krishna committed rape on me and after accused Krishna the accused Brojen Biswas committed rape on me and accused Krishna pressed my mouth while accused Brojen was committing rape. After commission of aforesaid rapes both the accused persons threatened me to kill me and my husband if the said incident was disclosed to my husband or anybody-else. Both

the accused persons went away after such threatening. My husband returned to the house just after one day at about 10 a.m. I reported the incident to my husband. My husband then reported the incident to the Panchayat and other influential persons. The Panchayat called the accused persons but the accused persons did not appear before the Panchayat. The Panchayat and ourselves gave seven days time to the accused persons regarding the incident. As the accused persons did not comply the same I went to Ghoksadanga p.s. alongwith my husband after seven days. I submitted the written complaint which was written by one Nripen Barman as per my instructions. The contents of the written complaint were read over and explained to me. Then I put my L.T.I. therein. During investigation police came to me. The police took me to the hospital for medical examination. Both the accused persons namely, Brojen Biswas and Krishna Mandal are present on the dock (id).**"**

10. Learned counsel for the appellants contended that the testimony of the prosecutrix does not inspire confidence and should be rejected by us. We regret that we cannot accede to this contention. After going through the entire deposition carefully, we find that she is wholly a reliable witness. In the first instance, she had given vivid description about the incident of house trespass by the appellants as well as about the incident of rape by the appellants upon her one after another coupled with threat to murder her and her husband if she would disclose the said fact to her husband or anybody else. Secondly, it is not believable that she being a rustic married woman having two children will stake her reputation by making a false charge against someone concerning her chastity unless she was actually raped. Thirdly, we find her account of the incident to which we have referred earlier, is in consonance with the important probabilities. Fourthly, the appellants who had been named and identified by the prosecutrix before the Trial Court as her rapists, is substantially inconformity from her earlier version as contained in the First Information Report made by her at police station. Fifthly, neither from the evidence of the prosecutrix nor otherwise, the defence could show any probability of the appellants having been roped in falsely in this sexual crime for any malicious reasons. Sixthly, the appellants were found capable of sexual intercourse on clinical examination by Dr. Tapas Kumar Ray (P.W. 9).

The testimony of the prosecutrix was corroborated by P.W. 2, her minor son who was sleeping in the room along with her mother and younger

sister at the fateful time of the incident.
P.W. 2 deposed inter alia as follows :-
" My name is Sujan Mandal. I read in class-III at Dakhin Putimari Primary School. I know about the incident regarding my mother about 4 ½ years ago. The incident took place at night. I was then about 7/8 years. Brojen Biswas pressed the mouth of my mother. (Demeanour noted. The witness seems to be puzzled and ashamed to say about the incident and kept silence for sometime). One Brojen Biswas and Krishna Mandal entered into our room.
To Court : My mother was then sleeping in the room. After pressing mouth of my mother by Brojen Biswas Krishna Mandal pressed mouth of my mother and at that time Brojen Biswas did the same thing on my mother as Krishna did at first. I went to Mathabhanga court and stated about the incident to the Ld. Magistrate. I put my L.T.I. on the paper which was written by Ld. Magistrate. Both Brojen Biswas and Krishna Mandal are present on the dock (id). On that date my father went to Maldah for his business of vegetables. At the time of said incident, I along with my mother and sister were sleeping in the room. When the accused persons entered into our room I woke up."
Apart from these, we find that the following circumstances corroborate and lend assurance to the testimony of the prosecutrix :-
(a) The First Information Report in this case was lodged at Police Station on 1.8.1997 at 11.35 hours which is situated at a distance of eight kilometres North/East from the place of occurrence by the prosecutrix herself. It is true that the prosecutrix in her evidence before the Trial Court has added something regarding the cause of delay in addition to that, which she initially stated in the First Information Report. This by itself does not go deep to discredit the material part of the testimony of the prosecutrix particularly when she has mentioned the name of the appellants as her rapists as also the material fact. That apart, the law does not require that First Information Report to contain all the minute facts and circumstances that the informant might know. The First Information Report is lodged with a view to setting the

investigative process in motion and not for the purpose of setting down on paper all known facts and circumstances about the incident. Moreover, the mental and physical condition of the informant will have to be considered when minute details are expected.

(b) The evidence of the prosecutrix was corroborated by her husband (P.W.3) to whom she narrated the incident immediately after his arrival at his residence from Malda at about 10 a.m. on the next day of incident.

P.W.3, the husband of the prosecutrix, deposed inter alia as follows:-

“ P.W. 1 is my wife. About 4/4 ½ years ago at night one incident took place in my house. At that time I was at Maldah. I was at Maldah for my business of vegetables. After one day I returned to my house at about 10 a.m. On returning to my house I saw that my wife was in bad mood and I enquired from her and then she stated to me that at about 12 hours at night accused Brojen Biswas and Krishna Mandal entered into her room and at first accused Brojen pressed her mouth and accused Krishna then committed rape (Ijjat Nasto Koreche) on her and thereafter accused Krishna pressed her mouth and accused Brojen then committed rape on her. My wife was then in her room alongwith our one son and one daughter. I then informed the incident to the Panchayet and some local neighbours. Prodhan of the Panchayet called a Salish. But the accused persons did not attend in the Salish. Then Panchayet expressed its inability to do anything and asked us to take shelter of law. In then went to P.S. alongwith my wife. The Prodhan of the Panchayet also went there. One Nripen Barman wrote the written complaint as per instruction of my wife and my wife put L.T.I. therein. I know both the accused Brojen Biswas and Krishna Mandal on the dock (id). The accused persons are my close-door neighbours. Since I informed the incident to the Panchayet at first and the Panchayet tried to take up the matter. I did not go to the P.S. instantly."

(c) The prosecutrix was subjected to medical examination by one Dr. Gour Chandra Naskar of Ghoskadanga, Block Primary Health

Center.

11. Despite effort, the prosecution has failed to secure the attendance of the said doctor before the learned Trial Court for recording his evidence. The clinical report of the said doctor, although has been marked as "X" for identification in this case, was not proved in accordance with law. Since the learned counsel for the appellants in course of hearing the argument before this Court invited our attention to the clinical report, we like to say that for purpose of proving commission of rape, the injury on the private part of the prosecutrix is not necessary. The prosecutrix in the instant case, a grown up rustic married woman aged about 35 years was the mother of two children. (**Viswanath & Ors. vs. State, Represented by Inspector of Police, Tamil Nadu 2008 AIR SCW 3246** paragraph 12 relied on).

12. An identical question was also considered by the Apex Court in **Santosh Kumar Vs. State of M.P. 2006(8) J.T.S.C. 171** and para 10 of the report is reproduced below:

" 10. The question, which arises for consideration, is whether the proved facts establish the offence of rape. It is not necessary for us to refer to various authorities as the said question has been examined in considerable detail in Madan Gopal Kakkad V. Naval Dubey, 1992(30 JT (SC) 270 and paras 37 to 39 of the said judgement are being reproduced below :

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

" Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had

been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one".

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

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

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

" ……..even slight penetration is sufficient and emission is unnecessary.**"**

13. Therefore, the absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed.

14. The testimony of the prosecutrix inspires confidence and is found to be reliable. She is an innocent rustic married woman having two children. She was not a stranger to the appellants. She is the victim of dastardly offence of gang rape though it was done in night by cutting 'Khayas sticks' fencing wall of her room where she was sleeping along with minor children. She had opportunity to see them. When the gang rape was done in the manner as stated by her, she was absolutely helpless and she cannot be expected to go on resisting except to resign to her fate and succumb to their sexual assault. Her evidence is intrinsically true and she is a truthful witness. Her evidence cannot be viewed with doubt, disbelieve or suspicion. Testimony of victim of sexual assault is at par with the testimony of an injured witness. Just as it is presumed that a person sustaining injuries in the occurrence is not likely to shield the real culprit, a rape victim is highly unlikely to protect her tormentor and to falsely implicate some person in the same way. Therefore, the evidence of the proxecutrix has great probative force. The prosecution story as a whole strikes the judicial mind as probable. The evidence of the prosecutrix is corroborated by her minor son and her husband. Besides some minor wear and tear in the evidence of the aforesaid material witnesses, learned counsel for the appellants

could not point out to us any material infirmity which could persuade us to hold contrary. Discrepancies are likely to occur for variety of reasons, namely the social status of the parties, education and time when the deposition of the witnesses is recorded. We do not find any artificiality in the version of the material witnesses of the prosecution and the discrepancies pointed out by the learned counsel appearing for the appellants in course of argument in our considered opinion are of insignificant nature and do not at all detract the material part of the version of the material witnesses. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance, more so when important "probabilities factor" echoes in favour of the version narrated by the material witnesses. The evidence of the prosecutrix as stated above would clearly reveal that she was subjected to sexual violence as put forth by the prosecution and the same has not only been corroborated by her minor son including her husband but also by other facts and circumstances of the case. In such conditions, minor contradictions, though present in the evidence of material witnesses, need not be attached with any importance at all. This is more so, having regard to social back ground of our country and the situation of females, it cannot be believed that the prosecutrix and her relatives would concoct a false case of sexual assault against the appellants which would stand a reputation lower in the society nor it could be believed that the prosecutrix would allow the real culprit to go scot-free and fabricate a false case against the appellants. The rape is a crime that destroys entire psychology of a woman and pushes her into deep emotional cries. We all are aware that when the fact of rape having been committed on a woman is known to the society all would look upon her with contempt and hence, the version of prosecutrix in such offence cannot be brushed aside lightly, and corroborative evidence is not an imperative component of judicial prudence in every case of rape, where the victim is subjected to sexual assault and is not an accomplice to the crime, but is a victim of another person's lust, and it would be improper, unrealistic and undesirable to test her evidence with a certain amount of suspicion and seek corroboration when judicial prudence would not so demand. In the same way, justice cannot be made casualty in the name of minor contradictions either in the evidence of the prosecution or defects in the investigation at the hands of the Investigating Agency. If judicial conscience is satisfied as to the credibility of the deposition and the say of the prosecutrix, then a fossil formula of insisting upon corroboration to the say of the prosecutrix would be unnecessary impediment in dispensation of justice.

15. It appears to us that the Investigating Officer (P.W. 7 and 6) had not been diligent enough but for that reason we do not feel that reliable and clinching evidence adduced in this case by the material witnesses should be discarded. In this connection, we may refer to the decision of the Hon'ble Apex Court in **Karmal Singh Vs. State of M.P. 1995 AIR SCW 3644**. In the said decision, it

has been stated by the Hon'ble Apex Court that in case of defective investigation, it would not be proper to acquit the accused if the case is otherwise established because in that event it would tantamount to be falling in the hands of an erring Investigating Officer. This aspect was also highlighted in **Dhanj Singh Vs. State of Punjab 2004 (3) SCC 654**.

16. It is difficult to believe that only because either Panchayat Pradhan or any member of the Panchayat has not been examined, the testimony of the material witnesses of the prosecution cannot be believed. They as per prosecution version, were not the eye-witnesses. At the most it could be said that they were supporting witnesses only to substantiate the testimony of the prosecutrix and her husband that they reported the incident to them; that Pradhan called a Salish; that the appellants did not attend in the Salish and then Pradhan expressed inability to do anything and asked them to take shelter of law. In these circumstances, non-examination of either Pradhan or any member of the Panchayat is not fatal to the prosecution case. The evidence which is adduced by the prosecution is required to be examined on the touch-stone of its truthfulness, when it is found that the evidence which is recorded is truthful, examination of this witness and that witness loses its importance in a criminal trial and these are the principles laid down by the Hon'ble Apex Court to appreciate the evidence in Criminal trials. (**State of Orissa vs. Thakara Besra,** reported in **(2002) 9 SCC 86** relied on).

17. In course of argument the learned counsel for the appellants tried to impress upon us that there is delay in lodging the First Information Report and as such there would be suspicion in the factum of the case. We find no force in the aforesaid sweeping contention of the learned counsel for the appellants. Delay in every case cannot be a ground to arouse suspicion. It can only be so when the delay is unexplained. That apart, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to police station to lodge a complaint. In a tradition bound society prevalent in our country more particularly rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the First Information Report. (**State of Himachal Pradesh –vs- Prem Singh 2009 Criminal Law Journal 786 and State of U.P. –vs- Manoj Kumar Pandey AIR 2009 SC 711** relied on).

18. In the instant case, there is some delay in lodging the First Information Report for the reasons of the absence of the husband of the prosecutrix, reporting the incident to village Panchayat by the husband of the prosecutrix and the time given by the village panchayat to settle the matter. Delay in the instant case is a self-explanatory and gets support from the testimony of P.W. 4, who was present in the Salish and as such it needs no

further explanation.
So far as offence punishable under Section 457 of the Indian Penal Code, the evidence of the prosecutrix was that the appellants entered into the room at about 12 hours (night) by cutting “Khayas sticks” fencing wall and committed rape forcibly one after another where the prosecutrix was sleeping along with her minor children. Section 457 of the Indian Penal Code speaks of lurking house trespass by night or house breaking by night in order to commit of an offence punishable with imprisonment. The appellants entered into the room during the night in order to have sexual intercourse with the prosecutrix whom they knew to be the wife of P.W. 3 and pursuant to the said object they committed rape upon the prosecutrix one after another.
The ingredients of Section 457 of the Indian Penal Code have been proved in the instant case and in our considered opinion, the learned Trial Judge correctly convicted the appellants for the offence punishable under Section 457 of the Indian Penal Code.
19. Having given our anxious consideration to the entire matter in issue, we do not find any reason to disbelieve the testimony of the material witnesses of the prosecution. Keeping in mind the realistic manner of appreciation of evidence, by no stretch of reasoning, it could be said that the prosecution was not able to prove the case beyond reasonable doubt through the testimony of the prosecutrix, her minor son and her husband.
In view of the above discussion we are firmly of the view that the appellants were rightly convicted by the learned Trial Court for the offences as indicated above. Accordingly, the impugned judgment and order of conviction warrants no inference in this case.

20. As regards the sentences, the learned counsel for the appellants submitted that the appellants are illiterate, poor persons and they are the first offenders having responsibility of their families. Learned counsel, therefore, prayed for imposition of less than minimum sentences prescribed under Section 376 (2)(g) (proviso) for commission of gang rape to the appellants.
Learned counsel appearing for the State-respondent in his usual fairness left the question of sentence to be imposed by the appellants to the discretion of this Court.
21. In the case of **Moti Lal v. State of M.P., 2008 Cri.L.J. 3543**, the Hon’ble Apex Court held as to the measure of punishment in para 11 of the judgment, which is reproduced hereunder: -
“ 11. The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The

socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, married women and respond by imposition of proper sentence.**"**

22. Therefore, the measurement of the punishment for an offence of gang rape should not be taken on the social position of the parties, injured, but on the greater or less atrocity of the crime, the conduct of the criminal and defenceless and unprotected stage of the victim.

In the instant case, a reading of the evidence of the prosecutrix would show that the appellants were dare-devil and the manner in which they committed the incident of gang rape, was an inhuman act.

23. It is true that the offence of gang rape is punishable with rigorous imprisonment for a term, which should not be less than ten years but it may be for life and shall also liable for fine. In the impugned judgment, while fixing the quantum of punishment, the learned Trial Judge after considering the submission made by the appellants took into consideration that the appellants had their responsibility towards their family.

24. The appellants at the time of commission of offence belonged to the age group between 27 ½ to 32 years. Keeping in mind the observation of the Hon'ble Apex Court in the case of Moti Lal (Supra), this Court is unable to accept the submission of the learned counsel for the appellants to reduce the sentence as awarded by the learned Trial Judge for the offence punishable under Section 376 (2)(g) of the Indian Penal Code. Considering the facts and circumstances of the case, we are of the considered opinion that it cannot be said that the learned Trial Judge exercised his discretionary power, while fixing the quantum of sentence either illegally or arbitrarily. The sentences awarded by the appellants for the offence punishable under Section 376(2)(g) cannot be said to be unduly harsh and the learned Trial Judge has rightly convicted and sentenced the appellants for the offence punishable under Section 376(2)(g) of the Indian Penal Code.

25. In view of the substantive sentence being awarded for major offence under Section 376(2)(g) of the Indian Penal Code, we think that no separate sentence against the appellants need be awarded for the lessor offence punishable under Section 457 of the Indian Penal Code. Ends of justice would be

met if the appellants are sentenced only for the major offence as awarded by the learned Trial Court for the offence punishable under Section 376(2)(g) of the Indian Penal Code.

26. Accordingly, the sentence as awarded by the learned Trial Judge for the offence punishable under Section 376(2)(g) of Indian Penal Code is confirmed but the separate sentence as awarded by the learned Trial Judge punishable under Section 457 of Indian Penal Code is set aside.

In the result, the instant appeal is dismissed with the above modification in the sentence as awarded by the learned Trial Judge for the offence under Section 457 of the Indian Penal Code.

27. The entire amount of fine, if realised, shall be paid to the prosecutrix by way of compensation.

28. The appellants are now in jail. They are directed to serve out the remainder part of their sentences as modified herein.

The learned Trial Court is directed to issue necessary revised jail warrant as required by the rules in respect of these appellants.

Lower Court Records with a copy of this judgment to go down forthwith to the concerned learned Trial Court for information and necessary action.

Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned Counsel for the parties upon compliance of all formalities.

(Kishore Kumar Prasad, J.)

I agree.

(Ashim Kumar Banerjee, J.)