IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF JANUARY 2017

PRESENT

THE HON'BLE MR. JUSTICE H.G.RAMESH

AND

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

CRIMINAL APPEAL No.149 OF 2012

BETWEEN :

STATE BY NEW TOWN POLICE,
BHADRAVATHI, SHIVAMOGGA,
REP. BY STATE PUBLIC PROSECUTOR. ... APPELLANT

(BY SRI S.RACHAIAH, HCGP)

AND:

1. ARMUGAM,
S/O.GOVINDASWAMY,
AGED 26 YEARS,
COOLIE, R/O.HALAPPA SHED,
LAST CROSS, GANESHA COLONY,
BHADRAVATHI.

2. ANTHONY,
S/O.THOMAS,
35 YEARS,
CHICKEN VENDOR,
ZINC LINE,
BHADRAVATHI.

3. P.PRAVEENA,
S/O.PARASHURAMA RAO,
27 YEARS, COOLIE,

R/O.1ST CROSS, LOWER HUTHA,
BHADRAVATHI,
NATIVE OF PAMENAHALLI OF
HARIHAR TALUK. ... RESPONDENTS

(By SRI K.S.VENKARAMANA, ADV.)

THIS CRL.A. IS FILED UNDER SECTION 378(1) & (3) OF CR.P.C., PRAYING TO GRANT LEAVE TO FILE AN APPEAL AGAINST THE JUDGMENT DT.30.7.2011 PASSED BY THE ADDL. S.J. & SPL. JUDGE, SHIMOGA IN SPL. (A) C.NO.6/2010 – ACQUITTING THE RESPONDENTS/ACCUSED NO.1 FOR THE OFFENCE PUNISHABLE UNDER SECTION 376 & 323 OF IPC AND SEC.3(1)(x) AND 3(1)(xii) OF SC/ST (P.A.) ACT, 1989 AND THE ACCUSED NOS.2 AND 3 ARE ACQUITTED FOR THE OFFENCES PUNISHABLE UNDER SECTION 323 R/W. SECTION 34 OF IPC AND U/S.3(1)(x) OF SC/ST(PA) ACT, 1989.

THIS CRL.A. HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 09.01.2017, COMING ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, **JOHN MICHAEL CUNHA J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

This is an appeal by the State against the order of acquittal passed by the Addl. Sessions Judge and special Judge at Shimoga in Special (A) Case No.6/10 dated 30.7.2011. By the impugned judgment, the trial Judge has acquitted accused No.1 of the offences punishable under section 376 and 323 of Indian Penal Code and section 3(i)(x) and 3(i)(xii) of SC/ST (PA) Act 1989 and accused Nos.2 and 3 are acquitted of the offences

punishable under section 323 r/w. section 34 Indian Penal Code and under section 3(1)(x) of SC/St (PA) Act 1989.

2. The facts leading to the appeal are as follows:

PW.1 Smt.Chowdamma, the mother of the victim (PW.2) lodged a complaint before the PSI of Bhadravathi Rural Police Station on 24.10.2009 at 3.30 p.m., alleging that on 23.10.2009 at 10.30 a.m., when her younger daughter PW.2 was spreading the washed clothes for drying, accused No.1 called her and when PW.2 proceeded to inquire him about the matter, he forcibly dragged her to a house situated in the garden land and committed forcible intercourse on her. PW.1 informed the incident to her brother (PW.3) and her son (PW.4) who were in Bengaluru and they asked her to wait till their arrival. On 24.10.2009, her elder brother Chowdaiah (PW.3) and her son Hanumantharaju (PW.4) approached accused No.1 and questioned him about the incident and at that time, accused No.1 and his men assaulted and injured them and hence, PW.1 sought for appropriate action against the culprits.

3. Based on this complaint, PW.16 the PSI of Bhadravathi Rural Police Station registered a case against accused No.1 and others and forwarded the FIR to the court. The further investigation was continued by PW.18 - the Dy.S.P., Bhadravathi who proceeded to the spot of occurrence, conducted the spot mahazar and sent the injured Hanumantharaju - PW.4 and the victim - PW.2 for medical examination. On the same day, he arrested accused No.1 and he was also sent for medical examination to the Government hospital, Bhadravathi. In the course of the investigation, he recorded the statement of the material witnesses, sent the seized clothes of the victim and accused No.1 for chemical examination and on receipt of the medial opinion and the FSL report, laid a charge sheet against all the respondents herein arraigning them as accused Nos.1, 2 and 3 respectively.

4. On committal of the case, the learned Sessions Judge framed charges against the accused for the aforesaid offences and in proof thereof, prosecution examined 18 witnesses as PW.1 to PW.18 and produced in evidence 17

documents which came to be marked as exhibits P1 to P17 and the material objects at M.Os.1 and 2. In the course of the cross-examination of prosecution witnesses, the defence got marked exhibits D1 to D4. On hearing the learned counsel appearing for the parties and on consideration of the oral and documentary evidence produced by the prosecution, by the impugned order, the learned Sessions Judge acquitted the accused of all the charges framed against them.

5. We have heard the learned HCGP and the learned counsel for the respondent/accused who have taken us through the material on record.

6. PW.1 is the mother of the victim girl. She has stated in her deposition that she came to know about the incident through PW.2 at about 4.00 p.m. and immedicately, she called her elder brother and her son who were working in Bengaluru at the relevant time and they asked her not to take any action until their arrival. After their arrival on 24.10.2009 at about 10.30 a.m., when her son Hanumantharaju (PW.4) and her elder brother Chowdaiah (PW.3) along with her sister's son (PW.15)

went to question accused No.1, the accused Nos.1 to 3 along with others assaulted her son (PW.4) and pushed him in a pit. Thereafter, at about 1.00 p.m. or 1.30 p.m., they proceeded to Bhadravathi New Town Police Station and she lodged a written complaint as per Ex.P1.

7. PW.2 is the victim. She has deposed before the Court that on 23.10.2009 at about 10.30 a.m., she was spreading washed clothes for drying in front of her house. Her mother PW.1, was sleeping inside, as she was unwell. At that time, accused No.1 called her and when she enquired him as to what was the matter, accused No.1 closed her mouth and held her tightly and dragged her to a labourers' room situated at about 10 feet away from the temple. There was a stone slab over which a bed was spread in that room. Accused No.1 pushed her on the bed. Even though she pleaded with him and tried to shout, accused No.1 held her mouth tightly and threatened to kill her. PW.2 has further deposed that out of anger, she slapped on his cheek and in return, accused No.1 also slapped her and she felt as if she lost consciousness. She fell on

the bed. She could not scream nor free herself from the grip of accused No.1. According to PW.2, at the time of incident, she was wearing a nighty and petticoat, accused No.1 pulled up her nighty and petticoat and thereafter, removed his shirt and pant. He removed the knicker of PW.2 and placed his private part inside her private part and pushed in and out for about 15 minutes. At that time, some white fluid fell in her private part and thereafter, accused took out his private part and went away. She felt pain in her stomach and limbs. She could not get up and thought of committing suicide. But she was determined to inform the matter to her mother. Hence, she went home. When her mother PW.1 got up, she saw PW.2 weeping. Hence she inquired PW.2 but PW.2, did not narrate the incident to her mother. Around 4.00 - 4.30 p.m., seeing her weeping, once again her mother enquired PW.2 and at that time, she narrated the incident to her mother. At about 6.00 – 6.30 p.m., her elder sister (PW.5) returned from school. On the instruction of her mother, her sister PW.5 rang up to her uncle – PW.3 and her elder brother PW.4 and they asked them not to take any action until their arrival. On the next day around 10.00 to 10.30

a.m., her uncle and elder brother reached home and around 12.00 noon when accused No.1 had come to the garden land along with his friends, her uncle, her mother and her brothers went to enquire accused No.1 about the incident. At that time, accused No.1 and other accused who were with him assaulted her brother PW.4 and pushed him into a pit. Thereafter, at about 1.30 p.m., they proceeded to the Police Station and lodged a complaint.

8. According to PW.2, after lodging the complaint, police came to the spot and she showed the room and the bed where there were broken bangle pieces and broken beaded chain. But the police did not seize them. Her brother also showed the place where he was assaulted and the police prepared the mahazar as per Ex.P2. Thereafter, at about 8.00 or 8.30 p.m., she and her brother were sent for medical examination to Bhadravathi Government Hospital. Her elder brother and accused No.1 also underwent medical check-up. Since lady doctor was not available, PW.2 was sent to Meggan Hospital at Shivamogga and was examined by the Doctor

between 1.00 to 1.30 a.m. and during the examination, the Doctor collected her knicker.

9. PW.3 Chowdaiah is the uncle of PW.2. According to this witness, on receiving the information from his sister namely PW.1, he along with PW.4 came from Bengaluru and on 24.10.2009 when they went to enquire accused No.1, accused Nos.1, 2 and 3 along with five or six other persons assaulted PW.4 and pushed him into a pit and went away in two motorcycles and an auto. Thereafter, they proceeded to the Police Station and lodged a complaint at about 3.00 p.m.

10. PW.4 - the brother of the prosecutrix has deposed in line with the evidence of PW.3 and has stated that he was assaulted by accused Nos.1 to 3 and was dragged and pushed into a pit, as a result, his nose started bleeding and he sustained scratch injuries on his face. According to PW.4, he showed the place of his assault to the police and the police prepared a mahazar as per Ex.P3.

11. PW.5 Usharani is the elder sister of the prosecutrix. According to this witness, in the evening at about 6.30 p.m., after her return from the college, she came to know about the incident and thereafter she and her mother informed the matter to PW.3, PW.4 and PW.15. This witness has further stated that on 24.10.2009 at about 10.30 to 10.45 a.m., when her brother and uncle had gone to enquire accused No.1, the accused persons along with others assaulted her brother and pushed him in a pit causing bleeding injuries and thereafter, they proceeded to the Police Station and lodged a complaint. PW.5 has stated that they had drafted a detailed complaint, but since the police told them that all such details were not necessary, they were made to submit a separate complaint.

12. PW.6 is a panch witness to the spot mahazar Ex.P2 and P3. But this witness has been treated as hostile by the prosecution.

13. PW.7 Kittappa is the owner of the garden land where the incident is said to have taken place. But this witness has deposed that the said property stands in the name of his wife

and there are ten houses in the said property which are rented out to K.S.R.P. staff. He categorically denied any knowledge of the incident. He has been treated as hostile.

14. PW.8 is the wife of PW.7. According to this witness, all the affairs of the garden land are looked after by her son. She has categorically denied that accused No.1 was appointed to work in their garden land. Even this witness is treated as hostile.

15. PW.9 is the Police Constable who collected the seized parcels from Bhadravathi Government Hospital and produced them before the I.O.

16. PW.10 is the Head Master of the school where PW.2 is stated to have studied. Through this witness, the prosecution has marked the study certificate of PW.2 as per Ex.P7.

17. PW.11 is the Tahsildar of Bhadravathi Taluk who has issued the caste certificate relating to the prosecutrix certifying that PW.2 belonged to Adi Karnataka caste.

18. PW.12 is the Medical Officer who examined PW.4 and issued the wound certificate as per Ex.P9 and furnished his opinion stating that the injuries noted in Ex.P9 are possible to be caused by an assault with hands. This witness has further stated that on 24.10.2009 at about 7.00 p.m., he examined accused No.1 and collected the prepuce swab and after receipt of FSL report - Ex.P12, gave his report as per Ex.P11 certifying that there was no evidence to show that accused No.1 was involved in sexual act.

19. PW.13 - Dr.Ambika H.E. is the Senior Medical Officer of Meggan Hospital, Shivamogga. According to this witness, she examined PW.2 on 24.10.2009 at about 10.30 p.m. and noted the history in the M.L.C. register Ex.P13 and during the examination, collected the pubic hairs, swab and smears and inner wear of PW.2 and forwarded them to the I.O. This witness has further stated that on receipt of FSL report, she issued her final opinion as per Ex.P14 to the effect that the prosecutrix was not used to any sexual act and there was no evidence of any

sexual act prior to her examination and the prosecutrix was not used to an act like that of sexual intercourse.

20. PW.14 is the lady police officer who submitted the seized articles to the FSL for chemical examination.

21. PW.15 is the son of the elder sister of PW.1. This witness has deposed in line with the evidence of PW.3 and PW.4.

22. PW.16 was the PSI of Bhadravathi Rural Police Station who received the complaint Ex.P1 and registered the case. According to this witness, on the direction of Dy.S.P, he arrested accused No.1 on 24.10.2009 and produced him before the Dy.S.P.

23. PW.17 Sadiq is the panch witness to the spot mahazar exhibits P2 and P3.

24. PW.18, the Dy.S.P. of Bhadravathi City is the I.O. who has stated that on 24.10.2009, he took over further investigation from PW.16, conducted the spot mahazar – exhibits P2 and P3, sent accused No.1 and the prosecutrix for medical

examination, recorded the statement of witnesses and after receipt of the FSL report and the medical opinion, laid the charge sheet against the accused.

25. On consideration of the above evidence, the trial court has acquitted the accused of all the charges including the charge under Section 376 of Indian Penal Code against accused No.1. The Trial court has held that the evidence of the prosecutrix is unreliable and not trustworthy. The grounds or the reasons assigned by the learned trial Judge for disbelieving the case of the prosecution and for discarding the evidence of PW2 are found in Paras 14 to 20 of the judgment. The said grounds/reasons are summarized as under:-

(i) The evidence of the complainant PW.1 and the evidence of PW.2 does not find corroboration in the contents of the complaint –Ex.P1 or in their statement recorded under section 161 of Cr.P.C. In other words, the version deposed by PW.1 and PW.2 is inconsistent with the FIR and 161 statement recorded by the I.O.

(ii) The material contradiction brought out in the cross-examination of PW.2, as per Ex.D3 renders her testimony susceptible to doubt.

(iii) The theory put forward by the prosecution that accused No.1 dragged PW.2 to the nearby house and forcibly closed her mouth and did not allow her to raise hue and cry is difficult to believe.

(iv) The statement of PW.2 that she slapped accused No.1 and in turn he slapped her violently does not find place in Ex.P1 or in the statement recorded under section 161 Cr.P.C.

(v) None of the neighbours are cited as witnesses to the incident even though it has come in evidence that the place of occurrence is surrounded by houses occupied by various tenants and other labourers.

(vi) Non-raising of hue and cry and not offering any resistance by PW.2 is indicative of the fact that there was no forcible rape as alleged by the prosecution.

(vii) Prosecutrix had opportunities to escape from the clutches of accused No.1 and to raise hue and cry.

(viii) As per the medical opinion, there were no signs of sexual act by accused No.1.

(ix) The Doctor who examined the prosecutrix has unequivocally stated that she did not find any injuries on any part of the body of PW.2.

(x) Her hymen was intact and there were no injuries on her breasts, cheeks, lips, thighs and genitals.

(xi) Medical opinion Ex.P14 reveals that PW.13 the doctor who examined PW.2 did not find any

sign of recent sexual intercourse and PW.2 was not used to an act like that of a sexual intercourse.

(xii) FSL report did not indicate any presence of semen or spermatozoa in the clothes of accused or prosecutrix.

26. It is the submission of the learned HCGP that the approach of the court below in appreciating the evidence on record is contrary to the well settled principles of appreciation of evidence in rape cases. Learned HCGP submits that the testimony of PW.1 and PW.2 does not suffer from any contradiction as held by the Trial Judge and even if there is any such discrepancy or variance in the testimony of the prosecutrix and other witnesses, the law on the point is well settled that minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core case of the prosecution should not be taken to be a ground to reject the prosecution evidence in its entirety. Further, the testimony of the

prosecutrix, being that of an injured witness, does not require any corroboration. It is the further submission of the learned HCGP that the court below has committed a grave error in acquitting the accused on the purported ground that the medical evidence produced by the prosecution is in conflict with the oral testimony of the prosecutrix which again is contrary to the settled principles of law laid down by the Hon'ble Apex Court in a catena of decisions. In support of his argument, learned HCGP has placed reliance in the case of ***RANJIT HAZARIKA vs. STATE OF ASSAM*** reported in ***1998 SCC (Cri) 1725.***

27. Learned counsel for the respondents, however, has sought to justify the impugned judgment. It is the argument of the learned counsel for the accused/respondents that at the earliest point of time, there were no allegations whatsoever that the accused gagged the mouth of the prosecutrix and forcibly dragged her to one of the houses situated in the garden land. The complaint Ex.P1 is silent about the alleged resistance offered by the prosecutrix. It is only during her examination before the Court the prosecutrix has come up with a story that she slapped

accused No.1 and he in return slapped her and that, she felt like loosing her consciousness. Her evidence is full of improvement and embellishment and suffers from inherent contradictions and improbabilities. It is the submission of the learned counsel that the court below has taken note of these contradictions and improbabilities and having found that none of the neighbouring occupants having been examined in support of the alleged incident, there is no error or infirmity whatsoever either in the appreciation of evidence or in the findings recorded by the court below refusing to place reliance on the interested testimony of the prosecutrix and her relatives who are the only witnesses examined by the prosecution. It is the further submission of learned counsel that even the medical evidence produced by the prosecution does not corroborate the version of the prosecutrix and therefore, the court below was justified in recording the order of acquittal as the evidence produced by the prosecution is wholly unreliable and susceptible to doubt.

28. We have bestowed our careful thought to the submission made by the learned counsel appearing for the

parties and have carefully scrutinized the evidence and the reasoning assigned by the court below in the impugned judgment. Undoubtedly, the fate of the case is dependent upon the appreciation of evidence of PW.2 – the victim of the alleged rape. There is no hard and fast rule regarding evaluation of evidence. Each case depends on its own facts. But the law is now well settled that while trying an accused on the charge of rape, the courts must deal the case with utmost sensitivity, examine the broader probability of the case and not swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of substantial character. It is held in the case of ***NARENDRA KUMAR vs. STATE OF NCT OF DELHI*** reported in ***(2012) 7 SCC 171*** as under:

> *"20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for*

judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice of the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial (sic circumstantial), which may lend assurance to her testimony."

29. A perusal of the impugned judgment reveals that the main reason which weighed with the trial court for acquittal of the accused is that the testimony of the prosecutrix does not find corroboration in the contents of the complaint Ex.P1 and in her previous statement. This reasoning, in our opinion, cannot be sustained.

30. It is too well settled, that the first information report is not an encyclopaedia of the evidence. What is required to be stated in the first information report as per Section 154 of Cr.P.C., is the information relating to the commission of a cognizable offence. Trial Court appears to have lost sight of the fact that in the instant case, the complaint was lodged by the mother of the prosecutrix and not by PW2; and therefore, it cannot be expected of PW1 to narrate all the details of the incident. Had the complaint been lodged by PW2 or the F.I.R was registered on the basis of the statement given by PW2, the Trial Court would have been justified in looking for corroboration in confirming the contents of the F.I.R. and in the evidence given before the court. Therefore, omission to mention all the details of the incident in Ex.P1 could not have been taken as a circumstance affecting the case of the prosecution.

31. The second reason assigned by the court below that the testimony of PW.2 is contrary to the previous statement recorded under section 161 of Cr.P.C., also cannot be accepted. In appreciating this contention, it is pertinent to note that PW.2

has graphically narrated the incident and the defence has not been able to shake the veracity and credibility of her testimony in the cross-examination. Except D3, no other portion of her Section 161 statement is confronted to PW2. In the course of her cross-examination, it was suggested to PW.2 that all the details narrated by her in her chief examination were not stated by her in her section 161 statement, but PW.2 has categorically denied the said suggestion. What is important to be noted is that the version deposed by PW.2 which is now sought to be contended as omission amounting to contradiction has not been proved as required under Section 145 of the Evidence Act.

32. The procedure as to bringing on record "contradictions" and "omissions" is well explained in the leading case of ***TAHSILDAR SINGH & Another vs. STATE OF U.P.*** reported in ***AIR 1959 SC 1012***. It is explained therein as under:

> *"13.xxxxxxx The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to*

be used for the purpose of contradicting him. The proviso to Section 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. …… To illustrate: A says in the witness-box that B stabbed C; before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer."

33. An omission is not a contradiction, unless what is actually stated contradicts what is omitted to be said. An omission may amount to contradiction if the matter omitted was one which the witness would have been expected to mention and the I.O. to make note of it in the statement. Such omission therefore could be proved only through the Investigating officer or the Police Officer who recorded the previous statement under Section 161 Cr.P.C.

34. In the instant case, even though the entire version of PW.2 which is stated to be "omission" or "improvement" but when this so called "omission" was put to PW.2, she has unequivocally stated that all these details were stated by her before the I.O. in her section 161 Cr.P.C. statement. Therefore it was incumbent on the defence to put the alleged omission to the I.O. and prove them so that the said omission could be taken as a circumstance affecting the credibility of the testimony of PW.2. The defence having not put these so called "omission" to the I.O., it gets confirmed that all the statements made by her in the witness box including the details of the incident, find place in her previous statement. Therefore, it is not open for the accused to contend that the narration of the details of the incident are to be treated as omissions amounting to contradictions impeaching the credibility of her evidence regarding the details of the incident. The court below therefore has committed a patent error in discarding the evidence of the prosecutrix on the purported ground that the evidence of the prosecutrix does not find corroboration in the contents of Ex.P1

and that her version is contradictory to the version recorded in section 161 Cr.P.C. statement.

35. Another circumstance which has driven the court below to disbelieve the evidence of PW.2 is Ex.D3. The court below has proceeded on the assumption that Ex.D3 is a serious contradiction affecting the credibility of the testimony of PW.2. But, on going through Ex.D3, we do not subscribe to the view that the contents of Ex.D3 amount to "contradiction" within the meaning of Section 162 of Cr.P.C. In order to understand the implication of Ex.D3 it is necessary to extract the English translation thereof which reads as under:-

> *"Thereafter, I came out of the house and I cried aloud and at that time, my mother came there. By then Armugam had run away from the place. My mother asked me as to why I was crying. I told her that Armugam forcibly dragged me and committed intercourse on me forcibly."*

A reading of Ex.D3 on the face of it reveals that it is in conformity with the core case of the prosecution. It does not reflect any contradiction. On the other hand, it reinforces the

fact that at the earliest instance while narrating the incident to her mother, PW.2 informed her in unambiguous terms that the accused forcibly dragged her and committed intercourse on her forcibly. No doubt it is true that the former part of Ex.D3 is inconsistent with the statements made by PW.1 and PW.2 inasmuch as both these witnesses have stated before the court that the incident was informed by PW.2 to her mother PW.1 at 4.00 p.m., but this inconsistency in the evidence of PW.1 and PW.2 relate only to the aftermath of the incident and does not affect the vital aspect of the prosecution case. It is an established principle of law of appreciation of evidence that "*where the story narrated by the witness in his evidence before the court differs substantially from that set out in his evidence before the police and there are large number of contradictions in his evidence, not on mere matters of details, but on vital parts; it would not be safe to rely on his evidence and it may be excluded from consideration in determining the guilt of the accused.*"

36. In the instant case, as already discussed above, the details of the incident as deposed to by PW.2 are proved to be the part of her previous statement. Even Ex.D3 does not bring out any contradiction in the core case of the prosecution either with regard to the implication of accused No.1 or with regard to the specific acts committed by him. In order to discard the testimony of a witness on the ground of contradiction, the statement made by the witness should be totally opposite to the facts spoken in his or her previous statement. In Shorter Oxford English Dictionary, the term *"contradiction"* is defined to mean *"a state of opposition in things compared; variance; inconsistent".* In the instant case, on perusing the evidence of PW.3 and Ex.D3, we do not find any contradiction whatsoever with regard to the basic facts establishing the act of rape committed by accused No.1. The inconsistencies discussed above relate only to the conduct of the witnesses subsequent to the incident and therefore, by no stretch of imagination, can Ex.D3 could be taken as a contradiction affecting the credibility of testimony of PW.2. On a thorough and careful evaluation of her evidence, we find that the testimony of PW.2 is trustworthy

and it does not suffer from any inconsistencies or contradictions and therefore, it could be made the sole basis for conviction of accused No.1 for the offence of rape alleged against him.

37. The other circumstances relied on by the court below for recording an order of acquittal, that the prosecutrix had opportunities to escape from the clutches of the accused No.1 and that she had not offered resistance to accused No.1 are nothing but surmises and assumptions which are not based on any evidence. These conclusions drawn by the court below are contrary to the specific evidence given by PW.2 before the court. At the cost of repetition, it is to be noted that in her evidence PW.2 in unequivocal terms has stated that when she was dragged inside the room, she tried to scream, but the accused held her mouth tightly and also threatened to kill her if she screamed. Though her testimony that she slapped accused No.1 and in return, accused No.1 slapped her violently appears to be an exaggeration, but in the absence of any circumstances having been brought out in her cross-examination to show that the said statement is an improvement or contradiction, there is

absolutely no reason to doubt or to disbelieve the testimony of PW.2 with regard to her reaction and conduct during the incident. We, therefore, do not approve the reasoning of the court below in this regard.

38. The Hon'ble Supreme Court in the case of ***RANJITH HAZARIKA vs. STATE OF ASSAM*** reported in ***1998 SCC (Cri.) 1725*** has laid down that non-rupture of hymen and the absence of injury on the victim's private parts does not belie the testimony of the victim with regard to the sexual intercourse alleged by her. The relevant observation at para 5 of the judgment reads as here below:

> *5. The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix and her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on*

her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".

39. The court below has rejected the case of the prosecution on the specious plea that the medical evidence produced by the prosecution is contrary to the testimony of PW.2 given before the Court. No doubt, it is true that PW.13- Doctor

who examined the prosecutrix as well as PW.12 - Doctor who examined the accused, have stated that they did not find any evidence to show that accused No.1 was involved in sexual act and that there was no evidence of any injury on the body of PW.2 and her hymen was intact and there was no evidence to show that she was used to act like that of sexual intercourse; but the law on the question of inconsistency in the medical evidence and the ocular testimony of the prosecution witnesses is now well settled.

40. Indisputably, Rape is a crime and not a medical condition. In order 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 this context, the Rajasthan

High Court in the case of ***STATE OF RAJASTHAN & Another vs. GOPAL & Another*** reported in ***RLW 2006(1) Raj 604,*** has observed that 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 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.

41. In the backdrop of the above legal position, on thorough scrutiny of the testimony of PW.2 and the circumstances brought out in the course of her evidence coupled with the testimony of her mother and her relatives namely PW.3, PW.4, PW.5 and PW.15, we are of the opinion that the testimony of PW.2 is inherently truthful and deserves to be accepted without any reservation. The subsequent events spoken to by PW.2 in her evidence and which are duly corroborated by the evidence of her mother PW.1 and uncle PW.3 and brother PW.4, lend full assurance to hold that on the date of the incident, PW.2

was raped by accused No.1. The incident that took place on the following day leading to the scuffle between the accused No.1 and the brother of PW.4 is a corroborating circumstance to show that on receiving the information of the incident, PW.3 and PW.4 rushed to the house of the complainant. The circumstances brought out in their evidence indicate that they immediately did not proceed to lodge the complaint apparently on the instructions of PW.3 and PW.4, but the events that took place on the following day inspire further confidence in the case of the prosecution. The fact that such an incident has taken place on 24.10.2009 leading to the injuries on PW.4 is proved by the prosecution by examining the injured witness PW.4 as well as the Doctor who examined PW.4 which is duly supported by the wound certificate Ex.P9. The defence has not brought out any contra evidence to show that the incident of 24.10.2009 was either stage-managed or was created with a view to provide an explanation for the delay in lodging the complaint. The defence having not brought on record any circumstance to disbelieve the evidence of PW.2, there is absolutely no reason to discard her evidence. Nothing has been brought out to doubt the veracity of

the testimony of PW.2 or to suggest as to why she would falsely implicate accused No.1 and bring on herself the stigma of rape thereby putting her reputation at stake.

42. No doubt, it is true that there is some delay in lodging the complaint, but the records reveal that the prosecution has suitably explained the said delay. The conduct of PW.1 and her family members clearly indicate that they did not want to put the honour of PW.2 into stake and apparently for the this reason, PW.2 and her mother did not rush to the Police Station to lodge the complaint till the accused was questioned by PW.3 and PW.4. Even otherwise, it has come in evidence that the family of the complainant was residing in Bhadravathi as agricultural labourers and about six months prior to the incident they had moved to that place. At the time of the incident, there were no male members residing with PW.1 and PW.2, therefore, it is quite natural for them to inform the matter to PW.3 and PW.4 and seek their instructions and await their arrival before taking any legal action in the matter. There is nothing in the evidence to suggest that PW.1 or her family members had any

independent advice or any help from their neighbours. It has come in evidence that there were more than ten tenements in the vicinity. The family of the land owner who are examined as PW.7 and PW.8 have failed to support the prosecution and have gone to the extent of denying any knowledge about the residence of PW.1 and PW.2 in their garden land which again indicates that no one in the viliage were prepared to help them. This also explains the reason as to why the I.O. could not find any witness from the locality. The Trial Court has failed to appreciate all these facts and circumstances and has chosen to acquit the accused by discarding the evidence of the prosecutrix on the purported ground that the details stated by PW.2 did not find place in her previous statement or in the F.I.R. lodged at the earliest point of time and that the details spoken to by PW.2 were improbable and difficult to believe.

43. The approach adopted by the court below is contrary to the settled principles of appreciation of evidence and is perverse. The Trial Court has failed to appreciate the evidence of the injured witness namely PW.2 in proper perspective. The

Trial Court has also failed to note that the details spoken to by PW.2 in her evidence were part of the previous statement of PW.2 and the defence could not shake the veracity of her testimony in the cross-examination. On re-evaluation of the evidence on record, we find the testimony of PW.2 fully reliable and trust-worthy. Her testimony is duly corroborated by the evidence of her mother, uncle and her brother. The testimony of PW.2 establishes the guilt of accused No.1 for the alleged offence of rape beyond reasonable doubt. Thus the prosecution having produced convincing and reliable evidence in proof of the charge against accused No.1 for the offence punishable under section 376 of Indian Penal Code, the judgment of acquittal rendered by the Trial Court against accused No.1 is liable to be set aside and accordingly, we set aside the said finding and convict accused No.1 for the offence of rape punishable under section 376 of Indian Penal Code.

44. In so far as the charge under sections 3(1)(x) and 3(1)(xii) of SC.ST (PA) Act is concerned, we do not find any material to convict the accused for the said offence. There is no

dispute that PW.2 belonged to Adi Karnataka caste and a member of the Scheduled Caste. But none of the witnesses have stated before the Court that the alleged offence was committed on the ground that PW.2 belonged to Scheduled Caste. The prosecution having not proved the ingredients of this section, the Trial Court is justified in acquitting the accused for the offence punishable under sections 3(1)(x) and 3(1)(xii) of SC.ST (PA) Act.

45. Regarding the charge under section 323 of Indian Penal Code is concerned, the case of the prosecution is that the incident of 24.10.2009 is the off-shoot of the incident that had taken place on 23.10.2009. In this regard, PW.4 - the injured witness has stated that on 24.10.2009, he along with his uncle PW.3 and his brother PW.15 had gone to question accused No.1 and at that time, accused Nos.1 to 3 chased him and lifted him and dumped him in a pit. Regarding this incident, PW.3 – the uncle of PW.4 has deposed that when he along with three others went to question accused No.1, accused Nos.1 to 3 and 5 to 6 others dragged and pushed PW.4 and thereafter, they escaped in two motorcycles and in an auto. According to this witness,

accused Nos.2 and 3 assaulted PW.4 on his face. PW.4 has nowhere stated that accused Nos.2 and 3 assaulted him on his face. PW.15 – the cousin brother of PW.4 has a totally different version regarding this incident. According to this witness, when he along with PW.3 and PW.4 approached accused No.1 and questioned him as to the incident that had taken place on the previous day, accused Nos.1 to 3 caught hold of the collar of PW.4 and assaulted him on his face. Thus there is no consistency with regard to the overt acts attributed to accused Nos.2 and 3. The evidence of these witnesses establishes the charge only against accused No.1. Therefore, to this extent, believing the evidence of PWs.3, 4 and 15, accused No.1 is liable to be convicted under section 323 of Indian Penal Code. To this extent, the impugned judgment calls for modification.

46. Hence, we pass the following order:

Criminal Appeal is partly allowed. The impugned judgment passed in Special (A) Case No.6/10 dated 30.7.2011 insofar as acquitting accused No.1 for the offence punishable under section 376 of Indian Penal Code is set aside and accused No.1 is

hereby convicted for the offence punishable under section 376 of Indian Penal Code and is sentenced to rigorous imprisonment for seven years and a fine of Rs.10,000/-. In default to pay or deposit the fine amount, he shall undergo rigorous imprisonment for a further period of one year. Further accused No.1 is convicted for the offence punishable under section 323 of Indian Penal Code and is sentenced to rigorous imprisonment for a period of three months. Both the substantive sentences shall run concurrently and the period of custody already undergone by accused No.1 shall be given set off. The bail bond of accused No.1 is cancelled and accused No.1 is directed to surrender himself to serve the sentence.

The impugned judgment passed by the court below acquitting accused Nos.1, 2, 3 and 4 for the offences punishable under section 3(1)(x) and 3(1)(xii) of SC.ST (PA) Act and accused Nos.2, 3 & 4 for the offences under Section 323 Indian Penal Code is confirmed.

Sd/-
JUDGE

Sd/-
JUDGE

Bss.