(2011) 07 CAL CK 0005

Calcutta High Court

Case No: C.R.A. 146 of 2005

Dipak Kumar Das		APPELLANT
	Vs	
State of West Bengal		RESPONDENT

Date of Decision: July 11, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 157, 159, 161, 164
- Penal Code, 1860 (IPC) - Section 354, 376, 511

Citation: (2012) 2 CHN 353

Hon'ble Judges: Kanchan Chakraborty, J

Bench: Single Bench

Advocate: Milon Mukherjee, Mr. Usuf Ali Dewan and Mr. M.R. Abedin, for the Appellant; Tapan Deb Nandi, for the Respondent

Judgement

Kanchan Chakraborty, J.

This appeal is directed against the judgment and order dated 15th January, 2005 and 17th January, 2005 passed by the learned Additional District and Sessions Judge, 1st Fast Track Court, Jangipur, Murshidabad in Sessions Serial No. 14/2004 arising out of Suti P.S. Case No. 78/2000 dated 16th July, 2000 thereby convicting the appellant, Dipak Kumar Das for committing an offence punishable under Sections 376 /511 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for five years and to pay a fine of Rs. 10,000/-, in default, to suffer simple imprisonment for one year more. The appellant has challenged the judgment impugned on the following grounds:

(1) that the learned Trial Court failed to apply judicial mind and, as a consequence, there was fragrant violation of the principle of natural justice;

(2) that the learned Court failed to appreciate the evidence in its proper and true perspective;

(3) that the learned Trial Court believed the testimonies of child witness and her close relations who were interested in the prosecution and recorded conviction on the basis of their testimonies incorrectly;

(4) that the learned Trial Court failed to appreciate the fact that the victim was never produced before the doctor for medical examination;

(5) that the learned Trial Court failed to appreciate that there was no eye witness of the alleged incident;

(6) that the learned Trial Court relied on inadmissible evidence and recorded conviction basing on uncorroborated and inconsistent testimonies of the witnesses;

(7) that the learned Trial Court failed to appreciate that the statement made by the victim u/s 164 of the Code of Criminal Procedure and statement made by her in Court as P.W. 3 were not consistent and corroborating to each other;

(8) that the learned Trial Court failed to appreciate the delay in lodging the First Information Report and sending the First Information Report by police promptly to the nearest Magistrate amounting to gross violation of law;

(9) that the learned Trial Court failed to appreciate that delay in lodging First Information Report and inordinate delay in presenting the First Information Report by the police to the nearest Magistrate had occasioned exaggeration, improvement and embellishment of the prosecution case;

(10) that the learned Trial Court failed to appreciate that there was political rivalry between the appellant and the father of the victim; and

(11) that the judgment and sentence being otherwise bad in law, is liable to be set aside.

The prosecution case before the learned Trial Court, in short, is that on 16.07.2000 at about 18.25 hours one Tilak Das, father of Tannita Das @ Riya Das, lodged one First Information Report with Suti Police Station alleging therein that he came to know from his daughter, Tannita, that about two months prior to the date of lodging of the First Information Report, Dipak Das attempted to commit rape on Tannita in his maternal uncle''s house. He had shown his male organ to Tannita and also rubbed his male organ on her panty. Tannita asked Dipak Das not to do so, but he did not refrain himself from doing so. He forcibly caught hold of Tannita and then committed sexual torture on her. He kissed Tannita and sucked her mouth by placing his mouth on her mouth. On 09.07.2000, at about 8 P.M. he also did similar thing in the house of Tilak Das. Dipak Das threatened her of dire consequence in case of disclosure of the fact and, as such, Tannita did not disclose anyone before 11.07.2000.

2. Tilak Das, being learnt the incidents became perplexed and started thinking as to what would be his next course of action. Thinking over the matter, ultimately, he

went to the Suti Police Station and lodged First Information Report on 16.07.2000.

3. On the basis of the said First Information Report, Suti Police Station Case No. 78 of 2000 was started against Dipak Das under Sections 376 /511 of the Indian Penal Code. The case was investigated into. In course of investigation, the Inquiry Officer got the statement of the victim girl, Tannita @ Riya, recorded u/s 164 of the Code of Criminal Procedure, recorded statements of available witnesses u/s 161 of the Code of Criminal Procedure, prepared rough sketch map of the place of occurrence and, finally, filed charge sheet against Dipak Das under Sections 376 /511 of the Indian Penal Code.

4. Dipak Das (hereinafter referred to as "the appellant") faced charge under Sections 376 /511 of the Indian Penal Code for committing rape/attempt to commit rape on Tannita @ Riya on various dates till 09.07.2000 by various means. The appellant pleaded not guilty to the charge and, accordingly, the trial commenced. In all, eight witnesses were examined on behalf of the prosecution. The First Information Report, the statement of the victim girl u/s 164 of the Code of Criminal Procedure and the sketch map of the place of occurrence were admitted into evidence and marked exhibits on behalf of the prosecution. On the other hand, the appellant examined two witnesses on his behalf in order to establish his specific alibi that because of political enmity, he was falsely implicated in the case by the father of the victim and that he was innocent.

5. Upon consideration of the evidence on record, oral and documentary, the learned Trial Court came to a finding that the appellant although did not commit rape but had made effort/attempt to commit rape and, as such, he was found guilty of offence under Sections 376 /511 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 10,000/-, in default, in payment of fine, he would suffer simple imprisonment for one year more.

6. The appellant has challenged the judgment and sentence impugned on the grounds stated earlier.

7. The point to be considered in this appeal is whether the judgment impugned is sustainable in law.

8. I have carefully perused the evidence on record, the documentary evidence as well as the judgment impugned. No doubt, certain points are required to be clarified and I have found that Mr. Milon Mukherjee, learned senior counsel appearing on behalf of the appellant, and Mr. Tapandeb Nandi, learned counsel appearing on behalf of the respondent-State, made their best efforts to get those points clarified. The learned Trial Court believed and relied on the statement of the P. W. 3, Tannita and Exhibit-2, i.e., the statement made by Tannita u/s 164 of the Code of Criminal Procedure. The learned Trial Court also believed the statements of the father (P.W. 3), the mother (P.W. 4) and the maid-servant (P.W. 8) and the Magistrate, who recorded the statement of the victim girl u/s 164 of the Code of Criminal Procedure.

The First Information Report of the case was lodged on 16.07.2000 at 18.25 hours. It says that the lodger of the First Information Report, i.e., the father of the victim (P.W. 1) came to know about the incidents only on 11.07.2000, i.e., five days prior to filing of the First Information Report. What he came to know? According to the First Information Report (Exbt. 1), the lodger of the First Information Report (P.W. 1) came to know from the victim (P.W. 3) that the appellant tried to commit rape on the P.W. 3 about two months ago in the house of his maternal uncle by way of showing his male organ and rubbing his male organ on her private part over her panty. He also kissed her and sucked her month. The First Information Report also shows that on 09.07.2000 at about 8 P.M. similar incident had taken place in the house of the lodger of the First Information Report. The victim could not narrate the incidents to anyone because she was threatened of dire consequence. But, on 11.07.2000 she disclosed the incidents to her father.

9. The lodger of the First Information Report was examined as P.W. 1. He stated that he came to know about the incidents on 11.07.2000 from his daughter Tannita @ Riya. He came to learn from her that when he had been to the house of Santu @ Abhijit Das, the maternal uncle of the appellant, Tannita went there to call on him. At that time, the appellant took Tannita to the first floor of the house of his maternal uncle and had shown his male organ to Tannita. He also rubbed his male organ on the private part of Tannita over her panty. He also kissed Tannita and threatened her not to disclose anything to anyone. On 09.07.2000, the P.W. 1 stated, the appellant came to his house at about 9 P.M. in absence of the P.W. 1. At that time his wife, i.e., the P.W. 4, was busy in making bread in the kitchen. The appellant sat on a sofa, called on Tannita, opened the zip of his pant and brought out his male organ. He took Tannita on his lap, placed his male organ on her private part after opening her pant and started jerking her repeatedly in the name of "jhiki-jhiki" game. He also threatened Tannita not to disclose anything to anyone. The P.W. 1 stated further that hearing everything from his daughter, he became perplexed and consulted with Monoj Das, his neighbour. He thought over the matter for about five days, then went to Suti Police Station with Tannita and one of his friends, Nurul Islam on 16.07.2000 and lodged the First Information Report written by Nurul Islam at his dictation. He identified the First Information Report containing his signature. In his cross-examination, he stated that he consulted the matter with Monoj Das and Nurul Islam before filing of the First Information Report. He admitted that he did not mention in the First Information Report the detail of the incident, which had taken place in the house of the maternal uncle of the appellant. In his cross-examination he further stated that he did not state any of the incidents to the maternal uncle of the appellant. He admitted in his cross-examination that he was the Sabhapati of Suti Block Congress. He, however, could not state whether the appellant was the Secretary of the D.Y.F.I., a wing of C.P.I. (M). party. He denied that Apurba Choudhury and Nurul Islam had no visiting term with him excepting on requirements. He denied the fact that the troubles started when Nurul and Apurba

Choudhury started visiting his house in his absence. He denied that he deposed falsely and out of political enmity, he implicated the appellant falsely in this case.

10. The Exhibit-1, i.e., the First Information Report, contains two important facts - (a) the appellant, two months prior to the date of filing of the First Information Report, eloped the victim, had shown his male organ and rubbed it over the panty of the victim repeatedly and (b) on 09.07.2000 at about 8 P.M. he acted in a similar way with the victim. These two important factual aspects will be discussed afterwards.

11. The P.W. 2, Sefali Halder, the maid-servant in the house of the P.W. 1, has stated that she came to know about the incidents from the P.W. 4, the wife of the P.W. 1. On careful scrutiny of the evidence of the P.W. 4, I find that no where within the four corners of her deposition in Court, she stated that the P.W. 2 was reported about the incidents by her at any point of time. The evidence of P.W. 2, therefore, can well be categorised as hearsay evidence and should not have been considered by the learned Trial Court.

12. The P.W. 3 is the victim girl, Riya Das. She is the most important witness in this case. She stated that in the house of Santu Kaku, the appellant had taken her to a room on the first floor, had shown his male organ, touched it on her body over her panty, pressed her chest and kissed her. She also stated that the appellant told her not to disclose the incidents to anyone. Some days thereafter, the appellant came to her house, sat on sofa and called on her. He made her sit on his thigh, brought out his male organ, removed her panty and touched his male organ on her vagina. He also pulled her by making sound "jhiki-jhiki" and in that process, he was pulling her up and down and pressed his male organ on her private part. He also pressed her chest and kissed her. She then narrated the incidents to her father, mother and others. She stated that she was taken to one Hakim who reduced her statement in writing, which was read over to her before she signed the same. In her cross-examination, she stated that she told the Magistrate that the appellant took her to the first floor of the house, made her sit on a khatia, took out his male organ and pressed her and rubbed his male organ over her panty. She stated further in her cross-examination that she informed the police that the appellant sat on the sofa, brought out his male organ, made her sit on his thigh and played game making "jhiki-jhiki" sound. She stated further that she informed the police that the appellant took out his male organ and touched it on her private part started pulling her in the name of "jhiki-jhiki" game. The statement of the victim u/s 164 of the Code of Criminal Procedure recorded by the learned Magistrate was admitted into evidence and marked Exhibit-2. The Exhibit-2 shows that the statement of the victim girl was recorded on 20.07.2000. The victim girl stated to the learned Magistrate that the appellant had shown his male organ one-day in front of her house. Another day, the appellant asked the victim to touch his male organ. She stated further that one day at night when her mother was preparing bread inside the kitchen and her father was roaming outside the house, the appellant brought out his male organ

and had shown to her. He pressed her chest, kissed her as well as made her sit on his thigh. Thereafter, the appellant started playing "jhiki-jhiki" game. She could not narrate the incidents to anyone because the appellant threatened her not to disclose the incidents to anyone. But, afterwards, she disclosed everything to her father. On careful perusal of the statement of the P.W. 3 made in course of her examination, I find that questions on material points regarding the alleged incidents were not put to her excepting in suggestion form which was denied by the P.W. 3. It is to be noted that the statement u/s 164 of the Code of Criminal Procedure of the victim does not disclose that while playing "jhiki-jhiki" game, her panty was removed by the appellant. This factual aspect will be discussed afterwards.

13. The P.W. 4 is the mother of the victim girl and wife of the P.W. 1. She came to know about the incidents from her daughter, P.W. 3 on 11.07.2000. She stated that her daughter, P.W. 3, stated her that the appellant having sat on a sofa in her house made her sit on his thigh and after bringing out his male organ and removing her panty connected his male organ with her private part, pulled her and tried to rape on her in the name of performing "jhiki-jhiki" game. She was also told by the P.W. 3 that previously, in the house of one "Santu", the appellant acted similarly. She stated in her cross-examination that in course of investigation she stated the Investigating Officer that the appellant tried to rape her daughter by putting his male organ on the private part of her daughter on the sofa of her house. She stated further that she informed the police that the appellant attempted to do so in the house of one "Santu". She denied the fact that any disturbance started because Apurba Choudhury and Nurul Islam started visiting her house and that there was political rivalry between her husband and the appellant.

14. The P.W. 5, Nurul Islam, is the scribe of the First Information Report (Exbt. 1). He stated that one day about four years ago, the P.W. 1 Tilak Das stated him that the appellant had done some bad things with his daughter. He also stated that Tilak Das informed him that in absence of Tilak Das, the appellant came to his house, sat on a sofa, removed panty of his daughter and rubbed his male organ on the private part of his daughter. The P.W. 5 stated further that the P.W. 1 Tilak Das also informed him that two months prior to that incident, the appellant also committed similar sexual act on his daughter but, owing to threatening, she did not disclose that incident to anyone. The P.W. 5 was not examined by the Investigating Officer. He is not a witness named in the charge sheet. He stated in his cross-examination that he wrote the First Information Report at the instance and dictation of Tilak Das. He wrote one First Information Report initially but, there were some mistakes. So, he wrote a fresh one. He also stated in his cross-examination that he came to know about the incidents 3 /4 days prior to the writing of the First Information Report. He came to know about the incidents from Tilak Das (P.W. 1), but he did not give any suggestion. He denied in his cross-examination that due to his visit to the house of Tilak, a dispute raised by the local people led by the appellant. He also denied existence of enmity between the P.W. 1 and the appellant.

15. The P.W. 6 is the Judicial Magistrate who recorded statement of the victim girl u/s 164 of the Code of Criminal Procedure. He stated that one lady constable, Doly Das escorted the victim girl before her statement was recorded. After recording her statement, she was again given in the custody of the said lady constable. He denied that the statement made by the victim girl was not voluntary and she was tutored by other persons before recording her statement. He made it clear in this cross-examination that at the time of recording statement u/s 164 of the Code of Criminal Procedure, no one was present.

16. The P.W. 7 is the Sub-Inspector of Police who received the Exhibit-1 and drawn the formal First Information Report. In his cross-examination, he stated that the First Information Report was written at the Police Station by the defacto-complainant. He denied that it was dictated by him.

17. The P.W. 8 is the Investigating Officer of the case. In his cross-examination he stated that he did not mention the name of any neighbour of the P.W. 1 as witness in the charge sheet. He stated that he sent the victim girl for getting her statement recorded u/s 164 of the Code of Criminal Procedure on 20.7.2000 at 9.35 A.M. and she was escorted by a lady Home Guard, Doly Das. He stated further that he examined the victim girl on the same date at 18.45 hours at the Police Station. He stated that P.W. 4, Sefali Halder, did not state him that the appellant inserted his male organ inside the private part of the victim girl. He stated further in his cross-examination that the victim girl did not state him that she went to call her father in the house of one "Santu Kaku" and that she was taken to the first floor of that house by the appellant. He also stated that the victim girl did not state him that the appellant brought out his male organ and pressed the same on the private part of the victim girl. He has stated further that the victim girl only stated that the appellant took out his male organ and touched it on her panty. He also stated categorically in his cross-examination that the victim girl did not state him that the appellant pressed his male organ on her private part.

18. There are discrepancies in the statement of the victim girl and the statement of the Investigating Officer in the matter of recording her statement u/s 161 of the Code of Criminal Procedure at the time of investigation. There are also discrepancies in the statement of the P.W. 4 and the statement of the Investigating Officer regarding recording her statement u/s 161 of the Code of Criminal Procedure. The Investigating Officer of the case, i.e., the P.W. 8, has denied that either the P.W. 3, i.e., the victim girl or her mother, P.W. 4 have stated that the appellant had pressed his male organ on the private part of the victim girl.

19. It also appears from the evidence of the Investigating Officer that the victim girl was sent to the Magistrate for getting her statement recorded u/s 164 of the Code of Criminal Procedure on 20.07.2000 at 9.35 A.M. and that he personally examined the victim girl at 8.45 P.M., i.e., about eight hours after sending her to the Magistrate. The First Information Report was lodged on 16.07.2000 at 18.25 hours.

20. In the case in hand, the victim girl was not sent for medical examination and, as a result, no medical document was placed before the learned Trial Court.

21. Two witnesses were examined on behalf of the appellant in order to establish that there was political enmity between him and Tilak Das and, as a result of the said enmity, he was falsely implicated in the case.

22. I have carefully gone through the evidences of D.W. 1 and D.W. 2. I find that their evidence neither proved enmity between the appellant and Tilak Das, P.W. 1 nor established that there was any of the reason for the P.W. 1 to implicate the appellant falsely in such a case.

23. Mr. Milon Mukherjee, learned counsel for the appellant, contended that the date of occurrence, better said the last occurrence, had taken place on 7.7.2000. Her parents were informed about the incidents and previous incidents on 11.7.2000. The First Information Report was lodged on 16.7.2000 and the First Information Report was sent to the nearest Magistrate on 20.7.2000. Mr. Mukherjee has also drawn my attention to the charge framed by the learned Trial Court and contended that the learned Trial Court, for the reasons best known to it, mentioned the time and date of incident as 8 P.M. on 9th July, 2000 and one evening two months prior to 9th July, 2000. He contended that the victim girl did not inform the incidents which allegedly had taken place two months prior to 9th July, 2000 to anybody. She did not inform anybody about the incident dated 9.7.2000 immediately thereafter. According to the case of the prosecution, the incident was reported only on 11.7.2000. Even then, no action was taken on behalf of the parents of the victim till 16.7.2000. Although, Mr. Mukherjee contended, one Monoj Das was informed about the incidents immediately after the P.W. 1 was informed by the victim girl about the incidents on 11.7.2000, he was not cited as a witness by the prosecution. This apart, Mr. Mukherjee contended that the prosecution Agency, i.e., the Police Officials of Suti Police Station had taken four days time to report the First Information Report to the nearest Magistrate. It was sent to the Magistrate only on 20.7.2000. According to Mr. Mukherjee, there was not only delay in lodging the First Information Report but also inordinate and alarming delay in sending the First Information Report to the nearest Magistrate. This delay appears to be fatal for the prosecution case. The prosecution case was developed, exaggerated and tainted with embellishment. He has taken me to the First Information Report (Exbt. 1) and contended that nowhere within the four corners of the First Information Report it has been stated by the P.W. 1 that his daughter, the victim girl, stated him that on 9.7.2000 in the evening, while the appellant was playing "jhiki-jhiki" game with her, he removed her panty and got his male organ touched with her private part. While recording statement u/s 164 of the Code of Criminal Procedure on 20.7.2000 she did not also state that the appellant removed her panty while playing "jhiki-jhiki" game. But, when the defacto-complainant was examined as P.W. 1, she stated for the first time that the appellant pressed his male organ on the private part of her daughter by opening

the wearing apparels of his daughter and repeatedly jerked her in the name of performing "jhiki-jhiki" game and, thus, tried to rape her. Mr. Mukherjee also drawn my attention to the statement of the P.W. 3, i.e., the victim girl and contended that while she got her statement recorded u/s 164 of the Code of Criminal Procedure on 20.7.2000, she did not state the Magistrate that the appellant removed her panty and connected his male organ with her private part by way of repeated jerking in the name of "jhiki-jhiki" game. But while examined as P.W. 3, she developed her statement by saying that the appellant removed her panty and touched his male organ on her private part and pulled her making sound "jhiki-jhiki" and in doing so, he made her up and down and thereby, touched his male organ on her private part. Mr. Mukherjee contended that the learned Trial Court erred in coming into a conclusion that the appellant, in fact, made any effort or attempt to commit rape on the P.W. 3. According to Mr. Mukherjee, the entire story of the prosecution case has been developed in course of time and should not have been believed by the learned Trial Court.

24. In the instant case, the victim was not medically examined. Therefore, no medical evidence, oral or documentary, was placed before the learned Trial Court by the prosecution. It is also not a case of the prosecution that the victim was actually raped although in course of examination, the witnesses stated that in the process of playing "jhiki-jhiki" game, the appellant committed rape on the P.W. 3. None of the witnesses has stated that the P.W. 3, Riya, sustained any injury of any nature on her body. She complained of pain only on her body not on her private part. Therefore, absence of medical evidence in the instant case, does not appear to be fatal for the prosecution case. Again, non-examination of Monoj Das, with whom the P.W. 1 discussed the matter, cannot be said to be fatal for the prosecution although his name was mentioned as a witness in the charge sheet. He was summoned but did not appear in the Court to depose in the case and the prosecution did not try to procure his attendance by way of praying for issuing of warrant of arrest. I mean to say that non-examination of Monoj Das is not fatal to the prosecution case because there are other witnesses who supported the prosecution case. Again, examination of Nurul Islam, whose name was not found place in the charge sheet, does not necessarily indicate that he was added as a witness and examined by the prosecution for any other suspicious reason. It is the case of the prosecution as well as the P.W. 1 that he consulted Nurul Islam before lodging of the First Information Report and Nurul Islam was the man who, in fact, had written the First Information Report at the instance of the P.W. 1 in the Police Station. There was no legal bar to examine Nurul Islam as a witness for the prosecution in the learned Trial Court. It might be that the Investigating Officer made a mistake in not mentioning his name in the First Information Report. That, in fact, did not preclude the prosecution to call him as a witness to the case.

25. Mr. Tapandeb Nandi, learned advocate appearing on behalf of the state-respondent, contended that in a case of rape, delay is not fatal to the

prosecution especially when the victim of the rape is a minor. In support of his contention, Mr. Nandi referred to the decision in State of Rajasthan Vs. Om Prakash, . In that case a child was raped. There was 26 hours delay in lodging the First Information Report. The delay was explained by the prosecution. No adverse inference was taken in such a circumstance.

26. In the instant case, there was delay of four days in lodging the First Information Report. The First Information Report, which has been marked as Exhibit 1, indicates clearly that the lodger of the First Information Report was perplexed and confused as to what would be his next step when he was informed about the incidents by his daughter. He had to think over the matter and that is why the delay was caused in lodging the First Information Report. The P.W. 1 in its examination-in-chief also stated that he became at a loss after hearing the incidents and at that stage of mind, he consulted with one Monoj Das and thought over the matter for about four days. Thereafter, he along with the victim and his friend Nurul went to the Police Station and lodged the First Information Report.

27. Generally, unexplained delay in lodging the First Information Report is fatal to the prosecution, but, in the instant case, delay has been explained properly. Whether delay in lodging the First Information Report is fatal to the prosecution or not, depends on the nature of offence involved. Delay stands generally explained in case of sexual assault because in the Indian society it brings a scandal to the family of the prosecutrix and time is unnecessarily wasted to decide if the scandal should be made public. In a case like rape or outraging of modesty of a woman, the aggrieved or the injured person or her relation will naturally think twice, if not more, before lodging a complaint to the police. This will be much more so in villages because it involves the prestige and reputation of the family of the victim. I have already stated that in the First Information Report as well as in his statement made in Court, the P.W. 1 explained the reason of delay satisfactorily and sufficiently. I do not find that when the delay is properly explained, it is fatal to the prosecution and the view of the learned Trial Court cannot be said to be wrong on that point.

28. Mr. Nandi referred to another decision of the Hon''ble Apex Court in Pala Singh and Another Vs. State of Punjab, and contended that Section 157 of the Code of Criminal Procedure requires such report to be sent forthwith by the police officer concerned to a Magistrate empowered to take cognizance of such offence. This is really designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and if necessary to give appropriate direction u/s 159 of the Code. So, where First Information Report was actually recorded without delay and the investigation started on the basis of that First Information Report and there is no other infirmity brought to notice, then, improper or objectionable delayed receipt of the report by the Magistrate concerned, cannot by itself justify the conclusion that the investigation was tainted and the prosecution is unsupportable. It is also not the appellant''s case that they

have been prejudiced by this delay.

29. In the instant case, there was delay of four days in the matter of sending the First Information Report to the Magistrate by the concerned Police Station and that delay has not been explained in any manner. But, upon receiving the First Information Report, investigation was started forthwith on that particular date, i.e., 16.07.2000. This fact stated by the Investigating Officer of the case, i.e., the P.W. 8, specifically and categorically. I do not find any reason as to why the proposition of law enunciated in Pala Singh''s case (supra) shall not be applicable in this case. Nowhere, in course of trial, it was asked by the defence, even in form of suggestion, as to why such delay was caused by the concerned Police Station in sending the First Information Report. Nowhere it has also been brought to the notice of the learned Trial Court that because of such delay, the appellant was prejudiced in any manner. Therefore, I do not like to put much importance on the contention of Mr. Mukherjee. It is, in fact, settled principle of law that delayed receipt of the report by the Magistrate alone would not be fatal to the prosecution case because it depends upon the facts and circumstances of each case. The proposition laid down by the Hon''ble Apex Court in Motilal and Another Vs. State of Rajasthan, , cannot be made applicable in this case because the nature of offence involved in this case and the case before the Hon''ble Apex Court are quite different.

30. Mr. Nandi has also referred to the decisions of the Hon''ble Apex court in State of Punjab Vs. Ramdev Singh, in Madho Ram and Another Vs. The State of U.P., and in Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, and contended that the sole testimony of the prosecutrix can be the basis of recording conviction and Court should display a greater sense of responsibility and to be more sensitive while dealing with the charge of sexual assault on woman particularly on a children. Mr. Nandi put much stress on the view of the Hon''ble Apex Court that corroboration of the testimony of victim of sexual offences is not required if the victim''s testimony is otherwise believable. However, he contended that in the instant case, the testimony of the prosecutrix was corroborated by her father and mother as well as P.W. 5. Therefore, there was no wrong or error on the part of the learned Trial Court to believe the testimony of the prosecutrix and come to a conclusion that what she stated in the Court were correct and were to be accepted without further corroboration.

31. There cannot be any dispute as to the views taken by the Hon''ble Apex Court in the decisions referred to above. It is settled principles of law that in a case of sexual assault, corroboration of the victim is not required either as a rule of law or rule of prudence if her testimony appears to be credible and trustworthy. But, in the instant case, according to Mr. Mukherjee, there is development in the prosecution case and it has been reflected in the First Information Report, in the statement u/s 164 of the Code of Criminal Procedure of the victim girl and, thereafter, in the evidence of the witnesses, mainly, the P.W. 3, the victim girl, the P.W. 1, the father of the victim girl

and P.W. 4, the mother of the victim girl. At the time of lodging of the First Information Report, the fact that the appellant rubbed his male organ on the panty of the victim has been specifically mentioned. It is to be noted that the First Information Report was lodged six days after the incidents alleged were reported to the P.W. 1 by the victim. It is not that the lodger of the First Information Report had no time to think over the matter. Perhaps, he thought over the matter again and again and lodged the First Information Report stating therein that the appellant rubbed his male organ on the panty of the victim after taking off her panty. He carefully omitted to mention therein that the appellant tried to penetrate the male organ inside the private part of the victim. The statement u/s 164 of the Code of Criminal Procedure of the victim girl was recorded on 20.7.2000. While making such statement before the Magistrate, the victim girl did not also mention that her panty was removed or lifted by the appellant at the time he played "jhiki-jhiki" game or at any point of time. But, at the time of examination in Court the P.W. 3 (victim), the father of the victim (P.W. 1) and the mother of the victim (P.W. 4) stated that the panty of the victim was removed at the time the appellant started playing "jhiki-jhiki" game sitting on a sofa and placing the victim on his thigh. There is sharp variation of the facts. Had not that been mentioned in the First Information Report, the effect would have been otherwise. When it has been mentioned specifically that the appellant rubbed his male organ over the panty of the victim girl repeatedly, it cannot be said that it was mentioned in the First Information Report by mistake or that the First Information Report was not supposed to contain each and every detail of the incident. The discrepancy in the manner the offence was committed appears to be fatal and I must say that the learned Trial Court was oblivious of taking note of that fact.

32. In Abhayanand Mishra Vs. The State of Bihar, the Hon''ble Apex Court observed:

The question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible.

There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, 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.

A person commits the offence of attempt to commit a particular offence when (i) he intends to commit that particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission, such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

33. In Sudhir Kumar Mukherjee and Sham Lal Shaw Vs. State of West Bengal, , the Hon''ble Apex Court observed :

A person commits the offence of attempt to commit a particular offence. When (I) he intends to commit that particular offence, and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission. Such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

34. It appears from the view of the Hon''ble Apex Court that for committing an offence it is necessary that a culprit intends to commit it. Thereafter, makes preparation. After preparation, he makes an attempt to commit the offence and in case the attempt succeeds, he is said to have committed the offence. If he fails due to a reason beyond his control, he is said to have attempted to commit the offence.

35. In the instant case, the appellant, according to the First Information Report, rubbed his male organ on the private part of the victim without taking off her panty. That specific averments of the First Information Report was changed at the time the witnesses examined in the Court and canvassed in the form that the appellant rubbed his male organ and touched it with the private part of the victim after taking off her panty in course playing "jhiki-jhiki" game. This discrepancy appears to be fatal in the backdrop of the facts that the first incident allegedly had taken place two months prior to reporting of the incidents by the victim girl to the P.W. 1 on 11.07.2000, the second incident had taken place on 9.7.2000, the incident of 9.7.2000 and the incident two months prior to that were reported on 11.7.2000, the First Information Report was lodged on 16.7.2000, the First Information Report was sent to the nearest Magistrate on 20.7.2000, i.e., the date when the statement of the victim girl was recorded u/s 164 of the Code of Criminal Procedure and the witnesses were examined in the year 2004. The possibility of development, embellishment or exaggeration, as pointed out by Mr. Mukherjee, cannot be ruled out.

36. Mr. Nandi, learned advocate appearing on behalf of the respondent-State contended that the prosecutrix, i.e., the P.W. 3 was a child, aged about 6 years 8 months at the relevant period of time. She made her statement before the learned Magistrate u/s 164 of the Code of Criminal Procedure has stated everything in detail. At the cost of repetition, I would like to state that the statement u/s 164 of the Code of Criminal Procedure made by the prosecutrix does not say that the appellant while playing "jhiki-jhiki" game, had taken off her panty and touched his male organ on

her private part.

37. A child may become a competent witness if the child is capable of giving rational answers to the questions put to him. The intelligence and not the age is the criterion of being a competent witness in case of a child. In the instant case, the statement u/s 164 of the Code of Criminal Procedure was recorded on 20.07.2000 and at that time, the prosecutrix was aged about 6 years and 8 months. She was examined in Court three years thereafter and by that time she became a girl of 10 years. Naturally, she could well understand the difference between taking off the panty and not taking off the panty. While examined as P.W. 3, she stated that her panty was taken off by the appellant. This statement of the prosecutrix neither has supported her statement u/s 164 of the Code of Criminal Procedure nor the statement she made to her father, the P.W. 1, on 11.07.2000. Accordingly, the same has not been reflected in the First Information Report.

38. A child has a very vivid imagination, it hears the talk of adults, in course of time comes to believe all that it hears. So the evidence of a child witness should be corroborated ordinarily. The principle is that necessity of corroboration is a matter of prudence and because of nature of child, it is always better to get her testimonies corroborated ordinarily.

39. In the instant case, everything she has stated has been corroborated by her father and mother. The fact that the appellant on many occasions did some dirty things with her has also been reflected in the First Information Report, in her statement u/s 164 of the Code of Criminal Procedure besides her oral testimony. But, I find the fact that the appellant had intention to commit rape on her and with that intention he prepared to commit the offence by taking off her panty and failed to commit the offence and, therefore, an attempt to commit the offence has not been proved. He might have intention to commit the offence but did not make any preparation to do so. Without preparation, there cannot be any attempt. Without taking off the panty, there cannot be any preparation for committing rape. Therefore, on that analogy, I find that the contention of Mr. Mukherjee is acceptable and convincing. It appears to me that this is a case of outraging of modesty simplicitor and not an offence of attempting to commit rape. I concede to the submission of Mr. Mukherjee in this regard. When the panty of the prosecutrix were not pulled off, no injury was detected on her private part, no semen was discharged by the appellant either on her private part or on her body, it can hardly be said that rubbing of male organ over the panty was amounting to attempting to commit rape. No doubt, the appellant has committed an offence coming within the purview of Section 354 of the Indian Penal Code.

40. I find that the learned Trial Court made a mistake over the issue and described all the misdeeds of the appellant as amounting to an attempt to commit rape. That view of the Court is liable to be modified in this appeal in view of the discussion above.

41. Accordingly, I modify the judgment and order under challenge to the extent that the appellant is not found guilty of offence under Sections 376 /511 of the Indian Penal Code. However, he is found guilty of offence u/s 354 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs. 5000/-, in default of payment of fine, he should undergo simple imprisonment for six months. The period in custody in connection with this case is liable to set off.

42. With the above direction, this appeal is allowed in part and is disposed of with the above modification of the judgment impugned.

43. Interim order, if there be any, stands vacated.

44. There will, however, be no order as to costs. Let urgent photostat certified copy of this order, if applied for, be given to the learned advocates of the parties upon compliance of necessary formalities.