In to commit rape who, except in the

In the third clause of the definition the words ‘ or any person in whom she is interested’ were added after the word ‘ her.’ A new fifth clause was enacted and added to the definition, while the old fifth clause was moved to become the sixth clause of the definition. Section 375 says that except under the exception provided for in this section, a man commits the offence of rape who has sexual intercourse with a woman under circumstances stated in any of the six clauses of this section. The language used is ‘ a man is said to commit rape who, except in the case hereinafter excepted, has sexual intercourse with a woman’ which means that only a man and no other person can be guilty of rape, and the sexual intercourse of only a man with a woman can amount to rape.

In Sakshi v. Union of India} the Supreme Court held that by a process of judicial interpretation the provision of section 375, Indian Penal Code cannot be altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration finger/vaginal and finger/anal penetration and object/vaginal penetration within its ambit. The definition of rape in the Code is restricted only to penile-vaginal penetration. The expression ‘ sexual intercourse’ used in section 375 is defined in the dictionary as hetrosexual intercourse involving penetration of the vagina by the penis. This is the correct meaning and is approved by the Supreme Court. First—Against her will According to the first clause, sexual intercourse by a man with a woman against her will amounts to rape if it does not fall under the exception provided in the section. The expression ‘ against her will’ means that the act is done in spite of opposition on the part of the woman. An element of force or compulsion is present.

It imports that the victim has been overpowered by the man. It shows that the man has used coercion against her. Where the accused had sexual intercourse with the woman victim by overpowering her and while the other accused had held her hands tightly, it was held to be a case of rape. Where the accused, a young man of twenty two years of age, overpowered a thirty years old mother of two children and committed rape on her, his defence that he would not have succeeded single handedly against such a senior lady was rejected because the facts and circumstances including the injuries on the private parts of the lady which could result only on forced sex established rape beyond doubt. The court distinguished the case of Pratap Misra v.

State, where the Supreme Court had observed that the opinion of medical experts also showed that it is very difficult for any man to rape single handed a grown up and an experienced woman without meeting stiffest possible resistance from her. Secondly—Without her consent If the sexual intercourse by a man with a woman is without her consent, it amounts to rape under the second clause if it does not fall under the exception given in the section. According to section 90 of the Code, consent given under fear of injury or under a misconception of fact is not a valid consent if the offender knows or has reason to believe that the consent was given in consequence of such fear of injury or misconception, or, if the consent is given by the victim who because of unsoundness of mind or intoxication is unable to understand the nature and consequence of the act to which she gave her consent. The third part of that section that the consent is not valid if it is given by the victim who is under twelve years of age, unless the contrary appears from the

context, does not apply to rape cases because the contrary does appear from the context in the form of the sixth clause as well as the exception given in section 375 wherein consent given by a girl under sixteen years of age is immaterial, and sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape respectively.

A sleeping person cannot give consent. Where the appellant and another person abducted a school girl despite raising of alarm by her, kept her under unlawful confinement at various places, and ultimately she consented to marry the appellant under the threat that otherwise he would take her to unknown places, and that night itself the appellant raped her, this section and section 366 were held to apply as giving consent to marriage did not mean consent to establish sex relations before marriage. Giving consent to sexual intercourse by a grown up woman on a promise of marriage by the accused, however, is a valid consent and is not consent under misconception of fact under section 90, unless it is proved that right from the beginning he had no intention to marry her. There is a difference between consent and submission. Consent involves submission but the converse is not necessarily true. Consent is voluntarily and consciously accepting what is proposed to be done by another and concurred to by the former. In Pratap Misra v. State, the three accused men allegedly raped a woman in her fifth months of pregnancy after a few days of which abortion took place.

The doctors were of the view that when such a woman is forcibly raped by three men one after the other abortion would result immediately thereafter due to shock and not after a few days as was the case here. The opinion of the medical experts also showed that it is very difficult for any man to rape

single handed a grown up and experienced woman without meeting very stiff opposition. Injuries on the person of the victim and the accused were not found which, the court thought, showed absence of resistance on the part of the victim. This and other factors taken together enabled the Supreme Court to conclude that the victim was a consenting party and thus the accused were not guilty of rape. The logic on the part of the court, with respect, seems strange. Does the court want one to believe that a woman in the fifth month of pregnancy would be so interested in sex relations as to allow three men to have sex with her? Or, does the court expect existence of marks of injury on the persons of the accused men when one of them is raping the woman while the other two are holding her tight by overpowering her? Or, does the court really believe, that in such a situation where a victim is being raped by one while two others have overpowered her that the sexual intercourse would be so difficult for the men as to leave injury marks on the body of the victim? And, when the medical experts opine that it is very difficult to rape a grown up and experienced woman single handed, is this opinion of theirs connected with medical matters at all? An argument that after the alleged rape had already taken place, and while the victim was being taken back she demanded money, would prove that everything had happened with her consent, cannot be accepted as in any case consent on the part of the victim, to negative a rape charge, must be before the incident and not after. But where a woman gives her consent for the sexual intercourse before the penetration, howsoever tardy or unwilling it may have been, no matter how much forceful the penetration may have been, the act cannot amount to rape. Where a fourteen year old girl went to a doctor for professional advice and he raped her while the victim all along believed that

the doctor was treating her medically and, therefore, she did not resist him, the doctor is guilty of rape as this cannot be held to be consent on her part.

Similarly, where a nineteen year old girl went to consult a doctor on some medical aspects and he raped her while the girl believed that he was performing surgical operation which he had suggested to her, it was held that there was no consent on the part of the victim and the doctor was guilty of rape. Again, where a music teacher pretending to be performing an operation to improve the breathing of the victim which would improve her voice and would enable her to sing better, raped her, he was held guilty of rape even though the girl submitted herself voluntarily under the belief, wilfully and fraudulently obtained by the accused, that he was treating her medically and surgically. In State of Himanchal Pradesh v. Shreekant Shekari, the Supreme Court clarified that the question of consent is really a matter of defence by the accused and it was for him to place materials to show that there was consent. Thirdly Where a man has sexual intercourse with a woman with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt, he is guilty under the third clause of committing rape. Under this clause the prosecution must prove that the offender had put either the victim or any person in whom she is interested in fear either of death or of hurt and her consent was obtained because of this fear. Before the Criminal Law (Amendment) Act, 1983 came into existence on December 25, 1983 the words ‘ or any person in whom she is interested’ did not exist in this clause. In Tukaram v.

State, popularly known as the ‘ Mathura case’, an eighteen year old Harijan orphan girl of that name was called to the police station on an abduction report filed by her brother. When they were about to leave the police station, the victim was asked to stay by G, one of the accused, who was on duty. Later on in that late hour of night he took her into a toilet and allegedly raped her. After that the other accused T allegedly molested her and tried to rape her but could not succeed as he was heavily drunk.

The lower court acquitted them on the basis of tacit consent on the part of the victim. The Bombay High Court convicted G of rape and T of molesting the woman on the ground that ‘ consent’ and ‘ passive submission’ were different from each other, and that mere passive or helpless surrender of her body and her resignation to the other’s lust under threats or fear could not mean consent on her part. The court observed that the fact that the victim made a statement immediately after the incident to the members of her family as well as before the crowd would show that she was subjected to forcible intercourse amounting to rape. The Supreme Court set aside the conviction and held the accused not guilty. It was observed that the woman was not subjected to fear of death or of hurt and it was not a case of ‘ passive submission’ as held by the High Court because there were no marks of injury on her person which showed that the whole affair was a peaceful one with consent. It was also said that when G asked her to stay she was not alone then and she could have said ‘ no’ at that very moment or could have requested her brother to take her, but she did neither. These, along with the fact that her conduct in following G and allowing him to have his way with

her to the extent of satisfying his lust in full, showed that she had consented to the act. The judgment was very widely criticised.

Issues like human rights and medical examination of the accused and not the victim to find out whether the sexual intercourse took place with consent or not were raised. The detaining of a minor Harijan illiterate woman alone in the precincts of a police station at night was severely criticised in the light of the then recent pronouncement made in the Nandini Satpapathy v. P. L. Dani, by the Supreme Court itself. Various women organisations also came forward against the judgment and the matter was raised both outside and inside the Parliament. This all culminated in the passing of the Criminal Law (Amendment) Act, 1983.

In addition to the changes brought about in the law by this Act as stated above under the sub-heading ‘ sexual offences’ in the beginning of the comments under this section, it also amended section 376 exhaustively and introduced minimum mandatory punishments in rape cases, both ordinary and custodial. Besides, it added four new sections 376-A, 376-B, 376-C and 376-D in the Code the first of which relates to intercourse by a man with his wife during separation while the last three deal with custodial sexual intercourse cases not amounting to rape. A new section 114-A was also inserted by this Act in the Evidence Act which provides that in a prosecution for rape under any of the clauses (a), (b), (c), (d), (e) or (g) of sub-section (2) of section 376 of the Indian Penal Code where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she

did not consent. Fourthly Where a man has sexual intercourse with a woman with her consent when he knows that he is not her husband but she has given her consent because she believes that he is another man to whom she is, or believes herself to be, lawfully married, it amounts to rape under the fourth clause. Knowledge on the part of the man that he is not the husband of the woman with whom he is having sexual intercourse and that she has given her consent because she believes him to be another man who is her husband is the essential requirement of this clause. In Bhitpinder Singh v.

Union Territory of Chandigarh, consent for sex relations was given by the prosecutrix under the belief that the accused was her husband. The prosecutrix had married the accused without knowing that he was already married. The Supreme Court held the accused guilty of rape under the fourth clause of section 375 of the Code. Fifthly According to the fifth clause of this section a man is guilty of committing rape if he has sexual intercourse with a woman with her consent, when, at the time of giving such consent, by reason of either unsoundness of mind or intoxication or the administration by him either personally or through any other person of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. This clause was previously not there in this section and was inserted by the abovementioned 1983 Act while the old fifth clause was renumbered in the present section as sixthly. Where the deceased had sexual intercourse with an imbecile girl and the jury concluded that because of this defect of understanding on her part, she was incapable of giving consent, the accused was held guilty of rape. Similarly, where the accused made a thirteen year old girl quite drunk and raped her

while she was insensible, he was convicted of rape. Where a woman was suffering from somnambulism or sleep walking and epilepsy and walked out of her sleep on a late night and reached a place from where five accused persons took her away into a lodge and all of them raped her, it was held that all of them were guilty of rape because the woman suffering from such a disease was incapable of giving consent.

Sixthly The sixth clause of the section states that a man is guilty of committing rape who has sexual intercourse with a woman with or without her consent when she is under sixteen years of age. This clause specifically makes consent given by a woman under sixteen years of age of no importance at all in rape cases. Initially this age was ten years. It was raised to twelve years by the Indian Criminal Law (Amendment) Act, 1891, and again to fourteen years by the Indian Penal Code (Amendment) Act, 1925, and yet again to the present limit of sixteen years by Act XLII of 1949. The prosecutrix, a girl of thirteen or fourteen years, was allowed by her father to be taken away by the relatives of her elder sister’s husband to her elder sister’s home to look after her for some time. Her father wrote two letters to them after some time to send her back but got no reply in return. Later on he received the information that they had got her married to the appellant.

He then lodged a report with the police that her daughter had been kidnapped by the accused persons and she had been forced by them to have illicit intercourse with the appellant. The police recovered her from the appellant’s home. The prosecutrix herself gave the statement that the appellant had raped her many times in his house. The medical evidence corroborated her statement. The appellant was convicted of rape.

Once it is established that the victim was less than sixteen years of age, the question of consent on her part became altogether irrelevant and even if no injuries are found in her private parts because she is used to sexual intercourse, the accused would be guilty of rape. Where the accused persons forcibly took away the victim, a girl below sixteen years of age, to another city and kept her there for a long time, even if it is proved that she had given her consent to accompany them, it would not matter at all as far as the offence of rape is concerned. In Mahendra Murtiyan Madrasi v.

State of Gujarat the accused was alleged to have kidnapped the victim, a minor girl, with the intent that she might be forced or seduced to illicit intercourse. The evidence showed that he had not used any force in taking her out of her house. The victim herself had taken some money from her house for going with the accused and the accused had no money of his own. The victim stated that her father was going to betroth her to another boy against her wishes. There was no evidence showing that the accused took or induced her out of the lawful custody of her father. The Gujarat High Court held that sections 363 and 366 of the Code do not apply in the case and since the accused had no intention to force or seduce her to illicit intercourse section 366-A was also not applicable. But since the victim was below sixteen years of age when the accused had sexual intercourse with her, he was liable to be convicted under section 376 for rape on the basis of clause 6 of section 375 even though the victim was a consenting party. Explanation The explanation attached to the section states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

In other words, it is not necessary for this offence that there must be a full and complete sexual intercourse. The private part of a man must penetrate the private part of the woman; it is not necessary to know as to how far it has entered. Some part of the virile member of the man must have been within the labia of the pudendum of the woman. Rupture of hymen is not at all necessary. Seminal emission is not necessary. Presence of spermatozoa is also not necessary. Where the accused attempted to ravish a girl and caused an injury on the fourchette indicating an attempt but could not penetrate, he should be convicted of attempt to commit rape and not of rape.

Exception The exception attached to the section says that sexual intercourse by a man with his own wife is not rape if the wife is not under fifteen years of age. This age limit was first raised to thirteen years by Act XXIX of 1925, and then to fifteen years by Act XLII of 1949. This exception has been added with a view to keep a check on husbands who may be inclined to take advantage of their marital status prematurely. A husband should not have a right to enjoy the person of his wife without taking into consideration her physical safety first.

The law presumes that a wife who is not under fifteen years of age has given her consent to her husband, by virtue of the marriage, to establish sexual contact with her. But if the wife is under fifteen years of age and her husband does have sexual intercourse with her under any of the six circumstances stated in this section, the husband would be guilty of rape. This, however, is subject to section 198 (6) of the Code of Criminal Procedure, 1973 according to which no court shall take cognizance of an offence under section 376 of the Indian Penal Code where such offence

consists of sexual intercourse by a man with his own wife, the wife being under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence. In camera proceedings and prohibition of publication The Criminal Law (Amendment) Act, 1983 has, besides the changes indicated at respective places in course of the above discussions, made certain additions in section 327, Code of Criminal Procedure, 1973 also.

The old section 327 has been numbered as sub-section (1) of that section and another provision, by way of sub-section (2), has been added in that section. This new provision says that notwithstanding anything contained in sub-section (1) the inquiry into and trial of rape or an offence under section 376, section 376-A, section 376- B, section 376-C, or section 376-D of the Indian Penal Code shall be conducted in camera : provided the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or remain in, the room or building used by the court. Sub-section (3) of this section states that where proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court. Corroboration of the complainant’s story The general rule in rape cases is that there may be corroboration of the complainant’s story by independent evidence. The corroboration would naturally depend on the facts and circumstances of each case. It may be in the form of injuries on the private or other parts of the complainant’s body or that of the accused, condition of the clothes worn by

her or the accused, seminal or blood stains on her or on the accused’s body or clothes or on the place of the incident, etc.

Prompt or delayed lodging of the F. I. R. may also be taken into account. There may be other allied evidence as well.

But all this is changing now . A woman who is the victim of rape cannot be described as an accomplice. The Supreme Court has stated that a socially sensitized judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protection writ into it. It has also observed that the court cannot cling to a fossil formula and insist on corroborative testimony. Judicial response to human rights cannot be blunted by legal bigotry. In the famous case of Bharwada Bhoginbhai Hirjibhai v. State the Supreme Court went on to emphasise that in the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

She would be conscious of the danger of being ostracized by the society including by her own family members, relatives, friends and neighbours. On principle, the evidence of a victim of sexual assault stands at par with evidence of an injured witness. If the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it

unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence where the same can be expected to be forthcoming. There is, however, this qualification that corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self- preservation or when the probability factor is found to be out of tune. Physical incapacity The former Chief Court of Lower Burma held the view that a boy of twelve years of age could be held guilty of attempt to commit rape as it is erroneous to believe that he could not possess the physical capacity to commit rape. The Bombay High Court had also held that a boy of thirteen to fifteen years of age who had the power of erection and probably that of emission as per the medical report, could be convicted of attempt to commit rape as penetration is enough to constitute rape. Promise of marriage In Uday v. State of Karnataka, the accused and the prosecutrix were deeply in love.

He promised to marry her on a later date. She was a nineteen year old college girl and was aware of the fact that they belonged to different castes and proposal of their marriage would be opposed by their families. Yet she started cohabiting with him consciously. The Supreme Court held that consent on her part could not be said to be under misconception of fact, i. e., promise to marry, but because she also desire for it. Also false promise is not a fact under the Indian Penal Code.

The accused was acquitted of the charge of rape. Difference between rape (or its attempt) and indecent assault (or outraging the modesty of a woman) Assaulting or using criminal force to a woman with the intention to outrage,

or with the knowledge that he will thereby outrage, her modesty is indecent assault. Such intention or knowledge is not part of rape or its attempt. An indecent assault may not amount to attempt to commit rape unless the court is satisfied that the accused had gone beyond the stage of preparation with a view to gratify his lust at all cost.

Where the accused tried to rape the victim but she picked up an axe and caused injuries on him after which he left her and escaped, he was held guilty under section 354. Where, however, the accused had taken off his own trousers and that of the victim, a five and a half year old child, and the doctor found fresh redness at the entrance of her vagina but no other injuries while the girl did not feel pain and there were no marks of blood or semen, it was held that the accused had gone beyond indecent assault and was guilty of attempted rape. Where the accused threw down the victim on the ground, put sand in her mouth, got on to her chest and attempted to have sexual intercourse but the victim managed to scream which attracted other people on to the spot, it was held that the accused had attempted rape. Mere penetration in the vulva would amount to rape. But where there was a congestion about quarter of an inch away from the vulva, and before the accused could do anything else the victim was injured and started bleeding, the accused had proceeded far enough but could not succeed in raping the girl, and thus he was guilty of attempt to commit rape under section 376 read with section 511, and not of outraging the modesty of a woman. Where the accused stripped a girl almost naked and was himself lying upon her when she cried for help and was rescued, he was held guilty of attempted rape.