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flaut law by adopting dubious means. In the garb of larger public interest it cannot be allowed to violate the law. Similarly, Rajasthan High Court in the case of *State of Assam V. State of Rajasthan* Single Bench CivilWrit No.28/96 decided on 3.5.96 held that State organised lotteries cannot be banned by a State as it falls under the Entry 40 List 1 Seventh Schedule of the Constitution of India. Central Government alone is competent to legislate on the same. No State Government has legislative or executive power to impose a ban on the sale of ticket of a lottery organised by the State Government or the Government of India as the case may be. The State Government has power to legislate under Entry 34 List II Seventh Schedule of the Constitution of India regarding "betting and gambling" but the lotteries organised by a State Government or the Government of India have been specifically taken away from the said entry and have been placed in Entry 40 List I Seventh Schedule of the Constitution of India, which cannot be banned by such notification. Suort in this regard can be had to the decision of Supreme Court in the case of *H.Anraj And Ors. V. State of Maharashtra AIR 1984 SC 781.*

16. As already observed above, the fact that the lotteries sold by the petitioner are State organised lotteries, hence the same could not be banned by the impugned notification. Even otherwise once the order of respondent No.1 had expired, the respondent No.2 could not resort to the notification to inject life to a dead order.

17. For the reasons stated above, the petition is allowed and the impugned notification dated 28th February,1996 is hereby quashed.

*** *** ***

1996 (38) DRJ

HIGH COURT OF DELHI

Crl.R.101/96

Sudesh Jhaku.............Petitioner

Versus

K.C.J...............Respondents

Jaspal Singh, J.

Decided on : May 23, 1996

Criminal Law

Witness—Child witness—Manner of recording the testimony—The witness already underwent the tragedy of sex abuse—Directions given to ensure sensitivity towards the witness during trial and to hold in the trial camera.

Held : *I feel it is time we in India give the subject a fresh look and evolve some principles which while protecting the child, do no harm to the defence. And, while I am on the subject, I cannot resist registering a strong protest at the manner the learned Metropolitan Magistrate recorded the statement of the child under section 164 of the Code of Criminal Procedure. He should not have recorded the statement while police officer was in atten-*

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dance. The record is in English (bad English, if I may say so) while the statement was made in Hindi. The Magistrate ought to have recorded the statement in Hindi only. If such grave mistakes are being committed despite our having given intensive and extensive training to the judicial officers, the system will take no time to collapse. I hope this feeling of despair would be conveyed to the Court on its administrative side.

What should be done now?

I hope that while the child is in the witness box every effort will be made by the learned trial judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. The Prosecutor in his zeal might undervalue the child's feelings. There is need to keep a check on it. The defence counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and harassment of the witness. If the court notices any departure from this course of conduct, it should rise to the occasion promptly and effectively. Child sexual abuse being one of the most serious and damaging criminal offences, the trial Judge shall handle the proceedings with considerable sensivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may be of the courtroom itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of the trial judge to notice it.

Interpretation of Statutes

Penal statute—Strict construction—Change in social conditions—Interpretation of an ongoing penal statute—Unless there is an ambiguity in language, resort to methods of interpretation, other than literal interpretation is not permissible.

Held *: Undoubtedly a Judge should not make a fortress out of the dictionary but then in the pursuit of melody its notes cannot be ignored. The plain ordinary grammatical meaning of an enactment still affords the best guide though where the language is contradictory, ambiguous or leads really to absurd results other methods of extracting the meaning can be resorted to so as to keep at the real sense and meaning. [Maxwell on Interpretation of Statutes 10th edn. p. 229. It is also to be remembered that penal statutes are to be construed strictly. The Court has to see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It is also a cardinal principle that in construing a penal statute, in case of doubt, the construction favourable to the subject should be preferred.*

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Penal Code 1860

Section 361—Abduction—Enticing away by natural guardian—Where a young girl is enticed away by her natural father, it does not constitute abduction.

Section 375 and 376—Rape—Definition of—Penal Law if an ongoing legislation—Penetration—Meaning of—It does not include penetration of any part of female body by any part of male body or by a foreign object—Words and Phrases.

***Held** : The definition of rape is based on the common law and in England, as well as in India the words "sexual intercourse" and "penetration" have all along been taken to mean the act of inserting the penis into the female organs of generation. It would not be permissible to strain the words and their well - understood and well- entrenched meaning so as to bring within their fold certain acts which do not come within the reasonable interpretation of the provision. It is not a case where the main object and intention of the provision is not clear. It is also not a case of absolute intractability of the language used. The language used also poses no difficulty in resolving the question before me or implementing the intention or spirit of the law. The duty to mould or creatively interpret the legislation does not thus arise.*

The concept of crime undoubtedly keeps on changing with the change in political, economic and social set-up of the country. The Constitution, therefore, confers powers both on Central and State legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Let the legislature intervene and go into the soul of the matter. Rape is a serious matter though, unfortunately, it is not attracting serious discussions. Not even in law schools.[Susan Estrich, Teaching Rape Law, The Yale Law Joumal (1992) The seriousness of the offence with respect to oral intercourse or vaginal penetration otherwise than with penis is not realised though it involves an act of sadism which is likely to cause the victim far greater pain and physical damage than rape itself.[Jennifer Tenkin, Towards a modem law of rape, The Modern Law Review (1982)] Take, for example, vaginal penetration by a bottle. In such a case the shock, trauma and long-term psychological damage to the victim will be at least as serious as that which befalls rape victims and yet it would not be rape as defined in section 375. Admittedly it would also be not an offence under section 377 of the Code. It would thus be an offence punishable under section 354 of the Code which provides maximum sentence of only two years. Does it not, to use the words of Wordsworth display "voluptuous unconcem" of the ground realities? This surely fails to protect the integrity of woman and shows a bias against them - a bias continuing right from the days when the law of rape was concemed with theft of virginity and protection of property rights. [See Bracton, The Laws and Customs of England, Vol. II FO 147] And when we think of integrity of the person violation of which "society cannot and must not tolerate,[Susan Estrich, Teaching Rape Law, The Yale Law Joumal.]

We think not only of women clad in chiffon, draped in misty soft powder sprinkled with a swansdown puff challenging to sink ships and stop heart beats, though they also

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are no less important, but of also those bare-faced a la Bankim Chandra imprisoned within the confines of female subordination and restricted life chances.

Mr.Arun Jaitley, Sr. Advocate with Ms.Naina Kapur, Ms.Meenakshi Arora & Ms.Vibha D.Makhija, Advocates for Petitioner.

Mr. K.K. Luthra, Sr. Advocate with Mr. Sidharth Luthra and Mr.R.P.Luthra, for Avinash Malhotra. Mr.I.L.Kapoor, Mr.S.P.Juneja Mr.S.P.Singh for K.C.Jhaku. Ms.Neelam Grover for State. Mr.Ravi Qazi & Mr.N.B.Sinha.

Jaspal Singh, J.

1. Is "rape" as defined in section 375 of the Indian Penal Code confined only to penile penetration of vagina? What about penetration of a bodily orifice (vagina, anus or mouth) by a penis or other part of the body, or by an object? Would it fall within the meaning of the words "sexual intercourse" and "penetration" as used in the said provision? These are some of the questions which have arisen in this petition. The other questions raised are also of no less importance. On such question revolves around the ambit and scope of section 361 of the Indian Penal Code. The second is about the precautions to be taken with regard to the recording of the statement of a child witness in a case of sexual abuse. The questions arise from a sordid story coming from the lips of a child at present aged about eight years. However, let me first introduce the main characters. The narration would follow.

2. K C J is at the centre-stage. He is a married man with three daughters, the youngest being B. SJ is his wife. The said three daughters are from her womb. He was an Under Secretary in the Ministry of Home Affairs. In the same Ministry worked JV and BB besides two women AK and BK. The year was 1994. B, by that time, had seen about six summers of her life. This little girl used to be taken by her father to his office and from there to a hotel room in or around the Pavilion Restaurant. The others to accompany them were the persons named above. Ensconsed there, they would consume alcohol, watch what are generally known as "blue films" and revel in sex orgies. And, during those naked games of raw flesh, KCJ would make his own daughter consume alcohol, remove her clothes, and thrust his fingers in her vagina and anus. If the child is to be believed, she was not safe even within the fourwalls of the house she called her home. This is how she describes her experience there:

> "I used to sleep with my sisters at night. Papa would knock on the door and I would open it. Then from the store he would take a bottle which contained white tablets, take a tablet with alcohol and also give me the same. From another bottle he would put something on a handkerchief and make mummy and my sisters smell it and go off to sleep. Then he would open mummy's cupboard and take out saris and money. Papa would take me to the drawing room and take off my clothes and his own clothes also. Then he would scold me and tell me to suck his penis. His penis (lamba wala cheez) would be soft and would smell. Some whitish liquid would come out of it and sometimes get into my mouth. The first time I had said no but Papa beat me a lot.

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I used to feel very revolted (ghin ati thi) and I would get up in the morning and quickly brush my teeth."

3. This yin yang of pain and lust forms part of her statement recorded on May 2, 1995 by a Metropolitan Magistrate under section 164 of the Code of Criminal Procedure. On July 20, 1995 the C.B.I. filed charge sheet not only against KCJ but against his above named office colleagues as well. It was under sections 376, 377, 354, 366 A read with section 109 of the Indian Penal Code. On February 7, 1996 the learned Additional Sessions Judge charged KCJ under Sections 354, 377 and 506 of the Indian Penal Code. The others were charged under section 109 for having abetted the commission of offences under sections 354 and 377.

4. The mother of the child on whose complaint the case was registered is not satisfied with the order of charge. She feels that besides the sections referred to above, the accused ought to have been charged under sections 376 and 366A of the Indian Penal Code also. Hence this revision petition.

5. Having dealt in brief with the essential features of the prosecution case, let me proceed to deal with the arguments advanced. However, before I do so, let me reproduce sections 375 and section 377 of the Indian Penal Code, for whatever was said with regard to the charge of rape centred around the said two provisions. First, let us have a look at section 375 which defines rape. Here it is:

> "**375.** *Rape.*-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
>
> First - Against her will.
>
> Secondly. - Without her consent.
>
> Thirdly.- 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.
>
> Fourthly. - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly. - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly - With or without her consent, when she is under sixteen years of age.
>
> *Explanation.*—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> *Exception.*—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. "

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Section 377 says:

> "**377.** *Unnatural offences* — Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

6. It was contended by Mr.Arun Jaitley that since the words "sexual intercourse" in section 375 and "carnal intercourse' in section 377 have not been defined and so also the word "penetration" used in both the provisions, therefore, the words "sexual intercourse" and "carnal intercourse" read in conjunction with the common word "penetration" should be interpreted to mean that where a male with the consent of the woman penetrates any part of his body into any part of her body other than her vagina, then he commits an offence punishable under section 377 of the Code but where he so penetrates into any part of her body including vagina without her consent then he commits an offence punishable under section 376 of the Indian Penal Code. In the alternative, it was contended that even if section 377 of the Code was taken to be confined only to the acts of sodomy, buggery and bestiality, the position with regard to 'rape' would remain to be materially the same and thus, where a male penetrates any part of his body or any foreign object like say a stick or a bottle into a woman's vagina without her consent, it would amount to rape within the meaning of section 376 of the Code.

7. The grievance of Mr.Jaitley was that the learned Additional Sessions Judge had arbitrarily interpreted the word "penetration" as appearing in section 375 of the Code to mean penetration of the male organ into a woman's vagina and that the interpretation so put failed to acknowledge the alarming increase in the incidence of sexual abuse and completely ignored not only contemporary understanding of rape but also the larger issues of humiliation, degradation and violence that occur when the penis is substituted by other body parts or foreign objects.

8. While pleading for what Mr. Jaitley called a "realistic" interpetation of sections 375 and 376 of the Penal Code he drew my attention to the changing scenario in various other jurisdictions showing contemporary understanding of the problem. In particular, my attention was drawn to the interpretation of sexual abuse as set out in section 319(1) of the Criminal Law Western Australia, and sections 151, 152 and 153 of the Canadian Criminal Code and so also to the existing definition of rape in Washington State and to what is provided on the subject in the Massachusetts Law.

9. Section 319(1) of the Criminal Law Western Australia provides:

"to sexually penetrate means"-

a) to penetrate the vagina (which term includes the labia majora), the anus or the urethra of any person with

    i. any part of the body of another person; or

    ii. an object manipulated by another person, except where penetration is carried out for proper medical purposes;

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b) to manipulate any part of the body of another person so as to cause penetration of the vagina (which term includes the labia majora), the anus, or the urethra of the offender by part of the other person's body,

c) to introduce any part of the penis of a person into the mouth of another person;

d) to engage in cunnilingus or fallatio; or

e) to continue sexual penetration as defined in paragraph (a), (b), (c) or (d)."

10. Section 151, 152 and 153 of the Canadian Criminal Code run as under:

"**151.** Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence...

152. Every person who, for a sexual purpose, invites counsels or invites a person under the age of fourteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of fourteen years, is gulty of lan indictable offense....

153. 1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a young person...."

11. The Washington State Law provides:

"Rape is force intercourse. "Intercourse" includes vaginal or anal penetration, however slight by a penis or by an object, as well as oralgenital contact."

12. I was told that under Massachusetts law, rape is defined as penetration against the victim's will of a bodily orifice (vagina, anus, or mouth) by a penis or other part of the body, or by an object.

13. It is rightly said that short of homicide, rape is the "ultimate violation of self". *Susan Brownmiller* calls it "an invasion of bodily integrity and a violation of freedom and self determination wherever it happens to take place, in or out of marriage."

14. Societal attitudes towards rape as borne out from the following add to the woe.

"That some women enjoy fantasies of being raped is well authenticated and they may well welcome a masterful advance while putting up a token resistance."

'A little still she strove and much repented.

And whispering "I will ne'er consent", consented' [Glanville Williams, Textbook p.238 quoted in C.M.V. Clarkson and HM Keating; Criminal Law: Text and Materials (Sweet and Maxwell) p.469.]

Or

"Nice girls don't, and bad girls don't complain." [See *C.M.V. Clarkson and HM Keating; Criminal Law: Text and Materials (Sweet and Maxwell) p.469.]*

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15. Not long time back most scholars and clinicians blamed the victims for their victimization ignoring that a high percentage of men harbour or desire to rape [See: *Neil Malamuth: Journal of Social Issues 37 (1981): 138-157; J. Briere and N.Malamuth: Self Reported Likelihood of Sexually Aggressive Behaviour," Journal of Research in Personality 17 (1983): 315-323.; J.Goodchilds and G.Zillman, "Sexual Signaling and Sexual Aggression in Adolescent Relationships," in N.Malamuth and E.Donerstein (eds), Pornography and Sexual Aggression (New York, 1984)]* and that there is a connection between sexism and rape. Though some stress psychopathology as the major causative factor in rape, others like *Lorenne Clam and Debra Lewis* argue that rape is a consequence of the coercive sexual and non-sexual power males have over females in patriarchal cultures:[The Power of Coercive Sexuality (Tornonto, 1977)] Others like Brownmiller [Susan Brownmiller: Against Our Will (1975); Kate Millet, Sexual Politics (1970)] have stressed that men as a gender benefit from rape because it keeps women fearful and dependent. Perhaps, one big factor has been the crushing totality of feminine subordination. [MacKinnon: Feminism Unmodified] Whatever be its causative factor, rape still stares at us with all its fangs and ferocity. *Lorene Clark and Debra Lewis* [The Power of Coercive Sexuality (Tornonto, 1977)] believe that rape cannot be eradicated without changing the coercive sexual and nonsexual power that males have over females in patriarchal cultures. Some say more legislation is the answer. Some feminists, however, have dedicated themselves to resistance.[See: Pauline B. Bart: Women's Studies Encyclopedia Vol. I (by Helen Tierney) Greenwood Press.] Quite a good number of them feel that nothing short of political revolution can redress the failings of the traditional approach to rape. They intimate that most of what passes for "sex" is actually coerced and thus nothing short of rape. [See MacKinnon, Feminism, Marxism and the State, 8 SIGNS 635 (1983); D.Russell, The Politics of Rape: The Victim's Perspective.] There is all round projection of anger, yearning, hope, self affirmation and restless bewilderment. And, in this atmosphere rape continues to be committed, everywhere, all the time, and in ever increasing number although even in a country like USA estimates of reporting range from one in three (FBI) to one in twelve.[See D.E.H. Russell, Sexual Exploitation, Beverley Hills Calif 1984] I fear the position in India must be worst. That is why, perhaps, Mr.Jaitley felt that there was need for expanded understanding of rape in the law and that it was time to give a go bye to the traditional approach which, according to him, reflected male views and male standards. He made an impassioned plea to realise, recognise, feel and respond to the changing scenario. I was told that a little "innovative boldness" would usher in the desired result and bring our laws in line with the thinking of some countries who have responded already to the call for change.

16. In the past the law of rape was concerned with theft of virginity and was there primarily to protect property rights.[See: S.Brownmillers Against Our Will (1976)pp. 23-30; Bracton, the Laws and Customs of England, vol. II, F.O. 147.] Redress lay in financial compensation. According to *Bracton*, [ibid.] even in the thirteenth century when penal sanctions for rape, imposed by the King's court were supposed to have supplanted pecuniary compensation, in practice, financial compensation continued to

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be paid. Even today the purpose does not seem unequivocally to be the female's right to her bodily integrity. The fact that marital rape is protected, whatever be the considerations, is a pointer towards that.

17. The Indian Penal Code, like most penal codes worldwide, incorporates a definition of rape evolved almost entirely on the basis of common law. Penetration, it has been held under the common law, is the act of inserting the penis into the female organs of generation *[R.V.Jordan and Cowmeadow (1839) 9 C & P 118, R v. Hill (1781) 1 East P.C.439; R v. M'Rue (1838) C & P 641; R v. Allen (1839) 9 C & P 31: R v. Hughes (1841) 2 Mood. 190; R v. Cox 15 C & P 297, CCR.]* It was because of this that in *R v. Williams [(1893) 1 QB 320.]* it was held that a boy under 14 could not be convicted of an assault with intent to commit rape. There is an irrebuttable presumption that a boy under fourteen is incapable of sexual intercourse; evidence may not be adduced to show that he is capable. *[R. v. Philips (1839) 8 C & P 736.]*

18. The Sexual Offences Act 1956, Section 1(1) states that it is an offence for a man to rape a woman. As per the Sexual Offences (Amendment) Act 1976, Section 1(1) a man commits rape if he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it *and* at that time he knew that she does not consent to the intercourse or he is reckless as to whether she consents to it. What is sexual intercourse in the eye of law? A definition is provided in Section 44 of the 1956 Act. It states:

> "Where.... it is necessary to prove sexual intercourse (whether natural or unnatural), it shall not be necessary to prove the completion of the intercourse by the emission of seed, but the intercourse shall be deemed complete upon proof of penetration only".

As per *Gary Scanlan & Christopher Ryan* An introduction to Criminal Law p. 208 [this means that

> "in so far as the law is concerned the slightest degree of penetration by the male sexual organ of the female sexual organ will be sufficient to constitute intercourse without anything more occurring".

The case law on rape coming from England after the Sexual Offences Act 1956 also shows that "sexual intercourse" is being confined to natural intercourse and that the question of rape turns solely on whether or not the victim's vagina was penetrated by a male organ without her consent. [Gary Scanlan And Christopher Ryan: An Introduction to Criminal Law p.210] In this respect reference may be made to *R. v. Olugboja* [(1982) QB 320 wherein the word "consent" in the Sexual Offences (Amendment) Act (1976I Section 1(1) was in issue and so also to *People (Gen.Att.) v. Dermody*.[(1956) I.R. at 32.] The intercourse thus must be per vaginam.[Sexual Offences (Amendment) Act 1976, S. 7(2): Gaston (1981) 73 Cr. App Rep. 164.] The latest judgment on the point to which I could lay my hands on is Attorney General's Reference (No.1 of 1992)[(1993) 1 WLR 274.] The point of law referred was:

> "Whether on a charge of attempted rape, it is incumbent upon the prosecution, as a matter of law, to prove that the defendant physically attempted to penetrate the woman's vagina with his penis."

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It was held that when we speak of sexual intercourse we mean the defendant physically penetrating the woman's vagina with his penis.

Reference may, in this connection, be also made to *Reg v. Robinson [(1993) 1 WLR 168]* though it too was not relied upon by either side. In that case, on 31st January, 1992 at about 9 PM while the complainant, a widow aged 87, was watching television, there was a knock at her front door. She went to the letter box, opened it and said, "Who is it?". The appellant, aged 16 years replied, "It's the police". She opened the door. The appellant forced his way in, pushing the complainant into the living room and on to the settee. He pulled her trousers down and exposed his penis. Her legs were forced apart and the appellant attempted to have sexual intercourse with her. She tried to resist. Having failed to penetrate her, the appellant dragged her into the bed room. He pulled off her Pyjama trousers completely, lifted her right leg and pushed it over his shoulder. He roughly opened her private parts and tried to insert his penis. Again he failed to penetrate her. Instead he inserted his finger. Throughout the appellant tried to kiss and insert his tongue into the complaint's mouth, slobbing over her, as she put it. He was held guilty of attempt to rape.

I have given the facts of Robinson's case in some detail with a purpose. The case clearly goes to show that intercourse must be per vaginam and that although in that case there was penetration of the vagina with fingers it was not taken to amount to "sexual intercourse" or "penetration" to constitute rape.

The definition of "rape" in section 375 of the Indian Penal Code being entirely on the basis of Common law, the law as to the meaning of "sexual intercourse" and "penetration" has been no different from that in England. In Natha v. The Crown AIR 1923 Lahore, 536 which refers to and relies upon in support a Bombay High Court judgment in Reg v. Feirol, it was held that to constitute penetration it must be proved that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. The law admittedly remains the same till date.

But then, Mr.Jaitley submitted that the questions raised by him were never canvassed before and as such the judgments delivered so far would not in any manner come in the way of looking at the provision in the context of today's thinking on rape laws. He submitted that an ongoing Act must be taken to be always speaking and as such the legislature must be taken to have intended the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed. He was thus echoing the words of Francis Bennion who had pleaded for giving to the ongoing Acts an updating construction. According to *Francis Bennion* [Statutory interpretation by Francis Bennion.]

> "In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true, original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act's passing, in law, social conditions, technology, the meaning of words) and other matters. Just as the US Constitution is regarded as "a living Act" That today's construction involves the supposition that Parliament was catering

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long ago for a state of affairs that did not then exist is no argument against that construction."

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"An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic proceeding provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials"

Undoubtedly, as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity". It does not mean that taking advantage of it a Judge can uproot the written word in effect calling the day night and the night day. Justice Cardozo [Cardozo, "The Nature Of the Judicial Process" 141 (1921)] says:

"In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful."

Undoubtedly a Judge should not make a fortress out of the dictionary but then in the pursuit of melody its notes cannot be ignored. The plain ordinary grammatical meaning of an enactment still affords the best guide though where the language is contradictory, ambiguous or leads really to absurd results other methods of extracting the meaning can be resorted to so as to keep at the real sense and meaning. [Maxwell on Interpretation of Statutes 10th edn. p. 229. It is also to be remembered that penal statutes are to be construed strictly. The Court has to see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It is also a cardinal principle that in construing a penal statute, in case of doubt, the construction favourable to the subject should be preferred. If I go by the suggestion of Mr.Jaitley I will be acting against these very well established principles.

The primary test remains to be the language employed in the Act. Section 375 of the Code uses words which are clear and plain and unambigiously express the intention of the legislature. As shown above, the definition of rape is based on the common law and in England, as well as in India the words "sexual intercourse" and "penetration" have all along been taken to mean the act of inserting the penis into the female organs of generation. It would not be permissible to strain the words and their well - understood and well- entrenched meaning so as to bring within their fold certain acts which do not come within the reasonable interpretation of the provision. It is not a case where the main object and intention of the provision is not clear. It is also not a case of absolute intractability of the language used. The language used also poses no difficulty in resolving the question before me or implementing the intention or spirit of the law. The duty to mould or creatively interpret the legislation does not thus

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arise.[See *Directorate of Enforcement v. Deepak Mahajan (1994) 3 SCC 440 at p. 453* where the provisions posed "difficulty " in resolving the question before it.]

True, as pointed out by Mr.Jaitley the ambit and scope of rape laws has been expanded in a number of other jurisdictions but then if the desired goal has been achieved it is not through interpretative process of the courts. The change has been brought about through legislation by artificially extending the definition of rape.

It may not be out of place to mention that in England, *Criminal Law Revision Committee* was appointed and one of the questions before it was: Should other kinds of penetration constitute rape? Its *Fifteenth Report* deals with the question as under:

> "2.45 Rape is sexual intercourse without consent, "sexual intercourse" being confined to natural intercourse (Gaston (1981) 73 Cr. App. R. 164) In paragraphs 44 to 46 of our Working Paper we invited comment upon whether it should be extended to other forms of non- consensual sexual penetration such as buggery, the insertion of the penis into the mouth, and the insertion of objects into the vagina. Our provisional conclusion was that it should not."

What I propose to emphasise by reference to the above report is that the definition of rape as con tained in the Sexual Offences Act 1956 which too talks of "sexual intercourse" and " penetration" was universally accepted as not wide enough to include other kinds of penetration and that plea for their inclusion in the definition of 'rape' through legislation was also rejected. Is it not a fact that in India too "sexual intercourse" and "penetration" have always been taken to mean penile penetration of the vagina? Is it also not a fact that in India too the concept of rape as a distinct form of criminal conduct is well established in popular thought and corresponds to a distinctive form of wrongdoing? Will not the interpretation suggested by Mr.Jaitley, besides being out of step with matters of common knowledge and matters of common report, be also out of tune with the plain words used, and with what has already been held by the courts? Will not the interpretation sought to be put make the offence of "rape" become out of step with the understanding of Indian populace a great majority of which is illiterate? True, some in England feel that this assumption is not correct. [Zsuzanna Adler, Rape On Trial.] According to them the concept of rape is now popularly understood to include behaviour other than that covered by the legal definition. Card [Quoted in Rape On Trial, ibid]. for example, cites as an illustration the frequent use of terms such as "oral rape" and "homosexual rape" in the press. But then, if it has been true there, it does not make it true here.

The boundaries of the forbidden areas have to be clearly marked. The petitioner is seeking to obliterate those well known, well observed markings. In the Michigan Statute "rape" has been renamed seeking thereby to rid the crime of its common law baggage of unique rules of resistance and proof. Even that has invited criticism. Says Susan Estrich:[Rape. The Yale Law Journal, vol. 95, No.6. May 1986]

> "However well-intentioned, these changes risk obscuring the unique meaning and understanding of the indignity and harm of "rape" Rape is a different and more serious affront than assault. Women who have been raped are

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very clear that they have not only been beaten or assaulted. As one woman testified in opposition to changing the name of the crime in Washington.

I think rape is a particular crime. I think that it's different than assault. People who commit rape commit it for different reasons than people who commit assaults. Changing the name of the crime isn't going to do any good. It's going to be throwing the issue under the rug, so to speak. I think this would be very detrimental to our work with rape victims, because rape is not simply a farm of assault.

The concept of crime undoubtedly keeps on changing with the change in political, economic and social set-up of the country. The Constitution, therefore, confers powers both on Central and State legislatures to make laws in this regard. Such right includes power to define a crime and provide for its punishment. Let the legislature intervene and go into the soul of the matter. Rape is a serious matter though, unfortunately, it is not attracting serious discussions. Not even in law schools.[Susan Estrich, Teaching Rape Law, The Yale Law Journal (1992) The seriousness of the offence with respect to oral intercourse or vaginal penetration otherwise than with penis is not realised though it involves an act of sadism which is likely to cause the victim far greater pain and physical damage than rape itself.[Jennifer Tenkin, Towards a modern law of rape, The Modern Law Review (1982)] Take, for example, vaginal penetration by a bottle. In such a case the shock, trauma and long-term psychological damage to the victim will be at least as serious as that which befalls rape victims and yet it would not be rape as defined in section 375. Admittedly it would also be not an offence under section 377 of the Code. It would thus be an offence punishable under section 354 of the Code which provides maximum sentence of only two years. Does it not, to use the words of Wordsworth display "voluptuous unconcern" of the ground realities? This surely fails to protect the integrity of woman and shows a bias against them - a bias continuing right from the days when the law of rape was concerned with theft of virginity and protection of property rights. [See Bracton, The Laws and Customs of England, Vol. II FO 147] And when we think of integrity of the person violation of which "society cannot and must not tolerate,[Susan Estrich, Teaching Rape Law, The Yale Law Journal.]

we think not only of women clad in chiffon, draped in misty soft powder sprinkled with a swansdown puff challenging to sink ships and stop heart beats, though they also are no less important, but of also those bare-faced a la Bankim Chandra imprisoned within the confines of female subordination and restricted life chances.

We know even the Michigan Statute which was largely the work of the Michigan Women's Task Force on Rape and which was hailed as the "most comprehensive and innovative statute of its kind",[J. Marsh, A. Guish & N. Caplan, Rape And The Limits Of Law Reform (1982)] has also been a lightning rod, praised by some writers as model legislation [See: Susan Estrich, Rapoe The Yale Law Journal vol. 95, Number 6, May 1986] and roundly denounced by others as "plainly unacceptable" and a good example of an "overreaction" to political pressures by the commentators of Model Penal Code.[ibid] However, let not the Law Commission and the legislature be deterred by it. And, if they really decide to look into it, what about defining the offence in gender - neutral terms? I think law reform community will have no objection to it. In this re-

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spect the following [Note, Rape and Rape Laws: Sexism in Society and the Law, 61 Calif. L. Rev. 919, 941 (1973)] needs to be noticed.

> "Men who are sexually assaulted shall have the same protection as female victims, and women who sexually assault men or other women should be liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as sexual possessions"

It is always appalling to watch the death agony of a hope. Mr.Jaitley wanted me to push forward to the future's front lines. To him, perhaps, I remain an old guard hunkering down in the bunkers of tradition.

On now, to the next point.

It may be recalled that as per the prosecution KCJ used to take her youngest daughter to his office and from there to a hotel room where the games of sexual orgies used to be played and where the young child also used to be subjected to sexual abuse by her own father. The petitioner alleges that the facts narrated above constitute 'kidnapping' within the meaning of section 361 of the Penal Code.

Kidnapping is defined by section 361 of the Code as under:

> "**Kidnapping from lawful guardianship.** - Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation: The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception: This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

It was contended by Mr.Jaitley that as according to the prosecution the child used to be taken by KCJ to a hotel for an immoral or unlawful purpose, therefore, the Exception to the section would stand attracted. I am afraid this is not correct. The Exception applies only to the act of any person who in good faith believed himself to be the father of the illegitimate child or who in good faith believed himself to be entitled to lawful custody of such child. It is not the case of the prosecution that the child in question is KCJ's illegitimate child. Being the natural father of the child he was her natural guardian and thus the second part of the Exception would not apply.

It was contended that the words "unless such act is committed for an immoral or unlawful purpose" would apply to a lawful guardian also. I do not think the section calls for any such interpretation. The Exception relates only to a person who in good

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faith believes himself to be the father of an illegitimate child or who in good faith believes himself to be entitled to the lawful custody of the child. It has no application to a person who does happen to be a lawful guardian. Consequently the words "unless such act is committed for an immoral or unlawful purpose" do not apply to a lawful guardian. The words "to the act of any person" and "unless such act" have to be read in conjunction with each other and not in isolation.

This leads me to the last question: What precautions should be taken with regard to the recording of the statement of a child witness in an alleged case of sexual abuse?

Unfortunately much thought has not so far been given in our country to the plight of very young or seriously traumatised children required to appear as witness in an open court. In a large number of continental legal systems and some of which are within the common law tradition, [Andenaes, "Evidence of Children in Legal Proceedings: The Scendinivian Countries (1990) in eds. Spencer, Nicholson, Flen & Bull, "Children's Evidence in Legal proceedings.] it is permissible to replace the child's appearance as a live witness in open court with judicially controlled examination taking place a long time before the trial. The examination is either reduced into a written transcript or videotape which is later put during the trial. Even in England since 1894 a statute is in force which allows a Magistrate to record a child's deposition which, provided the defence were given an opportunity to put their questions when it was taken, can be used at trial if the court appearance would seriously endanger his life or health.[Children and Young Person's Act 1933. Sections 42 & 43] In Denmark which too, like us, has an adversial system of justice, the child's evidence is "taken in advance of trial by a judicial officer with the defence having an opportunity to put questions.[Jones, "The Evidence of a Three Year Old Child (1987) Crim LR 677.]

The Scottish Law Commission has suggested examination of the child in Chambers early, but by the lawyers for both sides in the traditional system.[Scottish Law Commission Report No.125: See also: McEnam 1988 Crim LR 813.]

I feel a thinking on the subject by us is also overdue. The present system to which we are sticking and which is as old as the hills, is highly unsatisfactory. As stressed by some writers traditional cross-examination in open court will have following features:

(a) Like the examination-in-chief, it will take place a long time after the incident, when the child's memory for details of peripheral significance to the child (but of use to defence counsel) has begun to fade.

(b) It is likely to contain language that is beyond the child's understanding and knowledge of language.

(c) It will largely consist of leading questions. That leading questions tend to produce information which is inaccurate is something which psychologists have demonstrated again and again in a long line of experiments the first of which took place at the turn of the country. Recent works with children show, unsurprisingly that they are considerably more susceptible to this effect than adults.[Wells, Turtle and Luus "The Perceived Credibility of Child Eyewitnesses". Ceci "New Perspectives on Child Witness" (1988)]

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(d) It will contain questions that cause emotional stress to the witness.

I feel it is time we in India give the subject a fresh look and evolve some principles which while protecting the child, do no harm to the defence. And, while I am on the subject, I cannot resist registering a strong protest at the manner the learned Metropolitan Magistrate recorded the statement of the child under section 164 of the Code of Criminal Procedure. He should not have recorded the statement while police officer was in attendance. The record is in English (bad English, if I may say so) while the statement was made in Hindi. The Magistrate ought to have recorded the statement in Hindi only. If such grave mistakes are being committed despite our having given intensive and extensive training to the judicial officers, the system will take no time to collapse. I hope this feeling of despair would be conveyed to the Court on its administrative side.

What should be done now?

I hope that while the child is in the witness box every effort will be made by the learned trial judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. The Prosecutor in his zeal might undervalue the child's feelings. There is need to keep a check on it. The defence counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and harassment of the witness. If the court notices any departure from this course of conduct, it should rise to the occasion promptly and effectively. Child sexual abuse being one of the most serious and damaging criminal offences, the trial Judge shall handle the proceedings with considerable sensivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may be of the courtroom itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of the trial judge to notice it. One thing more before I draw the curtain. It relates to child support persons in the court room. On that Mr.Jaitley had drawn my attention to *The Report of the Special Advisor to the Minister of National Health and Welfare on Child. Sexual Abuse in Canada. Reaching for Solutions, 1991.* In fact the guidlines delineated above have drawn inspiration from the said Report and as regards the child support this is what it states:

> "There are situations in which it is desirable to have a social worker or other friendly but "neutral" adult visible to the child, or even sitting beside a young child who is testifying. While some judges have permitted this, others have not. There have been cases where the judge has ordered supportive persons to leave the court room, along with other members of "the public"."

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I am leaving the matter to the good sense of the learned trial judge. However, one thing is certain. The proceedings have to be in camera.

It was stated by the learned counsel for the respondents that charge could not be framed under section 377 of the Indian Penal Code and that, if so advised, the respondents would be filing a separate revision petition. I am mentioning this by way of record.

The revision petition is dismissed. Trial court record be sent back forthwith.

*** *** ***

1996 (38) DRJ

HIGH COURT OF DELHI

Crl.M(M).1267/96 & CRL.M.2312/96

Chandra Swami..............Petitioner

Versus

CBI...............Respondents

Usha Mehra, J.

Decided on : May. 1996

Criminal Procedure Code 1973

Section 439—Bail—On medical grounds—The ailments of the accused not of serious nature—The Medical Board opining that accused does not require complete bed rest but he should continue medication—The accused not entitled to bail.

Mr. Ashok Arora, Advocate for Petitioner.

Mr. A. Dutta with Mr.S.Lal, Advocate for Respondents.

Usha Mehra, J.

1. The bail application of the petitioiner has already been rejected by this Court vide order 8th May,1996. In this petition, the petitioner has averred that this petition is by way of review of the order of 8th May,1996. During the course of arguments, Mr.Ashok Arora, however, contended that this may be treated as second bail application. Admittedly, there is no bar for the petitioner to file a fresh bail application, but for doing so there has to be fresh facts and intervening circumstances to show that these facts were not available when his first bail application was decided or the intervening circumstances have enabled him to seek bail. But unfortunately no intervening circumstance nor fresh facts have been urged nor brought on record. Mr.Ashok Arora through out had been arguing that this Court while delivering the order on 8th May,1996 did not appreciate properly the contentions of the petitioner and had only presumed that C.B.I. was apprehending interference of evidence by the petitioner in India. This apprehension, according to Mr.Ashok Arora, cannot be based on any facts on record. In the S.L.P. filed in Supreme Court nowhere the plea was taken that this