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HIGH COURT OF TRIPURA
AGARTALA

CRL.A.(J)25 of 2016

1. Mangal Debbarma,
son of late Mangkarai Debbarma
of Village-Charankanta Para,
P.S. Ambassa, District : Dhalai,

2. Falakathar Debbarma,
son of Sri Rajendra Debbarma,
of Village-Charnakanta Para-2,
P.S. Ambassa, District : Dhalai

----Appellant(s)

Versus

The State of Tripura

---- Respondent(s)

For Appellant(s)	:	Mr. Ratan Datta, Adv.
For Respondent(s)	:	Mr. A. Roy Barman, Addl. P.P.
Date of hearing	:	11.07.2019
Date of delivery of Judgment & Order	:	29.08.2019
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE S. TALAPATRA
HON'BLE Mr. JUSTICE ARINDAM LODH

Judgment & Order

[Talapatra, J]

Both the appellants were charged under Section 376D and Section 4 of the Protection of Children from Sexual Offences Act, 2012, in short, POCSO Act separately and after a regular trial, they were convicted under Section 376D of the IPC and under Section 4 of the POCSO Act by the judgment dated 25.02.2016 delivered in case No. Special (POCSO) 28 of 2015 by the Special Judge, Unakoti Judicial District, Kamalpur [as it then was].

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2. Pursuant to the said conviction under Section 376D of the IPC, by the order dated 25.02.2016, the appellants were sentenced to suffer rigorous imprisonment for a period of twenty years, which is the minimum imprisonment as prescribed and fine of Rs.10,000/- with default stipulation but no separate sentence was awarded against the conviction under Section 4 of the POCSO Act. The said judgment and order dated 25.02.2016 are challenged in this appeal.

3. In the complaint filed by one Sunil Debbarma [PW-3], it was revealed that when his daughter [the name is withheld for protecting her identity] was returning home on 18.09.2014 at about 4 p.m. in the afternoon from the house of informant's paternal uncle namely Annabahadur Debbarma [PW-8] situated at Masimog para, the appellants namely Mangal Debbarma and Falakathar Debbarma restrained his daughter, gagged her mouth and took her inside the jungle (forest) of Masimog para and raped her. His daughter came back home and informed the entire incident to the informant. In the complaint [Exbt.2] it has been also stated that the delay caused in lodging the ejahar was for apprehension of social stigma. On the said complaint dated 24.09.2014, Ambassa P.S. Case No.48/14 under section 376D of the IPC and Section 6 of the POCSO Act was registered and taken up for investigation. On completion of investigation, the police report was filed in the court of the Special Judge (POCSO) and the charge was framed as stated, but those were denied by the appellants claiming to face the trial.

4. In order to substantiate the charge, as many as fifteen witnesses including the victim [PW-1] were examined by the prosecution and fifteen documentary evidence [Exbts.1 to 15] including the pupilage certificate [Exbt.9] and the SFSL report [Exbt.10] was

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introduced in the evidence. After recording of the prosecution evidence, the appellants were separately examined under Section 13 of the Cr.P.C. to have their response on the incriminating materials those surfaced in the evidence. The appellants denied the evidence and repeated their plea of innocence. Thereafter, having appreciated the evidence, by the said judgment dated 25.02.2016, the Special Judge returned the finding of conviction.

5. Questioning the legality of the judgment, Mr. R. Datta, learned counsel appearing for the appellants has submitted that it is apparent on the face of the record that there is no sustainable evidence in respect of the identification of the appellants, even, the victim did not assert that the appellants were known to her before the incident. That apart, there is no medical testimony in support of the gang rape or rape. But it is apparent that there was medical examination when the vaginal swab was collected from the victim for purpose of sending to the State Forensic Science Laboratory (SFSL). But on examination, it is apparent from the testimony of PW-13 that no semen or seminal stain or spermatozoa of human origin could be detected in the exhibits as marked and described in Exbt.10. The report of the SFSL was admitted in the evidence through PW-13. Mr. Datta, learned counsel has submitted that the medical examination report has been suppressed and the SFSL report [Exbt.10] does not implicate the appellants. Mr. Datta, learned counsel has further submitted that no specific forensic opinion was available in respect to Exbts.A to V. He has further submitted that the seizure list by which the vaginal swab, the blood sample etc. was seized has been marked as Exbt.14.

6. Mr. Datta, learned counsel has submitted that it is grossly improbable that the victim of gang rape will have no injury on her

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private parts. That apart, Mr. Datta, learned counsel has challenged the determination of age of the victim on the basis of the pupilage certificate [Exbt.9] and the entry in the register of birth and death [Exbt.14]. Mr. Datta, learned counsel has further submitted that even, Arun Debbarma in whose house the village salish was held, has not been examined.

7. In support of his contention, Mr. Datta, learned counsel has referred to the testimony of Durjoy Reang [PW-12]. PW-12 has only stated that as per record, the date of birth of victim is 10.01.2002. According to Mr. Datta, learned counsel, the entire prosecution story has caved in, in absence of credible evidence, inasmuch as, PW-1 [the victim] has given a different story. She had been going to the house of her grandfather and on the way, the incident took place. But the informant had stated that when she was coming from her grandfather's house, she was raped. Both the appellants were present in the salish which was held two days after the occurrence in the house of the local "Choudhury" (the community head). But the appellants denied their involvement. Thereafter, PW-3 lodged the complaint and the victim was examined under section 164(5) of the Cr.P.C. [Exbt.1 series] but the Magistrate was not examined in the trial. However, the statement was admitted through the victim [PW-1].

8. Mr. Datta, learned counsel has finally stated that the manner in which the examination under Section 313 has been carried out, it is not only defective but it amounts to denial of opportunity of explaining the position of fact by the victim. Mr. Datta, learned counsel has illustrated his contention by referring to question No.15, in particular. In support of his contention, Mr. Datta, learned counsel has relied on few decisions of the apex court and this court. In **Rinku Nath**

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versus State of Tripura reported in **2018 Cri LJ 4668**, this court had occasion to observe as follows :

> **"21. We are of the view that some supporting evidence was essential for the prosecution case to book the accused-appellant for commission of rape. As already mentioned above, the medical evidence does not support the commission of rape and there is no other corroborative evidence on record which may support the statement of the prosecutrix. The present evidence on record failed to satisfy the basic requirement of Sec.375 IPC and it appears from the statement of the prosecutrix (PW-1) that there was no semblance of any resistance or made any hue and cry that would certainly have attracted the persons who are residing in the nearby huts as it revealed from the hand-sketch map (Exhibit-5) who were deliberately not made the prosecution witnesses and she disclosed the fact to her husband (PW-2) only when he noticed Rs.100/- which the accused-appellant, according to PW-1, left behind after the alleged rape being committed by him.**
>
> **22. It is true that the version of victim is in great command deserves respect and acceptability but if the same under any circumstances casts some doubt in the mind of the court on the veracity of the victims evidence, then it is not safe to rely on the uncorroborated version of the victim of rape in isolation."**

According to Mr. Datta, learned counsel, the said analogy is to be applied in the present context for their resemblance.

9. Another decision of this court in **Nakul Sharma versus State of Tripura** [judgment dated 02.08.2016 delivered in Crl.A(J)No.29 of 2016], has been referred. In that report, it was observed that the prosecution had failed to establish the age of the victim following the procedure as laid down in **Alamelu and Another versus State Represented by Inspector of Police** reported in **AIR 2011 SC 715** inasmuch as the apex court had occasion to observe as follows :

> **"38. We may now take up the issue of Sekar's conviction under Section 376 IPC. Whilst upholding the conviction of Sekar under Section 376 IPC, the High Court has held that the girl would not have voluntarily gone with Sekar. It has also been held that she was not a major at the relevant time. In our opinion, both the conclusions recorded by the High Court are contrary to the evidence on record. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ext. P-**

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16 and the certificate issued by PW 8 Dr. Gunasekaran, Radiologist, Ext. P-4 and Ext. P-5.

40. Undoubtedly, the transfer certificate, Ext. P-16 indicates that the girl's date of birth was 15-6-1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e. 31-7-1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

41. We may notice here that PW 1 was examined in the Court on 9-8-1999. In his evidence, he made no reference to the transfer certificate (Ext. P-16). He did not mention her age or date of birth. PW 2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 CrPC seeking permission to produce the transfer certificate and to recall PW 2. This petition was allowed. She was actually recalled and her examination was continued on 26-4-2000. The transfer certificate was marked as Ext. P-16 at that stage, i.e. 26-4-2000. The judgment was delivered on 28-4-2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ext. P-16 issued by the school and accordingly her date of birth noticed as 15-6-1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

42. Considering the manner in which the facts recorded in a document may be proved, this Court in Birad Mal Singhvi Vs. Anand Purohit : 1988 Supp SCC 604, observed as follows: (SCC pp. 618-19, para 14)

> **"14. .... The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. ..... Merely because the documents Exts. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of**

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> **the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted."**
>
> **43. The same proposition of law is reiterated by this Court in Narbada Devi Gupta Vs. Birendra Kumar Jaiswal : (2003) 8 SCC 745 where this Court observed as follows: (SCC p.751, para 16)**
>
> > **"16. …. The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue'."**
>
> **44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl."**

Mr. Datta, learned counsel has submitted that in this case also, the prosecution has failed to establish the age of the victim following the above procedure and as such, the victim cannot be treated as child or not having attained the age of consent.

10. Reliance has been placed as well on **Md. Jamiruddin Ahmed versus State of Assam** reported in **2008 Cri LJ 586**. In **Jamiruddin Ahmed** (supra), the apex court had occasion to observe as follows :

> **13. The Doctor in his opinion clearly stated that the girl was about 7 years but below 11 years of age. He did not find any symptom of sexual intercourse or any sexual assault on the girl. On cross-examination he explained that it was a fact that if a girl of less than 12 years was subjected to sexual intercourse by an adult boy, there was bound to rupture of fourchetty and abrasion of labia majora and minora and there was every possibility of tearing of hymen.**
>
> **14. On bare perusal of the medical evidence it would be clear that there was no element of offence of rape on P.W. 4 and the girl did not suffer any injury on any part**

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> **of her body as claimed by the prosecutrix in her deposition as P.W. 4.**
> **15. In such a situation supported by the medical report of the Doctor, it can be easily held that there was no symptom of sexual intercourse or any sexual assault on the girl and the evidence of P.W. 4 is belied by the medical evidence.**
>
> **16. Having meticulously considered the testimony of P.Ws. 4 and 5 and also having regard to the Judicial pronouncement referred to in Yerumalla Latchaiah's case (supra) as well as upon hearing the learned Counsel for the parties, we are of the considered opinion that in the facts and circumstances of the case in its totality, the testimony of P.W. 4 cannot be accepted as the same has been totally Impeached by medical evidence.**

In this case, no medical examination report has been produced. Except the oral evidence of the victim, there is no corroborating forensic opinion and hence, Mr. Datta, learned counsel has submitted that the incidence of rape has not been established by legal evidence.

11. In **Bibhisan versus State of Maharashtra** reported in **(2007) 12 SCC 390** the apex court has curtly observed as follows :

> **"6. We have gone through the judgment of both the courts below and also perused the necessary record. As per the evidence of the doctor, there was no injury on the body of the prosecutrix Anita. There was no sign of semen on the private part of the body. Neither her clothes were torn nor there was any presence of hair of the accused on the private part of the prosecutrix. The doctor after examining the prosecutrix deposed that the girl was habituated to sexual intercourse. In view of this evidence, we are of the opinion that the High Court as well as the trial court has not correctly appreciated the evidence and has wrongly convicted the appellant-accused. The accused who has been charged under Section 376 read with Section 511 IPC is entitled to benefit of doubt."**

Such observation, however, made on consideration of the medical and forensic report.

12. In **Sham Singh versus The State of Haryana** reported in **AIR 2018 SC 3976**, the apex court has dwelled on a case of gang rape under Section 376(2)(g) of the IPC, the pre-amended provision of Section 376D of the IPC.

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In **Sham Singh** (supra), the apex court has disbelieved the statement of the victim and one of the witnesses [PW-10] for the reason that where the occurrence took place, that is the place where the mother, children and sister of the accused persons were living. Such a brutal offence of rape would not have been executed without attracting the attention of anyone at that point of time and thus, it appeared to the apex court that the prosecution version turned seriously improbable and accordingly, the conviction was reversed by acquitting the accused from the charge of gang rape.

13. In respect of examination of the accused under section 313 of the Cr.P.C., a decision of this court in **State of Tripura versus Rashida Tripura & Others** [judgment dated 01.08.2017 delivered in Death Sentence Reference No.01 of 2015] has been referred, where this court had occasion to observe as follows :

> **"20. Section 313 of the Cr.P.C. embodies fundamental principle of audi alteram partem. As stated, the provisions of this section are mandatory and cast a duty on the court to afford opportunity to the accused to explain the incriminating material against him. Therefore, the examination under Section 313 of the Cr.P.C. is not an empty formality. It prescribes a procedural safeguard for a person facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the evidence led by the prosecution. That safeguard cannot be negated or compromised. Such examination can be carried out by a Magistrate or a trial Judge at any stage and this examination is in addition to the cross-examination. The words appearing in subsection(1) of Section 313 of the Cr.P.C. 'to explain any circumstances appearing in the evidence against him' is of paramount importance. The accused facing the trial is entitled to be asked about every piece of evidence which appears incriminating and to respond in the way the accused might consider to be made. However, it is open to the accused whether he would avail the opportunity for offering his explanation or he would not. But the incriminating materials which are not put to the accused for his response cannot be relied by the court for conviction or any adverse observation. It is also well settled that the accused person cannot be examined together or collectively. It is imperative that each and every question must be put to the accused separately and their answers shall be recorded also separately. Recording of the statement of the accused persons simultaneously and putting same questions to all the accused might cause prejudice to the accused. Hence it**

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is not proper at all. Thus, the alluring convenience for forming of common set of questions has to be avoided in order to obviate probability of taking any undue advantage by the prosecution.

21. The duty of the court while examining the accused under Section 313 of the Cr.P.C. is not to put him the entire evidence on record. The duty is to put specific circumstances of incriminating nature upon which the prosecution relies and which appears from the evidence on record. The specificity must be in regard to the circumstances appearing against the accused. The court cannot absolve itself of its duty by putting general questions without specifying the incriminating circumstances. The Judges and Magistrates must realise the importance of examination under this section. Each and every incriminating circumstance revealed from evidence must be put to the accused separately. Even if, allegations are common, each accused shall be given opportunity separately. The entire statement of the witnesses are not to be put to the accused during their examination under Section 313 of the Cr.P.C., only material fact or details are to be put. Mere putting questions to the accused that whether he has heard the prosecution evidence and what he has to say would be no compliance of Section 313 of the Cr.P.C. The accused's attention should separately be drawn to every inculpatory material so as to enable him explain it. This is the fundamental attribute of fairness in the criminal trial and failure in it may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred, it does not ipso facto vitiate the proceeding. 'Prejudice' occasioned by such defect must be established by the accused. In the event of any material not being put to the accused, the court must ordinarily eschew such material from consideration.

22. As stated, even the appellate court can call the accused to extend the explanation on the material by which he might have pleaded the prejudice and may make cure the defect without throwing out the entire prosecution case. The fundamental method of examination is very simple i.e. to put materials simply and separately. It is not sufficient compliance to string together a long series of facts and ask what he has to say about them. That is what we have witnessed in this case. The accused shall be questioned separately about each material circumstance which is intended to be used against him. The questioning must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate can readily appreciate and understand. It is always better and safer in the interests of better administration of criminal justice that each and every circumstance emerging from the record against the accused is put to him. Justice requires that questions are put in a manner and style and form so as to be easily comprehensible to the accused. It is better if each question contains one circumstance only and not

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> **a combination of several circumstances, in order to provide to the accused proper and adequate opportunity to explain the circumstances against him. It is to be fair and just that the circumstances are properly put to him in the first place. That will not only help the accused but also help the appellate court in correctly appreciating the materials brought in the record. Where two material questions are put to the accused person in a combined and interpreted form those definitely will not conform to the requirement of Section 313 of the Cr.P.C."**

14. In order to repel the submission made by Mr. Datta, learned counsel appearing for the appellants, Mr. A. Roy Barman, learned Addl. P.P. appearing for the state has submitted that the limited reading of the evidence is to be averted and a complete reading or appreciation of the evidence in totality would only unfold the prosecution case. According to Mr. Roy Barman, learned Addl. P.P., PWs 2 and 3 are the parents of the victim and they have corroborated what they had heard from the victim [PW-1] and there is no incongruity. That apart, even though, the victim was medically examined and some biological elements and clothes of the victim were forensically examined but the medical examination report was not introduced and the Forensic Examination Report has not been supporting the prosecution case, in any manner, but that cannot by itself made the statement of the victim untrustworthy. That apart, the delay in lodging the complaint has been explained. In addition to the said explanation, PW-3, the father of the victim has categorically stated that as the matter was interfered by the local "Choudhury" (the community head)", the informant [PW-3] was late in lodging the complaint [Exbt.2].

15. Mr. Roy Barman, learned Addl. P.P., in his rebuttal has submitted that the statement made by the victim under Section 164(5) of the Cr.P.C. is early disclosure of the occurrence which stands in tune with the statement made in the trial. That apart, the appellants in presence of the witnesses identified the place of occurrence and that

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can be treated as the fact, discovered in terms of Section 27 of Indian Evidence Act. But Mr. Roy Barman, learned Addl. P.P. has submitted that there is no reason to dis-believe the prosecutrix, inasmuch as, no persuasive evidence has been placed on record that she had any reason to lie against the appellants. In this regard, Mr. Roy Barman, learned Addl. P.P. has relied heavily on the proposition as laid down by the apex court in **State of Punjab versus Gurmit Singh and Others** reported in **(1996) 2 SCC 384** where the apex court has unambiguously laid down the principle in respect of how to appreciate the evidence of the prosecutrix. The relevant passage is reproduced hereunder :

> **"8. The grounds on which the trial court disbelieved the version of the prosecutrix are not at all sound. The findings recorded by the trial court rebel against realism and lose their sanctity and credibility. The court lost sight of the fact that the prosecutrix is a village girl. She was a student of Xth Class. It was wholly irrelevant and immaterial whether she was ignorant of the difference between a Fiat, an Ambassador or a Master car. Again, the statement of the prosecutrix at the trial that she did not remember the colour of the car, though she had given the colour of the car in the FIR was of no material effect on the reliability of her testimony. No fault could also be found with the prosecution version on the ground that the prosecutrix had not raised an alarm while being abducted. The prosecutrix in her statement categorically asserted that as soon as she was pushed inside the car she was threatened by the accused to keep quiet and not to raise any alarm otherwise she would be killed. Under these circumstances to discredit the prosecutrix for not raising an alarm while the car was passing through the Bus Adda is traverisity of justice. The court over-looked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alram. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how car that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. Trial Court fell in error for discrediting the testimony of the prosecutrix on that account. In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the prosecution but in the facts and circumstances of the case was also natural. The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to**

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go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Trilok Singh PW6, father of the prosecutrix came to know from his wife, PW7 about the incident he went to the village sarpanch and complained to him. The sarpanch of the village also got in touch with the sarpanch of village Pakhowal, where in the tube well kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any justice to the prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have o n the reputation and future prospects of the marriage etc. of their daughter. Trilok Singh PW6 truthfully admitted that he entered into consultation with his wife as to whether to lodge a report or not and the trial court appears to have misunderstood the reasons and justification for the consultation between Trilok Singh and his wife when it found that the said circumstance had rendered the version of the prosecutrix doubtful. Her statement about the manner in which she was abducted and again left near the school in the early hours of next morning has a ring of truth. It appears that the trial court searched for contradictions and variations in the statement of the prosecutrix microscopically, so as to disbelieve her version. The observations of the trial court that the story of the prosecutrix that she was left near the examination center next morning at about 6 a.m. was "not believable" as `the accused would be the last persons to extend sympathy to the prosecutrix" are not at all intelligible. The accused were not showing "any sympathy" to the prosecutrix while driving her at 6.00 a.m. next morning to the place from where she had been addicted but on the other hand were removing her from the kotha of Ranjit Singh and leaving her near the examination center so as to avoid being detected. The criticism by the trial court of the evidence of the prosecutrix as to why she did not complain to the lady teachers or to other girl students when she appeared for the examination at the center and waited till she went home and narrated the occurrence to her mother is unjustified. The conduct of the prosecutrix in this regard appears to us to be most natural. The trial court over-looked that a girl, in a tradition bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others over-powered by a feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name

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and honour is brought into controversy. Therefore her informing to her mother only on return to the parental house and no one else at the examination center prior thereto is an accord with the natural human conduct of a female. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra vs Chandraprakash Kewalchand Jain : (1990 (1) SCC

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550) Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

> **"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecurtix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."**
>
> **[Emphasis added]**

16. Mr. Roy Barman, learned Addl. P.P. has reiterated that a girl in a tradition-bound and non-permissive society would extremely be reluctant, even to admit that any incident which is likely reflect upon her chastity has occurred being conscious of probability of being ostracized by the society or being look down upon by the society. Thus, Mr. Roy Barman, learned Addl. P.P. has contended that the trial court has rightly believed the prosecutrix and there is no reason to discard the evidence on the minor discrepancy, inasmuch as, it has clearly

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emerged from the statement that the victim was forcibly restrained, pulled inside the jungle and subjected to sexual intercourse without her consent and against her will. In this fact situation, the question of age of the prosecutrix would pale into insignificance.

17. For appreciation of the submissions advanced by the counsel for the parties, it would be apposite to survey the evidence as recorded in the trial meaningfully.

18. PW-1 [the name is withheld for protecting her identity] is the victim and was tested in terms of Section 118 of the Indian Evidence Act by the trial court, having considered her as the witness of tender age. On the day of recording her deposition, she was twelve years of age and she was a student of Class-V when the occurrence took place i.e. 18.09.2014 whereas her statement was recorded on 02.04.2015. The victim [somewhere referred as the prosecutrix] being PW-1 has stated in the trial that one day at about 4 p.m. after coming from the school she started for the house of her grandfather and on the way, Mangal Debbarma and Falakathar Debbarma dragged her to a jungle and raped her one by one removing her under garment. Her mouth was gagged and for that reason, she could not raise alarm. There were no huts nearby the place of occurrence. From that place, the house of her grandfather is ten minutes away on foot. She has categorically stated that Mangal Debbarma, the appellant No.1 raped her first and thereafter Falakathar Debbarma, the appellant No.2 raped her. She returned home and narrated the incident to her mother [PW-2]. Her father was not at home at that time. Her mother informed her father about the incidence. Her father [PW-3] approached the local "Choudhury" for justice. A salish was organized. PW-1 has stated about the occurrence in that salish but the appellants who were present in

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that salish denied the allegation. In that circumstances, the "Choudhury" advised to lodge the complaint and thereafter, her father lodged the complaint [Exbt.1]. She was taken to a doctor at Kulai Hospital and produced before the Magistrate at Kamalpur. She identified her statement made before the Magistrate [Exbt.1 series]. She had identified the appellants in the trial. In the cross-examination, she has admitted that the appellants were from a different village but just adjacent to their village. She has denied the suggestion that there was no incident of rape committed by the appellants.

19. PW-2, Buddhini Debbarma being the mother of the victim has stated in the trial that her daughter on 18.09.2014 in the afternoon at 4 p.m., coming from the school went out of the home. After a while, she returned and she found her battered. She told her that while she had been going to the house of her grandfather, Falakathar Debbarma and Mangal Debbarma dragged her to a jungle and raped her. When her husband returned home in the evening, she had reported him the said incident. Her husband approached the local "Choudhury". After 3/4 days, a salish was held. The appellants denied the act and then the "Choudhury" advised them to lodge the case. She has categorically stated that the appellants are known to them as they are the resident of adjacent village, Chandrakanta Para. She identified them. She has categorically stated in the trial as under :

> **"My daughter was 11 years old at the time of the incident. She denied the suggestion made contrary to what she had stated in the examination-in-chief."**

The age of the victim as stated by PW-2 has not been confronted by the defence.

20. PW-3, Sunil Debbarma being the father of the victim has stated that on 18.09.2014 after coming from the school, his daughter

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took out a journey to reach his father's house. On the way, Mangal Debbarma and Falakathar Debbarma dragged her in a nearby jungle and raped her one by one by removing her garments. She returned home and narrated the incident to her mother. When he returned home at 9 p.m. his wife [PW-2] informed him about the incident. On the following day, he had approached the local "Choudhury" for justice. The "Choudhury" arranged the salish on 24.09.2014 but in the salish, the appellants denied the act. Consequent thereupon, he filed the complaint [Exbt.2] for taking action against the appellants. He has also stated that at the time of occurrence, his daughter was 11-12 years old.

In the cross-examination, he has denied that his daughter did not know the appellants for their not being from their village. He has denied all other suggestions made to discredit his statements made in the examination-in-chief.

21. PW-4, Debu Rani Debbarma is the witness of discovery of the place by the appellant No.1, [Mangal Debbarma]. In his presence, the appellant No.1 pointed out the place where the incident took place. He had identified his signature on the memorandum of pointing out [Exbt.3]. The appellant No.2, [Falakathar Debbarma] also identified the place and the disclosure statement [Exbt.4] was identified by PW-4. In the cross-examination, he has stated that the appellants were not known to him prior to that day i.e. 25.09.2014.

22. PW-5, Swapna Debbarma is also another witness of such discovery and she had identified her signature on the memorandum of pointing out and the disclosure statement [Exbts.3, 4, 5 & 6]. She has denied the suggestion that the appellants did not identify any place.

23. PW-6, Ranjan Debbarma has stated that PW-3 on 24.09.2014 stated him that the appellants raped his daughter in a

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jungle. He has further stated that in the salish, the appellants denied the said allegation. He was examined by the Magistrate at Kamalpur and he has identified his statement [Exbt.7 series] as recorded by the Magistrate.

In the cross-examination, nothing could be elicited from him.

24. PW-7, Biprajit Debbarma was also informed by PW-3, his co-villager that his daughter was raped by Mangal and Falakathar of their locality. But he has made a very 'strange' statement that at the salish, initially, the appellants denied the allegations but when it was decided to inform the police, they admitted their guilt. He was also examined under Section 164(5) of the Cr.P.C. The said statement, [Exbt.8] has been admitted in the evidence. The defence could not elicit any statement which might support their case.

25. PW-8, Annabahadur Debbarma has stated that PW-3 informed him on 24.09.2014 that Mangal Debbarma and Falakathar Debbarma of their locality raped the daughter of PW-3. They arranged the meeting. In that meeting, Mangal and Falakathar initially denied the charge, but ultimately admitted to have committed rape on the victim. This statement has not been confronted by the defence in the cross-examination.

26. PW-9, Aruna Rani Kalai had simply stated in the trial that she was informed by PW-2 that Mangal and Falakathar raped her daughter. Those persons were known to her and she identified them in the trial.

27. PW-10, Rabikanya Debbarma has stated in the trial that PW-3 informed her that his daughter [referred by name] was raped by

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Mangal and Falakathar in a jungle. In the cross-examination nothing could be elicited from her.

28. PW-11, Akshirai Debbarma has stated that on 18.09.2014 PW-3 had informed him that his daughter was raped by Falakathar and Mangal. A salish was arranged in the house of Arun Debbarma but Falakathar and Mangal did not confess their guilt and as such, the police was informed. He identified the appellants in the trial.

29. PW-12, Durjoy Reang has produced the pupilage certificate [Exbt.9] which was issued on 26.09.2014 by him being the Head-master of Haripada Debbarma Para J.B. School where the victim was studying from Class-I to Class-V. He has stated that her date of birth is recorded as 10.01.2002. There was no cross-examination by the defence.

30. PW-13, Sabyasachi Nath who was posted as the Scientific Officer in SFSL on 27.09.2014 has made the following statement in the trial :

> **"On that date our office received one sealed parcel containing two exhibits in connection with ABS PS Case No.48/14 being forwarded by SDPO Ambassa. The exhibits parcel was endorsed to me by the Director for examination and opinion. On examination of the said exhibits no semen or seminal stain or spermatozoa of human origin could be detected in the exhibits marked as B,C,E,F,H,I, M,N,P,U and V. No opinion could be given regarding presence of any foreign hair in the exhibits marked as Exbt.C,I and U. This is the said report prepared by me bearing my signature. On identification marked as Exbt.10."**

For obvious reason, PW-13 was not cross examined by the defence.

31. PW-14, Kirtijoy Reang was the Officer in charge of Ambassa police station on 24.09.2014 . On that day, he had received the complaint [Exbt.2] from PW-3 and registered the police case being ABS

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P.S. Case No.48/14. He had filled up the FIR form [Exbt.11] duly. He was also not cross-examined.

32. PW-15, Mukta Ghosh a woman sub-inspector who was posted on 24.09.2014 at Ambassa Police Station. She was endorsed the case for investigation. On that very day, she had arranged for the medical examination of the victim at Kulai District Hospital. Thereafter, she had stated in the trial as follows :

> **"The doctor opined that the hymen of the girl was ruptured and there were indications that she was subjected to sexual intercourse. I also arrested the two FIR named accused namely Mangal Debbarma and Falakathar Debbarma of Charankanta Para and arranged for their medical examination. The doctor opined that both of them are capable of sexual intercourse under normal circumstances."**

She identified in the trial, the seizure list [Exbts.12,13,14 & 15] by which she had seized the body fluids of the accused and wearing apparels of the victim. She had sent the samples and seized materials for forensic examination to the SFSL for their opinion. After completion of the investigation, she was satisfied that a case under Section 376D of the IPC and under Section 6 of the POCSO Act was well made out and hence, she filed the final report. Since, the defence did not make any reference to the age while cross examining the witnesses, including the victim, it is not called upon to refer the content of those statements. Moreover, their statements as referred in their depositions were not contested.

33. From inspection of the pupilage certificate [Exbt.9] it has surfaced that the date of birth of the victim is recorded in the admission register as 10.01.2002. It further appears from [Exbt.14] that some irrelevant pages unrelated to the victim have been admitted in the evidence.

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34. Having scrutinized the testimony of PW-1 [the victim] this court finds that her testimony is wholly reliable [see **State of Rajasthan versus Babu Meena :2013 4 SCC 206**].

35. In view of the proposition of law as laid down in **Ravindra versus State of M.P.** reported in **(2015) 4 SCC 491** this court is of the view that the oral testimony of PW-1 is sufficient to convict the offenders as made by her and for that, no further corroboration is required. It conforms to the standard as laid in **Miller versus Minister of Pensions** reported in **(1947)2 ALL ER 272**. In **Miller** (supra), it has been observed by Lord Denning as under :

> **"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence 'of course', it is possible but not in the least probable,' the case is proved beyond reasonable doubt."**
>
> **True it is that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land."**

36. In **Sucha Singh and Another versus State of Punjab** reported in **(2003) 7 SCC 643** as referred by the trial court, the apex court has further evolved the principle by observing as under :

> **"20. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. (see Gurbachan Singh v. Satpal Singh AIR 1990 SC 209). Prosecution is not required to meet any and every hypothesis put forward by the accused. (see State of U.P. v. Ashok Kumar Srivastava, AIR 1992 SC 840). A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being**

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> **punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish."**

37. No fair doubt based on reason and common sense has grown out of the evidence in the case in hand. Moreover, the post occurrence conduct of the victim is so natural that it has consolidated the genuineness of her version. The prosecution, however, has shown its abject failure in admitting the medical examination report as prepared by doctor Puspita Debbarma, the Medical Officer, Dhalai District Hospital, Dhalai [see Exbt.14 and the testimony of PW-15]. It is shocking, the way the prosecution was carried out in a case of gang rape. Even the investigation has been trivialized when the appellants were led to discover the place of occurrence on the basis of their disclosure and when in presence of the witnesses, the said place was located by them. When the victim was alive to show the place of occurrence to the investigating officer, the discovery of the fact in respect of the place of occurrence cannot come under the province of Section 27 of Indian Evidence Act.

38. Mr. Datta, learned counsel appearing for the appellants has referred the proposition of law as laid down in **Alamelu**(supra). In **Alamelu** (supra) it has been observed that mere production and marking of a document cannot be held to be a due proof of his contents. Its execution has to be proved by admissible evidence, i.e. by the evidence of those persons who can vouchsafe for truth of the fact in issue. In that case, no evidence of that kind was produced. But in the present case, the parents of the victim [PWs- 2 & 3] have categorically stated in the trial that at the time of incident, their daughter was 11/12 years of age. That statement was not even confronted by the defence in the cross-examination.

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Since, the parents have vouchsafed the age of the victim which is corroborative of the entry in respect of the date of birth, in the pupilage certificate [Exbt.9] the said date of birth can be accepted as the date of birth of the victim. Hence, the victim was a child within the meaning of the POCSO Act and below the consenting age.

39. So far the identification of the appellants are concerned, unwaveringly, the victim has identified them. Not only the victim, other witnesses from the victim's village have identified the appellants. It is not strange that the boys from the neighbouring village, where the villages are small in size and in the close vicinity, would be known to a girl of the next village. The plea that has been raised is that the explanation in respect of the delay in filing the complaint should not be accepted by the court. True it is that the "Choudhury" [Arun Debbarma] has not been examined in the trial but the other witnesses who were present in the salish have clearly stated of holding of the salish and its failure. Thus, the delay in lodging the complaint, according to the court, is well explained and that cannot be used against the prosecution case in any manner.

40. So far the forensic report is concerned, this court is of the clear view that both PW-1[the victim] and her mother [PW-2] have clearly stated that the undergarment of the victim was removed before doing the forceful intercourse. Thus, absence of seminal stain in those clothes is quite natural. Absence of spermatozoa in the vaginal swab after such long delay cannot indicate to the falsity of allegation.

41. What Mr. Datta, learned counsel has contended in respect of the manner of examination under Section 313 of the Cr.P.C., even though, this court is in full agreement, but having due regard to the question and answer, particularly, in respect of the question No.15

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which has been framed on the testimony of PW-15, this court does not find any prejudice occurred to the appellants, inasmuch as, the testimony of PW-15 is in respect of method of investigation only.

42. Having observed thus, we do not find any merit in this appeal and accordingly, the same is dismissed.

Send down the LCRs forthwith.

JUDGE **JUDGE**

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