

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
Crl.A(J). No. 42 of 2023

1. Matilal Sarkar, son of Sri Indrajit Sarkar of Fatik Charra Sibir, P.S. Lefunga, District: West Tripura.

.....Appellant

-V E R S U S-

1. The State of Tripura.

..... Respondent.

_B_E_F_O_R_E_
HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT

For Appellant(s)	:	Mr. R. Datta, Advocate. Ms. R. Purkayastha, Advocate.
For Respondent(s)	:	Mr. R. Datta, Public Prosecutor.
Date of hearing	:	07.01.2025
Date of delivery of Judgment and order	:	15.01.2025
Whether fit for reporting	:	YES

JUDGMENT & ORDER

[T. Amarnath Goud, J]

Heard Ms. R. Purkayastha, learned counsel appearing for the appellant also heard Mr. R. Datta, learned Public Prosecutor, appearing for the respondent-State.

[2] This criminal appeal under Section-374 of the Code of Criminal Procedure, 1973 is directed against the judgment and order of conviction and sentence dated 19.07.2023 passed by the learned Special Judge (POCSO), West Tripura, Agartala in connection with case No. Special (POCSO) 07 of 2022 whereby and whereunder, the appellant was convicted and sentenced to suffer imprisonment for 3[three] years and fine of Rs.10,000/- for the offence punishable under Section-366 of IPC in default to suffer Simple Imprisonment [S.I.] for 2 months. Further, to suffer imprisonment for three months and fine of Rs.5,000/- for the offence punishable under Section-342 of IPC and in default to suffer SI for one month and also to suffer rigorous imprisonment for a period of 20 years and

to pay a fine of Rs.30,000/- only and in default to suffer RI for 6 months for the commission of offence punishable under Section-6 of POCSO Act. All the sentences of imprisonment shall run concurrently.

[3] The prosecution case in brief as reflected from the written complaint of the informant/brother is that the victim was going to Fatikcherra High School from her house at that time the accused forcibly took her inside the tea garden and forcibly committed rape upon her. Thereafter, the brother-in-law i.e. the husband of the sister of the above mentioned accused, namely, Ranjit Nama of Lefunga came near the place of occurrence along with an auto-rickshaw and then with the aid of Jawaharlal Sarkar, Mohanlal Sarkar and Shyamal Sarkar all are the elder brothers of accused Matilal Sarkar along with their mother, namely, Smti. Rekha Sarkar kidnapped the victim and took her to Belonia Hrishyamukh in a house at Krishnagar. Thereupon, the accused consecutively for two days forcefully committed rape upon the victim several times.

[4] According to the informant, on 16.11.2021 night police with the help of local people recovered victim and therefrom, the informant took the victim in their house. It is also added in the complaint that after committing rape upon the victim at Fatikcherra Tea Garden, accused also captured some naked photographs of victim in his mobile and threatened her with dire consequences to kill her. But in result, the learned Special Judge (POCSO) sentenced to suffer as stated above.

[5] On the basis of the aforesaid complaint, investigation started. During investigation the I.O. namely, Dibyajyoti Majumder, SI of police on 19.11.2021, examined the complainant and the witness Biswajit Sarkar and recorded their statements under Section-161 of Cr.P.C., visited the place of occurrence and prepared hand sketch map with separate index. Thereafter, he arranged for recording the statement of the victim under Section-164(5) Cr.P.C. before the learned Magistrate, examined the victim and the witnesses and also recorded their statements under Section-161 of Cr.P.C.

[6] During the course of investigation, on 23.11.2021, the I.O. of the case seized some articles in connection with this case by preparing a seizure list and arranged for medical examination of the victim at the Bamutia CHC. He also received the medical report of the victim on the same date itself. On 28.11.2021 the I.O. seized the original birth certificate of the victim girl by preparing a seizure list and further examined the witness namely, Sailendra Ch. Dey and recorded his statement under Section-161 of Cr.P.C. Thereafter, on 29.11.2021 I.O. of the case made a prayer before the learned Court for adding Section-376 of IPC and Section-4 of POCSO Act, which was allowed by the learned Court.

[7] On 02.12.2021 he arrested the accused namely, Matilal Sarkar and forwarded him before the learned Court on the following day and also examined the witnesses namely, Promod Sarkar and Smti. Supriti Sarkar and recorded their statement under Section-161 of Cr.P.C. Further, during the course of investigation the I.O. made arrangement for medical examination of the accused and also received the medical examination report of the accused. Thus, after completion of investigation I.O. laid charge-sheet vide Lefunga P.S. Case No. 01/22 dated, 09.01.2022 under Sections-341/366A/506 of IPC and added Section-376 IPC and Section-4 of the POCSO Act against the accused person namely, Matilal Sarkar as a *prima facie* case against the accused person was well established for facing trial in the open Court of law.

[8] After hearing both sides and on perusal of the documents submitted by the prosecution, the learned trial Court, framed charges against the above named accused-persons, the appellants herein, for the offence punishable under Sections-366/376(3)/342 of IPC and Section-6 of the POCSO Act, to which the appellants pleaded not guilty and claimed to be tried.

[9] To substantiate the charge, the prosecution has adduced as many as 8 witnesses including the complainant and also exhibited certain relevant documents and materials [Exbts.1 to 9].

[10] On closure of prosecution evidence, the accused-person was examined separately under Section-313 of Cr.P.C. for having his response in respect of the incriminating materials surfaced in the evidence, as adduced by the prosecution, wherein, the accused-person declined to adduce any evidence in support of his case. Thereafter, on appreciation of the evidence and materials on record, the learned Court below by the judgment and order dated 19.07.2023, convicted the accused-person and sentenced him to suffer rigorous imprisonment as mentioned above. For the purpose of reference, the finding as arrived at by the learned Court below may be reproduced hereunder:

“In this case, the prosecution has successfully discharged the bounded duty of establishing the fundamental facts against the accused. The accused could not at all rebut the presumption under Sections-29 and 30 of the POCSO Act and there is nothing present before the Court from the evidence on record that the accused has not committed the offence.

Hence, all the points for determination are answered in the affirmative and in favour of the prosecution.

9(o). Having regard to the discussion as hereinabove, I am of the opinion that the prosecution has proved the charge punishable under Section-366/342/376(3) of the IPC and Section-6 of the POCSO Act.

10. Accordingly, the accused Matilal Sarkar stands convicted for the offence punishable under Section-366/342/376(3) of the IPC and Section-6 of the POCSO Act.

As the Sections prescribe imprisonment up to life, the benefit of the Probation of Offenders Act cannot be extended to the convict.

Convict is taken into custody.

He will be heard on the question of sentence at 2:45 p.m.”

[11] Being aggrieved by and dis-satisfied with the said judgment and order of conviction dated 19.07.2023 passed by the learned Court of Special Judge (POCSO), West Tripura, Agartala in Case No. Special (POCSO) 07 of 2022, the appellant herein has preferred this appeal before this Court.

[12] Ms. R. Purkayastha, learned counsel appearing for the appellant has submitted that the learned trial Court has failed to appreciate the law, facts, evidence and circumstances and merely on conjectures and surmise

has convicted the appellant which need to be set aside. The victim girl i.e. PW-2 deposed that she took birth in Bangladesh yet this fact was not at all considered by the learned Court below.

[13] The facts elicited in cross examination were not at all considered by the learned Court below and hence the order of conviction and sentence is liable to be set aside. PW-6 during her cross examination has stated that at the time of examination of the victim, she did not find any injury, pain, discomfort, uneasiness, swelling in the body of the victim including her private parts and the victim did not make any complaint in respect of the same.

[14] The material discrepancies between the statements of the witnesses, yet these facts were not at all considered by the learned Court below. There is no alleged intention of the accused person that the victim girl abducted or kidnapped would be compelled to marry any person against her will which the requirement under Section-366 of IPC. PW-1 has stated before the I.O. that Subhash Nama, brother-in-law of the accused kidnapped his aforesaid sister by an auto-rickshaw. Also the crime was not reported at the earliest opportunity and reason was given illness of the victim which the learned Court below did not consider this aspect while convicting the appellant. No investigation was done by the I.O. at Belonia and no evidence of any police personnel of Belonia Women P.S. has also been recorded by the I.O. of this case.

[15] It has been further contended that the learned Court below has not taken into consideration that there are several lapses on that part of the IO of this case, so far as the investigation conducted by him in the case. There is no connectivity of events regarding the alleged offence of kidnapping brought against the accused person. The learned Court below has not taken the same into consideration and hence, the judgment and order of conviction and sentence is liable to be quashed.

[16] During arguments, it has been contended that PW-6 i.e. the Medical Officer has medically examined the victim girl on 23.11.2021 and

the date of occurrence is 15.11.2021. She raised a contention that PW-6 during her cross-examination has stated that *“My report reflecting my final opinion also uses the expression hymen torn suggesting the fact that any activity of sexual intercourse may have taken place within a span of 1/2 days.”* This, according to her goes to prove that the medical report does not support the prosecution case.

[17] In support of her case, Ms. Purkayastha, learned counsel for the appellant has placed her reliance on certain decisions of the Hon’ble Apex Court in ***Rajoo & Others v. State of M.P.***, reported in ***AIR 2009 SC 858*** wherein, it has been observed that:

“8. The observations in Gurmit Singh's case were reiterated in *Ranjit Hazarika vs. State of Assam* (1998) 8 SCC 635 in the following terms:

"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 overlook. 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 or 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 leveled 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 on a 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 overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a

victim of another person'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.

.....This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth.....”

[18] Another case in *Alamelu and another v. State, represented by Inspector of Police WITH Sekar and another v. State, represented by Inspector of Police*, reported in *AIR 2011 SC 715*, wherein, the Court has observed as under:

“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, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 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., 31st July, 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 Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the 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. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 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 Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 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.

Considering the manner in which the facts recorded in a document may be proved, this Court in the case of *Birad Mal Singhvi Vs. Anand Purohit*¹, observed as follows:-

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 Exs. 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 Exs. 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 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 1988 (Supp) SCC 604 have no probative value and the dates of birth as mentioned therein could not be accepted."

[19] Mr. R. Datta, learned Public Prosecutor, appearing for the respondent-State has submitted that PW-8, the I.O. during his cross-examination has stated that though he has verified the authenticity of the birth certificate of the victim girl but he has to mention the said fact in the charge sheet and the I.O. has also voluntarily stated that he has found the birth certificate to be genuine. He has further contended that the counsel for the appellant has not denied the contents of the seizure list dated 28.11.2021 and for that the same cannot be disputed by the counsel for the appellant.

[20] At this juncture, the prosecution stressed the fact that as per General Rule of Interpretation, if any fact, is not disputed by the adverse party, then the same shall be deemed to be admitted and hence, in the light of the above, there is no any iota of doubt, to hold that the victim is a 'child' within the meaning and sphere of the POCSO Act. If the fact is not denied by the adverse party, then it shall be deemed to be admitted.

[21] Learned P.P. has argued that the place of birth is not a parameter of the date of birth of the victim girl. Mere fact that the girl was born in Bangladesh will not be sufficient to throw out this case, out of the

purview of the POCSO Act, which shall be detrimental to the interest of the victim girl, who is a victim of the lust of the accused person. It has already been discussed that contents of the birth certificate of the victim girl has got evidentiary value.

[22] In support of his case, he has placed his reliance on certain decisions of the Hon'ble Apex Court in ***Birbal Nath v. State of Rajasthan and Others***, reported in ***2023 SCC Online SC 1396***, wherein, the Hon'ble Apex Court has observed as under:

“19. Statement given to police during investigation under Section 161 cannot be read as an “evidence”. It has a limited applicability in a Court of Law as prescribed under Section 162 of the Code of Criminal Procedure (Cr.P.C.).

20. No doubt statement given before police during investigation under Section 161 are “previous statements” under Section 145 of the Evidence Act and therefore can be used to cross examine a witness. But this is only for a limited purpose, to “contradict” such a witness. Even if the defence is successful in contradicting a witness, it would not always mean that the contradiction in her two statements would result in totally discrediting this witness. It is here that we feel that the learned judges of the High Court have gone wrong.

The contradictions in the two statements may or may not be sufficient to discredit a witness. Section 145 read with Section 155 of the Evidence Act, have to be carefully applied in a given case. One cannot lose sight of the fact that PW-2 Rami is an injured eye witness, and being the wife of the deceased her presence in their agricultural field on the fateful day is natural. Her statement in her examination in chief gives detail of the incident and the precise role assigned to each of the assailants. This witness was put to a lengthy cross examination by the defence. Some discrepancies invariably occur in such cases when we take into account the fact that this witness is a woman who resides in a village and is the wife of a farmer who tills his land and raises crops by his own hands. In other words, they are not big farmers. The rural setting, the degree of articulation of such a witness in a Court of Law are relevant considerations while evaluating the credibility of such a witness. Moreover, the lengthy cross examination of a witness may invariably result in contradictions. But these contradictions are not always sufficient to discredit a witness. In *Rammi v. State of M.P.* (1999) 8 SCC 649, this Court had held as under:

“24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non- discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.”

In the same case, how far a contradiction in the two statements can be used to discredit a witness has also been discussed.

“25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:

“155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him— (1)-(2)*** (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;”

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be “contradicted” would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to “contradict” the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to “contradict” the witness.”

In State of T.N. v. Ravi Alias Nehru, reported in (2006) 10 SCC 534, the Hon’ble Apex Court has observed as under:

“6. PW-2, the prosecutrix has stated in examination in chief that she was studying in UKG and on the fateful day after the school was over she went to her aunt's house (father's sister's house) at about 2 p.m. On the way the accused accosted her and took her stating that they would watch TV. She further stated that there were two other persons watching TV and the accused took her to another room and made her sit on his lap. The accused then removed his pant and brief and also removed the prosecutrix's brief. The accused pressed his sexual organ on her sexual organ. Then she started weeping and the other two brothers scolded the accused. The accused then ran away by putting his pant and shirt. Thereafter, the prosecutrix after putting her brief went to the house sobbing. She narrated the story to her mother. She also stated that on seeing her coming sobbing her mother fainted and fell down and then PW-8 Kamalam and PW-9 Rani received her clothes and drenched them in water. She further stated that PWs 8 and 9 also washed her sexual organ. Her statement was well corroborated by PWs 1, 3, 6, 7, 8 and 9.

15. We may also notice the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

“Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or

pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

[23] In *B.C. Deva alias Dyava v. State of Karnataka*, reported in (2007) 12 SCC 122, the Hon'ble Apex Court has discussed thus:

"18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though, the report of the Gynaecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.

19. Though, the FSL Report marked as Ex.C-1 pertaining to the undergarments of the accused and the victim did not contain any seminal stains, yet the said report cannot be given any importance because the underwear of the accused was taken into possession by the police on the next day of the incident when he was arrested. There is no evidence brought on record to show that the accused handed over the same under wear to the police, which he was wearing on the day of incident or he had handed over some other underwear which was seized under mahazer (Ex.P-5) by the police. The possibility of absence of seminal stains on petticoat of the prosecutrix which she was wearing at the time of the incident, could not be ruled out due to the fact that the petticoat got drenched in the water and the seminal stains might have been washed away."

[24] In view of the above discussions and observations as cited by both the learned counsel appearing for the parties, this Court is of the opinion that either in criminal case or civil case, fact remains all through and the same cannot be supplemented nor there can be two versions of a single fact. As seen from the evidence of PW-2, the victim girl in her deposition and the statement recorded under Section-164 of Cr.PC both are coupled together and extracted for consideration.

"The informant is my brother and I am the victim in the instant case. On 15.11.2021, at about 10/10.30 a.m., while I was proceeding towards my school, at that time, accused person namely, Matilal Sarkar forcibly kidnapped me and took me to a nearby jungle and forcibly committed rape upon me. Thereafter, the accused took me to some other place but, I have no

idea about the exact place. On the following day, i.e., 16.11.2021, I boarded a Commander Jeep and during that time I communicated with my elder brother who advised the driver of the said vehicle to drop me to the Belonia PS. Accordingly, my brother also reached the PS and took me back to our home. After reaching home, I disclosed the aforesaid incident to my brother and other family members. Accordingly, my brother lodged the instant before the Lefunga PS. During investigation, one day, I was examined by the police and thereafter, I was produced before the Magistrate, whereupon, my statement was recorded on a paper whereupon I have put my signatures. This is the said signatures on the said statement. On identification, the signatures of the witness on the statement recorded by the Magistrate, under Section-164(5-A)(a) of the Cr.P.C stands marked as Exhibit-2/1 series. Also, during investigation, one day, police made arrangement for my medical examination to a hospital. Witness duly identified the accused Matilal Sarkar while his picture was shown to her through a mobile phone display.”

“On 15.11.2021 at about 10.30 am when I was going to my school Fatikcherra Uchya Bidyalay, a person Motilal Sarkar he came from the back side and pressed by mouth and dragged me to a forest type land. He then torn open my school uniform he beat me with his hand. He then pressed both my breasts and also touched me between the thighs in the female organ. He then clicked my photographs in his mobile phone [black] in colour. He also raped me by tying my hands. He then forced me to go with him. He made me were a saree as I could not do it properly. He assaulted me severely.

He then took me to his relatives place in Belonia. I was in unconscious condition.

I woke up at 11 pm and found that I was in Belonia. We took food at about 1 am. He forced me to sleep with him or else he would circulate my photos over social media.

He then opened the saree which I was wearing and inserted his male organ but is resisted him but he still raped me.

The next morning I called my sister in law, she was busy in phone. I then called his brother and informed him. Then I went to the main road, he followed me. Motilal Sarkar then made me set in a car and then I informed the matter to my sister in law and after talking with the car driver, he dropped me in Belonia P.S. The statement is recorded in English after interpreting from Bengali. The statement is read over to the witness after interpretation who admits to be correctly recorded.”

[25] It is seen from the above that in 164 statements the version she made that on telephone she called her sister-in-law. This is contradictory version of the fact. As per the evidence of PW-1, the informant/complainant he stated that he received phone call from his sister/victim girl and he went to rescue her. PW-5, sister-in-law of the victim and wife of the PW-1 categorically stated that on receipt of phone call one of the family members went to rescue the victim girl but in cross, she has given three names i.e.

Bijoy Sarkar, Pramode Sarkar and Biswajit Sarkar. PW-2 deposed that she first called her sister-in-law PW-5 and as she did not pick up the call, PW-2 called brother of PW-5. Thus, the statement of PW-1 that PW-2 called him stands disbelieved. A fact is a fact it cannot be changed.

[26] PW-7 who is a neighbor has categorically stated that there was a land dispute between both the brother i.e. the father of the accused person and the victim girl and even after the incident; he deposed that the victim girl went away from house and for that the relevant portion may be extracted thus: *“during the year 2021, in the month of November, one day I came back from work and came to know from the local people that, the daughter of Ramjit and the son of Indrajit i.e. Motilal Sarkar have eloped with each other.”*

[27] PW-8 is the witness to the seizure list and birth certificate issued by the IGM Hospital. As per the evidence of the victim girl, she is born in Bangladesh and 8 years ago she came to Tripura with her family. Admittedly, no birth certificate from the Bangladesh is procured and even the medical certificate which is obtained from IGM Hospital, Agartala, is not exhibited and the author has also not been examined on the point of determination of birth certificate and also the age of the victim girl. Ossification test has not been conducted to determine the age of the victim girl.

[28] It is only the sole and solitary statement of the victim girl declaring her age as 15 years none of them have been examined to prove the age. No document is mentioned. In view of the above discussion, since the age is not established, it cannot be said that the victim is a minor girl. Now, it falls for consideration with regard to the issue of rape as has been committed or not. To establish the committal of rape and for this purpose, statement of PW-6, Dr. Sanghamitra Dhar is necessary to be extracted:

“On 23.11.2021, the period of examination commenced at about 2.15 p.m. and was concluded at 2.50 p.m. prior to medical examination, consent for such medical examination was taken and I have reflected the same in my said report. After the examination of the victim, aforesaid, finally, I have

submitted my report dated 23.11.2021 and in my said report I have opined that *"Based on the above findings, I am of the opinion that, the victim is having hymen torn which is not so old, this may be suggestive of recent sexual intercourse"*. The report consisting of 5 sheets was prepared by me, in my own handwriting bearing my signatures upon it. On identification, the report stands marked as Exhibit-3 and the signatures stands marked as Exhibit-3/1 series, respectively.

In rape cases, if a conviction is based on the sole evidence of a single witness, even that of the victim herself, such evidence should inspire confidence in the Court. While the victim's statement is given a very high value, the Court must carefully examine the same.

[29] During the course of argument, upon direction of this Court, the learned P.P has also obtained the report from the I.O. to say about the status of the parties. Since the crime has taken place on 2021 and it is difficult to know the status of their marriage since they were relatives, the report has been placed on record stating that both the father of the victim girl and the accused person are coldblooded brothers and their children are cousin and thus, the relationship for marriage cannot be accepted. The victim girl is already married and she is leading a healthy family life and blessed with a child. Both the accused person and the victim girl were teenagers and the accused is languishing in jail an innocent person cannot be penalized. This Court is not declaring the accused person as innocent but the guilt is not proved beyond reasonable doubt.

[30] It is evident from the statement of the victim girl that she accompanied the accused person and she was there with him. Both being teenagers, it was not possible to believe the version of the victim in absence of any bodily injury that he forcefully tied her and disrobed her and changed her school uniform by wearing saree and travelled together from place to place. In view of such in-consistent versions, this Court is not inclined to accept the charge leveled under Section-366 of IPC against the accused person and the same stands set aside.

[31] Evidence of doctor PW-6 who conducted the medical examination upon the victim girl on 23.11.2021 and opined that hymen torn

and the same is fresh and it is just one or two days ago. But it is seen from the record that the alleged rape has taken place on 15.11.2021 and thus, it is one week old and no samples collected for analysis and there is no forensic report as the medical examination was conducted after a week and in the meanwhile, she had her daily bathe and changing of clothes. Though, the only witness to the said crime is the victim girl and there is no other witness examined to say that the victim and the accused person were together in a room and both were in privacy in a room/house during the date from 15th to 16th of November, 2021 and the FIR came to be filed on 19.11.2021.

[32] There was no reason when both the accused person and the victim girl were together from 15th to 16th of November, 2021 and she was recovered on 16th and complaint was filed on 19.11.2021, medical examination was conducted on 23.11.2021 but prosecution has not acted immediately when it is a serious case according to them under POCSO and rape.

[33] The statement of independent witnesses stating that there were land dispute and this girl again left the house cannot be brushed and not to tarnish her conduct but at the same time, in a criminal case it becomes necessary to examine the veracity of the statement of the victim girl in this regard. Therefore, the statement of PW-7 has more weight-age than the evidence of PW-2. So, prosecution has not proved the case beyond reasonable doubt and accordingly, this Court is of the opinion that the accused person is entitled for acquittal. For the aforesaid reasons as discussed above, the judgment and order or conviction of the learned Court below stands set aside and the accused is acquitted from charges leveled against him as the prosecution has not proved the case beyond reasonable doubt. Therefore, this Court is of the opinion that it cannot be treated as POCSO as the age is not proved. Insofar as rape under Section-376(3) of IPC is concerned except the statements of PW-2 there is no evidence against the accused. More so, the statement of the PW-2 is not sufficient to hold accused as guilty for the reasons indicated above and statement of PW-6 also do not support the case of PW-2.

[34] In that view of the matter, we are of the opinion that the judgment and order of conviction and sentence passed by the learned Court of Special Judge (POCSO), West Tripura, Agartala, in connection with case No. Special(POCSO) 07 of 2022, stands set aside and quashed.

[35] Hence, the instant appeals filed by the accused-person, namely, Matilal Sarkar, stand allowed and the accused-appellant shall be released forthwith, if not wanted in connection with any other case. As a sequel, miscellaneous applications pending, if any, shall stand closed. Send down the LCRs.

B. PALIT, J

T. AMARNATH GOUD, J

A.Ghash



सत्यमेव जयते