HIGH COURT OF TRIPURA
AGARTALA

Crl. A(J) 49/2017

B E F O R E

HON'BLE MR.JUSTICE S.TALAPATRA

HON'BLE MR.JUSTICE S.G.CHATTOPADHYAY

1. **Dhari Kumar Jamatia**,
son of Sri Lakhi Gobinda Jamatia,
resident of village Chandradayal Para,
P.S : Raisyabari, Gandacharra,
District :Dhalai.

2. **Kumar Jamatia**,
son of Sri Aranya Kumar Jamatia,
resident of village Chandradayal Para,
P.S : Raisyabari, Gandacharra,
District :Dhalai.

3. **Khuphula Jamatia**,
son of Sri Ravi Kumar Jamatia,
resident of village Chandradayal Para,
P.S : Raisyabari, Gandacharra,
District: Dhalai.

.....Appellants.

Versus

State of Tripura

.....Respondent.

For the Appellant(s)	:	Mr. S.Kar Bhowmik, Advocate.
For the Respondent(s)	:	Mr. S. Debnath, Addl. P.P.
Date of hearing	:	11.05.2020
Date of Judgment and Order	:	12.06.2020
Whether fit for reporting	:	Yes ✓ / No

J U D G M E N T

(*Per S.G.Chattopadhyay, J*)

1. This appeal under Section 374(2) Cr.P.C. is directed against the judgment and order of conviction and sentence dated 19/07/2017 passed in case No. Special (POCSO) 02 of

2016 by the learned Special Judge (Additional Sessions Judge), Kamalpur, North Tripura Judicial district, as it was then, whereby the three(03) appellants, herein, were convicted for offence punishable under Section 376D, IPC and sentenced to RI for Twenty (20) years which is the minimum sentence prescribed for the offence and fine of Rupees Five thousand(Rs.5000/-) payable to the victim with default stipulation and though the appellants were separately charged under Section 6 of the POCSO Act and at the conclusion of trial they were found guilty of the charge, the punishment provided under Section 376D being greater than the punishment provided under Section 6 of the POCSO Act, the learned trial court, keeping in view the provision of Section 42 of the POCSO Act, imposed punishment under Section 376D on the appellants. Appellants 01 and 02 were further convicted for offence punishable under Section 323, IPC and sentenced to RI for three(03) months and it was ordered that the sentences imposed on them would run concurrently.

2. The case of the prosecution which led to the conviction and sentence of the appellants emerges out of FIR No. 001 of 2016 which was registered at Raisyabari Police Station in Gandacherra sub-division on the basis of the oral complaint of Sri Sumanta Jamatia(PW1) who appeared at Raisyabari police station on 17/01/2016 at around 08.30 a.m and lodged an oral complaint to the effect that on 16/01/2016, i.e. the day before, at around 06.30 p.m the victim(PW5), who is his younger sister, had gone to the house of Madhulaxmi Jamatia(PW11) in their neighbourhood for bringing one jacket. She was then accompanied by her elder sister Smt. Sima Jamatia(PW3) and her neighbour Smt. Madhulaxmi

Jamatia(PW11). On their way back, the three appellants appeared and caught hold of the victim(PW5) and they had forcibly taken her away to the nearby rubber garden where she was gang raped by them. Her sister Smt. Sima Jamatia(PW3) who was accompanying the victim informed her first informant brother (PW1) about the occurrence. The first informant then rushed to the place of occurrence and found his sister lying unconscious at the rubber garden with multiple injuries on her private part. His oral complaint was reduced into writing by the duty officer of the police station and RSB PS case No.2016 RSB 001 under Sections 341, 376D read with Section 34 IPC and Section 4, POCSO Act was registered against the accused appellants and the case was endorsed to SI Jhutan Jamatia(PW19) for investigation.

3. The accused appellants were arrested on 17/01/2016 and the victim girl and also the appellants were then subjected to medical examination and on completion of investigation, SI Jhutan Jamatia (PW19) submitted charge sheet against the three accused appellants before the learned Special Judge at Kamalpur for trial. At the trial, the learned Special Judge framed the following charges against the 03(three) accused appellants:

> *"Firstly that all of you, on 16/01/2016 at about 1830 hours at Sarat Chandra Para, in a rubber garden, under Raisya Bari PS, acting as a group and in furtherance of common intention committed rape on the victim and you have thereby committed an offence punishable under Section 376D of the Indian Penal Code and within my cognizance.*
>
> *Secondly, that all of you on the above mentioned date and time committed aggravated gang penetrative sexual assault on the victim, a child below 18 years of age, and have, thereby, committed an offence punishable*

under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and within my cognizance.

And I hereby direct that you be tried on the said charges."

Separate charge of offence punishable under Section 323, IPC was framed against 02 (two) accused appellants namely Kumar Jamatia and Dhari Kumar Jamatia.

All the accused appellants pleaded not guilty to the charges and claimed trial.

4. In order to substantiate the charge, as many as 19 witnesses including the victim (PW5) and her first informant brother(PW1) were examined and 22 documents were exhibited on behalf of the prosecution. The accused appellants were then examined under Section 313,Cr.P.C. who denied the prosecution case and claimed that the charges were foisted on them.

5. During their examination under Section 313 Cr.P.C. as well as in cross examination of the PWs, the appellants projected a defence story to the effect that on the date of occurrence they came to know that Pushpa Sadhan Jamatia (PW2) and Sanjoy Kishore Jamatia (PW4) together with the victim were caught by the villagers at the place of occurrence. The appellants then met the parents of the victim when her parents proposed for a compromise. But the appellants did not agree because they wanted to teach Pushpa Sadhan and Sanjoy a lesson who used to visit their village frequently from a different village and mix up with the victim despite their objection. Accordingly, the appellants had taken Pushpa Sadhan and Sanjoy Kishore to Raisyabari Police station and filed a complaint against both and on their complaint a case was also

registered at the police station on 16/01/2016. But, Sumanta Jamatia(PW1), brother of the victim, filed the present complaint on 17/01/2016 implicating the appellants and the prior complaint filed by the appellants on 16/01/2016 against Pushpa Sadhan and Sanjoy Kishore was suppressed and not acted upon.

However, the learned Special Judge on conclusion of the trial and on scrutiny of the evidence, convicted and sentenced the accused appellants, as noted above.

6. We have heard Mr. S. Kar Bhowmik, learned counsel representing the appellants as well as Mr. S. Debnath, learned Additional Public Prosecutor appearing on behalf of the state respondent.

7. Challenging the legality of the trial court's judgment, Mr. Kar Bhowmik, learned counsel of the appellants has contended that there is no iota of truth in the prosecution case against the appellants. According to learned counsel, it is established during the trial that Pushpa Sadhan Jamatia (PW2) had love affair with the victim and he was caught by the villagers in a compromising position with the victim in the rubber garden where he was beaten by the villagers and subsequent thereto the appellants filed a case against Pushpa Sadhan(PW2) and his associate Sanjoy Kishore Jamatia(PW4). Learned counsel had also taken us to the overwritings appearing at different places in the printed FIR form and argued that it occurred due to the fact that the FIR originally filed by the appellants against Pushpa Sadhan Jamatia(PW2) on 16/01/2016 was suppressed and the FIR lodged by Sumanta Jamatia(PW1), brother of the victim on the following day was

acted upon which necessitated those overwritings/interpolations in the printed FIR form. It is therefore, contended on behalf of the appellants that the learned trial court returned the finding of conviction and sentence of the appellants without appreciating the fact that the actual occurrence was suppressed by the prosecution and as such, the judgment of the learned trial court is liable to be set aside. In support of his contention Mr. Kar Bhowmik, learned counsel has relied on the decision of the Himachal Pradesh High Court in **State of Himachal Pradesh vs Dumnu Ram reported in 2015 CRI. L. J 4584** wherein the High Court observed that *when the genesis of the prosecution version gets submerged in a taint of falsehood, as a corollary then, this court would obviously be inclined to not construe the version rendered by the prosecutrix qua the genesis of the occurrence to be either trustworthy or credible (vide para 18)*. Mr. Kar Bhowmik, learned counsel, in this regard, also relied on the decision of the Gauhati High Court in **Md. Jil Hoque vs. State of Assam reported in 2016 CRI. L.J. 2822** wherein the High Court observed that *the genesis of the actual occurrence had been suppressed by the prosecution* and pursuant to such findings acquitted the appellants of the charge brought against them.

According to Mr. Kar Bhowmik, leanred counsel the same analogy is to be applied in the present context for their resemblance.

8. It is further contended by Mr. Kar Bhowmik, learned counsel that the victim (PW5) also suppressed the actual story in her evidence at the trial and the learned trial court committed error in placing reliance on her statement as *gospel*

truth without sufficient corroboration. In this regard, Mr. Kar Bhowmik, learned counsel relied on the decision of the Apex Court in **Raju and Ors. Vs. State of Madhya Pradesh reported in (2008) 15 SCC 133** wherein the Apex Court after making a reference in **Gurmit Singh's** case **reported in (1996) 2 SCC 384** observed as follows:

> **"12....This clearly shows that in so far as the 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."**

According to learned counsel of the appellants, the ratio decided by the Apex Court, if applied to the given case, the appellants would be entitled to acquittal.

9. Further contention on behalf of the appellants is that the whole incident allegedly occurred in the neighbourhood of the victim at a distance of about 120 meters from her home and the victim was also discovered immediately but the FIR was filed by her brother (PW1) on the following day and apparently there is no explanation of delay which casts shadow of doubt over the prosecution case. Further argument on behalf of the appellants is that the occurrence allegedly took place at around 6.30 p.m on 16/01/2016 during winter and the sun sets at around 5 p.m in winter when it becomes totally dark. Added to this, PW14, owner of the rubber garden also deposed that it would be totally dark at the alleged time of occurrence making the identification difficult. Therefore, the identification of the accused committing the offence in the darkness of the evening was quite improbable. It has been further contended by learned

counsel of the appellants that the medical report (Exhibit-12) does not provide material information like whether any biting, kissing or licking occurred at the sites involved, whether the assailants ejaculated at the location, whether contraceptive was used during the assault and whether consciousness of the victim was lost during the assault. As a result, the prosecution story of gang rape and the allegation that the victim lost consciousness owing to the assault do not gain ground. Further contention on behalf of the appellants is that the recognized procedure was not followed in dispatching the alamats of the case to the Forensic Science Laboratory because all alamats including the wearing apparels of the victim and the vials containing the semen sample were put together in a single packet which was sent for forensic analysis. As a result, the possibility of leakage of the vials and contact with the wearing apparels of the victim could not be ruled out. Further contention of Mr.Kar Bhowmik, learned counsel of the appellants, in this regard is that the instructions provided under Regulation 297 in Appendix XVIII of The Police Regulations of Bengal(PRB) as adopted in Tripura were not followed by the investigating agency in dispatching the exhibits to the Forensic Science Laboratory. It was also added by learned counsel that the victim had allegedly gone to the house of Smt. Madhulaxmi Jamatia (PW11) to bring one jacket but the jacket could not be seized during investigation. His further contention is that evidently, the victim (PW5) was intoxicated at the time of occurrence and therefore, her evidence cannot be relied upon.

10. It is also argued by Mr. Kar Bhowmik, learned counsel that the learned trial court committed error in framing the charge against the appellants under Section 6 of the POCSO

Act and finding them guilty of the charge without the proof of the age of the victim. As contended by him, no ossification test/ x-ray was done to determine the age of the victim. Though PW18, Headmaster of the school where the victim read upto class VIII was called to prove the school certificate containing her date of birth, the person who actually made entry of the date of birth in the admission register was not examined to prove the source of entry of her date of birth in the school certificate. As a result the findings of the learned trial court that the victim was 16 years' old and a minor at the time of occurrence were not correct.

In support of his contention learned counsel appearing on behalf of the appellants placed reliance on the decision of the Apex Court in **Sunil Vs. State of Haryana reported in AIR 2010 Supreme Court 392** wherein the judgment and order of conviction and sentence for offence punishable under Sections 366, 366A and 376 IPC for kidnapping and raping a minor girl was under challenge before the Apex Court and in that case whether the prosecutrix was proved to be a minor was an issue before the court.

11. On this issue reliance was also placed by Mr. Kar Bhowmik, learned counsel, on the decision of the Apex Court in **Alamelu and Anr. Vs. State represented by the Inspector of Police reported in (2011) 2 SCC 385** in which the conviction of the appellants under Sections 366 and 376 IPC confirmed by the High Court was under challenge before the Apex Court and the age of the prosecutrix was one of the central issues to be considered by the court.

12. The learned counsel of the appellants has also referred to the decision of the Apex Court in **State of Punjab Vs. Gurmit Singh and Ors. reported in (1996) 2 SCC 384** wherein the question relating to the age of the prosecutrix, amongst other things, was examined by the Apex Court.

13. Learned counsel of the appellants had also made a reference to the cross examination of Dr.Subhankar Nath (PW16) wherein the PW stated as follows:

> *"The semen stain found in Exhibit-I has been contributed by a fourth source different from the DNA profile of the three(03) accused persons"*

Learned counsel also pointed out that the PW recorded the same finding in his report (Exhibit-16) and argued that such evidence of the forensic expert has made the prosecution story highly suspicious and the benefit of doubt should be given to the accused.

14. Mr. Kar Bhowmik, learned counsel of the appellants finally submitted that the entire evidence of the prosecution suffer from lot of contradictions on material points and as such the learned trial court should not have relied on such fragile evidence and drawn the conclusion of guilt of the appellants.

15. Mr. S.Debnath, learned Additional PP representing the respondent on the other hand supported the judgment and order of conviction and sentence of the learned trial court and argued that trial court's judgment is based on cogent evidence and sound reasoning which does not merit any interference in appeal. While arguing on behalf of the respondent, learned counsel had taken us to the evidence of the prosecution witnesses and submitted that the consistent evidence of the

victim corroborated by the evidence of other witnesses having established the charges against the accused appellants during trial, the learned trial court found the appellants guilty and rightly convicted and sentenced them. Learned counsel therefore urges us to maintain the findings of conviction and sentence returned by the learned trial court and dismiss the appeal.

16. Before we proceed to examine the merits of the arguments of learned counsel representing the parties, it would be appropriate to have a look into the prosecution evidence for the purpose of re-evaluation of such evidence recorded by the learned trial court.

17. Among the 19 prosecution witnesses examined at the trial, PW1, Sumanta Jamatia is the brother of the victim. He told the court that on 16/01/2016 his victim sister(PW5) accompanied by Pushpa Sadhan Jamatia (PW2), Smt Sima Jamatia,(PW3)and Smt. Madhulaxmi Jamatia, (PW11) had gone to the house of Madhulaxmi Jamatia(PW11) in their neighbourhood to bring one jacket. When they were returning home, the accused appellants stood on their way and after assaulting Pushpa Sadhan Jamatia(PW2) they had forcibly taken away the victim to the nearby rubber garden of Buddha Chandra Jamatia(PW14) and took turns in raping her. Wife of the PW and his mother (PW12) recovered the victim from the rubber garden of Buddha Chandra Jamatia (PW14) and when the victim was so recovered by them she was found unconscious and not in her clothes. After she regained her sense, she narrated the incident to the PW and others. Thereafter he went to the police station and lodged oral

complaint. Police wrote down his complaint. He identified his signature on the complaint which was marked as Exhibit-1 on such identification. During investigation police seized the wearing apparels of his victim sister which were also identified by him during trial and marked as Exhibit-MO1, MO2 and MO3.

In his cross examination the PW stated that the house of Madhulaxmi Jamatia (PW11) was situated at a distance of 120 mtrs from his house and the rubber garden where the occurrence took place was situated in between his house and the house of Madhulaxmi Jamatia. The PW further stated in his cross examination that he informed police about the occurrence on the same day at about 9.30 p.m. About Pushpa Sadhan Jamatia (PW2), he stated that Pushpa Sadhan came to their village from a different place named *Gangia Para* and it takes about 3 hours for reaching his village from *Gangia Para* by car. He further stated in cross examination that he told the Investigating Officer that when his victim sister was discovered by his mother and wife she was in unconscious condition. The rest of the cross examination of the PW contains the statement made by him in denial of the suggestions put to him on behalf of the accused appellants.

18. PW2, Pushpa Sadhan Jamatia lends support to the evidence of PW1 to the extent that he was accompanying the victim along with Sima Jamatia(PW3), Madhulaxmi Jamatia (PW11) and Sanjay Kishore Jamatia (PW4) while the victim was returning from the house of Madhulaxmi Jamatia where the victim had gone to bring one jacket. The PW told that it was evening. Three persons unknown to the PW stood on their way and prevented them from proceeding further. One of them

started assaulting him and another forcibly dragged the victim to the nearby rubber garden. The PW fled from the spot and took shelter in the house of his relative. Later he came to know that the victim was raped. During trial he identified accused appellants Kumar Jamatia and Dhari Kumar Jamatia to be his assailants and Khuphalak Jamatia to be the person who dragged the victim to the forest plantation area. The PW told the court that he received injuries during his assault for which he received treatment in Raisyabari PHC. He also told the court that he came to visit his grand-father namely Mangal Hari Jamatia who lived at 2 minutes' walking distance from the house of informant Sumanta Jamatia(PW1). After coming to the village he was introduced to the victim and her first informant brother. He also stated that during investigation he was brought before a magistrate for giving statement. His statement recorded under Section 164 (5) Cr.P.C by SDJM Gandacherra was taken into evidence and marked as Exhibit-3.

In cross examination he admitted that he came to visit Sarat Chandra Para i.e. the village of the victim for the first time and on that day Hrangrai festival (a tribal festival on the first day of Magha) was being celebrated. The PW denied that he had love affairs with the victim and that he was caught and assaulted by the villagers after being found in compromising position with the victim. He also denied in cross that he was drunk and he was handed over to police by the villagers. He also denied that he was not assaulted by the accused appellants.

19. PW3, Sima Jamatia, in her examination in chief told the court that the victim was her younger sister. On

16/01/2016 evening, the victim, accompanied by her along with Pushpa Sadhan Jamatia(PW2) and Sanjay Kishor Jamatia(PW4) went to the house of Madhulaxmi Jamatia(PW11) to bring one jacket from the house of Madhulaxmi. While they were returning home from there the victim (PW5)and Pushpa Sadhan(PW2) were coming together. The PW later came to know that the three appellants suddenly appeared there and dragged the victim to the nearby rubber plantation where they raped her. She categorically stated in her examination in chief that she did not have any personal knowledge about the occurrence other than what she heard from the victim and the villagers.

In her cross examination the PW stated that neither Pushpa Sadhan Jamatia(PW2) nor the victim(PW5) consumed alcohol. She also stated that she did not see Pushpa Sadhan along with the victim entering into the rubber garden. She denied that there was love affair between her victim sister(PW5) and Pushpa Sadhan Jamatia(PW2).

20. PW4, Sanjay Kishor Jamatia also supported the fact that at the material time on 16/01/2016 the victim(PW5) had gone to the house of Madhulaxmi Jamatia(PW11) to bring one jacket. He also accompanied the victim. While they were returning, the victim (PW5)and Pushpa Sadhan Jamatia(PW2) were ahead of them when the three accused appellants appeared and started assaulting Pushpa Sadhan. The PW fled in fear. Later he learnt that the victim was found lying unconscious in the rubber garden. During trial he identified the three appellants in the dock of the court room. He also told the court that during investigation he was brought before a

magistrate for giving statement. His statement recorded under Section 164(5) Cr.P.C by SDJM Gandacherra was taken into evidence and on identification by him it was marked as Exhibit-4.

In his cross examination, the PW denied that he did not see the three appellants attacking Pushpa Sadhan Jamatia(PW2). He told that he was twenty cubits behind Pushpa Sadhan. He also denied that he could not identify the accused appellants and he denied that he deposed falsely due to his good terms with the informant.

21. PW5, is the victim. In her examination in chief she told the court that on 16/01/2016 evening she had gone to the house of Madhulaxmi Jamatia (PW11) to bring a jacket and at that time she was accompanied by her sister Sima Jamatia (PW3), neighbour Madhulaxmi Jamatia(PW11), Pushpa Sadhan Jamatia (PW2) and Sanjay Kishor Jamatia(PW4). On her way back she and Pushpa Sadhan Jamatia(PW2) were ahead of Sima Jamatia(PW3) and Sanjay(PW4). When they reached near the rubber plantation, the three appellants appeared and assaulted Pushpa Sadhan. Then Pushpa Sadhan and others fled from there. The three appellants dragged her to the nearby rubber plantation owned by Buddha Chandra Jamatia(PW14) where each of they took turns in raping her. During the commission of the offence they removed her clothes and she was made lye on the ground with her back on the soil. Appellant Khuphula Jamatia first raped her while the two other appellants were holding her hands with her mouth gagged. Thereafter, appellant Dhari kumar Jamatia followed by Kumar Jamatia committed rape upon her. She lost her sense and received injury on her private part. She regained her sense in her house and narrated

the incident to her sister Sima Jamatia (PW3). The victim was then taken to the hospital by police where she was medically examined. In the hospital she also told the attending doctor about the incident. Subsequently, she also gave statement before a Magistrate. Her statement recorded under Section 164(5), Cr.P.C. by the sub-divisional Judicial Magistrate, Gandacherra was taken into evidence and marked as Exhibit-5. During the trial, the PW identified the appellants as her assailants and also identified her wearing apparels seized by police which were already marked as Exhibit MO1, MO2 and MO3.

In her cross examination she stated that she read upto class VIII and left her studies one year back. She further stated that Pushpa Sadhan Jamatia(PW2) came to their village once before the occurrence. She denied in cross that she had love affairs with Pushpa Sadhan Jamatia(PW2) and the villagers caught them together in a compromising position. She also denied that the accused appellants did not assault Pushpa Sadhan(PW2).

22. PW6, Smt. Laxmi Das was a general duty attendant (GDA) in Gandacherra sub-divisional Hospital. She witnessed Doctor Suman Sarkar(PW8) of the hospital handing over to police the blood sample, vaginal swab, scalp hair, nail scrapping, saliva sample of the victim. The samples were seized in her presence and she signed the seizure list as a witness which was identified by her as Exhibit-6 during the trial of the case. PW also witnessed Doctor Suman Sarkar handing over the preliminary examination report of the victim to police which was seized by police in her presence and she signed the seizure list

as a witness and her signature thereon on identification by her was marked as Exhibit -7 during trial.

Her cross examination was declined on behalf of the accused appellants.

PW7, Smt. Shreelekha Jamatia, appeared before the trial court for deposition. But her examination in chief was tendered by the prosecution and her cross examination was also declined on behalf of the accused appellants.

23. PW8 is Doctor Suman Sarkar who was posted as the sub-divisional medical officer in Gandacherra on the material date. Day after the occurrence, i.e. on 17/01/2016 at 2.45 p.m she examined the three appellants and found that each of appellants had developed secondary sexual characteristics who had no erectile dysfunction and each of appellants were found physically and mentally fit in their potency test. The PW prepared reports after examining the appellants and identified the report of Khuphula Jamatia as exhibit-9 and that of Dhari Kumar Jamatia as exhibit-10 and the report of Kumar Jamatia as Exhibit-11. In the course of examination of the appellants PW8 Doctor Suman Sarkar also collected the blood sample, pubic hair, nail scrapping, matted pubic hair, saliva sample, penile swab, and semen sample of the appellants.

At around 4.00 p.m on the day the PW examined the victim who was aged around 16 years. PW told the court that the victim was brought with a history of sexual assault and during examination of the victim the PW found scratch mark over her nose, chick, neck, stomach and multiple nail mark over upper back and right thigh. The PW collected her blood sample,

urine sample, scalp hair, vaginal swab as well as her wearing apparel and handed over the samples and wearing apparels of the victim so collected by him to police. The PW further deposed that during the per virginal examination of the victim, the PW found her hymen ruptured and also found several injury mark like abrasion and scratch mark over multiple areas which were tendered at the time of examination indicating that those were recent in nature and the PW was of the prima facie opinion that the victim girl was subjected to sexual intercourse within the recent vicinity of her examination. After he received the forensic report from SFSL, the PW gave his final report wherein he opined that the victim had undergone sexual intercourse during the recent vicinity of her medical examination by him. The PW identified his preliminary report as Exhibit-12 and final report as Exhibit-13 during trial.

In his cross examination the PW stated that he prepared his report after perusal of the Medico Legal Register kept in the hospital. He stated that the Register was not produced before him in court. He also stated that he did not mention in his report what were the symptoms which led him to infer that the injuries were nail marks. The PW stated that the hymen could be ruptured due to physical exercise also. He stated that he could not say whether hymen of the victim was ruptured due to sexual intercourse or physical exercise. The PW further stated in cross that he did not mention in his report that the victim had under gone sexual intercourse within the recent vicinity of the examination.

24. PW9, Sajal Shil was a general duty attendant at Gandacherra sub-divisional hospital and witnessed Doctor

Suman Sarkar (PW8) examining the appellants in the hospital and collecting their blood sample, pubic hair, nail scrapping, matted pubic hair, saliva sample, penile swab, and semen sample and also their wearing apparels and handing over the same to police.

His cross examination was declined on behalf of the accused appellants.

PW10, is a police constable who also witnessed Doctor Suman Sarkar (PW8) examining the appellants in the hospital and collecting their blood sample, pubic hair, nail scrapping, matted pubic hair, saliva sample, penile swab, and semen sample and also their wearing apparels and handing over the same to police.

His cross examination was declined on behalf of the accused appellants.

25. PW11 is Smt. Madhulaxmi Jamatia who in her brief testimony before the court deposed that the victim as well as the three accused appellants were known to her as they were her co-villagers. She supported the prosecution version by saying that on the material day i.e. on 16/01/2016 at around 6.30 O'clock in the evening she accompanied the victim along with Sima Jamatia (PW3) Pushpa Sadhan Jamatia(PW2) and Sanjay Kishore Jamatia(PW4) to the house of her for bringing one jacket. On their way back also, she accompanied the victim upto the road when she saw Pushpa Sadhan and the victim were walking hand to hand. She then returned back and did not know what happened thereafter.

In her cross examination the PW stated that on the material day Pushpa Sadhan (PW2) Sima (PW3), Sanjoy Kishore(PW4) and the victim (PW5) had consumed liquor in her house and she saw Pushpa Sadhan and the victim moving towards the rubber garden. The PW stated that she had gone home and informed the matter to her brother and her neighbour.

26. PW12, Smt. Durgadhani Jamatia and PW13, Sri Panchananda Jamatia are the parents of the victim. PW12, Durgadhani Jamatia in her testimony at the trial on 04/08/2016 told that about 7 months back, her victim daughter accompanied by Madhulaxmi Jamatia(PW11), Sima Jamatia (PW3) Pushpa Sadhan Jamatia(PW2) and Sanjay Kishore Jamatia(PW4) had gone to the house of Madhulaxmi Jamatia(PW11) to bring one jacket. On their way back the three appellants obstructed them and assaulted Pushpa Sadhan Jamatia(PW2) and forcibly dragged her victim daughter to the nearby rubber garden of Buddha Chandra Jamatia(PW14) where they raped her daughter one after another. Her daughter Sima Jamatia (PW3) reported the incident to her and immediately the PW rushed to the spot and found her daughter lying unconscious at the rubber garden and she was not in her clothes. After regaining her sense, the victim narrated the incident to her PW mother. The PW also told the court that all the three appellants were her co-villagers and known to her. While testifying before the court the PW broke down into tears and the fact was recorded by the learned trial court.

In her cross examination the PW stated that Pushpa Sadhan was caught by the villagers in connection with this case

and he was handed over to police. The PW denied in cross that Pushpa Sadhan(PW2) had taken her victim daughter to rubber garden. The PW also denied that the accused appellants had handed over Pushpa Sadhan to Police and therefore, a false case was lodged against the accused appellants. The PW also denied in cross that the accused appellants did not commit any wrong to her daughter.

27. PW13, Panchananda Jamatia, father of the victim, in support of the prosecution case, told the court that on 16/01/2016, in the evening, his victim daughter had gone to the house of Madhulaxmi Jamatia(PW11) for bringing one jacket. On her way back the three appellants obstructed her and forcibly dragged his victim daughter to the nearby rubber garden of Buddha Chandra Jamatia(PW14) where they raped his daughter one after another. His daughter Sima Jamatia (PW3) reported the incident to him and immediately the PW rushed to the spot and found his daughter lying unconscious at the rubber garden and she was not in her clothes. After regaining her sense the victim narrated the incident to his PW father. The PW also told the court that all the three appellants were his co-villagers and known to him.

In his cross examination the PW stated that he did not witness the incident. The PW also admitted that the villagers handed over Pushpa Sadhan Jamatia (PW2) to police at around 9.30 p.m. The PW denied in cross that Pushpa Sadhan had taken his daughter to the rubber garden. He also denied the fact that the accused appellants had handed over Pushpa Sadhan to Police against his will and therefore, a false case against them was lodged. The PW also denied in cross that

the accused appellants did not commit any wrong to his daughter

28. PW14, Buddha Chandra Jamatia owned the rubber garden where the incident allegedly occurred. He testified that the three appellants as well as the victim were known to him as his co-villagers and on the date of occurrence the PW had seen the victim and three others consuming liquor. In the evening his wife told the PW that some fighting incident took place near their rubber garden. The PW heard that the victim was raped but he was not aware as to who committed the offence.

In his cross examination the PW stated that the trees in his rubber garden were big and therefore there was darkness in his nine year- old garden. The PW also stated in cross that the two boys who had consumed liquor with the victim and Sima Jamatia and Madhulaxmi Jamatia came from Amarpur sub-division.

PW15, is Harisadhan Jamatia whose examination in chief was tendered by prosecution and his cross examination was declined on behalf of the appellants.

29. PW16, Doctor Subhankar Nath is a forensic expert who held the DNA profiling of the alamats. The PW stated in his examination in chief that on 29/01/2016 he was posted as Deputy Director cum Chemical Assistant Examiner in the SFSL. On that day he received 6 packets containing Exhibits B,I,J,L,S and W from the Biology / Serology division for DNA examination of the exhibits in connection with RSB PS case No.20/16 RSB 001 dated 17/01/2016 and he conducted the experiment from 29/01/2016 to 19/02/2016. As per his report (Exhibit-16)

following are the description of the articles and result of his report:

Packet Parcel No.	Exhibits Marked in the SFSL	Details of the Exhibits
01	Exhibit B	Gauze cloth piece having minute amount of red stain said to be the blood sample of the victim.
02	Exhibit I	Small black/ violet / pink / white and green color cloth piece of salwar said to be the kameez of the victim
03	Exhibit J	Yellow color small cloth piece said to be the piece of the underwear of the victim
04	Exhibit L	One gauze cloth piece having red stain said to be the blood sample of accused appellant Kumar Jamatia
05	Exhibit S	One gauze cloth piece having red stain said to be the blood sample of accused appellant Dhari Kumar Jamatia
06	Exhibit W	One gauze cloth piece having red stain said to be the blood sample of accused appellant Khuphula Jamatia

Result of the examination

Seminal stain/spermatozoa of human origin was detected in the Exhibits marked I & J.

The semen stain found in Exhibit marked J (source : yellow colour small cloth piece of underwear of the victim) originated from single source Exhibit marked L (source : blood sample of accused Kumar Jamatia)

The partial profile generated from the semen stain of Exhibit I (source : Small black/ violet / pink / white and green color cloth piece of salwar said to be the kameez of the victim) was not originated from Exhibit L (source : One gauze cloth piece having red stain said to be the blood sample of accused appellant Kumar Jamatia), Exhibit S (source : One gauze cloth

piece having red stain said to be the blood sample of accused appellant Dhari Kumar Jamatia) Exhibit W(source : One gauze cloth piece having red stain said to be the blood sample of accused appellant Khuphula Jamatia)

The PW in his examination in chief further stated that all the exhibits were initially received in the biology division of the FSL which were examined by Doctor Sabyasachi Nath. Doctor Sabyasachi Nath being away from the station on the date of his deposition, the PW stated that he was conversant with the handwriting of his colleague Doctor Sabyasachi Nath and on his identification the report of Doctor Sabyasachi Nath was marked as Exhibit 17.

In his cross examination the PW stated that entire piece of wearing apparels were received at their laboratory. But when the matter was sent to his division from the Biology division of the FSL, only the piece of cloth containing the seminal stain was sent to his division. The PW also stated in cross that the semen stain found in Exhibit I was contributed by a fourth source different from the DNA profile of the three accused appellants. The PW denied that his examination did not conform to the standards set out for scientific examination.

30. PW 17 is Doctor Ajay Halam who examined injured PW Pushpa Sadhan Jamatia (PW2) on 17/01/2016 i.e. day after the occurrence and found the following injuries in his person:

(i) old grazes mark over lower eye lid and upper eyelid of right eye

(ii) old grazes mark over right side of the face.

(i) old grazes mark over right side of the forehead.
(ii) Blue coloration over lower eyelid of left eye

(iii) small grazes mark over left lower eyelid.
(iv) small grazes mark over left side of the face.
(v) Old grazes and scratch mark over middle of the chest

The PW opined that the scratches might be caused by nails or by dry parts of plants. PW identified his report as Exhibit-18.

In his cross examination the PW stated that the patient was forwarded as an arrested accused in connection with case No. RSB 1 of 2016.

31. PW 18 is Sadhan Chakma, Head Master of the high school of Raisyabari in Gandacherra who issued the school certificate (Exhibit-19) in favour of the victim. The PW deposed that as per the records maintained in the school the date of birth of the victim is 01/08/2001 and she read in Raisyabari High School upto class VIII. The witness identified the certificate (Exhibit-19) issued by him. The PW deposed that he handed over the certificate to police and police seized it in his presence and procured his signature (Exhibit-20) on the seizure list.

In his cross examination the PW stated that he issued the certificate in consultation with the Admission Register and he denied the suggestion that the date of birth recorded in the Admission Register was not correct. The PW also denied in cross that the as per the Admission Register year of birth of the victim is 1996.

32. PW 19 is Jhutan Jamatia, a Sub-Inspector of police who conducted the whole investigation of the case. The PW has deposed at the trial that in the course of his investigation he

visited the place of occurrence, prepared hand sketch map with separate index thereof, examined the material witnesses and recorded their police statement. He also seized the wearing apparels of the victim and those of the accused appellants and produced them in hospital for medical examination. The blood sample, pubic hair, nail scrapping, matted pubic hair, saliva sample, penile swab, and semen sample of the appellants were collected at the hospital and the same after seizure were sent to State Forensic Science Laboratory. The PW also seized the school certificate containing the date of birth of the victim which was issued by the Head Master of her school. Injured PW2, Pushpa Sadhan Jamatia was also produced by him at the hospital for his medical examination. After collection of reports from the hospital and State Forensic Science Laboratory he closed his investigation and submitted charge sheet against the accused appellants for offence punishable under Sections 341, 323, 376D IPC and Section 4 of the POCSO Act.

In his cross examination the PW stated that he investigated the case from its beginning till end. The PW further stated that no reason was recorded for the delay of 14 hours in the registration of the case. The PW denied that on 16/01/2016 i.e. on the date of occurrence a case was lodged against Pushpa Sadhan Jamatia(PW2) and Sanjoy Kishore Jamatia(PW4) for committing rape on the victim. He also denied that a new FIR was registered on 17/01/2016 suppressing the first FIR implicating Pushpa Sadhan (PW2) and Sanjoy Kishore (PW4). The PW stated that the accused appellants were produced before the court on 18/01/2016 after their arrest on 17/01/2016. The PW further stated that the body fluids of the accused appellants were forwarded to SFSL by the SDPO under

his seal and gala by a messenger and total 30 items were seized vide Exhibit 8/3 which were sent to the SFSL in one sealed packet. The PW further stated in cross that he affixed labels on the wearing apparels of the accused appellants for identification of their names. The PW denied the fact that the accused appellants had produced Sanjoy Kishore and Pushpa Sadhan at the PS on 16/01/2016 and the present case was registered with a view to save Sanjoy Kishore(PW4) and Pushpa Sadhan(PW2).

33. Undoubtedly, determination of the age of the victim is very relevant and crucial in this case because charge was framed under Section 6 of the POCSO Act against the accused appellants and they were also found guilty of the charge. Therefore, we shall deal with the issue at the outset. We have taken note of the submission of learned counsel of the appellants challenging the correctness of the findings of the learned trial court as to the age of the victim. As noted above, it has been argued by learned counsel that no ossification test / x-ray to determine the age of the victim was conducted during investigation and though the Headmaster (PW18) of the school where the victim studied upto class VIII was summoned and examined to prove her date of birth, the person who actually made entry of the date of birth in the school Admission Register was not examined to prove the source of entry of her date of birth in the school Admission Registrar on the basis of which the school certificate (Exhibit-19) was issued by PW18 and as a result, the prosecution case that the victim was a minor at the time of occurrence is not established. In support of his contention

learned counsel of the appellants placed reliance on the decision of the Apex Court in **Sunil Vs. State of Haryana reported in AIR 2010 Supreme Court 392** wherein the judgment and order of conviction and sentence for offence punishable under Sections 366, 366A and 376 IPC for kidnapping and raping a minor girl was under challenge before the Apex Court and in that case whether the prosecutrix was proved to be a minor was an issue before the court and the court found that the prosecutrix was admitted in school by her brother but the said brother was not examined and the document on the basis of which the age was entered in the school was not also produced and moreover, the father of the prosecutrix could not also give a correct date of birth of the prosecutrix and as a result the Apex Court did not rely on the evidence adduced by the prosecution regarding date of birth of the prosecutrix.

In **Sunil Vs. State of Haryana**(cited supra) the Apex Court had also made a reference in **Birad Mai Singhvi Vs. Anand Purohit, AIR 1988 SC 1796** wherein the Apex Court held as follows:

> **"24.The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or the scholar's register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given the parents, the entry would have evidentiary value, but if it is given by a stranger or someone else who had no special means of knowledge of the date of birth, such entry will have no evidentiary value."**

34. On this issue reliance was also placed by Mr.Kar Bhowmik, learned counsel, on the decision of the Apex Court in **Alamelu and Anr. Vs. State represented by the Inspector of Police reported in (2011) 2 SCC 385** wherein conviction of the appellants under Sections 366 and 376 IPC confirmed by the High Court was under challenge before the Apex Court and the age of the prosecutrix was an issue before the court. The Transfer Certificate duly signed by the Headmaster and issued from the school of the prosecutrix recording her date of birth was relied upon by the trial court as well as by the High Court. The person who made the entry of the date of birth or who supplied the date of birth was not examined. The Apex Court after considering the document held that *the transfer certificate had been issued by a government school and had 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 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*.(vide para 40 of the judgment)

The Apex Court in this judgment also made reference to its earlier decision in **Birad Mai Singhvi** (cited supra) with regard to the manner of proving the facts recorded in a document and observed vide paragraph 43 in **Alamelu** that the said proposition of law was also reiterated by the Apex Court in **Narbada Devi Gupta vs. Birendra Kumar Jaisawal reported in (2003) 8 SCC 745** as follows:

> **"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'."**

35. The learned counsel of the appellants also referred to the decision of the apex court in **State of Punjab Vs. Gurmit Singh and Ors. reported in (1996) 2 SCC 384** wherein the question relating to the age of the prosecutrix, amongst other things, was also examined by the Apex Court. In **Gurmit Singh** the prosecutrix herself and her parents deposed at the trial that she was a minor on the date of occurrence and their evidence was supported by the birth certificate and school leaving certificate of the prosecutrix. That apart, clinical examination of the prosecutrix also established that she was less than 16 years on the date of occurrence. Though the evidence with regard to the age of the prosecutrix was accepted by the Apex Court, it was observed that with a view to do complete justice, *the trial court could have summoned the official concerned from the school to prove various entries in the school leaving certificate*.

36. But in a later decision in **State of Madhya Pradesh Vs. Preetam reported in (2018) 17 SCC 658,** the Apex Court examined similar issue and observed as follows (vide paragraph 11):

> **"11.In our considered view, the approach of the trial court was not correct. In each and every case the prosecution cannot be expected to examine the person who has admitted a student in the school. The school registers are the authentic documents being maintained in the official course, entitled to credence of much weight unless proved otherwise. In our view, considering the evidence of**

> **Headmaster, Bhaulal (PW8), and the school certificate produced by him i.e. Ext.P/13-A, age of the victim has to be taken as 12 years at the time of occurrence."**

37. We have also noted that the same principle of law was laid down by the Apex Court in **Harpal Singh and Anr. Vs. State of Himachal Pradesh reported in (1981) 1 SCC 560** wherein the Apex Court found that the prosecution proved before the trial court that the victim of rape was below 16 years of age and as such question of her consent was wholly irrelevant. In order to prove the age of the victim at the trial, the radiological report of the victim regarding her age was proved, the radiologist was examined, her school admission register was also proved by the Headmaster of the concerned school and even the certified copy of the relevant entry in the birth register was also proved which were accepted by the trial court as well as by the High Court in appeal. When the matter came up before the Apex Court it was argued on behalf of the appellant that in absence of examination of the concerned officer who recorded the entry in the birth register, the document was inadmissible in evidence. The Apex Court disagreeing with the argument observed as follows:

> **"3....We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that is therefore, clearly admissible under Section 35 of the Evidence Act and that is not necessary for the prosecution to examine its author. From whatever angle we view the evidence, the conclusion is inescapable that Saroj Kumari was below 16 years of age at the time of occurrence. Accordingly, we agree with the judgments of the courts below and see no merit in this appeal which is dismissed."**

38. Our attention is also drawn to a decision of this High Court in **Mangal Debbarma Vs. State of Tripura(Crl. A(J) 25 of 2016) decided on 29/08/2019 and reported in MANU/TR/0187/2019** wherein this High Court with reference to the decision of the Apex Court in **Alamelu**(supra) held as follows:

> **"38.....In Alamelu(supra) it has been observed that mere production and marking of a document 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 truth of the facts in issue. In that case, no evidence of that kind was produced. But in the present case, the parents of the victim [PWs2 &3] have categorically stated in trial that at the time of incident, their daughter was 11/12 years of age. That statement was not even contradicted by defence in cross examination.**
>
> **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 [Exhibit-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. As we have already noted above, in the given case, age of the victim is material because the trial court framed charge of offence punishable under Section 6 of the POCSO Act, 2012, against the accused appellants besides framing charge under Section 376D IPC and found them guilty of both the charges. For proper appreciation of the facts and evidence, the findings of the learned trial court with regard to the age of the victim (PW5) recorded in paragraph 49 of the judgment which is under challenge before us is reproduced hereunder:

> *"In the case at hand the prosecution proved the school certificate of the victim. But there is no evidence in record to show on what basis the date of birth of the victim was entered in the school record. However, the victim girl while deposed before this court has stated that her age is 16 years. The medical officer PW-8 Dr. Suman Sarkar also stated in his evidence that the age of the victim-A whom he examined was 16 years. The medical report furnished by him, marked as Ext.12 also shows that her age is 16 years. The defence while cross examined the victim and the medical officer did not dispute the age of the victim stated by her in course of giving her deposition before this court. Similarly, no cross-examination is done of PW-8(medical officer) about the age recorded in the medical report (Ext.12) meaning thereby the defence accepted the age of the Victim-A. In view of the fact when the defence did not dispute her age while she was cross examined her evidence on oath cannot be discarded on technical ground. So the contention of the learned defence counsel that the age of the victim was above 16 years and that she was not a child at the time of occurrence is not tenable. Therefore, looking to the above evidence on record this court is of the opinion that the age of the victim was less than 18 years on the date of alleged occurrence and she was child within the meaning of section 2(1)(d) of the POCSO Act,2012"*

40. Thus, from the reasoning recorded by the learned trial court with regard to proof of the age of the victim, it emerges that learned trial court came to the conclusion that the victim (PW5) was of the age of 16 years because the victim (PW5) herself deposed that she was 16 years old and the medical officer(PW8) recorded in his report (Exhibit-12) that age of the victim was 16 years as on 17/01/2016 when she was examined by the medical officer (PW8) at Gandacherra sub-divisional hospital. The learned trial court did not act upon the evidence of Sri Sadhan Chakma, (PW18) who issued the school certificate (Exhibit-19) on the ground that prosecution could not

prove the source of entry of the date of birth in the school certificate. In so far as the evidence of the Medical Officer (PW8) is concerned, the PW at the trial stated as follows regarding the age of the victim:

> *"I examined the victim (name withheld) aged around 16 years in connection with the same case."*

Since the Medical Officer(PW8) was not contradicted by defence on his statement concerning the age of the victim in cross examination, the learned trial court held that the age of the victim was 16 years.

41. We are unable to agree with the views of the learned trial court because the learned trial court lost sight of the fact that the victim was produced before PW8 for collection of evidence regarding commission of rape through her medical examination and on that occasion the medical officer recorded her age in his report as 16 years as per information supplied to him by the victim. No clinical test /x-ray etc. was conducted for determination of her age. Besides, we have not come across any statement of the victim (PW5) in her entire deposition wherein she had stated that she was 16 years old.

42. As we have discussed above, principle of law laid down by the Apex Court in the case of **Birad Mai Singhvi,** then **in Narbada Devi Gupta,** thereafter **in Sunil Vs. state of Haryana** and also **in Alamelu and Anr**. (cited supra) is 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'.*

43. We have also noted above that also in the case of **Mangal Debbarma vs. State of Tripura**(cited supra), this High Court pursuant to the proposition of law expounded by the Apex Court held that mere production and marking of a document cannot be held to be a due proof of its contents and its execution has to be proved by admissible evidence, i.e. by the evidence of those persons who can vouchsafe for the truth of the contents and the High Court in that case accepted the school certificate of the victim as the proof of her age because the parents of the victim appeared before the trial court to vouchsafe for the correctness of the date of birth of the victim.

44. But in **Harpal Singh and Anr. Vs. State of Himachal Pradesh** (cited supra) the Apex Court found that *prosecution proved the age of the victim girl by overwhelming evidence* and also accepted the *entries made in the birth register as to the date of birth of the victim* as authentic piece of evidence even though the concerned official making such entries was not examined and the Apex Court held that *such entry was made by the concerned official in the discharge of his official duties* and therefore, it was clearly admissible under Section 35 of the Evidence Act and also in the 2018 judgment in **State of Madhya Pradesh Vs. Preetam** (cited supra) the Apex Court accepted the evidence of the Headmaster and the school certificate produced by him as authentic proof of the age of the victim and held that in every case prosecution cannot be expected to examine the person who has admitted a student in the school.

45. Our difficulty in this case is that though the parents of the victim(PWs 12 & 13), her elder brother (PW1) and even

her elder sister(PW3) appeared before the trial court and they were examined and cross examined, none of them made any statement about the age/date of birth of the victim to vouchsafe for the correctness of her date of birth recorded in the school certificate (Exhibit -19) which was issued by the Headmaster (PW-18) of the concerned school on 28/01/2016 i.e. 12 days after the occurrence.

46. Therefore, keeping in view the proposition of law laid down by the Apex Court in the Judgments noted above and also by this court and the facts and circumstances of the given case, we are of the considered view that though the school certificate issued by PW18 has been taken into evidence and marked as Exhibit-19 in terms of Section 35 of the Evidence Act,1872, it would not be safe to hold that the date of birth of the victim has been duly proved in this case without the source of entry being proved particularly when the parents of the victim, her elder brother and elder sister were examined at the trial and they did not give any evidence to vouchsafe for the correctness of her date of birth.

47. We have also noted the submission of Mr. Kar Bhowmik, learned counsel appearing for the appellants that the original FIR dated 16/01/2016 lodged by the appellants against Pushpa Sadhan Jamatia (PW2) was suppressed and the complaint lodged by PW1 on 17/01/2016 implicating the appellants was treated as FIR and it was acted upon by police. In this regard, a suggestion was put to the investigating officer (PW19) during his cross examination that on 16/01/2016 a case was lodged against Pushpa Sadhan Jamatia (PW2) and Sanjoy Kishore Jamatia(PW4) for committing gang rape on the victim

which was suppressed and a new FIR was registered on 17/01/2016. The investigating officer categorically denied the suggestion. The issue was also raised by Mr. Kar Bhowmik at the learned trial court. It emerges from paragraphs 61 and 62 of the trial court's judgment dated 19/07/2017 that in order to assess the merit of the submission, the learned trial court called for the General Diary of the police station of the relevant period and after perusal of the same found as follows:

> *"61.....In view of the argument of the learned defence counsel to remove the doubt over the issue this court called for the GD Book of Raisyabari P.S. of the relevant date. The present OC of the PS in compliance of the order produced the GD Book before this court under deal and cover. On 08.06.2017 I examined the all GD entry made on 15.01.2016 and 16.01.2017 in presence of the learned counsel of both side. The relevant portion of the order dated 08.06.2017 was as follows:*
>
> *"OC Raisyabari PS produced the RSB GD Book Vol No. 01 with effect from 01.01.2016 to 31.01.2016 containing the GD entry dated 15.01.2016, 16.01.2016 and 17.01.2016 as per order dated 29.05.2016 under sealed cover.*
>
> *I perused the GD Book in presence of Ld. Special PP as well as Ld. Defence Counsel.*
>
> *On perusal of the said GD Book dated 15.01.2016 and 16.01.2016 it is transpired that there is no entry in c/w RSB Case No.01/2016 dated 17.01.2016.*
>
> *In view of that learned defence counsel has submitted that the defence will not cross examine the police officer who made the GD entry on 15.01.2016, 16.01.2016 and on 17.01.2016.*
>
> *62. The order dated 08-06-2017 which has passed after perusal of the GD Book made it amply clear that there was no complaint or case registered in the police station at Raisyabari on 16.01.2016 about any incident against Pushpa Sadhan Jamatia(PW-2) and Sanjoy Kishore Jamatia (PW-4) as alleged by the accused persons in their defence story....."*

48. We have also examined the printed FIR form (Exhibit-21) and the written complaint lodged by Sumanta Jamatia(PW1). We have taken note of such overwritings appearing in the printed FIR form (Exhibit-21) at three(03) places. One of those overwritings seems to have occurred to the FIR number in column No.1 of the printed FIR form and the other has occurred to column-3(c) in the GD reference entry number and the third one appears in respect of age of the accused appellant Kumar Jamatia within the bracket after his name in column 7 of the printed FIR form. In so far as the written complaint of PW1 is concerned, there seems to be no overwriting / correction on the document. It seems that these overwritings in no way establish the defence version that originally, FIR of the case was lodged by the appellants against Pushpa Sadhan Jamatia which was suppressed and the complaint lodged by the brother of the victim (PW1) on the following day was treated as FIR and it was acted upon. Had it been true, there must have been corrections also in column 7 on the same page of the printed FIR form in respect of the names of the accused. Added to this, the overwritings as noted above, appearing on the printed FIR form(Exhibit-21) were not taken to the notice of the investigating officer for his explanation during his cross examination as PW19 at the trial. Besides, the trial court enquired into the matter pursuant to the submission of learned defence counsel and during such inquiry meticulously examined the GD book of the relevant period and found that no such complaint was filed or case was registered at the PS on 16/01/2016 against Pushpa Sadhan Jamatia and Sanjoy Kishore Jamatia.

For the reasons stated above, we are unable to accept the submission of learned counsel of the appellants in this regard.

49. We have also examined the other submissions of learned counsel of the appellants that the FIR was delayed, the identification of the accused appellants due to darkness at the PO was improbable, dispatch of the exhibits to the chemical examiner was not made in terms of the guidelines issued under Regulation 297 of the Police Regulations of Bengal and also the submission that the evidence of the forensic expert (PW16) that semen stain found in Exhibit–I (Kameez of the victim) originated from a fourth source different from the DNA profile of the three (03) accused appellants ruled out the involvement of the accused appellants and that there were major contradictions in the evidence of the prosecution witnesses etc.

50. As regards the submission of leaned counsel regarding the unexplained delay in lodging the FIR, it emerges from the record that the occurrence took place at 6.30 p.m. on 16/01/2016 and the FIR was lodged by the brother of the victim at 8.30 a.m on 17/01/2016. So there was few hours' delay in lodging the FIR. The investigating officer (PW) was confronted in cross on this issue who admitted that there was no explanation of such delay. In the course of his arguments, learned counsel of the appellants contended that the belated filing of the FIR indicates that the case against the accused appellants was an afterthought and they were falsely implicated in the case.

In our considered view, it is quite unrealistic to look for explanation for every moment's delay in reporting the crime

to police in rape cases. When such a barbaric crime is committed to a woman, not only the victim, her entire family undergoes a trauma and it takes time for them to come back to normalcy and think for other things. What we need to consider is whether the lapse of time / delay, in the given facts and circumstances of the case, creates an inference that the time was utilized for concoction and false implication.

In the given case, it emerges from evidence that the victim was discovered from the PO in an unconscious state after the occurrence took place at 6.30 p.m. and immediately after regaining consciousness she narrated the story to the members of her family and there was no chance of concoction and false implication. Added to this, their village is located in a remote place. The Police Station is not also situated at their door steps. It is about 4kms away from their home and the night intervened. In the backdrop of these circumstances, 14 hours' delay cannot be considered as fatal to the prosecution case.

51. The submission of learned counsel that identification of her assailants by the victim due to the darkness at the PO was improbable is not also acceptable for the reason that all the accused appellants were known to her who lived in the same village and evidently she had also seen the appellants when they dragged her to the rubber garden from the road after assaulting her companion namely Pushpa Sadhan Jamatia (PW2) who was later treated in the hospital for the injuries suffered by him at the hands of the accused appellants.

52. Regarding the submission of learned counsel of the appellant that the exhibits were dispatched to the Forensic Science Laboratory for chemical examination in a single packet

at the risk of leakage and that the guidelines under regulation 297 of the Police Regulations of Bengal were not followed in making the dispatch of the exhibits, it is found from the evidence of the Investigating Officer (PW19) that he was confronted on this issue in cross examination and in reply he stated that the items were sent to the Forensic Science Laboratory in one sealed packet and labels were also affixed to the wearing apparels of the accused appellants indicating their names. Dr.Subhankar Nath(PW16), who gave the final opinion in the matter was also cross examined on behalf of the accused appellants but he was not confronted on this issue at the trial. Rather, the PW in his examination in chief told that he received the exhibits in six (06) sealed packets from the Biology/ Serology Division of the Forensic lab for DNA profiling of the exhibits. The exhibits were initially received at the forensic lab by Dr. Sabyasachi Nath, Senior Scientific Officer –cum-Assistant Chemical examiner. Dr. Sabyasachi Nath having been away from his place of work on the day of hearing, the trial court accepted his report (Exhibit-17) through examination of his colleague Dr.Subhankar Nath(PW16) who was stated to be acquainted with the signature and handwriting of Dr. Sabyasachi Nath. It emerges from his report (Exhibt-17) that one sealed pitch board box parcel bearing specimen seal impressions containing the exhibits forwarded by the Sub-divisional Police Officer, Gandacherra of Dhalai district in intact condition was received at the laboratory through a special messenger on 21/01/2016 after tallying with the specimen seal forwarded therewith and out of those exhibits six(06) exhibits marked as Exhibit B,I,J,L,S and W were forwarded to the DNA typing division for further examination which were examined by

PW16 and after such examination of the exhibits, PW-16 recorded his views in his report (Exhibit-16). Therefore, it emerges that the exhibits were duly sealed in separate parcels and put together in a big pitch board box parcel bearing specimen seal impressions of the authorized officer and the same were received at the Forensic Science Laboratory in intact condition and before receiving the exhibits the specimen seal impression appearing on the parcel was also tallied with the specimen seal forwarded therewith.

From what is discussed above, we are of the considered view that there was no breach of the recognized procedure in the dispatch of the exhibits to the Forensic Science Laboratory.

53. It was also argued before us on behalf of the appellants that the prosecution evidence suffers from contradictions on material points and conviction on the uncorroborated testimony of the prosecutrix is not sustainable.

54. We have already discussed above the whole evidence adduced on behalf of the prosecution at the trial and noted that the medical report (Exhibit-18) indicates that the victim suffered from extensive injuries in her body as well as on her private part owing to the offence committed on her. For better appreciation of the evidence, the extract of the deposition of Dr. Suman Sarkar (PW8) is produced hereunder:

> *"The girl had a history of sexual assault. During examination I found scratch mark over her nose, cheek, neck, over stomach, a multiple nail mark over upper back, right thigh. I collected her blood sample, urine sample, scalp hair, vaginal swab as well as her wearing apparel. These were handed over to police. The per vaginal examination revealed ruptured hymen as well as injury*

> *mark like abrasion and scratch mark over multiple areas which were tendered at the time of examination indicating they were recent in nature. I was of the prima facie opinion that the girl underwent sexual intercourse within the recent vicinity of my examination."*

Obviously, his ocular testimony is based on his report (Exhibt-18). It is quite improbable that the victim would have lost her consciousness and suffered from such extensive injuries had it been a case of consented sexual relationship with Pushpa Sadhan Jamatia (PW2) as it has been suggested by the defence. We have also taken note of the evidence of Dr. Subhankar Nath(PW16), forensic expert and his report(Exhibt-16). As per the report (Exhibt-16) of PW16, the seminal stain found in the underwear of the victim originated from accused appellant Kumar Jamatia. This was so confirmed after DNA profiling of the blood sample collected from accused appellant Kumar Jamatia. The report (Exhibt-16) says that the seminal stain found in the kameez of the victim did not, however, originate from any of the appellants. In his cross examination, PW16 also opined that the seminal stain found in the kameez of the victim was contributed by a fourth source different from the DNA profile of the accused appellants. Learned counsel of the appellants, therefore, argued that the fourth source not being identified, the prosecution case appears to be completely doubtful and the appellants should be given the benefit of doubt. In reply Mr.S.Debnath, learned additional PP representing the state respondent contended that the evidence of the victim (PW5) against the three appellants is so clear and consistent and so strongly corroborated by the evidence of other witnesses and the attending facts and circumstances that there is no scope to suggest that she had not been gang raped by the three appellants. It is true that in his report (Exhibit-16)

Dr.Subhankar Nath (PW16) has categorically opined that the semen stain found in the Kameez of the victim originated from a fourth source different from the DNA profile of the three(03) accused appellants, but this evidence does not demolish the case against the accused appellants particularly when the DNA report has undoubtedly assured the involvement of accused Kumar Jamatia in the commission of rape upon the victim and the unambiguous and indubitable evidence of the victim(PW5) corroborated by other evidence has demonstrated that all the three accused appellants were together right from the beginning and they dragged her away from road to a lonely place in the rubber garden and took turns in the commission of rape upon her. We have taken note of the evidence of the victim (PW5). She has very categorically stated before the trial court that when she was returning from the house of Madhulaxmi Jamatia (PW11) the three appellants forcibly dragged her to the nearby rubber garden and took turns in raping her. They removed her clothes and made her lye on the ground. Appellant Khuphula Jamatia first raped her and when she was being raped by appellant Khuphula Jamatia the other two appellants held her hands and kept her mouth shut by gagging her. Thereafter, appellant Dhari Kumar Jamatia followed by Kumar Jamatia committed rape upon her. She lost her consciousness during the process. The PW further stated that she received injuries in her private parts and when she regained her sense she narrated the incident to her sister Sima Jamatia(PW3). She also stated the incident to the Doctor when he examined her. The PW also made statement (Exhibt-5) before the Judicial Magistrate under Section 164(5) Cr.P.C. which was exhibited during trial. Her statement (Exhibt-5) also

corroborates her testimony at the trial. In cross examination her evidence could not be impeached to any extent. She categorically denied the suggestions of the accused that she was not raped by the appellants. There is no denial of the fact that the three appellants were together at the material time and they met the victim when she was returning from the house of Madhulaxmi Jamatia(PW11) along with her sister Sima Jamatia(PW3), Pushpa Sadhan Jamatia(PW2) and Sanjoy Kishore Jamatia(PW4) and evidently the three appellants assaulted Pushpa Sadhan Jamatia(PW2) who fled in fear. The fact that PW2 Pushpasadhan Jamatia was assaulted is also proved by the ocular testimony of Dr. Ajoy Halam (PW17) and his report(Exhibit-18) which has also been corroborated by the statement(Exhibit-3) of Pushpa Sadhan Jamatia(PW2) recorded under Section 164(5) Cr.P.C. The victim has categorically stated that the three accused then dragged her to the nearby rubber garden and took turns in raping her. The medical evidence also supported the fact that she was subjected to sexual intercourse at the relevant time resulting in multiple injuries on her private parts. After DNA profiling of the blood sample of one of the appellants namely Kumar Jamatia, it matched with the seminal stain found in the underwear of the victim and in these circumstances the other two appellants who were all along with accused Kumar Jamatia and against whom there is unimpeachable evidence of the commission of rape on the victim cannot escape the penal consequence of the offence only on the ground that there is no forensic proof against them.

In this regard, the Apex Court in **State of Rajasthan vs. Roshan Khan and Ors. reported in (2014) 2**

SCC 476 while dwelling on a case of gang rape under Section 376D IPC made the following observation:

> **"16.....This court has, therefore, consistently held that where there are more than one person acting in furtherance of their common intention of committing rape on a victim, it is not necessary that the prosecution should adduce clinching proof of a complete act of rape by each one of the accused on the victim. (See Om Prakash v. State of Haryana[7], Ashok Kumar v. State of Haryana[8], Bhupinder Sharma v. State of H.P.[9], Pardeep Kumar v. Union Admn.[10] and Priya Patel v. State of M.P.[11])**

55. Section 376D of the Indian Penal Code also provides that where a woman is raped by one or more persons constituting a group or acting in furtherance of common intention, each of those persons shall be deemed to have committed the offence of rape. Moreover, we do not also find the slightest reason for the victim to falsely implicate the appellants in the offence involving herself and putting her future at stake.

56. The learned trial court also discussed the law expounded by the Apex Court in **State of UP vs. Chhoteylal reported in (2011) 2 SCC 550** regarding appreciation of the testimony of rape victim wherein the Apex Court held as follows:

> **"22. In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of**

> **an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that court may look for some corroboration so as to satisfy its conscience and rule out any false accusations."**

57. It is now a settled position of law that conviction can be founded on the testimony of the victim alone unless the court finds compelling reasons for seeking corroboration.

58. This court also discussed the issue in **Mangal Debbarma and Ors. Vs. State of Tripura** (cited supra) and observed as follows:

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

59. We have already discussed above, the whole evidence adduced at the trial and found that leaving aside minor contradictions here and there the prosecution has led consistent evidence in support of the charge of gang rape

committed upon the victim by the accused appellants. The evidence of the victim (PW5) is quite consistent and trustworthy and corroborated by the evidence of other Prosecution Witnesses. From whatever angle we look at the evidence, the conclusion is irresistible that the victim was gang raped by the three(03) accused appellants. The defence version on the other hand is not worth placing reliance. The trial court, therefore, rightly convicted the three (03) accused appellants namely Dhari Kumar Jamatia, Kumar Jamatia and Khuphula Jamatia for offence punishable under Section 376D of the Indian Penal Code and sentenced them to RI for 20(twenty) years with fine payable to the victim which is the minimum sentence provided under Section 376D, IPC. The offence punishable under Section 323 IPC for voluntarily causing hurt to Pushpa Sadhan Jamatia also having been proved against accused appellants namely Dhari Kumar Jamatia, and Kumar Jamatia the trial court rightly convicted and sentenced them for the offence. The age of the victim not being proved for the reasons noted above the three appellants are exonerated from the charge of offence punishable under Section 6 of the POCSO Act.

The appeal is thus partly allowed and disposed of.

Send back the LC Record.

JUDGE **JUDGE**

Saikat Sarma