

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 135 of 2017
With
IA No. CRAN 1 of 2017 (Old CRAN No.2532 of 2017)

Binoy Roy
-Vs-
The State of West Bengal & Ors.

For the Appellant: Mr. Tapan Dutta Gupta,
 Mr. Parvej Anam.

For the State: Ms. Sukanya Bhattacharyya,
 Mr. Md. Kutubuddin.

Heard on: March 08, 2021.

Judgment on: March 22, 2021.

BIBEK CHAUDHURI, J. : –

1. Judgment and order of conviction dated 8th February, 2017 and 10th February, 2017 passed by the learned Additional Sessions Judge, 2nd Court, Malda in Sessions Trial No.14 of 2015 arising out of Sessions Case No.195 of 2014 convicting the appellant under Section 376(1) of the Indian Penal Code is assailed by the convict/appellant in the instant appeal.

2. On 10th December, 2013 at about 9.05 am the victim girl lodged a written complaint stating, inter alia, that on 9th December, 2013 at about

4 O' clock in the afternoon she went to the field to bring their goats back to their house from grazing. When she was coming back to her house with the goat, one Binay Roy seeing her alone near the submersible pump house caught hold of her and forcibly raped her against her will. The victim shouted in fear, but the accused threatened her to kill. At that point of time the elder brother of the victim, namely Bipro Roy was returning home from Habibpur Rice Mill Haat. Hearing cry of the victim he rescued her.

3. On the basis of the said complaint police registered Habibpur P.S Case No.231 of 2013 dated 10th December, 2013 under Section 376 of the Indian Penal Code and took up the case for investigation.

4. The investigation ended with filing of charge-sheet under Section 376(1) of the Indian Penal Code against the accused/appellant the case was committed to the court of sessions for trial. Subsequently it was transferred to the 2nd Court of the learned Additional District Judge, Malda being the Special Court to try cases for offences against women.

5. On 2nd January, 2015 the learned trial judge framed charge against the accused/appellant under Section 376(1) of the IPC and Section 4/10 of the POCSO Act. As the accused pleaded not guilty, trial of the case commenced.

6. During trial prosecution examined 11 witnesses. Some documents were marked exhibits. The accused pleaded that he was innocent and furthermore the victim girl was not a minor at the time of commission of

offence. In support of his defence the accused examined one Sohan Tudu, teacher of Dhananjay Nimna Buniyadi Vidyalaya.

7. The learned trial judge on careful evidence on record, both oral and documentary held the accused guilty for committing offence under Section 376 of the Indian Penal Code and convicted and sentenced him to suffer rigorous imprisonment for seven years and also to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment of one year for the offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter describe as the POCSO Act).

8. At the time of hearing of the instant appeal, Mr. Tapan Dutta Gupta, learned Advocate on behalf of the appellant has assailed the judgment and order of conviction passed by the learned court below on the following grounds:-

- (i) Belated FIR – According to prosecution case, incident took place on 9th December, 2013 at about 4 p.m. and the FIR was lodged by the victim of the case on 10th December, 2013 at 9.05 a.m, i.e. after a lapse of about 17 hours. There is no explanation offered by the defacto complainant as to the delay in lodging FIR.
- (ii) Place of occurrence has not been proved – In the FIR it is alleged by the defacto complainant/victim that the accused caught hold of her near the submersible pump room situated on the agricultural field. In her evidence she stated that the alleged incident took place where a

submersible pump was installed at village Rampura which is $\frac{1}{2}$ km away from her house. The Investigating Officer prepared a rough sketch map of P.O. According to the rough sketch map (Exhibit-11) the place of occurrence was near a pond inside a bush. In the sketch map the Investigating Officer did not mention the existence of any submersible pump in or around the place of occurrence. Therefore the place of occurrence has not been proved by the prosecution.

- (iii) Framing of charge is defective – Mr. Dutta Gupta, learned Advocate for the appellant draws my attention to the charge framed against the accused/appellant by the learned Judge, Special Court at Malda. The charge was framed as hereunder:-

“Firstly – that on 09.12.13 at 4:00 p.m in the field, about half k.m north from her house when Sraboni Roy aged 17 years was returning home with her goats at village Dhananjay you committed rape upon her by force and thereby committed an offence punishable u/s 376(1) of the IPC within the cognizance of this Court and I hereby direct you to be tried on the said charge.

Secondly – that on 09.12.13 at 4:00 p.m in the field you committed the offence of penetrative

sexual assault against Sraboni Roy and thereby committed an offence u/s 4 of POCSO Act within the cognizance of this Court and I hereby direct you to be tried on the said charge.

Thirdly – that on 09.12.13 at 4:00 p.m in the field you committed an offence of aggravated sexual assault against Sraboni Roy and thereby committed an offence punishable u/s 10 of POCSO Act within the cognizance of this Court and I hereby direct you to be tried on the said charge.”

According to the learned Advocate for the appellant the learned trial judge committed gross error in framing the charge in as much as the place of occurrence was not properly mentioned in the charge and it was not explained to the accused. The learned trial judge stated that the alleged incident took place “in the field, about ½ km north from the house of the defacto complainant”. It has not been stated that the offence was allegedly committed near a submersible pump or that near a pond under a bush. Thus, the charge is defective and prejudicial to the accused.

- (iv) No independent witness was examined – it is not in dispute that the alleged incident took place on a day which was “Haat Bar” (weekly village market) in their village. There was a Haat near Habibpur Rice Mill and the witnesses stated that many villagers go to the said haat for marketing following a road running by the side of the place of occurrence. The incident took place at 4 p.m. It is obvious that many people were going through the road running by the side of the place of occurrence on the particular date and time. The defacto complainant herself admitted that there are cultivable land near the place of occurrence and people frequently go to that place for their work. She also admitted that herds of cattle were returning home after days grazing through the field. It is a matter of great surprise that except the elder brother of the victim no other villager witnessed the incident. The accused/appellant is entitled to get the benefit of adverse presumption under Section 114(g) of the Indian Evidence Act for non prosecution of the independent villagers in support of the prosecution case.
- (v) Mr. Dutta Gupta further submits that the investigation of this case was absolutely perfunctory. From the evidence of the Medical Officer it is ascertained that

vaginal swab of the victim was collected and it was sent to the Forensic Science Laboratory for chemical examination. The chemical examination report of vaginal swab of the victim was not collected by the Investigating Officer. He even did not seize the wearing apparel of the appellant. Without considering such evidence, learned trial judge committed wrong in holding the appellant guilty for commencing offence under Section 376 of the Indian Penal Code and Section 4 read with Section 18 of the POCSO Act.

- (vi) It is also submitted by the learned Advocate for the appellant that the POCSO Act is applicable for special kind of offences mention in the Act purported upon a child below the age of 18 years. It is the specific case of the defence that on the date of occurrence the victim was above 18 years of age. In order to prove the defence case the appellant examined a teacher of Dhananjay Nimna Buniyadi Vidyalaya as Dw1. DW1 produced the original school admission register where the date of birth of the victim was entered as on 28th October, 1995. The alleged incident took place on 9th December, 2013 therefore on the date of alleged occurrence the victim was more than 18 years of age and charge under

Section 4/10 of the POCSO Act is bad in law and so is the conviction.

- (vii) It is further submitted by the learned Advocate for the appellant referring to the cross examination the victim (PW1) that the accused was known to her for last 10/12 years. There was a talk of marriage with the PW1 and the accused prior to the alleged incident. Referring to the above evidence it is submitted by the learned Counsel for the appellant that the accused may be falsely implicated by the victim girl and her family members as he refused to marry her.
- (viii) According to Mr. Dutta Gupta the learned Judge failed to consider the evidence on record in its true perspective. Even the learned trial judge did not frame the points of determination in his judgment and violated the provisions of Section 354(b) of the Code of Criminal Procedure. Accordingly it is submitted by him that the judgment and order of conviction and sentence is liable to be set aside and the appeal should be allowed by this Court.

9. Learned P.P-in-Charge, on the other hand submits that importance of the evidence of a victim in a case of rape is similar to that of an injured witness. A victim of rape is not an accomplice of offence. She is the only witness from him eyewitness account of the incident is available. Solitary

evidence of the victim of rape can be the basis of conviction without any corroboration if the testimony of the victim is trustworthy, unblemished and inspires confidence of the court. In such case even no corroboration is required.

10. With this introduction, learned Advocate for the respondent refers to the evidence of PW1. She stated on oath that on 9th December, 2013 at about 4 p.m when she was returning with their goats from the field at village Rampura, the accused caught hold of her on the field at a place where a submersible pump was installed and committed rape upon her. At that point of time there was no person in the vicinity. She raised alarm which attracted her elder brother Bipro Roy who was returning from rice mill bazaar at the relevant point of time. The said Bipro Roy rescued PW1 and the accused fled away from the place.

11. The elder brother of the victim, namely Bipro Roy deposed during trial as PW2. He corroborated the evidence of PW1 in all material opportunities. In his evidence he stated that on the way back to his home from Habibpur Rice Mill Bazarat about 4 p.m he went to the field to look for their goats at that time he heard a cry coming from near the submersible pump. When he reached the place, he saw Binay Roy committed rape of her sister. Seeing him Binay fled away and PW2 brought his sister back to home.

12. It is submitted by the learned Advocate for the respondent that no girl who has attained marriageable age on the date of her deposition will depose at the cost of her chastity and only to implicate the accused

falsely. It is also pointed out by the learned Counsel for the respondent as to why the elder brother of the victim would implicate his younger sister as a victim of rape. The victim knows that she will have to bear a stigma for being a victim of rape. Her family members may not be able to give her marriage. She is suffering such trauma after the offence was committed upon her. In spite of such disadvantageous position, the victim girl came up to depose during trial against the accused. Her evidence in chief could not be shaken in her cross examination. It may be a fact that there was a talk of marriage of the victim with the accused especially when no suggestion was put to PW1 to the effect that she implicated the accused in a false case after the accused refused to marry her.

13. Learned Advocate for the respondent further submits that the alleged incident took place on 9th December, 2013 at 4 p.m. The victim girl lodged complaint before the Officer-in-Charge of the local P.S on 10th December, 2013 at 9.00 a.m. In her written complaint she stated that as a result of the offence purported upon her, her mental state was not good. This was the reason why she lodged the complaint on the next day at about 9 a.m. Thus in the complaint itself, delay was properly explained by the victim. There was no cross examination on this score by the defence during trial of the case. At the stage of appeal, the convict/appellant again raised such question of delay in lodging the FIR. The accused is not entitled to get any benefit for such delay in lodging the FIR.

14. In reply to the argument advanced by the learned Advocate for the appellant on the point of defect of charge, the learned Advocate for the State respondent refers to the provision of Section 215 of the Code.

Section 215 runs thus:-

“No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.”

He also refers to Section 464(1) of the Code. The said provision is quoted below:-

“464. Effect of omission to frame, or absence of, or error in, charge.-(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.”

15. Thus, it is submitted by the learned Advocate for the State that even assuming that there was error in charge, such error or omission to state the offence in particular shall not be treated as illegality and for this reason trial cannot be vitiated unless the accused was in fact misled by such error or omission or it has caused a failure of justice. Section 464 of the Code goes further to state that even omission to frame charge or the irregularity in charge shall not be treated to be fatal unless a failure of justice has in fact been occasioned thereby.

16. It is also submitted by the learned Advocate for the respondent that immediately after lodging the FIR the victim girl was medically examined by PW4 Dr. Mukti Saha Basak. On examination of victim, PW4 found that her hymen was ruptured; vagina admits one finger and there was no scratch mark or scar on her private parts. PW4 also recorded that the victim girl stated to her that she was raped by appellant Binay Roy, her neighbour on 9th December, 2013 at 4 p.m in a field nearby her house when she went to the field to bring their goats back. The Medico Legal Examination report is marked as exhibit-3/1.

17. It is urged by the learned Advocate for the respondent that Medico Legal Examination is sufficient to hold the accused guilty for committing offence under Section 376 of the Indian Penal Code. When the medical evidence is conclusive no further scientific examination report or examination of wearing in apparel of the victim and the appellant is necessary.

18. It is further submitted by the learned Advocate for the state respondent that there is no ground to interfere with the judgment and order of conviction passed by the learned Judge, Special Court at Malda in Sessions Trial No.14 of 2015.

19. Having heard the learned Advocates for the appellants and the state respondents, I like to record at the outset that though the learned Advocate for the appellant has raised doubt over the authenticity of the FIR on the ground of delay, such delay in filing FIR itself cannot be a ground to doubt the prosecution case and discard it. It often happens that the victim in sexual offence does not complain against such act immediately because of her shame or uncertainties about the reaction of their parents, neighbours and other persons with whom she has acquaintance. These are precisely the reason for delay in lodging FIR in cases of sexual offence. In the instant case the defacto complainant stated in the FIR that after the incident her mental condition was not stable and therefore there was delay in lodging the FIR. The said statement made by the defacto complainant in the FIR was not challenged or contradicted during her cross examination. Therefore delay in lodging the FIR in the instant case is of no consequence.

20. I also do not find any merit in the submission made by the learned Counsel for the appellant that the appellant was prejudiced as in the charge the place of occurrence was not properly mentioned.

21. In the charge framed by the learned Special Court at Maldla it is stated that the place of occurrence is “....in the field, about ½ k.m north from the house of the defacto complainant”. The learned judge did not specify that the offence was committed inside a bush on the field by the side of a submersible pump.

22. The effect of error or omission to frame charge was first considered by a Five Judges Bench of the Hon’ble Supreme Court in the Case of **Willie (William) Slaney vs. The State of Madhya Pradesh** reported in **AIR 1956 SC 116**. Hon’ble Justice Vivian Bose speaking for the Bench observed as follows:-

“44. In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage. If it was not, and particularly where the accused is defended by counsel (*Atta Mohammad v. King-Emperor*) it may in a given case be

proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that “no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused” (*Abdul Rahman V. King-Emperor*). But these are matters of fact which will be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases “however” alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even Judges, are sometimes prone to argue and to act as if there were.”

23. The said decision was subsequently considered with approval in the case of **Esher Singh Vs. State of A.P.** reported in **2004 (11) SCC 585**.

24. The Code does not define what a charge is. It is the precise formulation of the specific accusation made against a person who is entitled to know its nature at the earliest stage. A charge is not an accusation made or information given in the abstract, but an accusation made against a person in respect of an act committed or omitted in violation of penal law forbidding or commanding it. In other words, it is

an accusation made against a person in respect of an offence alleged to have been committed by him

25. The main purpose for framing a charge is to make the accused aware of the accusation made against him for which he would be tried so that the accused can get an opportunity to defend himself.

26. In the instant case the appellant was charged for committing offence of rape and/or aggravated penetrative sexual assault upon defacto complainant/victim on 9th December, 2012 at about 4 p.m. The charge contains the date and time of occurrence. The place of occurrence was stated as in the field about ½ k.m away on the northern side of the house of the defacto complainant. The defacto complainant in her FIR narrated the P.O in the same words as employed by the learned trial judge. No cross examination was made to any of the witnesses on behalf of the prosecution that the alleged incident did not take place at the place narrated by the defacto complainant. In his defence the appellant did not take any plea that no such incident took place on the date, time and place of occurrence as stated by the defacto complainant. From the cross examination of the witnesses on behalf of the prosecution as well as the examination of the accused under Section 313 of the Code of Criminal Procedure it is ascertained that the accused was not mislead or prejudiced for not specifying the place of occurrence as in the field under a bush by the side of a submersible pump. Moreover, in order to get rid of the charge under the POCSO Act, the accused summoned a teacher of a local school with admission register of the victim girl. The said admission

register was proved and marked as exhibit-A in order to prove that at the relevant point of time the prosecutrix was more than 18 years of age. Thus the accused being not mislead or prejudiced by the charge framed by the learned trial court, argument advanced by the learned Advocate for the appellant criticizing framing of charge cannot stand.

27. It is pertinent to mention here that the decision of the Division Bench in this Court in the case of **Rebati Baidya & Ors. vs. The State of West Bengal** reported in **(2014) 1 C Cr LR (Cal) 171** is not applicable under the facts and circumstances of this case. In the said report there was no precise indication of the time when the incident occurred or indeed the place where the offence was allegedly committed by the appellants. Furthermore, there was also no indication in the charge as to how the offence was allegedly committed.

28. In the instant case, however, date and time of occurrence, place of occurrence and the nature of offence was clearly narrated in the charge and it was read over and explained to the appellant when he pleaded not guilty. Thus, I do not find any irregularity in framing of charge in the instant case and trial of the case was not vitiated.

29. In a case of sexual offence, seeking for corroboration from the eyewitnesses will add to the mental wound and psychological trauma of the victim girl. The nature of sexual offence is such, it is needless to say, that the offender always commit the offence in such a manner that nobody might see the incident. The incident took place on 9th December, 2013 at about 4 p.m it was winter afternoon. During the month of

December in the afternoon sunlight fades. So, it might not be possible for the passersby to notice the incident. In cross examination the victim girl admitted that many people follow the road running by the side of the place of occurrence to go to Habibpur Rice Mill Bazar. However PW1 was not cross examined as to whether at the time of occurrence other people were going through the said road or not. It would also not be out of place to mention that PW2 saw the incident while returning from the market when he went to the field in search of their goats. No cross examination was also made that the place of occurrence was visible from the road and the passerby had the opportunity to see the incident. In a case involving sexual offence, non examination of the independent witness is not fatal for the prosecution and no adverse presumption can be taken under Section 114(g) of the Indian Penal Code.

30. For the reasons stated above, I am not in a position to rely on the decision of the Division Bench Sikkim High Court reported in **2018 (2) AICLR 45 (Sikkim)** as well as the decision of the Hon'ble Supreme Court in the case of **Chunthuram vs. State of Chhattisgarh** reported in **(2021) 1 SCC (Cri) 9**. In **Chunthuram's** case vital forensic evidence was kept away during trial of the case and not produced as evidence. In such circumstances, the Hon'ble Supreme Court held that adverse presumption will have to be drawn against the prosecution. In the instant case no adverse presumption can be drawn for non examination of any issue called independent witness when it is not established that on the date and time of occurrence some people other than the elder brother

of the victim saw the incident and they were not made witnesses in the instant case.

31. In an offence of rape, the offence of the prosecutrix is of great importance. It is observed by the Hon'ble Supreme Court in the cases of **Ranjit Hazarika vs. State of Assam** reported in **1998 (8) SCC 635** as well as **State of Punjab vs. Gurmit Singh & Ors.** reported in **1996 (2) SCC 384**, the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman will come forward in a court just to make a humiliating statement against her honour such as involved in the commission of rape on her. The evidence of a prosecutrix should not be suspected and should be believed and if the evidence is liable, no corroboration is necessary.

32. In the case of **Raju v. State of Madhya Pradesh** reported in **(2008) 15 SCC 133**, it is observed and held by the Supreme Court in paragraphs 11 and 12 as under :-

11."It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

12. Reference has been made in **Gurmit Singh's case** reported in **1996 (2) SCC 384; 1996 SCC CrI.316** to the amendments in 1983 to Sections 375 and 376 of the Indian Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. 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. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

33. In the subsequent decision of the Hon'ble Supreme Court in the case of **Rai Sandeep @ Deepu vs. State of NCT of Delhi**, reported in **(2012) 8 SCC 21**, the Hon'ble Supreme Court had the occasion to consider who can be said to be "sterling witnesses". It is observed and held as under:-

22. "In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose

version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core

version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

34. In case of **Krishan Kumar Malik v. State of Haryana** reported in **2011(7) SCC 130**, it is observed and held that no doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

35. Bearing the principles quoted above in various decisions by the Hon'ble Supreme Court in mind, if we consider the instant case it is found from the evidence on record that within 17 hours of the occurrence the defacto complainant lodge complaint before Officer-in-Charge of jurisdictional police station. In her FIR she clearly stated that the accused forcibly committed rape upon her. When the victim raised hue and cry, he threatened her with dire consequence. At that time the elder brother of the prosecutrix came to the spot and accused fled away leaving the prosecution.

36. Immediately after recording of formal FIR, the prosecutrix was produced before the learned Judicial Magistrate, 3rd Court at Malda who recorded her statement under Section 164 of the Code of Criminal Procedure. She clearly narrated the incident and the manner in which the accused/appellant, commit rape upon her to the learned Magistrate. The statement under Section 164 of the Code of Criminal Procedure was marked as Exhibit-2. On the selfsame date she was medically examined

and the doctor found her hymen was ruptured. I also do not find any reason to disbelieve the evidence of PW2 Bipro Roy who is the elder brother of the victim. Thus, on careful consideration of the entire evidence on record, I have no hesitation to hold that the learned Judge, Special Court Malda rightly held the appellant guilty for committing offence under Section 376 of the Indian Penal Code and convicted him.

37. Therefore, there is no reason to interfere with the judgment and order of conviction and sentence passed by the learned trial judge against the appellant under Section 376(1) of the Indian Penal Code.

38. Now comes to the question as to whether the prosecutrix was below 18 years of age at the time of commission of offence. In order to prove her age, the Investigating Officer collected the admit card issued by the West Bengal Board of Secondary Education in the name of the prosecutrix. In her admit card, her date of birth is recorded as 27th February, 1996. The incident took place on 9th December, 2013. If in the absence of other evidence, the admit card is accepted as the proof of date of birth of the prosecutrix, she was aged about 17 years and 9 months on the date of occurrence.

39. Learned Advocate for the appellant referring to a decision of the Hon'ble Supreme Court in the case of **Jarnail Singh vs. State of Haryana** reported in **2013 (4) AICLR 815** submits that in case of difference in date of birth in the admission register of the school and the admit card by the Board, the admission register shall prevail. In paragraph 20 of the aforesaid report it was held by the Hon'ble Supreme

Court that on the issue of determination of age of minor, one only needs to make a reference to Rule 20 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. The said rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 refers to the procedure to be followed in determination of age. It is further held by the Hon'ble Supreme Court that even though Rule 12 is directly applicable only to determine the age of a child in conflict with law, the aforesaid statutory provision should be the best for determining age, even for a child who is a victim of crime.

40. I have already stated that one Sohan Tudu, a teacher of Dhananjay Nimno Buniyadi Vidyalaya was examined as DW1. He produced the admission register of the prosecutrix where from it is found that the date of birth of the petitioner was recorded in the school admission register as on 28th October, 1995. If the said record is accepted to be true and genuine, the victim was more than 18 years of age.

41. Apart from the above mentioned documents, no further evidence is on record to ascertain the age of the victim. The basis of recording the victim's date of birth recorded in the admit card issued by the West Bengal Board of Secondary Education and also in school admission register was not stated in the evidence.

42. Since there remains discrepancy and conflict between two documents as record the date of birth of the prosecutrix, it was necessary for the prosecution to conduct ausification test of the prosecutrix. However her ausification test was not done.

43. When two conflicting dates are available as the date of birth of the victim, none of the said two dates should be accepted. In such case, the prosecutrix must be held to be above 18 years of age on the date of commission of offence.

44. Since the accused/appellant committed rape upon the prosecutrix against her will and without her consent, the learned Special Judge rightly held him guilty for committing offence under Section 376(1) of the Indian Penal Code.

45. On independent and careful scrutiny of evidence on record, I do not find any infirmity in the impugned judgment passed in the learned Court below in Sessions Trial No.14 of 2015.

46. The instant appeal is accordingly dismissed on contest however without cost.

47. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court, Malda in Sessions Trial No.14 of 2015 is affirmed.

(Bibek Chaudhuri, J.)