

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak
and
The Hon'ble Justice Md. Shabbar Rashidi

CRA 68 of 2021
Srikanta Dhara..... Appellant (in jail)

Versus

The State of West Bengal

For the appellant : Mr. Niladri Sekhar Ghosh, Adv.

: Ms.Sompurna Chatterjee, Adv.

: Mr. Sourov Mondal, Adv.

For the State : Ms. Zareen N. Khan, Adv.

: Md. Kutubuddin, Adv.

: Mr. Arup Sarkar, Adv.

For the victim/de facto

complainant : Mr. Jayanta Narayan Chatterjee, Adv.

: Ms. Moumita Pandit, Adv.

: Ms. Nandini Chatterjee, Adv.

: Mr. Supreem Naskar, Adv.

: Ms. Jayashree Patra, Adv.

: Ms. Ritushree Banerjee, Adv.

: Ms. Pritha Sinha, Adv.

Hearing concluded on : March 15, 2023

Judgment on : April 05, 2023

Md. Shabbar Rashidi, J.

1. The appeal is directed against the judgment of conviction dated December 20, 2018 and order of sentence dated December 21, 2018 passed by the learned Judge, Special Court under the Protection of Children from Sexual Offences Act, Serampore, Hooghly in Sessions Trial No. 09/2017 arising out of Special Case (P) No. 19/2017.
2. By the impugned judgment of conviction and order of sentence, the appellant and another accused were convicted for the offences punishable under Section 376D of the Indian Penal Code and Sections 6 and 12 of the Protection of Children from Sexual Offences Act, 2012. They were sentenced to rigorous imprisonment for 20 years each and a fine of ₹. 50.000/- and in default of payment of fine to undergo simple imprisonment for a further period of three months, for the offence punishable under Section 376D of the Indian Penal Code as well as of the Section 6 of the POCSO Act, 2012. They were also sentenced to rigorous imprisonment for 3 years each and

a fine of Rs. 10.000/- and in default of payment of fine to undergo simple imprisonment for a further period of one month, for the offence punishable under Section 12 of the POCSO Act, 2012. Both the sentences were directed to run concurrently.

3. The mother of the victim lodged a written complaint on April 26, 2017 with the police stating, inter alia, that the victim was 16 years of age. On April 25, 2017, a Puja was being celebrated throughout the night. The de facto complainant along with her husband and two daughters went to see the Puja. She further stated that in the early morning of April 26, 2017 at about 5 AM, when the Puja was over, her daughter i.e. the victim was talking to her friend at a place which was a little distance away from the temple. In the meantime, the two accused persons came to her daughter and dragged her forcefully into a vacant land i.e. the place of occurrence and committed rape upon her against her will.

4. The written complaint also disclosed that the two accused persons used to block occasionally the way of

the victim on her way to school occasionally, passed lewd comments and used to threaten to commit rape upon her. The de facto complainant also stated that the victim disclosed the aforesaid facts before her but out of shame and fear; she did not make any complaint in this regard.

5. It was also stated in the written complaint that the friend of the victim fled away from the place they were talking out of fear. The accused persons took photographs of the rape committed upon the victim through their mobile phone and threatened the victim to make it viral if she disclosed the incident to anyone. The victim managed to reach her house crying and disclosed the incident to the de facto complainant. After discussions with her husband, the de facto complainant lodged the written complaint with the police.

6. On the basis of such written complaint, Chanditala Police Station Case No. 180/17 dated April 26, 2017 under Section 376 D of the Indian Penal Code and Section 6/12 of the Protection of Children from Sexual

Offences Act, 2012, was started against the two accused persons including the appellant.

7. The police took up the investigation and on completion of the investigation, submitted the charge sheet. Charges under Section 376 D of the Indian Penal Code and Sections 6 and 12 of the Protection of Children from Sexual Offences Act were framed against the two accused persons including the appellant on July 1, 2017. Both the accused persons pleaded not guilty to the charges and claimed to be tried. Accordingly, they were put on trial.

8. In course of trial, the prosecution examined as many as 12 witnesses. In addition, prosecution also relied upon certain documentary and material evidences. On conclusion of the prosecution evidences, the two accused persons including the appellant were examined under Section 313 of the Code of Criminal Procedure.

9. It is submitted on behalf of the appellant that on the basis of the given injuries found on the private parts of the victim, the doctor was not in a position to come to a

definite conclusion that the injuries found on the person of the victim were sustained in the alleged incident. Moreover, DNA test was suggested. The wearing apparel of the victim, vaginal swab of the victim and semen of the appellant were collected and sent for examination. However, no report in this regard was ever produced and proved by the prosecution. Such report, if proved, could have conclusively established the guilt of the accused persons including the appellant or in the alternative could result in demolition of the prosecution case.

10. It was contended that failure on the part of the prosecution to produce the DNA test report necessarily entails an adverse inference against the prosecution case, as set out, in terms of the provisions of Section 114 of the Indian Evidence Act, 1872. In support of such contention, learned advocate for the appellant has relied upon the case of **Krishan Kumar Malik versus State of Haryana (2011) 7 SCC 130.**

11. Learned advocate for the appellant also contended that the doctor failed to describe the age of the injuries

found on the person of the victim. Since, the doctor had opined that the injuries so found could be the result of any other reasons including masturbation with large nails and that there may be various reasons which may cause rupture of hymen. In absence of the description regarding the age of such injury, the same may not be associated to the incident alleged. The appellant has relied upon the case of **Rai Sandeep alias Deepu; (2012) 8 SCC 21.**

12. Learned advocate for the appellant has also doubted the prosecution case on the ground that the victim is alleged to have been dragged by the appellant and another accused and committed rape upon her on rough surface of earth. In the incident, the victim is not portrayed as a consenting partner. It is contended that no injury whatsoever, has been found on the person of either the victim who was dragged and raped on a rough surface, or on the person of the accused persons as the victim was expected to have put some amount of resistance in the incident. To such proposition, learned

advocate for the appellant cited the decisions in the case of **Abbas Ahmad Chaudhary** reported in **(2010) 12 SCC 115, Ganesh Orang versus State of West Bengal and Another; 2022 SCC On Line Cal 255 and Raju and others versus State of Madhya Pradesh; (2008) 15 SCC 133.**

13. It was also submitted by the learned advocate for the appellant that post occurrence conduct of the victim was anything but natural. Having been subjected to an incident of rape, the doctor did not notice any trauma or mental reaction as was expected in a victim of rape.

14. Learned advocate for the appellant also highlighted that the father of the victim was not informed about the incident and he came to know of the occurrence after the First Information Report was already lodged. Besides, the sister of the victim left for her matrimonial house on the very day of the incident and report to police. Such facts, have been canvassed on behalf of the appellant as not a natural human conduct, telling upon the credibility of the prosecution case.

15. Learned advocate for the appellant also contended that the appellant and another accused were falsely implicated in the incident with a view to cover up an incident perpetrated by some other persons, more particularly, PW7, who was in a relationship with the victim, admittedly, in abhorrence with her brothers and might have been found in compromising condition with him.

16. It was also pointed out by learned advocate for the appellant that evidence has come that there was a large gathering of people at the relevant date and time owing to celebration of Puja, nevertheless, no one from such a huge gathering could notice and intervene in the incident. No one from such congregation was examined as a witness by the prosecution. Such facts cast serious doubts regarding the prosecution case.

17. Learned advocate for the appellant also questioned the implication of the appellant in the incident on the ground that there are contradictory statements regarding the identification of the accused persons. He referred to

the statement of the victim who stated that initially she did not know the name of the assailants but later on she would come to know their names from the police. Whereas, her uncle PW4 stated that the victim identified the appellant after some photograph of the boys playing football in her village were shown to her from the mobile phone of one villager, however, the First Information Report contained the names of the assailants from the very inception.

- 18.** It was pointed out that the person from whose mobile phone the victim identified the assailants was not examined nor his mobile phone was seized. Moreover, the club near which, the victim was talking to her friend was not identified. Therefore, according to learned advocate for the appellant, identification of the appellant as an assailant is doubtful. Besides, the mother of the victim and PW7 has stated that the victim was with her till 4.30 am whereas her friend PW2 has contradicted by saying that he was with her till 1.30 am. The mobile phone of the appellant which was used to record the photos of the

incident was never sent for expert examination. Such facts also raise doubts regarding the veracity of the prosecution case.

19. Learned advocate for the appellant contended that the conviction of the appellant on the basis of such contradictory evidence is liable to be set aside.

20. Learned advocate for the state submitted that the prosecution witnesses including the victim herself as well as her parents have supported the case of the prosecution as made out in the written complaint. It is submitted that the date and time and place of the occurrence as also the manner of the occurrence has been emphatically established with the help of the prosecution witnesses led at the trial. It has also been contended that the manner in which the offence was perpetrated by the appellant and the accused persons as narrated by the prosecutrix has been supported by all the other witnesses examined on behalf of the prosecution. Not only that, the nature and extent of the injuries found on the private parts of the victim detected

by the doctor, seems to be quite commensurate with the manner of the occurrence carried out by the accused persons in the commission of the offence complained of. It has been submitted on behalf of the state that the prosecution witness has been able to prove sufficiently the case as made out in the written complaint beyond the shadow of all reasonable doubts and as such learned Trial Court was quite justified in convicting the accused appellant. Accordingly, it was submitted on behalf of the State that the impugned judgment of conviction and order of sentence deserves to be upheld.

- 21.** The de facto complainant/respondent No. 2 has also stated that the victim in her deposition at the trial was quite consistent in the description of the alleged incident as set out in the written complaint. It was further contended on behalf of the respondent No. 2 that the witnesses examined on behalf of the prosecution have sufficiently supported the case of the prosecution as stated by PW 1. It has been submitted that the victim herself was quite consistent in her deposition as regards

the date time and place of occurrence as also the manner in which the incident happened at the hands of the accused persons. The learned advocate for respondent No.2 has relied upon the decision in the case reported in **(2020) 10 SCC 573 (Ganesan V. State)**.

22. Learned advocate for the respondent No.2 further stated that the case of the prosecution can be said to have been proved even on the basis of sole testimony of the prosecutrix and in the cases involving sexual offences like rape, the victim cannot be considered to be an accomplice rather, she should be considered as victim of sexual assault. On such proposition the respondent relied upon **(2010) 8 SCC 191 (Vijay Vs. State of MP)**, **(1990) 1 SCC 550 (State of Maharashtra Vs. Chandra Prakash Kewalchand Jain)**, **(2005) 3 SCC 594 (State of U.P. Vs. Pappu)**, **(1996) 2 SCC 384 (State of Punjab Vs. Gurmeet Singh)**, **(2009) 16 SCC 69 (Rajendra Vs. State of H. P.)**, **(2022) 8 SCC 668 (Virender Vs. State of M.P)**, **(2022) 2 SCC 74 (Phool Singh Vs. State of M. P)** and **(2008) 11 SCC 20 (Moti Lal Vs. State of M. P)**.

23. It was contended on behalf of learned advocate for the private respondent no. 2 that the impugned judgment of conviction and order of sentence passed by learned trial court is based on established principles of law and credible evidences and, therefore, prays for upholding the same.

24. In order to bring home the charges, the prosecution examined twelve witnesses in all. In addition, the prosecution also relied upon certain documentary as well as material evidences.

25. The victim herself deposed as PW1. She stated that her mother lodged a written complaint with regard to an incident that occurred in the early morning of April 26, 2017. She has stated that on the relevant date at about 5/5.30 am, she was talking with one of her friends, with whom she had a love affair standing by the village road and a pond situated on the back side of her house. She also stated that she reached the place to find seclusion from the temple, where a Puja was going on and loudspeakers were running at high pitch. At that time,

two boys came there and one out of them started chasing her friend whereas other pressed her mouth with his hands. She further stated that her friend fled away out of fear thinking that the two accused persons were the elder brothers of the victim.

26. PW1 further stated that both the accused persons caught hold of her and dragged her to a nearby vacant land. She was threatened by the two accused persons that if she raised any shout, she would be killed. Thereafter, wearing apparels of PW1 were removed and the two miscreants committed rape upon her. She further stated that the accused persons also took photographs of the incident and threatened her that if she would disclose anybody about the incident, the photographs would be published on the internet. PW1 has also stated that previously she had seen the aforesaid two boys near her school. They used to pass loose comments but she never responded to such behaviour.

27. PW 1 also made a statement under Section 164 of the Code of Criminal Procedure which was tendered in

evidence and marked as Exhibit-1. PW1 identified the appellant and another accused in Court as the miscreants. PW1 further stated that after the incident she came back to her crying. Upon being asked by her mother, she disclosed the incident to her whereupon her mother lodged a written complaint with the police. She has also stated that at the time of the incident, she did not know the name of the two miscreants but subsequently she came to learn from Police their names as Srikanta and Abhijit. In her cross-examination, PW1 stated that she never complained of the misbehaviour done by the accused persons to her friends or teachers of the school. She voluntarily stated that the said facts to the Police and her mother. PW1 in cross-examination stated that her elder brothers did not like her mixing up with the friend with whom she was talking.

- 28.** The mother of the victim deposed as PW2. She has stated that the incident occurred on 26 of Baisakh of the year she was deposing. On the day of Rakhsa Kali Pujo there was a village fair in the locality. She along with her

daughters attended the Puja and observed the dance and fair throughout the night. She further stated that at the dawn, she asked her daughter to return to the house while she was watching the dance performance. But she intended to stay back and observe the dance program. Thereafter, PW2 left for her whom at about 4/4.30 am.

- 29.** PW2 also stated that thereafter her daughter went a little away from her house as well as from the venue of cultural program with her friend. While her daughter PW1 was talking to her friend, suddenly two boys came there and one of them chased the friend of her daughter. The other boy caught hold of PW1. The second boy also came back. Thereafter, both the boys dragged her daughter to a nearby place by gagging the mouth of her daughter. The aforesaid two boys forced PW1 to disrobe and thereafter committed rape upon her. PW2 also stated that the miscreants also took photographs of the incident of rape on their mobile and threatened her daughter to publish the photographs in public if she disclosed the incident. She also stated that her daughter returned

home crying and when she asked PW1, she disclosed the incident to her. PW2 then prepared a complaint with the help of one Abhijit Bag, son of her elder brother-in-law, which she submitted to the Police. PW2 tendered the written complaint in evidence which was marked as Exhibit-2. She then brought PW1 to the hospital where she was medically examined. PW2 also made a statement under Section 164 of the Code of Criminal Procedure which she tendered in evidence and marked as Exbt. 3.

- 30.** In her cross-examination, PW2 stated that her daughter upon returning to the house reported that Srikanta and Abhijit committed the incident upon PW1 and thereafter, the written complaint was prepared. She admitted that she had knowledge that PW1 had an intimacy with her friend and that her husband and her sons of PW2 did not like such intimacy of PW1 with the said friend. In her cross-examination, PW2 further stated that all the details of the incident were narrated by PW1 to her in the house.

31. The father of the victim was examined as PW3. He stated that he knew that his wife lodged a written complaint with the Police Station with regard to an incident occurred on his daughter. He also stated that initially no one communicated anything about the incident but subsequently, PW3 came to know about it. The incident is said to have taken place on the day of Kali Puja celebrated in his village on 25/26 of Boisakh. He also stated that on the said day, two boys, one of whom was the appellant, committed rape upon her daughter at about 4.30/5 am at the place of occurrence. PW3 identified the appellant and the other accused in Court. He also tendered the birth certificate of the victim which was marked as Exbt. 4. PW 3 further stated that he came to know from his daughter that the accused persons used to pass remarks upon PW1 on her way to school.

32. The uncle of the victim deposed as PW4. He stated that the occurrence took place with PW1 on 25 of Boisakh when Raksha Kali Pujo was observed on the

village. On the following day, PW1 was crying after returning to her house in the early morning. She disclosed to PW2 the two boys forcibly took her to a vacant land i.e. the place of occurrence and committed rape upon her. PW4 also stated that subsequently he came to know that the miscreants were the appellant and one Abhijit. He identified the two accused persons in Court. PW4 further stated that after lodging of the written complaint, he visited the police station on a day where police obtained his signature on a paper. He proved his signature on such document (Exbt. 5). In his cross-examination, PW4 stated that he signed on the document as evidence of the fact that the accused persons committed rape upon his sister. He came to know about the incident at about 8.30/9 am on the day following the Puja. He came back to his house at about 4/4.30 am. PW4 also stated in his cross-examination that he knew the accused persons including the appellant as they used to visit his village for play foot ball. He further stated in his cross-examination that

initially PW1 could not say the name of the miscreants but she stated that the boys were from adjacent village. Thereafter, the photographs of some boys who used to play football in their village were shown to the victim from the mobile of one Chiran wherefrom the victim identified the two accused persons including the appellant as the miscreants. PW4 has also stated that at the time when his sister identified the accused persons in the mobile set of Chiran, the parents of the victim were also present beside herself.

33. The married sister of the victim was examined as PW5. She has stated that after her marriage, she had been residing at her matrimonial house; occasionally she used to visit her father's house. On 25 of April in the Bengali month of Boisakh the year, she deposing, Rakkha Kali Puja was organised in her paternal village. She stated that she was then present at her father's house and watched the Puja till 1 a.m. in the night. Thereafter, she went to sleep to her father's house. On the following morning, she wake up at 6 a.m. and coming

out from her room, she saw the victim and her mother crying sitting in the verandah. Upon her query, her victim sister disclosed that the boys forcibly had taken her to the vacant land (place of occurrence) and committed rape upon her and also took the photographs of the incident. PW5 also stated that subsequently, she came to know that Abhijit and Srikanta Boral were the culprits of such committed offence. She was also reported by the victim that the aforesaid two persons used to pass loose comments on her way to the school. In her cross-examination, PW3 stated that she returned to her matrimonial house from her father's house in the afternoon at the day of Kali Puja and she was not interrogated by a Police.

- 34.** The medical officer who examined the victim deposed as PW6. He stated that on April, 27 2017, he examined the victim and on such examination, he found slight bruise over the right lower aspect of vaginal introitus. No other injury was seen by PW6 in vulva, buttock, perineum, thigh, breast and back. PW5 also

found hymen tears at the middle of lower aspect of vaginal introitus associated with slight bleeding. He tendered the report prepared by him which was marked as Exhibit-6. PW6 stated that the victim disclosed before him that she was raped by Srikanta Boral and Abhijit Boral on April 26, 2017 at 5 a.m. In his cross-examination, PW6 stated that the bleeding injury found in the vaginal introitus was due to the tear of hymen.

- 35.** The friend with whom the victim was talking on the date of incident was examined as PW7. He stated in his deposition that the victim was his classmate. On the day of Rakkha Kali Puja at their village, he was moving with the victim on the night between 10 pm to 1 am. He also talked with the victim standing beside the club. At that time, while he was passing urine, the two boys came there and shouted “Dhar! Dhar!” (catch! Catch!). Hearing such sound, PW7 fled away to his house and on the following morning, he came to know that the two boys committed rape upon the victim. In the morning, he was called by the parents of the victim whereupon he stated

that he did not know the said boys. He also made a statement to that effect before the police. PW7 also identified the accused persons in the Court by stating that though at the time of incident, he did not know them but as of now, he came to know. He also recorded his statement before the magistrate and identified his signature on such statement. In his cross-examination, PW7 denied to have any affair with the victim. He also did not make any complaint against the two boys when they chased him. In his cross-examination, PW7 has admitted to have stated before the Police that he was talking to the victim between 10 pm and 1 am.

36. The judicial magistrate deposed as PW8. She recorded the statement of the PW7 under Section 164 of the Code of Criminal Procedure, which was marked as Exbt. 7.

37. One pathologist of the hospital deposed as PW9. He stated that on April 28, 2017, he collected the semen of the appellant duly identified by the police constable. He tendered the medical examination report prepared in his

pen and signature which was marked as Exbt. 8. He further stated that on the self-same day, he also collected the semen of another accused Abhijit Boral in connection with the same case. He proved the medical examination report in respect thereof which was marked as Exbt. 9. In cross-examination, PW9 opined that if a person is resisting during commission of rape then there may not be some injury on the private parts of the person committing rape.

38. One medical officer was examined as PW10. He has stated that on May 30, 2017, he examined the hymen and the other accused persons psychologically. PW10 proved the OPD tickets in respect of the two persons he examined which he were marked as Exbt. 10 and 10/1.

39. PW11 is another judicial magistrate. He recorded the statement of the victim girl under Section 164 Cr. PC. He tendered the statement of the victim girl recorded under Section 164 Cr. PC.

40. The Investigating Officer of the case deposed as PW12. He proved the endorsement of receipt of the

written complaint (Exbt. 2/1) and the formal FIR Exbt. 11. PW12 stated about the various steps taken by him in course of investigation of the case. He examined the available witnesses including the de facto complainant and the victim girl and recorded their statement under Section 161 of the Code of Criminal Procedure. He also visited the place of occurrence and rough sketch map with index thereto. He also proved the photographs of the place of occurrence. He also arrested the two accused persons and submitted prayers for recording the statement of the witnesses under Section 164 of the Code of Criminal Procedure. He also collected the vaginal swab of the victim and seized the same under a seizure list (Exbt. 14). He also collected the place of occurrence semen both the accused persons under a seizure list (Exbt. 15). He sent the samples to forensic science laboratory for examination. On completion of investigation, he submitted the charge sheet against the two accused persons under Section 376D of the Indian

Penal Code read with Section 6/12 of The Protection of Children from Sexual Offences Act, 2012.

41. On completion of the evidence on behalf of the prosecution, the appellant was examined under Section 3 and 13 of the Code of Criminal Procedure. The appellant in such examination pleaded innocence and stated to have been falsely implicated in the case.

42. The appellant and the other accused were convicted and sentenced for the offences punishable under Section 376D of the Indian Penal Code, 1860 as well as under Sections 6 and 12 of the Protection of Children from Sexual Offences Act, 2012.

43. The victim, at the time of her deposition stated her age to be 16 years. She was then studying in class IX. Such claim of the victim PW1 has been testified by her mother PW2 in her cross examination when she stated that her daughter was yet to complete the age of 18 years. The father of the victim PW3 tendered the birth certificate of the victim which was admitted in evidence and marked as Exhibit 4. According to the entries made

in the said Exhibit the date of birth of the victim is noted as July 28, 2001. Such certificate was duly issued by the competent authority far back on September 10, 2001. The incident is said to have occurred on April 26, 2017. Therefore, the age of the victim as stated by herself as well as her mother PW2 does fall within the time frame as evident from her birth certificate being Exhibit 4. Thus, it is conclusively proved that the victim was a minor on the date of incident when she was allegedly subjected to sexual assault.

- 44.** According to the case made out by the prosecution, the victim and her mother and sister attended a Puja organized in the village. After the Puja, she was talking to her friend PW7 at about 4.30/5.00 am in the morning, a little distance from the place where Puja was organized. At that time, the two convicts, came there, chased the friend of the victim, who fled away thinking the convicts to be brothers of the victim. Thereafter, the two convicts dragged the victim into a vacant land which has been

identified as the place of occurrence by all the witnesses, and committed forceful rape upon her.

45. The friend of the victim PW7 has corroborated the statement of the victim. He stated in his deposition that he was gossiping with the victim. When he was passing urine two boys came there and shouted 'Dhar Dhar' (Catch Catch) whereupon PW7 fled away. On the following morning, he came to know that the victim was raped by the two convicts whom he identified in court.

46. After the occurrence, the victim, reached her house crying and narrated the incident to her mother whereupon her mother lodged a written complaint with the police. The mother of the victim PW2 has testified that her daughter, the victim, returned to the house crying and upon enquiry, she narrated the incident to her to the effect that she was sexually violated by the convicts at the place of occurrence at the relevant time.

47. The other witnesses, PW3, PW4 and PW5 have though, corroborated the case of the prosecution, as made out in the written complaint but they appear to be

post occurrence witnesses. PW3 and PW5 were in the house and they came to know about the incident early in the morning when the victim was narrating the incident to PW2 or immediately thereafter. Nevertheless, the testimony of the prosecution witnesses including the victim herself is consistent with regard to the date, time and place of occurrence as well as the manner of the incident and the involvement of the appellant and the another convict in the incident.

- 48.** A written complaint was lodged over the incident by PW2, resulting in a First Information Report in this regard. The victim was medically examined on the day following the incident. The doctor PW6 noted the injuries found on the person of the victim which she sustained in the incident. PW6 prepared a report, Exhibit 6, in respect of his examination of the victim and her injuries. PW6, in course of such examination, opined that ‘the type of injury found on the person of the victim was very common in the event of any sexual assault upon a tender aged girl.’ Therefore, the post occurrence medical

evidence collected upon the examination of the victim seems absolutely consistent with the oral testimony of the prosecution case.

49. Thus, considering the oral testimony of the material witnesses as well as the findings of the medico legal examination report of the victim, being Exhibit 6, it can be safely held that the prosecution was able to establish that the victim girl was sexually violated in the manner as set out in the prosecution case.

50. So far as the involvement of the appellant in the commission of incident is concerned, the victim girl, PW1, in her deposition gave out in unambiguous terms that the appellant and another convict were the persons who perpetrated the incident. One of them first chased the friend of the victim and thereafter, both of them caught hold of her, dragged her into a nearby vacant land and sexually violated her. Such case was testified by the friend of the victim PW7. He deposed to the effect that he was chased by one of the convicts whereupon he fled away to his house.

51. The victim, after the incident, returned to her house crying and narrated the incident to her mother PW2. Subsequently, PW2 lodged a written complaint over the incident identifying the two miscreants, one of whom was the present appellant. In our considered opinion, the defense has not been able to extract anything favorable from the cross examination of PW1, PW2 or PW7. The aforesaid witnesses remained unshaken and consistent as regards the date of occurrence, time of occurrence and the place of occurrence and went to corroborate each other.

52. The medical evidence, PW6 together with Exhibit 6 goes to support the case of the prosecution to the effect that the victim was sexually violated. The nature of injuries found on the private parts of the victim seems quite commensurate to the sexual violation of the victim in the manner it has been stated by PW1, PW2 and PW7.

53. The case of **Rai Sandeep alias Deepu (Supra)** relied upon by the appellant deals with the quality of a witness in the following terms, that's to say:

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre 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 howsoever 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 every one 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 such similar tests to be applied, can it 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.

23. On the anvil of the above principles, when we test the version of PW 4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the court at the time of trial. There are material variations as regards the identification of the accused persons, as well as the manner in which the occurrence took place. The so-called eyewitnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instil the required confidence of the court in order to confirm the conviction imposed on the appellants.”

54. However, as noted above, in the instant case the defense has not been able to imprint any dent in the credibility of the prosecution witnesses.

55. However, in the case of **Motilal (Supra)**, the Hon’ble Supreme Court placed a prosecutrix of a sex offence on a higher pedestal than the other witnesses. She was considered to be a victim of such crime. In consideration

of such facts, the Supreme Court observed that the victim of rape is a competent witness, as contemplated under Section 118 of the Indian Evidence Act and her evidence was held to carry the same weight as that of an injured in case of physical violence.

56. In the Case of **State of U.P. Vs. Pappu (Supra)** the Supreme Court went further to extend the credence to the evidence of a prosecuterix or victim of rape case even if it was proved that the victim girl was of easy virtue

57. In the case of **Raju (Supra)** it was observed 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.

58. In the instant case, though, PW1 was confronted with a suggestion that she has falsely implicated the appellant/convicts, out of grudge as they had reported the mixing up of victim with her friend PW7, to her brothers, but such suggestion was squarely denied by her. The appellant also failed to establish at trial that anything like that ever happened. Nothing was brought forth by the appellant to justify that he was falsely implicated by the victim or the statement of the victim, PW7 or other witnesses were not true and credible.

59. In the case of **Ganesh Orang (Supra)** the evidence of the minor victim was found to suffer from patent contradictions with regard to her earlier statement to the magistrate vis-à-vis the time and place of occurrence as well as other inherent weakness and accordingly, the conviction of the appellant was set aside on such consideration. However, in the present case, no

such contradiction could be pointed out by the defense. The victim PW1, not only withstood the cross examination but at the same time, her deposition at the trial was quite consistent with her statement recorded under section 164 of the Code of Criminal Procedure being Exhibit 1/2. Not only that, the statement of the victim was also unswerving with that of PW2 and PW7 as regards the date and time of the occurrence and place of occurrence as well.

60. The case of **Abbas Ahmad Choudhary (Supra)** dealt with the rule of procedure in a case of rape. It was observed that,

“11. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a

prosecutrix would always tell the entire story truthfully.”

61. In the case at hand, we have already noted that the case of the prosecution, is not only based on the testimony of the victim PW1 but at the same time her testimony has been emphatically corroborated by the other prosecution witnesses like, PW7 who was with her just prior to the occurrence and PW2, to whom she reported the incident just subsequent to such incident. The case of the prosecution also gets overwhelming corroboration from the medical evidence PW6 and Exhibit 6. Moreover, we have also concluded that the narration of incident by the victim is quite consistent, credible and trustworthy in every details with reference to the manner of action by the appellant/convicts as well as the date and time of occurrence and place of occurrence. It would not be justified in saying that the prosecution case is based on sole testimony of the victim alone.

62. In the case of **Phool Singh (supra)**, it was laid down by the Hon’ble Supreme Court that there could be a

conviction on the sole testimony of the victim/prosecutrix when the possession of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of the sterling quality. The observations made by the Hon'ble Supreme Court in the case of **Phool Singh (supra)** were based on its discussions in the case of **Ganesan (supra)**. The principles laid down in this case also were on the proposition that a conviction for the offence of rape and like offences, sole testimony of the victim/prosecutrix is sufficient if it is found absolutely trustworthy and unblemished. We have already discussed herein before and concluded that the evidence adduced on behalf of on behalf of the prosecution specially the evidence of PW1, PW7 and PW2 being corroborated with that of PW6 together with Exhibit 6, there appears no iota of doubt regarding the veracity of the case of the prosecution as set out in the first information report.

63. The case of **Krishna Kumar Malik (Supra)** was relied upon by the appellant on the proposition that the

semen of the convicts/appellant were collected, wearing apparels of the victim were seized but the same were not sent for DNA profiling or chemical examination. At least, no such report has been brought on record by the prosecution. Such report, could have conclusively established the guilt or otherwise of the convicts/appellant. Since the prosecution has not taken steps, in the present case, in terms of the provisions of Section 53A of the Criminal Procedure Code, 1973.

64. True it is, Section 53A of the Criminal Procedure Code, 1973, provides that if any person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, the medical officer would be justified in applying appropriate force, on the request of a police officer of a certain rank, to get such arrested person examined for the purpose.

65. Exercise of such power by the medical officer, as ordained by the aforesaid provision is not mandatory and

subject to the existence of reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence.

66. In the present case, although, semen of the appellant/convicts was collected in exercise of the powers conferred under the provisions of Section 53A of the Code of 1973 and were suggested for chemical examination through the medical evidence Exhibit 6. However, no such report was produced by the prosecution.

67. As noted, the provisions of Section 53A of the Code of 1973 are directory in nature and not mandatory. It never commands that unless it is duly complied in each and every case, no conviction of an accused charged with the offence of rape et cetera, can be secured. Non compliance of the provisions of Section 53A of the Criminal Procedure Code, does not *ipso facto* entails an acquittal of the persons arrested for the commission of such offences, even if, the prosecution is otherwise able to prove the case, beyond reasonable doubts.

68. Such view was also laid down by the Hon'ble Supreme Court in the case of (**Veerendra supra**). In the said case it was laid down by the Supreme Court that,

“53. In view of the nature of the provision under Section 53-A CrPC and the decisions referred to, we are also of the considered view that the lapse or omission (purposeful or otherwise) to carry out DNA profiling, by itself, cannot be permitted to decide the fate of a trial for the offence of rape especially, when it is combined with the commission of the offence of murder as in case of acquittal only on account of such a flaw or defect in the investigation the cause of criminal justice would become the victim. The upshot of this discussion is that even if such a flaw had occurred in the investigation in a given case, the court has still a duty to consider whether the materials and evidence available on record before it, are enough and cogent to prove the case of the prosecution. In a case

which rests on circumstantial evidence, the Court has to consider whether, despite such a lapse, the various links in the chain of circumstances form a complete chain pointing to the guilt of the accused alone in exclusion of all hypothesis of innocence in his favour.”

69. As noted above, in the present case, we have found that, though, a DNA profiling of the semen collected from the victim and the wearing apparel of the victim as well as the convicts/appellants, could have provided additional links towards the guilt or otherwise of the involvement of the appellant/convicts in the commission of the offence of rape, but such an omission on the part of the prosecution cannot be allowed to render the entire trial futile when the prosecution seems to have emphatically brought home the charges against the appellant, independent of DNA profiling.

70. Therefore, on the basis of afore-gone discussions, we are convinced that the prosecution has been able to prove the charges leveled against the appellant/convicts

with the help of convincing evidence. The impugned judgment of conviction dated December 20, 2018 and order of sentence dated December 21, 2018 passed by learned Judge, Special Court under Protection Of Children from Sexual Offences Act, Serampore, Hooghly in Sessions Trial No. 09/2017 appears to be well founded on convincing evidences, sufficient enough to base a conviction upon and does not warrant interference in the facts and circumstances of the case. We affirm the same.

71. Accordingly, the instant appeal being **CRA 68 of 2021** is hereby dismissed.

72. In view of the disposal of the appeal, connected applications, if any, shall stand dismissed.

73. Trial Court records along with a copy of this judgment and order be sent transmitted, at once, to the learned Trial Court for necessary action.

74. Period of detention already undergone by the appellant shall be set off against the substantive punishment in terms of the provisions contained in Section 428 of the Code of Criminal Procedure.

75. Urgent Photostat certified copy of this order,
if applied for, be given to the parties on priority basis
upon compliance of all formalities.

[MD. SHABBAR RASHIDI, J.]

76. I agree.

[DEBANGSU BASAK, J.]