

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Sugato Majumdar

CRA 114 of 2020
+
CRAN 1 of 2020 (Old No.: CRAN 935 of 2020)
+
IA No.: CRAN 2 of 2021
In Re.: **Chimu Sarder @ Chimu Sardar**
with
CRA 369 of 2009
In Re.: **Kurban Ali Mondal & Anr.**
with
CRA 520 of 2012
+
IA No.: CRAN 1 of 2012 (Old No.: CRAN 2867 of 2012)
In Re.: **Lodhai Sardar**

For the Appellant
[in CRA 114 of 2020] : *Mr. Sumanta Chakraborty.*

For the Appellant
[in CRA 369 of 2009 and
CRA 520 of 2012] : *Mr. Sudipto Moitra,*
Mr. Kallol Mondal,
Mr. Krishan Ray,
Mr. Souvik Das,
Ms. Anamitra Banerjee,
Mr. Dwaipayan Biswas.

For the State : *Mr. Swapan Banerjee,*
Mr. Suman De.

Hearing is concluded on : *19th December, 2023.*

Judgment On : 3rd January, 2024.

Tapabrata Chakraborty, J.

1. The criminal appeal being C.R.A. 369 of 2009 has been preferred by Kurban Ali Mondal (in short, Kurban) and by Lodhai Sardar (in short, Lodhai) challenging the judgment dated 31st March, 2009 passed by the learned Additional Sessions Judge, Fast Track Court, Ranaghat, Nadia in Sessions Case No.68(8) of 2003 [ST No.5(9) of 2003] whereby Kurban has been convicted under Sections 395 and 396 of the Indian Penal Code (in short, IPC) and Lodhai has been convicted under Sections 395, 396 and 376 of the Indian Penal Code (in short, IPC).

2. The criminal appeal being C.R.A. 114 of 2020 has been preferred by Chimu Sardar (in short, Chimu) challenging the same judgment dated 31st March, 2009 whereby he has been convicted under Sections 395 and 396 of IPC.

3. As in all the appeals, the judgment dated 31st March, 2009 passed by the learned Additional Sessions Judge, Fast Track Court, Ranaghat, Nadia in Sessions Case No.68(8) of 2003 [ST No.5(9) of 2003] is under challenge, the same have been taken up for analogous hearing.

4. The prosecution case is that on 6th February, 2003 at about 6.20 hrs one written complaint of one Dilip Ghosh of Aishmali within P.S. Dhantola was received. In the same, the complainant stated *inter alia* that on 6th February, 2003 he was working in the bus No.WB-51 2658

(hereinafter referred to as the first bus) as helper of the driver. On 5th February, 2003 he went to Birnagar Amdanga within P.S. Ranaghat from village Kuchiamora within P.S. Gopalnagar with bridal party. He started for return journey to Kuchiamora village at about 00.00hrs/00.15 hrs. At about 01.20 hrs the bus reached at Aishmali near Madrasa Ibrahimia Darul Ulam but could not proceed further since bricks were stacked on the road. Immediately thereafter some armed miscreants boarded the bus and snatched away cash, watches, gold ornaments, finger rings from him and from the other passengers of the bus. When they tried to snatch away money from Samir Ghosh @ Banka Ghosh, the driver, he had an altercation and the miscreants opened fire and he died on the spot. In the meantime another bus being No.WB-51/2733 (hereinafter referred to as the second bus) arrived at the spot with a bridal party and miscreants also looted the ornaments, watches, camera, V.C.P., cassette from the passengers of the said bus.

5. On the basis of the said written complaint Dhantola P.S. Case No.32 of 2003 dated 6th February, 2003 under Section 396 of IPC and 25/27 of Arms Act was registered and upon completion of investigation, charge sheet was submitted under Sections 396/ 412/ 376/ 354/ 120B of IPC and 25/27 of the Arms Act against Subal Bagchi and 19 others on 3rd May, 2003. Subsequent thereto, on 16th August, 2003 a supplementary charge sheet was submitted before the learned Sub-Divisional Judicial Magistrate and the case was committed to the Court of the learned Sessions Judge, Nadia. In the midst thereof, a supplementary charge sheet was submitted

before the learned Sub-Divisional Judicial Magistrate against five accused persons and the Court forwarded accused Kurban and one Yasin Biswas to the Court of the learned Sessions Judge, Nadia. The case was, thereafter, transferred to the Court of Additional Sessions Judge, 1st Fast Track Court, Ranaghat.

6. The prosecution examined 138 witnesses during trial which included the complainant (PW-1), namely, Dilip Ghosh (in short, Dilip). In course of trial, Kurban submitted judicial confession under Section 164 of the Criminal Procedure Code (in short, the Code) which was recorded by a learned Magistrate, who deposed as PW-130. The statement of Kurban was marked as Ext.-172. Kurban, however, subsequently retracted his judicial confession. PW-59, one of the women victims, identified two miscreants in the test identification parade (in short, TI parade), one who scuffled her and one who committed rape upon her. She also identified Lodhai in Court as the person, who had committed rape and one Pute Sarder @ Sanjoy Sarder, who along with Lodhai touched her body and scuffled her. Sketches of arrest memo, site plans, recovered ornaments were marked as material exhibits.

7. The defence denied the prosecution case and cross-examined the prosecution witnesses and placed reliance upon the statements made by the accused persons during their examination under Section 313 of the Code.

8. Upon hearing the arguments advanced by the parties and considering the materials on record, the learned Court observed that *‘prosecution has been able to prove the following facts beyond reasonable doubt which also appears to have been admitted by the defence :*

1. *That the incident of dacoity took place in the intervening night of 5.2.2003 and 6.2.2003 the day before Saraswati Puja on the road near village Aishmali near a Madrasha which was under construction.*
2. *That the dacoits assaulted the passengers of both the Buses who were members of bridal party and also snatched away the cash and ornaments and other valuable articles from them.*
3. *That they killed the driver Samir Ghosh of Bus No.WB-51/2658. by bullet injury.*
4. *That the miscreants snatched away two cycles, cash, wrist watches and silver chain from P.W.21 and 22 and also assaulted them.*
5. *The miscreants also entered inside vehicle No.WB-52A/6514 (Tata Sumo) and snatched away the belongings of the Barjattris from inside the vehicle and snatched cash of Rs.940/-. and a silver ring from P.W.43.*
6. *The miscreants assaulted P.W.95 and P.W.102 and snatched away one jacket from P.W.102 and one hundred rupee note from P.W.95.*
7. *The miscreants snatched away the cycle of P.W.44 and cash Rs.1015/- from him and also snatched away the cycle of P.W.45 and snatched away his cycle, one golden ring and cash of Rs.2000/- and assaulted hi'.*
9. *The learned judge upon considering the arguments as advanced and upon scrutiny of the evidence on record acquitted 17 accused persons,*

however, Kurban, Lodhai, Pute @ Sanjoy Sarder and Chimu Sardar were found guilty of the charges under Section 395 and 396 and Lodhai was also found guilty of the charge under Section 376 of IPC and Pute @ Sanjoy Sarder was found guilty of the offence under Section 354 of IPC.

10. Mr. Moitra, learned senior advocate, assisted by Mr. Mondal, learned advocate, appearing for the appellants urged that the prosecution had failed to discharge its burden of proof beyond reasonable doubt. He asserted that lack of independent witnesses as well as the inconsistency in the complainant's version and absence of any corroboration altogether evidenced that Kurban and Lodhai had been falsely implicated. Reliance has been placed upon the depositions of PW nos. 1, 6, 15, 16, 21, 43, 44, 54 and 95.

11. According to him, the learned Court below erred in law in convicting Kurban solely on the basis of his statement as recorded under Section 164 of the Code though the same was subsequently retracted. He was not placed in the TI parade. Caution and prudence in accepting retracted confession is an ordinary rule and only if a retracted confession is found to be corroborative in material particulars it may be the basis of conviction. The confession has to fit into the proved facts. In the instant case, as the order of conviction against Kurban has been passed on the basis of uncorroborated confession, the same is not sustainable in law. It was the ignorance of Kurban which led to delayed retraction. He could only speak up about the procurement of the alleged confessional statement by way of inhuman torture by the police authority while he was given an

opportunity to ventilate his version at the stage of examination under section 313 of the Code. As such, the retraction by the appellant cannot be doubted in any manner whatsoever especially when the prosecution had miserably failed to project any other circumstance against him.

12. He argues that it was incumbent upon the learned Court below to scan the evidence in its entirety and not in isolation. A particular clause cannot be taken up and highlighted. It is the quality of evidence which is relevant in criminal trial and not the quantity. In securing conviction of Lodhai, the fact of recovery of a silver ring from him weighed with the learned Court. In course of the trial PW-34 being the police driver had *inter alia* stated that the ring was seized by the police after it was cut open from the finger of the Lodhai and although PW-52 had stated about the seizure of the ring after cutting it out from the finger of the accused Lodhai but he had failed to identify the ring in Court. The learned Court ought to have appreciated that the question of cutting open a ring from someone's finger arises only when the said person has been wearing such ring permanently and continuously for a substantial period of time. The manner of seizure clearly points out that the ring belonged to the person who was wearing it.

13. Mr. Mondal argues that the alleged incident took place on a dark and foggy night and it was an impossibility for the witnesses to identify any miscreant, moreso when the lights of the buses were switched off. The learned Court below placed reliance upon the deposition of Bhaskar Ghosh, PW-54, who in course of his deposition stated that '*out of the miscreants he clearly found one person who was of a short height and also blakish*

complexion. His was about 22/23 years and he was moving inside the Bus with a gun at that time. At that time a bulb was lighting inside their Bus and so he found that miscreant'. The light emitted from only one light within the bus renders the assertion of Bhaskar as regards identification of the accused, to be doubtful. The learned Judge glossed over the said issue and did not return a finding on the same.

14. Mr. Mondal contends that identification tests are meant for the purpose of helping the investigating agency with an assurance that its progress with the investigation into the offence is proceeding on right lines. The test identification evidence is not a substantive piece of evidence but can only be used coupled with corroborating evidence. The major flaw in the TI parade was that it was held in police presence and as such the learned Court erred in law in granting weightage to such identification.

15. He further argues that there was no allegation of rape in the original complaint and much reliance ought not to have been placed on the statement of PW-59 when there was a substantial delay on the part of the said witness in disclosing the illegal acts, moreso when Dr. Ratna Kar (P.W. 113) in course of her deposition stated that she did not find marks of violence on the body of P.W. 59. Almost all the witnesses including PW 59 had divulged that the allegation of rape was put forward when the CID inspectors started alleged examination of the witnesses. However, none of those witnesses could enlighten any reason for doing so. While looking at the evidences before the learned Court below it could be found that such lady police personnel happens to be PW 136, who during her deposition had

categorically stated that she had examined PW nos. 60, 61, 63 and 66. She had never uttered the name of PW-59 in course of her deposition. Such specific version of PW-136 clearly renders the evidence of PW-59 an unashamed endeavour to implicate the concerned appellant with such heinous allegation at the behest of the prosecution. The learned Court also did not appreciate the fact that except PW 59 none of the alleged and/or projected victims of rape could identify the accused persons before the Court. In fact almost all other witnesses had deposed that the miscreants had covered their faces and their eyes were only open, therefore probability of identification of accused persons goes in vain and the prosecution had tutored the PW-59 with an objective of filling up of lacunae of the prosecution case. In support of the arguments advanced reliance has been placed upon the judgments delivered in the cases of *Santosh Prasad Alias Santosh Kumar –vs- State of Bihar*, reported in (2020) 3 SCC 443, *Bhagwan Singh and Others–vs- State of M.P.*, reported in (2003) SCC 21, and *Parmananda Pegu –vs- State of Assam*, reported in (2004) 7 SCC 779.

16. He argues that charges under Section 395 and 396 were framed only against four persons and there is also no finding as regards presence of any other person and as such the very genesis and rudiments of the prosecution case were shrouded with doubt. The learned Court below also did not take into consideration the fact that there was no recovery from Kurban and Lodhai. There is thus no evidence on record to bring home the charges under Section 395 and 396 against the appellants. At best the appellants could have been convicted under the provisions of Section 392

and the appellants have already suffered the punishment prescribed under the said Section. Out of 21 accused 17 have already been acquitted and that as such it was not proper to convict the appellants under Section 395 IPC. Their conviction ought to have been altered to one under Section 392 IPC. Reliance has been placed upon the judgment delivered in the case of *Om Prakash Vs State Of Rajasthan*, reported in AIR 1998 SC 1220.

17. Mr. Chakraborty, learned advocate appearing for the appellant in C.R.A. 114 of 2020 submits that Chimu's conviction for dacoity with murder punishable under Section 396 of IPC, in the facts and circumstances of the case, cannot be sustained inasmuch as the prosecution failed to prove the participation of five persons in the commission of the alleged offence or establish their identity moreso when the charge of criminal conspiracy could not be established. The effect of acquittal of the co-accused persons from the charge of conspiracy, which had not been challenged by the prosecution, demolishes the prosecution's story of preparation, assembling before dacoity upon identifying the target buses. In support of such contention, reliance has been placed upon the judgments delivered in the cases of *Manmeet Singh Alias Goldie -vs- State of Punjab*, reported in (2015) 7 SCC 167, *Chottan Mahton and Others -vs- State of Bihar*, reported in (1969) 3 SCC 727 and *Raj Kumar Alias Raju -vs- State of Uttaranchal (Now Uttarakhand)*, reported in (2008) 11 SCC 709.

18. He further argues that in the absence of recovery of offending weapons and failure to link the material exhibits and the seizure of different items with the alleged incident, the liability in the instant case could not

have been fastened upon Chimu especially when he was acquitted of the charge under Section 412 of the IPC. Reliance has been placed upon unreported judgments delivered in the cases of *Hari Om @ Hero –vs- State of U.P.* and *Dikla @ Surender Das & Ors. –vs- The State of West Bengal*.

19. Mr. Chakraborty has also placed reliance upon the judgment delivered in the cases of *Rahul –vs- State of Delhi Ministry of Home Affairs & Anr.*, reported in *2022 LiveLaw (SC) 926* and *Iqbal and Another –vs- State of Uttar Pradesh* in support of the proposition of law that in order to sustain conviction, the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused. In the present case, in the absence of proper identification and recovery of incriminating articles, the learned Court below erred in law in convicting Chimu merely on the basis of surmises. Such conviction falls short of establishment of guilt to its hilt.

20. According to Mr. Chakraborty, extra-judicial confession made by Kurban is the main plank of the prosecution's case. A confession cannot be treated as substantial evidence. It needs to be appropriately corroborated. In the present case, the confession lacks support from other evidence on record and in view of such infirmity, the presence and participation of Chimu in the alleged offence is shrouded with doubt. In support of such contention, reliance has been placed upon the judgment delivered in the case of *Pancho –vs- State of Haryana*, reported in *2011 (4) Crimes 226 (SC)*.

21. *Per contra*, Mr. Banerjee, learned advocate appearing for the State buttress the judgment impugned by highlighting the consistent testaments of the witnesses. He argues that it would be explicit from the deposition of Bhaskar Ghosh (PW-54) that amongst the miscreants he clearly found one person who was of a short height and was having blackish complexion. He was moving inside the bus with a gun and at that time a bulb was on inside the bus and as such he could identify the said miscreant. In the complaint the manner in which the offence took place had been minutely detailed. The miscreants looted away cash, gold ornaments, watch, camera, V.C.P. Cassette etc. from the passengers and such facts have been duly corroborated. The surathal report detailed that the dead body was found lying straight in the cabin of the bus bearing registration no. WB 51/2658. *Post-mortem* was conducted and the report was duly proven by the doctor opining that the deceased sustained bullet injury and the death was due to such injury.

22. He further submits that the appellant Kurban was arrested in connection with a case of Jagatballavpur Police Station. On 18th March, 2004 Kurban was interrogated by PW-138 viz., Tapan Kumar Das. On 30th March, 2004 Kurban was produced before Ranaghat Court when trial had already commenced and 28 prosecution witnesses had already been examined and therefore Kurban was not placed in TI parade. PW 59, the victim lady deposed in her evidence that Lodhai committed rape upon her and also identified him in TI parade. The deposition of said witness inspired confidence and therefore conviction can be based upon her deposition. The

incident took place on 06th February, 2003 and the medical examination of PW 59 was conducted on 07th March, 2003, i.e., more than one month after the occurrence and such efflux of time explains the absence of marks of violence. The appellants have been identified by the lights inside the bus. The source of light has been mentioned by PW-54, viz., Bhaskar Ghosh and PW-57, viz., Surajit Ghosh. Moreover, the appellants have also been identified by the witnesses on dock during trial. Identification of the accused made in Court, is substantive evidence, where as identification of the accused in test identification parade can be used to corroborate the identification of accused by the witnesses in Court. TI parade is conducted only to make sure that the investigation is proceeding on the right direction. The testimony of the prosecution witness can be accepted with regard to identification of the accused, in Court and conviction can be sustained without any doubt. It is not a proposition of law that after a lapse of long period, witnesses would, in no case be able to identify the dacoits committing dacoity. Where the light was enough to enable the assailants to identify the victims it cannot be urged that the light was not enough to identify the assailants. In support of the arguments advanced reliance has been placed upon the judgments delivered in the cases of *Malkhansingh & Ors. -vs- State of Madhya Pradesh*, reported in (2003) 5 SCC 746 and *Md. Kalam @ Abdul Kalam -vs- State of Rajasthan*, reported in (2008) 11 SCC 352.

23. He argues that the learned Court below rightly acted upon the confession of Kurban as the same was voluntary in nature and bereft of any

threat, inducement or promise. It cannot be laid down as a general proposition that a confession is a weaker kind of evidence than other pieces of evidence. PW-130 deposed that Kurban was sent for reflection at Ranaghat Sub Divisional Correctional Home and segregated, in accordance with law. On the next date on 13th April, 2004 Kurban was produced before him and he recorded his confessional statement, in accordance with law was produced and identified by Constable No.20 Ashoke Kumar Biswas. After his production he observed all the required formalities of law and after giving due caution to Kurban several times and after satisfying himself regarding voluntary nature of his confession and that it would be free from police influence he started recording the same. He also stated that after observing all the necessary formalities of law he recorded the confessional statement of Kurban covering six separate sheets numbered pages 1 to 12 in his own hand writing and thereafter he read over and explained its contents to the Kurban, who admitted the same to have been correctly recorded and voluntarily made by him. After ascertaining all these aspects required by law, he obtained Kurban's signatures on each page of the confessional statement in his presence. He also put his signature on each and every page of the same as recording Magistrate. Finally he appended a certificate at the end of that confessional statement as required by law in accordance with the provision of section 164(4) of the Code. The witness proved the confessional statement which has been marked as Ext.172 and the signatures of Kurban have been collectively marked as Ext.172/1. In the backdrop of such sequence, the argument of Mr. Mandal that the

confessional statement of Kurban was illegally procured, is not acceptable. In support of such contention, reliance has been placed upon the judgments delivered in the cases of *Balbir Singh –vs- State of Punjab*, reported in *AIR 1957 SC 216* and *Bharat –vs- State of U.P.*, reported in *(1971) 3 SCC 950*.

24. Placing reliance upon the judgment delivered in the case of *Ganesan –vs- State*, Mr. Banerjee argues that merely because some of the accused persons absconded and less than five persons came to be tried in the trial, it cannot be said that the offence under Section 391 IPC punishable under Section 395 IPC is not made out. What is required to be considered is the involvement and commission of the offence of robbery by five persons or more and not whether five or more persons were tried. Once it is found on evidence that five or more persons conjointly committed the offence of robbery or attempted to commit the robbery a case would fall under Section 391 IPC and would fall within the definition of ‘dacoity’. In support of such contention, reliance has also been placed upon the judgment delivered in the case of *Sk. Aminul –vs- State of West Bengal*, reported in *2016 SCC OnLine Cal 12107*.

25. Heard the learned advocates appearing for the respective parties and considered the materials on record.

26. The entire episode on the fateful date encompasses five distinct incidents. First pertaining to bus no. WB-51/2658. Second pertaining to bus no. WB-51/2733. Third pertaining to a Tata Sumo vehicle no. WB-51/3284. Fourth pertaining an auto van. Fifth pertaining to two cyclists.

The contemporaneous sequence of events duly corroborated through the helpers of the buses, the cyclists, the boarders of the Tata Sumo vehicle fortifies the prosecution.

27. Indisputably, the PW-54, namely, Bhaskar Ghosh, as well as PW-61, namely, Polly Ghosh, PW-63, namely, Chaina Ghosh identified Chimu during TI parade, as would be explicit from Exhibit-177. PW-54 also identified Chimu in Court. During TI parade, PW-59 identified Lodhai to be the person who committed rape upon her and also identified Pute as the person who had scuffled her. PW-58 also identified Pute during TI parade, as would be explicit from Exhibit-176. Identification of accused in test identification parade and dock identification is a clinching evidence against accused. Identification of Lodhai, Pute and Chimu in TI parade and dock identification by PW-54 and PW-59, establish the prosecution's case against the appellants beyond doubt.

28. The involvement of more than five persons in the alleged incident stands substantially established from the evidence on record. The depositions of PW-1, helper of bus No WB-51/2658, PW-2, scribe of the complaint, PW-6, the driver of the bus No WB-51/2733, PW-10, helper of the first bus, PW-26, a passenger of the first bus, PW-47, a passenger of the first bus, PW-54, a passenger of the first bus, PW-59, the victim girl, PW-95, traveling in the auto-van and PW-102, a co-passenger in the said auto-van, all in unison narrated the incident of dacoity and specifically stated the involvement of five and more persons in the said incident. None of the said witnesses were shaken in course of cross-examination pertaining to the

involvement of five and more persons in the alleged incident. On the rudiments of such evidence on record, the argument of Mr. Mondal that less than five persons were involved in the alleged offence is not acceptable to this Court. What is required to be considered is the involvement and commission of the offence of robbery by five persons or more and not whether five or more persons were tried.

29. From the consistent statements of PW nos. 1, 2, 3, 6, 8, 9, 10, 13, 14, 15, 16, 18, 19, 20, 23, 24, 25, 26, 27, 32, 33, 35, 40, 44, 45, 54, 58, 59 to 66, 81 and 82, the learned Court below rightly arrived at the findings that the incident of dacoity took place in the intervening night of 5.2.2003 and 6.2.2003, the day before Saraswati Puja on the road near village Aishmali near a Madrasha which was under construction and that the dacoits assaulted the passengers of both the buses and also snatched away the cash and ornaments and other valuable articles from them.

30. It is not in dispute that the driver of the first bus was found to have been murdered and his body was found lying straight in the cabin of the bus. It is also not in dispute that the body was sent for *post mortem*. PW 78, namely, Dr. Parthasarathi Saha conducted the *post mortem* examination and stated in the report, being Ext. 109, that he found one through and through bullet injury with wound of entry over the right side of the bridge of nose and wound of exit over the occipital region below the external occipital protuberance. Death in his opinion was due to effect of that particular injury ante mortem in nature. He proved the carbon copy of the P.M. Report prepared by him which has been marked as Ext.109. He also stated that

the said bullet injury was homicidal in nature. The *post-mortem* report duly proven by the said expert establish the deceased to have sustained bullet injury and the death was due to such injury.

31. There is neither a rule of law nor of prudence to the effect that a confession cannot be acted upon. If the Court is satisfied that the confession is true and voluntary it can base its conviction on it. It is not a case that the capacity of the Kurban to remember the facts stated, had been impaired at the time he was making the statement, by circumstances beyond his control. There is nothing on record to show that such confession was caused by inducement, threat or promise. The statement had been made at the earliest opportunity and was not the result of tutoring by interested parties. The sheaves of papers containing the confession were full of facts punctiliously put together detailing the manner in which offence was committed and the involvement of the appellants. The confession has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers. The scope of section 313 of the Code is wide and is not a mere formality. The object of recording the statement of the accused under section 313 is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. In the present case, proper methodology had been adopted by the learned Court providing ample opportunity to the accused to tell to the Court as to what is the truth and what is his defence. In the aforesaid backdrop, we are

of the opinion that the confession of Kurban is worthy of credence and is trustworthy.

32. It has been strenuously argued on behalf of the appellants that in the written complaint there was no allegation of rape and the conviction of Lodhai under Section 376 of IPC was not sustainable inasmuch as it had been clearly deposed by PW-113, namely, Dr. Ratna Kar, that no marks of violence were found on the breasts, lips, face and other private parts of the victim lady, being PW-59. Thus, the evidence of the prosecutrix does not stand corroborated by medical evidence. In this context, it needs to be stated that the incident was on the night in between 5th February 2003 and 6th February, 2003 whereas the medical examination of PW-59 was conducted about a month thereafter, i.e., on 7th March 2003 and in the same it was also specifically observed that hymen was ruptured partially, as would be explicit from Ext. 157. The evidence of the victim lady, being PW-59, is also corroborated by PW-60, namely, Pinky Ghosh, and by PW 61, namely, Polly Ghosh another female barjatri, who identified one of the miscreants during TI parade. The medical report of Polly Ghosh, being Ext. 125, states that she could not be examined on 26th February, 2003 as she was having period. However, Ext. 156 pertaining to Polly Ghosh states that she was not capable of sexual intercourse. The above sequence of facts needs to be considered in its totality and not in isolation. A single statement cannot be picked up and highlighted. Fact remains that hymen of PW-59 was found to have been partially ruptured. In view thereof, we do not find

any reason to differ with the findings of the Learned Trial Court pertaining to conviction of Lodhai under Section 376 of IPC.

33. The deposition of the victim ladies being PW-59 to PW-66, bear testimony to the facts that the miscreants entered the bus, searched them and forcibly took away their belongings. They were also forcibly brought down from the bus. PW-59 was placed at the side of the bus and raped. PW-60 and PW-61 were taken to a nearby banana field. PW-59 identified Lodhai and Pute during TI parade and also in Court. PW 61, namely, Polly Ghosh identified one Rezaul Mondal (Ext. 174). PW 64, namely, Dipika Ghosh, also identified one of the miscreants, namely, Noor Haque Mondal (Ext. 176) during TI parade. It is not a case that the identifications were held in police presence. However, as PW-63, namely, Chaina Ghosh failed to identify the accused persons and PW-65, namely, Rishika Ghosh, who did not substantially state anything implicating the accused persons, they were declared hostile. In the above conspectus, it cannot be ruled out that some of the witnesses were hesitant to identify the accused persons or to get entangled in the rigmarole of trial. Situation arises in many cases where the witness does not give answers in favour of the party calling the person as a witness. However, credible evidence even of a hostile witness can form the basis for conviction in a criminal trial and his/her evidence can be accepted, if he/she is a natural and independent witness. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof.

34. The argument of Mr. Mondal that it was an impossibility for the witnesses to identify any miscreants as the lights of the buses were switched off had been rightly discounted by the learned Court below since from the evidence on record it transpired that the lights of the buses were on but they were switched off subsequently. While the first bus was standing, the second bus came from behind and the front lights certainly focused light and certainly the passengers of the first bus had opportunity to see the miscreants by that light. So also the passengers of the second bus had the opportunity to see the miscreants by the head lights of the Tata Sumo which came thereafter. These facts were not even disputed at the time of trial in cross examination.

35. It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. Plentitude of pronouncements leaves cleavage in the opinions formed in the respective cases. There is no dispute as regards the proposition of law as laid down in the judgments upon which reliance has been placed by Mr. Moitra and Mr. Chakraborty, however, the same are distinguishable on facts. In the case of *Santosh Prasad (supra)* conviction based on the sole testimony of the prosecutrix was viewed with suspect as the medical report was not supporting the case of the prosecution and as the Court below proceeded being oblivious of the existing enmity between the parties. In the

case of *Bhagwan Singh (supra)* testimony of a child pertaining to the offence was not found to be reliable in the absence of test identification parade. In the case of *Parmananda Pegu (supra)* the Court arrived at a finding that the confession taken as a whole did not fit into the facts proved by other evidence on record. In the case of *Manmeet Singh (supra)*, *Chottan Mahton (supra)* and *Raj Kumar (supra)* the prosecution failed to establish the participation and identity of five or more person in the commission of the offence. In the case of *Hari Om (supra)* the version of a child witness was found to be unworthy and incompatible with the other pieces of evidence on record. In the cases of *Dikla (supra)* and *Rahul (supra)* there were gaping holes in the investigation as no test identification parade was conducted. In the case of *Iqbal (supra)* the verdict of conviction only on the basis of oral testimony of two witnesses was found to be doubtful. In the case of *Pancho (supra)* the Court observed that in dealing with a case against an accused, it must begin with other evidence on record and upon forming an opinion with regard to the quality of such evidence, turn to the confession.

36. The learned advocate appearing for the appellants in CRA 369 of 2009 and CRA 520 of 2012 submits, upon instruction, that the first appeal being CRA 369 of 2009 was filed by Kurban Ali Mondal and Lodhai Sardar and thereafter the appeal being CRA 520 of 2012 was inadvertently filed by Lodhai.

37. We have perused the findings of the learned Court below qua each of the accused and find that no case for interference on such findings of fact is called for by this Court.

38. Accordingly, the criminal appeals being CRA 369 of 2009, CRA 520 of 2012 and CRA 114 of 2020 and all connected applications, if any, are dismissed.

39. The Lower Court Records be sent down to the learned Court below forthwith.

40. There shall, however, be no order as to costs.

41. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Sugato Majumdar, J.)

(Tapabrata Chakraborty, J.)