

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 637 of 2014

**Mohan Mondal
-Vs-
The State of West Bengal**

For the Appellant : Mr. Ayan Basu
Mr. Asraf Mondal

For the State : Mr. Tanmoy Kumar Ghosh
Mr. Kutubuddin

Heard on : 10.08.2023, 03.10.2023, 04.12.2023,
03.01.2024, 22.01.2024, 25.01.2024

Judgment on : 21.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 14.05.2014 passed by the Learned Additional Session Judge, Tehatta, Nadia in Sessions Case No. 76(6) 2011/S.T. 2(7)11/ S.T. 72(4) 13 whereby the petitioner found guilty for the commission of offence under Sections 448/376 of the Indian Penal code and sentence to suffer rigorous imprisonment for 7 years and also to pay fine of Rs. 5000/- in default to suffer rigorous imprisonment for 6 months for the offence and to suffer rigorous imprisonment for 1 year for

the commission of offence under Section 448 of the Indian Penal Code, both the sentence shall run concurrently.

2. The prosecution case precisely was that the father of the victim (de-facto complainant) stated that her daughter used to stay at their house after the demise of the wife of the de-facto complainant and on the fateful date the de-facto complainant went to attend a religious 'Jalsa' in their village leaving his daughter alone in the house at that night. The accused taking that opportunity entered in their house, armed with a 'Hasua'. He threatened the victim, the prosecutrix and extinguished the light (Lampha) which was burning in the room. After that he raped the prosecutrix against her will, who raised alarm and however, pushed aside the accused. Hearing her alarm neighboring persons came there. Subsequently her father returned and heard the incident from the prosecutrix herself that thereafter the complainant went to the Hogalberia Police Station but police personnel was not ready to initiate the case. The de-facto complainant file an application under Section 156(3) of the Cr.P.C. before the Learned A.C.J.M. Tehatta, Nadia with a prayer for sending the application to the police station for investigation treating same as F.I.R.
3. Upon direction of the Learned Magistrate the police of Hogalberia Police Station registered Hogalberia P.S. Case No. 161 of 2010 dated 17.12.10 under Sections 448/376 of the Indian Penal Code.
4. The investigating authority initiated the investigation and after completion of all formalities of the Charge-Sheet was filed against the appellant under Sections 448/376 of the Indian Penal Code.

5. The said case was transferred to the Learned Additional Session Judge, Tehatta, Nadia for trial. After receiving the case record the Learned Additional Session Judge, Tehatta, Nadia (hereinafter called the Ld. Trial Judge) framed Charge against the appellant under Sections 448/376 of the Indian Penal Code upon which the appellant pleaded not guilty and claimed to be tried.
6. The prosecution has examined as many as 15 witnesses to establish the charge against the appellant and exhibited certain documents.
7. Learned Advocate for the appellant submitted that –
 - i. Regarding the time of occurrence, there were differences of opinion among the PWs. Few said it occurred at 8 p.m., or others stated it took place at 5 a.m. (at dawn).
 - ii. From the statement of the prosecutrix (PW-1) as also for the started at PW-2 and PW-5 the time of occurrence was started 8 P.M. but the sister of prosecutrix PW-13. PW-18 has mentioned that the said incident took place at 4 A.M. (dawn). Thus there was a gulf of difference regarding the time of commission of the incident. The rest of the prosecutrix case has been distorted by the prosecution witness themselves.
 - iii. The Learned Trial Judge should have disbelieved the testimony of PW-1, for during cross-examination PW-1 had retracted from the very basic foundations of her depositions during examination-in-chief. The statements made by PW-1 during the examination-in-chief were not corroborated by some other witness nor were supported by any material brought on record during the trial.

- iv. At the time of giving statement the prosecutrix i.e. PW-1 stated that at the time of commission of the offence the appellant entered in her house with "Hansua" in his hand. But at the time of making statement before the Learned Magistrate under Section 164 of Cr.P.C. She has not mentioned about the braudship of said "Hasua". The said "Hasua" has not also seized by the Investigating Agency. Such papers on the part of the prosecution were series in nature and the appellant would get the benefit or the same.
- v. PW-1 as well as her father PW-2 has mentioned about the putting of the lamp by the accused before the commission of the offence but the said lamp has not been seized by the police. This also affects the prosecution case.
- vi. PW-2 in his statement stated that there was Jalsa on the fateful day and he went to attend the same. For this his daughter (PW-1) was above at home. But prosecution has failed to give any evidence regarding the occurrence of 'Jalsa' on that fateful date. This also courts a doubt regarding the prosecution case.
- vii. There was delay of nearly 20 days to file the complainant as the alleged incident took place on 12.11.2010 while the petitioner of complainant was filed before the Learned A.C.J.M., Tehatta on 01.12.2010. No reasonable explanation has been advanced by the de-facto complainant PW-2, regarding such inordinate delay in filing the within complaint. This gave rise to fabrication of prosecution case.

- viii. The prosecution cited the Assistant Teacher of Jalalerpara Joyrampur Primary School (where the PW-1 was a student as PW-1). The prosecution did not seize or venture to produce the Admission Registrar of said school showing the date of birth of PW-1. The investigating agency had also not taken any steps to carry out the ossification test, so the conclusion regarding age of the victim girl was taken by the court was not in accordance to law.
- ix. The attending Doctor had not found any injury either in the body or private part of victim girl which medical examination report (Exbt. - 7). In case of forcible rape of the minor girl must have same injury. But in this case in absence of any injury in the victim person casts a doubt over the incident.
- x. There were discrepancies in the statement of PW-2, the father of the victim girl who happened to be the de-facto complainant of this case.
- xi. The prosecution witness no. 3 and 5 stayed away from the house of the victim and they had come to the place of occurrence after the incident so no reliance could be placed upon the statement of PW-3 and PW-5.
- xii. There was salish regarding the “kutsa”, between the prosecutrix and the appellant. In that salish PW-2 have given pressure to the appellant to marry his daughter. Being refused by the appellant and his family member, PW-2 has filed this instant case against the appellant.
- xiii. The Learned Trial Judge ought to have considered that the statement of PW-13 and 14 did not corroborate the statement made by PW-1 and PW-2 this has shaken the prosecution case.

- xiv. The Learned Trial Judge ought to have held the investigation carried out by PW-15 has seriously prejudiced the appellant.
- xv. The Learned Trial Judge ought to have found that the prosecution has hopelessly failed to prove the motive of the offence.

8. The Learned Advocate for the State submitted that the incident of rape took place on 12.11.2010 at 08:00 P.M. when the victim was residing alone at her house. At the relevant time, the age of the victim was 13 years and 6 months.

9. The Learned Advocate for the State further submitted that mere delay in lodging the F.I.R. cannot be a ground by itself for disbelieving the entire prosecution case. He further stated that the conviction in connection with an offence of rape can be on sole evidence of the prosecutrix if creditable. He further submitted that the evidence of a prosecutrix cannot be tested with suspicion as that of an accomplice. Moreover, the victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable.

10. The Learned Advocate for the State relied on the following decisions:-

- i. State of Haryana –Vs- Basti Ram, reported in (2012) 126 AIC 229,

ii. State of U.P. –Vs- Chhoteylal, reported in (2011) 100 AIC 150,

iii. State of Rajasthan –Vs- Noore Khan, reported in (2000) 2 AICLR 438.

11. A circumspection of evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 stated in her evidence stated that Rahaman Mondal was her father and he lodged one complaint against accused Mohan Mondal before the Learned Court of A.C.J.M, Tehatta. Accused Mohan Mondal was present before Court and the witness identified the accused person on dock. She could not recollect the exact date, monthy and year of incident but the same took place about nine months back from the date at about 8:00 P.M. The said incident took place in her room and which was at village- Joyrampur within P.S.- Hogolberia. In the said house where the incident took place herself and her father only resided there. Her mother died. At the time of incident her father was not in the house since her father then went to Mathpara for hearing the function of Muslim rituals. Mathpara situated in village Joyrampur. At the time of incident, she was alone in her room and then the accused person came there and knocked the door at that time the door of her room was slightly bolted by a bamboo stick and due to such knocking of the door by the accused person, the door was then opened and accused Mohan then entered into her room with a 'hansua' and by placing that 'hansua' on her

neck and he then by placing that 'hansua' on her neck and gave her threatening and accused Mohan then extinguished the lamp/lampha which was burning in her room and touched on her body and accused Mohan then put off her wearing pant and accused Mohan then committed rape on her. She raised hue and cry and on hearing the same, Haqueman, Lokeman and Amrul came to her room and at that time accused Mohan dashed those persons and as a result they fell down and accused Mohan then fled away from her room. Her father then came to her house and on being asked she reported the entire incident to her father. Accused Mohan Mondal was her co-villager. After the incident police of Hogolberia P.S. took her to Karimpur Hospital for her medical treatment and where she was treated by doctor. She made a statement before the Learned Judicial Magistrate, Tehatta and where she narrated everything about the incident and put her signature therein after realizing its contents. She read upto Class-IV. She was a student of Jalalerpara/Joyrampur Primary School, Hogolberia.

- ii. During cross-examination, PW-1 stated that there were two rooms in her house. Amrul Mondal was the elder brother of her brother. The distance of the house of Amrul was about 2 km from her house. Haqueman Mondal was the elder brother of her father and his house was at a distance of 2 km from their house. The house of Fazlu Mondal was at a far distance from their house. She knew Faraz Mondal and his house was also at a far distance from their house.

The House of Lokeman Mondal situated by the side of her house. 7 to 8 minutes after the incident her father came to the house. Thereafter, herself disclosed everything about the incident to her father. Thereafter, her father went to the P.S. in the night of incident. After the incident she was once treated at Karimpur Hospital. After the incident she was examined by the I.O. of this case. She stated to the I.O. that while she was inside her room at that time accused knocked the door and as a result door was opened. She stated to the I.O. that accused Mohan Mondal threatened her by placing one "hansua" on her neck. She stated to the police that accused person committed rape on her. She further stated to the I.O. that on hearing her hue and cry Maqueman, Lokeman & Amrul came to her house. Masadul was the son of her uncle. The daughter of Israfil namely Firu was married to his elder brother. Israfil was the uncle of accused Mohan. There was some "gandogol" in between Masadul and Firu. She could not state the date of such marriage of Firu and Masadul. On the date of incident accused Mohan was in her room for 7 to 8 minutes. She stopped her study for the last three years. Her father and his elder brothers besides informing the police about the incident or took her to hospital did nothing over the said incident. It was not a fact that whatever she stated that day against the accused person was all false. It was not a fact that she, her father and the brothers of her father due to family enmity tagged this accused person falsely in this case. Police did not collect the wearing apparels which she wore on

the date of incident. It was not a fact that she in order to suppress the exact state of affairs withheld or did not hand over her wearing apparels either to police or doctor. It was not a fact that whatever she disclosed before the Learned Judicial Magistrate, Tehatta were tutored to her. It was not a fact that whatever she deposed that day were all false.

- iii. PW-2 in his deposition stated that PW-1 was his daughter. At the time of giving deposition PW-2 stated his daughter was aged about 13 and half years. PW-2 filed a complaint before the Learned A.C.J.M., Tehatta against accused Mohan Mondal relating to an incident of his daughter/PW-1. Occurrence took place on 25th Kartick last and the said incident took place at 8.00 p.m. inside his house of village Joyrampur. On the date and time of the incident he was present in a function of Muslim rituals at Mathpara and at that time his daughter/PW-1 was alone in his house and in course of such function he left that place and proceeded to his house and on returning to his house he saw people were there. Then, he heard it from his daughter /PW-1 that accused Mohan Mondal after opening the bamboo made door of his house entered into a room of PW-1 and threatened her by placing one "hansua" and then Mohan extinguished the lamp/lampha which was burning in the room and committed rape on his daughter/PW-1. Thereafter, he went to the P.S. but refused to entertain his complaint and accordingly him lodged the complaint before the Learned A.C.J.M., Tehattta. Asan Ali

Sk. was his lawyer before Learned A.C.J.M., Tehatta. Thereafter, his daughter was taken to Karimpur Hospital by police for her treatment and where she was treated. After completion of drafting of his petition of complaint he put his L.T.I. on the same. PW-2 handed over the school certificate of his daughter/PW-1 before police and police had seized the same under a seizure list and he put his L.T.I. on the same. PW-2 identified accused Mohan Mondal on dock.

- iv. During his cross-examination PW-2 stated that the distance of Mathpara is less than half mile from his house. He left the place of such function of Muslim rituals at 8.00 p.m. and it took 10 to 15 minutes time to reach his house. He mentioned it in his written complaint that on returning from function of Muslim rituals he saw many people were there in his house. It is not a fact that he falsely stated that he had heard everything about the incident from his daughter/ PW-1. It was not a fact that whatever he stated that day are all false. It was not a fact that no such incident as stated by him ever took place. It was not a fact that just to harass the present accused person he had filed this case falsely. He did not know any namely Firu. He did not know any person named as Masadul. He could not state the date when his daughter was taken before the Learned Judicial Magistrate, Tehatta nor could he state when she was taken to hospital. It was not a fact that he falsely stated that there as Jalsha on the date of incident at village Mathpara. It was not

a fact that the said function of Muslim rituals was held on 2nd Kartick of last year.

- v. PW-3 in his deposition stated that he knew PW-2 and PW-1 and they were of his village. He knew the accused person of this case and his name was Mohan Mondal and the witness identified the accused person on dock. The house of Rahaman Mondal situated by the side of his house. There was other person of his village whose name was also Haqueman Mondal. He had heard it that Rahaman Mondal lodged one complaint against the present accused person over an incident which happened relating to his daughter Meriyan. On 25th Kartick of last year at about 8:00 P.M. the incident took place in the house of Rahaman Mondal. On the date and time of incident he was in his house and on that date there was one function in their village and at that time he had heard one noise which was coming out from the house of Rahaman Mondal and accordingly he came to the house of Rahaman Mondal and on reaching there he asked the daughter of Rahaman Mondal namely Meriyan Khatun as to what happened and then she stated it to him that accused Mohan Mondal came to her room and on reaching there by placing one 'hansua' accused Mohan threatened her and at that time accused Mohan extinguished the 'lampha' of that room and Meriyan further stated it to him that accused Mohan committed rape on her.
- vi. During cross-examination PW-3 stated that he was examined by police. He could not recollect whether he stated it to police that

Meriyan stated it to him that accused Mohan committed rape on her. He could not recollect whether he stated it to the I.O. that on hearing the noise coming out from the house of Rahaman Mondal he went to that house. It was not a fact that whatever he stated this day relating to the present case were all false. It was not a fact that he had heard anything from Meriyan. It was not a fact that he falsely stated it that on the date of incident there was one function in their village. It was not a fact that there was function in their village on 2nd Kartick of last year. He was the uncle of Meriyan Khatun. It was not a fact that by making conspiracy by him, his elder brother Rahaman Mondal and Meriyan Khatun, they had lodged the case falsely against the present accused person.

- vii. PW-4 stated in his evidence that he was posted at Suri, District-Birbhum as Judicial Magistrate 1st Class and on 11.01.11 he was posted at Tehatta Court as Judicial Magistrate 1st Class. On that date, he recorded the statement of witness Meriyan Khatun in connection with Hogalberia P.S. Case No. 161/10 dated 17.12.10. The said witness was brought before him by Lady Constable 1992 Sulekha Mondal and she had identified the said witness before him. After administering oath he recorded the statement of the said witness in terms of Section 164 of the Cr.P.C. The said witnesses put her signature in the presence of PW-4. The statement was read over and explained by him to the said witness and thereafter she put her signature in his presence. PW-4 appended one certificate and put his

signatures on the said statement. That was the said statement recorded by him and it bore his signature as well as the official designation and it also bore the signature of PW-1/victim girl. The said statement was marked as Ext. 1. During his cross-examination PW-4 stated that it was not a fact that he recorded the said statement not in accordance with law.

- viii. PW-5 in his deposition stated that he knew Rahaman Mondal/PW-2 of his village and PW-2 was his co-villager. The house of PW-2 was situated by the side of his house. PW-5 knew that PW-2 lodged one complaint against accused Mohan Mondal. PW-5 identified accused Mohan Mondal on dock. Occurrence took place on 25th Kartick last at about 8 p.m. in the house of PW-2. On the date and time of incident PW-5 was in his house and at that time he heard one hue and cry which was coming out from the house of PW-2. Accordingly, he went to the house of PW-2 and there he met with the daughter of PW-2 i.e. the PW-1, and she stated it that accused Mohan Mondal committed rape on her. At that time the father of PW-1 was not in the house since at that time he went to a function. That was his signature on a seizure list and he signed on the said seizure list while police seized one school certificate of PW-1 as produced by her father PW-1. The signature of PW-5 on the seizure list dated 14.02.2011 was marked as Ext. 2.
- ix. During his cross-examination PW-5 stated that he could not state as to how many days after the incident he signed on the seizure list. He

could state the contents of the seizure list. He without wasting time reached to the house of PW-2 on hearing the hue and cry on the date of incident. On reaching to the house of PW-2, he only saw the daughter of PW-2 was there. He could not state when the father of PW-1 came to the house on the date of incident. He could not state as to who were the other persons who had come to the house of PW-2 on hearing the noise of his daughter/PW-1. It was not a fact that he falsely stated it that he had heard about the incident from PW-1. It was not a fact that he falsely stated that there was one function in their village. It was not a fact that he deposed falsely.

- x. PW-6 in his deposition stated that he was an Assistant Teacher of Jalalerpara Joyrampur Primary School, P.S. Hogolberia and working there since 14.02.2006 as Assistant Teacher. On 14.07.2009 he was posted in the said school and in the said post. That was the certificate relating to PW-1, daughter of Rahaman Mondal of village Joyrampur, P.S. Hogolberia which relates to her date of birth and was prepared by him and it bore his signature with date as well as his official designation. The said certificate issued by him on 14.07.2009 was marked as Ext. 3. He mentioned the date of birth of PW-1 in his said certificate from the admission register of PW-1 of their school.
- xi. During his cross-examination PW-6 stated that school register was not lying with him just then. He could not state as to from which paper the date of birth of PW-1 was mentioned in the school

admission register. It was not a fact that Ext. 3 was not a genuine one.

- xii. PW-7 in his deposition stated that at the time of deposition he was posted at Krishnanagar Sadar Hospital as Superintendent and on 29.01.2011 he was posted in the same place and post. On that date he examined Mohan Mondal, 19 years age, a Muslim male I/C/W Hogolberia P.S. Case No. 161/10 dated 17.12.2010 under Sections 448/376 of the Indian Penal Code and the said person namely Mohan Mondal was brought and identified before him by Constable No. 285 namely Ekkori Ghosh. The age as mentioned by him in his report had been stated before him by Mohan Mondal. In course of his examination of accused Mohan Mondal he found that Mohan Mondal was capable of sexual intercourse and thus he was potent. That was the said report prepared and signed by PW-7 and it bore his official with date and it also bore the signature of accused Mohan Mondal who signed in his presence. The said report was marked as Ext. 4.
- xiii. PW-8 in his deposition stated that at the time of deposition he was posted at Hogolberia P.S. as A.S.I. of police and on 17.12.2010 he was posted at the same place and post. On that date he received one petition of complaint as forwarded by Learned A.C.J.M., Tehatta under Section 156(3) Cr.P.C. and based on the said written complaint he started Hogolberia P.S. Case No. 161/10 dated 17.12.2010 under Sections 448/376 of the Indian Penal Code. That was his receiving endorsement on the said petition of complaint and it was marked as

Ext. 5. Based on the said written complaint he drew up the formal F.I.R. That was the said formal F.I.R. prepared and signed by PW-8. That was the signature of the then O.C. of Hogolberia P.S. namely Sri Mukul Miya since PW-8 worked with him and as such he knew his handwriting and signature. That was the said formal F.I.R. prepared and signed by PW-8 and bore the signature of Mukul Miya and it was marked as Ext. 6.

- xiv. During cross-examination PW-8 stated that besides receiving the written complaint of Rahaman Mondal and preparation of the formal F.I.R. he did nothing in the present case.
- xv. PW-9 in his deposition stated that he knew accused Mohan Mondal and he identified the accused person on dock. PW-9 knew Rahaman Mondal of his village and he knew the daughter of Rahaman Mondal but he could not state her name. One day there was meeting in his village over the incident of rape by Mohan Mondal on the daughter of Rahaman Mondal and the said incident took place about 2 years back and in that meeting he was present. The incident of rape was in the night. Over that incident of rape Rahaman Mondal lodged a complaint against accused Mohan Mondal. He signed on a seizure list as prepared by police. That was his signature on the seizure list. The signature of PW-9 on the seizure list dated 14.02.2011 was marked as Ext. 2/1.
- xvi. During his cross-examination PW-9 stated that he could not state the date of salish meeting which took place in the village. He could not

state as to what was happened before that meeting. He could not state whether there was any Jalsha in his village on 25th Kartick of Bengali calendar year. It was not a fact that he falsely stated it that there was one salish in his village. It was not a fact that he falsely stated it that salish was held over the incident of rape by the accused person of this case on the daughter of Rahaman Mondal. He was examined by police. It was not a fact that he deposed falsely.

- xvii. PW-10 in his deposition stated that at the time of deposition he was posted at Karimpur Rural Hospital as Medical Officer and on 11.01.2011 he was posted in the same place and post. On that date he examined PW-1/victim girl I/C/H Hogolberia P.S. Case No. 161/10 dated 17.12.2010 under Sections 448/376 of the Indian Penal Code. The patient was brought and identified before him by Lady Constable 2000, namely Banashri Saha. He examined PW-1 in presence of female staff nurse of the said hospital. During his examination he found that her hymen was torn and there was old tear on hymen and vagina permits easily two fingers. After examination it was his opinion that she was capable of intercourse and there was no visible injury in her private parts and it was difficult to comment whether she was raped or not. That was the said report of his examination and it bore his signature and official seal marked as Ext. 7.

- xviii. During his cross-examination PW-10 stated that it might be that in case of rape on a minor girl there might be gross damage in the vagina.
- xix. PW-11 in his deposition stated that he knew Rahaman Mondal who was his co-villager. He also knew Jalal Mondal of their village. He also knew Mohan Mondal, son of said Jalal Mondal. Pw-11 identified accused Mohan Mondal in Court. He knew that Rahaman Mondal lodged one complaint against Mohan Mondal relating to PW-1, daughter of said Rahaman Mondal. Approximately before 3 years ago said occurrence took place. One salish took place relating PW-1 and the appellant. He was present in the said salish. Said salish was relating to one 'kutsha' in between PW-1 and the appellant. He heard one illicit relation in between PW-1 and appellant. Appellant made intercourse with PW-1. He did not make any inquiry from PW-1. Police did not interrogate him. At this stage PW-11 was declared hostile as per the prayer of the prosecution.
- xx. During cross-examination PW-11 stated he did not state to police that Mohan Mondal made illegal work (kharap kaj) upon PW-1/victim girl. He did not state to the police that one salish took place relating to the incident in between PW-1/victim girl and appellant. He did not state to the police that no fruitful result was found after the said salish. In the said salish accused Mohan Mondal agreed to marry PW-1. He knew that as Mohan Mondal subsequently did not marry PW-1/victim girl and for that reason Rahaman Mondal/PW-2 lodged this

case. It was a fact that family members of Mohan Mondal were not agreed the marriage in between PW-1 and appellant did not take place. Not a fact that he did not state the actual fact in his evidence to save the accused from this case. Not a fact that no salish took place relating to any incident of PW-1 and Mohan Mondal and no discussion took place relating to the 'kutsha' of PW-1 and Mohan Mondal. Not a fact that he had stated falsely that in the said salish Mohan Mondal agreed to marry PW-1/victim girl and subsequently family members of Mohan Mondal did not agree the marriage in between Mohan Mondal and PW-1. Not a fact that he had deposed falsely.

xxi. PW-12 in his deposition stated that he knew Rahaman Mondal who was his co-villager. He identified the accused in court. He heard from other people that Rahaman Mondal lodged the case against Mohon Mondal. As there was an illicit relation in between Mohon Mondal and the daughter of Rahaman Mondal and relating to the said mater on salish took place. In the said salish it was discussed relating to marriage in between Mohon Mondal and daughter of Rahaman Mondal. Subsequently, said marriage did not take place. Said incident took place more than 2 years ago.

xxii. During cross-examination, PW-12 stated that not a fact that it was not true that in a salish it was discussed relating to illicit relation of Mohon Mondal and daughter of Rahaman Mondal. Not a fact that it was not true that in the said salish Mohon Mondal agreed to marry

the daughter of Rahaman Mondal. Not a fact that he had deposed falsely.

- xxiii. PW-13 stated in her evidence that Rahaman Mondal was her father and PW-1 was her sister. She knew the accused Mohon Mondal who was present in accused dock. She identified the accused. She stated that her father lodged one complaint before Tehatta Court against the accused relating to the incident of her sister PW-1. Said incident took place before 3 years ago at her father's house in a night at about 4:00 A.M. (dawn). In the said night, one jalsha festival was going on in their para. Her father went to hear the said jalsha in the place of jalsha. On the said moment, accused Mohan Mondal entered into the room of her sister PW-1 and he behaved with PW-1 like husband and wife. Then said, accused on that time raped PW-1. PW-1 raised alarm and hearing the same para people came there. Subsequently, her father came there. On that time PW-1 stated the said incident to him. When the para people came to the room of PW-1 after hearing hue and cry then accused fled away from the said place. On that time, in her father's house, PW-1 and her father were residing because her mother died before that date. PW-13 got married in an adjacent village. After hearing the said incident, she came to her father's house and heard the said incident from PW-1.
- xxiv. During cross-examination, PW-13 stated that she got married before 24 years ago. She did not know what was the actual distance in between her father's village and her husband's village. Her father

informed her the aforesaid incident. She could not say the said date. Police interrogated her. She was not able to remember whether she had stated to the I.O. or not that occurrence of this case took place at 4:00 A.M. (dawn). She had stated to the I.O. that she heard the aforesaid incident from her father and also heard the same from PW-1. Not a fact that no such incident took place as per her evidence. Not a fact that they had tried to give marriage in between PW-1 and the accused and they could not succeed and for that reason PW-13 and her father arranged the case against the accused. Not a fact that she had deposed falsely.

xxv. PW-14 stated in his evidence that he knew Rahaman Mondal and his daughter PW-1. He also knew accused Mohan Mondal who was present in accused dock. PW-14 identified the accused. He heard that Rahaman Mondal lodged a case at Tehatta Court against the accused relating to incident of his daughter. He heard one incident in between PW-1 and accused Mohan Mondal. Said incident took place before 3 years ago at the house of Rahaman Mondal at about 4:00 A.M. (dawn). On the aforesaid date and time, accused Mohan Mondal raped PW-1 at the house of Rahaman Mondal. He heard the said incident from some para people of Rahaman.

xxvi. During cross-examination PW-14 stated that not a fact that he had stated falsely that he heard one incident in between PW-1 and the accused. Not a fact that accused did not rape PW-1 in a night at

about 4:00 A.M. (dawn). Not a fact that no such incident took place as per his evidence on the aforesaid date, time and place.

- xxvii. PW-15 stated in his examination-in-chief that he was posted at Kotwali as S.I. of Police and on 17.12.12 he was posted at Hogolberia P.S. as S.I. On that date, he took up investigation of this case as per instruction of the then O.C., Hogolberia P.S. During investigation he perused the F.I.R., visited the place of occurrence, prepared rough sketch map and index. The rough sketch map and index were marked as Ext. 8 and 8/a. He had examined available witnesses and recorded their statement under Section 161 Cr.P.C. He had also arranged for medical examination of the victim and also arranged for recording of statement of victim under Section 164 Cr.P.C. He also collected medical report and copy of statement of the victim recorded under Section 164 Cr.P.C. He also arrested the accused and also arranged for medical examination of the accused and collected the said medical report. He also seized the birth certificate of the victim. On perusal of a seizure list, he had prepared it by his own handwriting. The document bore his signature. His signature was marked as Ext.9. After completion of investigation, he had consulted with his superiors and thereafter submitted charge-sheet against accused Mohan Mondal for the offence punishable under Section 448/376, I.P.C.
- xxviii. During cross-examination, PW-15 stated that he had not recorded any statement of the de facto complainant Rahaman Mondal. The victim PW-1 did not state before him that accused came to her room

and pushed the door and on that time door was closed in a slightest manner. She did not state before him that accused opened the door as it was slightly closed and thereafter entered into her room along with 'hansua' and placed the same on her neck and on that time extinguished the lamp/lampha which was burning in her room and thereafter accused touched her body. She did not state before him that as per her hue and cry Hakman, Lokman, Amrul came to her house. Said witness did not state before him that Mohan aforesaid 3 persons and as a result they fell down and then accused fled away from the room of PW-1. Said witness did not state before him that after returning to her father she stated the incident to him. She did not state before him that after the incident police of Hogolberia came and took away her to Karimpur Hospital for her medical treatment. Witness Hakman Mondal did not state before him that on the date of incident he had been in his house, he heard hue and cry from the house of Rahaman. Said witness did not state before him that he asked PW-1 as to what happened then she stated before him that accused Mohan Mondal came to her room and on reaching there by placing one 'hansua' he threatened her and at that time accused extinguished the lamp/lampha of that room and thereafter accused committed rape upon her. Witness Lokman Mondal did not state before him that on the night of incident he had been in his house and after hearing one hue and cry from the house of Rahaman he went there and met PW-1 and she stated that accused Mohan Mondal

committed rape upon her. Witness Fazlu Mondal stated before him that one salish took place relating to daughter of Rahaman and accused Mohan but said witness did not state before him that said salish took place relating to a kutsa. He did not state before him that he heard one illicit relation in between PW-1 and Mohan Mondal. Witness Jamena Bibi stated before him that occurrence took place in the night but she did not state before him that said occurrence took place at 4:00 A.M. (dawn). Said witness did not state before him that she heard the incident from PW-1. Said witness did not state before him that she heard the incident from PW-1. Said witness did not state before him that PW-1 and her father were only residing in the said house and she after receiving the said information came to her father's house. Witness Amrul Mondal stated before him that incident took place in the night but he did not state before him that incident took place at 4:00 A.M. (dawn). He did not send the vaginal swab of PW-1 for chemical analysis. He did not arrange for any other medical test except the medical examination dated 11.01.11 relating to alleged rape. On perusal of court complaint which was forwarded to Hogolberia P.S. under Section 156(3) Cr.P.C. He did not mention the name of the writer of the said complaint and filing advocate as such he did not cite any witness as scribe and filing advocate.

12. The father of the victim girl (de-facto complainant) stated that her daughter used to stay at their house after the demise of the wife of the de-facto complainant and on 12.10.2010 at about 8.00 p.m. the de-facto complainant

went to attend a religious “Jalsa” in their village leaving his daughter alone in the house. The accused taking that opportunity entered in their house and was armed with a hasua. He threatened the victim. Thereafter, the accused put off the light (lampha) which was burning at the time in the room. After that he raped the victim girl against her will, somehow the victim girl able to push the accused down and raised alarm. Hearing her alarm neighbours rushed there, but the accused person thrashed the villagers and fled away.

13. It appeared from the deposition of PW-1/victim girl that after the alleged incident hearing her hue and cry Haqueman (PW-3), Lokenath (PW-5), Amrul (PW-14) came to her room and at that time accused person dashed those persons as a result they fall down and the accused persons fled away from the spot but in the cross-examination the witness deposed that the house of Amrul Mondal (PW-14), Haqueman Mondal (PW-3) is 2 km away from her house. So, just after the incident presence of Amrul Mondal (PW-14), Haqueman Mondal (PW-3) to the place of occurrence was seriously doubtful. PW-1 did not state the incident about manners of commission of offence to the Investigating Officer, first time she stated the incident before the Court.
14. PW-2/father of the victim girl, as well as the informant of the instant case, was not present at the place of occurrence, he heard the incident from the victim girl/PW-1 and thereafter he lodged the complaint against the accused person.

15. It appeared for the deposition of PW-3/uncle of the victim girl, after hearing a noise he went to the house of the victim and he was informed by the victim about the incident.
16. In the deposition of the victim girl/PW-1, it appeared that hearing her hue and cry this witness along with PW-5 and PW-14 came to her room and at that time accused person dashed those persons and as a result they fell down and the accused person managed to flee from the room, but in the deposition of PW-3 he never stated such incident of dashing with accused, which created serious doubts about the presence of the accused in the place of occurrence. PW-3 did not state the incident to the Investigating Officer, whatever he deposed for the first time before the Court.
17. PW-5/co-villager of the victim girl, it appeared from the deposition of the witness that after hearing a noise he went to the house of the victim and he was informed by the victim about the incident.
18. In the deposition of victim (PW-1) it appears that hearing her hue and cry this witness along with Haqueman Mondal (PW-3) and Amrul Mondal (PW-14) came to her room and at that time accused person dashed those persons and as a result they fell down and the accused person managed to fled away from the room, but in the deposition of this witness he never stated such incident of dashing with accused, which creates serious doubts about the presence of the accused in the place of occurrence. This witness in his deposition stated that he did not know other persons, present at the place of occurrence. This witness did not state the incident to the Investigating Officer, whatever he deposed for the first time before the Court.

19. PW-6 happened to be Assistant Teacher of the school, where victim used to study. She had issued a certificate to prove the age of the victim but it appeared from the evidence that the school register and/or record was not produced and exhibited before the Court to substantiate the authenticity of the said certificate. It was trite law that merely a school certificate without producing the concern school register before the Court, is not an admissible piece of evidence to prove the age of the victim. Prosecution, thus had miserably failed to prove the age of the victim beyond reasonable doubt.
20. PW-7 happened to be the Doctor, who had examined the Accused person of this instant case.
21. PW-8 happened to be the Police Personnel, who drew up the Formal F.I.R.
22. PW-9 was present in salish. It appears from the deposition of the witness that he does not have any personal knowledge about the alleged incident.
23. PW-10 happened to be the Doctor, who examined the victim girl. It appeared from the deposition of this witness that after examining the victim she did not find any injury in the private part of the victim girl and she further deposed that *"it is difficult to comment whether the victim girl is raped or not"*, So from the evidence of this witness it appeared that she did not support the prosecution case and prosecution thus had miserably failed to prove its case of forceful rape beyond reasonable doubt.
24. PW-11 was present in salish. It appeared from the deposition of this witness that he heard about illicit relationship between victim girl and the accused and in the saalish accused agreed to marry the victim girl but subsequently the family members of the accused were not agreed in that marriage so the

marriage between the victim girl and the accused did not take place and for that reason PW-2 lodged this instant case. PW-11 was declared hostile by the prosecution.

25. PW-12 was present in saalish. It appeared from the deposition of this witness that this witness was examined after two years and six month from the alleged incident. he heard the incident from other people that Rahaman Mondal (PW-2), had lodged the case against the accused person as there was illicit relationship between victim girl and the accused and in the salish accused agreed to marry the victim girl but subsequently the family members of the accused were not agreed in that marriage so the marriage between the victim girl and the accused did not take place. So it appeared from the evidence of this witness that this witness had not supported the prosecution case. So it was bound on the prosecution to prove its case beyond reasonable doubt. PW-12 was not declared hostile by the prosecution.

26. PW-13 heard the incident from the victim girl and the informant (PW-2) of the instant case. So this witness was a hearsay witness. This witness did not state the incident to the Investigating Officer, whatever he deposed, for the first time before the Court.

27. In the deposition of victim (PW-1) it appeared that hearing her hue and cry PW-14 along with PW-3 and PW- 5 came to her room and at that time accused person dashed those persons and as a result they fell down and the accused person managed to flee from the room, but in the deposition of PW-14 never stated such incident of dashing with accused, which created

serious doubts about the presence of the accused in the place of occurrence. PW-14 heard the incident from other people of the village. So this witness was a hearsay witness.

28. PW-15 happened to be the Investigating officer of the instant case. It appears from the deposition of PW-15 that he did not record any statement of the informant (PW-2) and PW-15 further deposed that during the course of investigation the victim girl (PW-1) did not state the alleged incident to this witness. It also appeared from the deposition of PW-12 that witnesses namely, Hakman Mondal (PW-3), Lokman Mondal (PW-5), Jamena Bibi (PW-13) did not state anything about the incident before this witness. PW-15 stated that the victim girl did not state to him that she had informed her father (PW-2) about the alleged incident. PW-15 stated that PW-3 did not state to him that hearing of noise he gone to the house of the victim girl (PW-1). PW-15 stated that PW-5 did not state to him that hearing of noise he gone to the house of the victim girl. It also appeared from the deposition of PW-15 that he did not send the vaginal swab of the victim for chemical analysis.

29. The prosecution case did not mention any eye-witness to the offence of rape to have been committed on the victim. The victim in her deposition stated to have been threatened by a 'hansua' prior to the commission of rape. She further stated to have raised a clamour to which Haqueman, Lokeman and Amrul came to her room and the appellant dashed these three persons who incidentally fell down and eventually the appellant escaped.

30. Haqueman Mondal PW-3 in his deposition stated to have heard that Rahaman Mondal the father of the victim lodged a complaint against the appellant over the incident of rape committed to her daughter. He further stated to have reached the house of the victim having heard a commotion and subsequently enquired the victim the reason of the same. The victim narrated to have been raped by the appellant being threatened by the 'hansua'. PW-3 did not state to the Investigating Officer to have learnt about the incident from the victim or her father.
31. PW-5 Lokeman Mondal stated to have learnt about the incident from the victim and her father.
32. PW-9 heard about the incident and was devoid of personal knowledge.
33. PW-11 deposed to have been present at a salish concerning a rumor involving the victim and the appellant. He was declared hostile by the prosecution. During his cross-examination by the prosecution, PW-11 stated that the appellant initially agreed to marry the victim however denied to accomplish the same. Consequently the instant case was filed.
34. PW-12 deposed to have heard about the incident of an illicit relationship between the appellant and the victim to be the subject matter of a salish. However PW-12 was not declared by the prosecution.
35. PW-13 the sister of the victim narrated the prosecution case synchronizing the events as stated by the victim and her father. However, her evidence is based on hearsay.
36. The testimony of PW-14 is based on hearsay.

37. PW-15 the Investigating Officer in his cross-examination stated that he did not record the statement of the de facto complainant and the deposition of the victim, PW-3 Haqueman Mondal, PW-5 Lokeman Mondal, PW-13 Jamena Bibi and PW-14 Amrul Mondal were not recorded by him since the aforesaid prosecution witnesses did not divulge the same before him and deposed the narrative before the Court for the first time. Contrary to the deposition of the victim PW-2 the prosecution witnesses namely Haqueman Mondal, Lokeman Mondal and Amrul did not visit the house of the victim at the time when the appellant escaped or to have dashed with them. There are contradictions and inconsistencies in the deposition of the victim. Most of the prosecution witnesses apart from the official witnesses did not witness the incident nor did anyone of them see the appellant to flee from the house of the victim after the commission of the offence. The 'hansua' or the 'lamp' was not recovered. The incident alleged to have been taken place on 12.11.2010 however the complaint was lodged on 17.12.2010 without an explanation of the delay. The father of the victim reached the house within 8-10 minutes of the incident however did not instantly report the same to the police authority.
38. PW-4 recorded the statement of the victim under Section 164 of the Code of Criminal Procedure. There are variations in the statement as well as her deposition before the Court.
39. PW-10 the doctor who examined the victim could not comment as to whether she was raped or not as there was no visible injury in her private parts.

40. Section 448 of the Indian Penal Code, 1860 states as follows :-

“448. Punishment for house-trespass.—Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.”

41. In **Vidyadharan v. State of Kerala**¹, the following was held by the Hon’ble Supreme Court:-

“10. Intention is not the sole criterion of the offence punishable under Section 354 IPC, and it can be committed by a person assaulting or using criminal force to any woman, if he knows that by such act the modesty of the woman is likely to be affected. Knowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed. A victim of molestation and indignation is in the same position as an injured witness and her testimony should receive the same weight. In the instant case after careful consideration of the evidence, the trial court and the High Court have found the accused guilty. As rightly observed by the courts below, Section 3(1)(xi) of the Act which deals with assaults or use of force to any woman belonging to a Scheduled Caste or Scheduled Tribe with the intent to dishonour or outrage her modesty is an aggravated form of the offence under Section 354 IPC. The only difference between Section 3(1)(xi) and Section 354 is essentially the caste or the tribe to which the victim belongs. If she belongs to a Scheduled Caste or Scheduled Tribe, Section 3(1)(xi) applies. The other difference is that in Section 3(1)(xi) dishonour of such victim is also made an offence. Section 448 provides for punishment relating

¹ (2004) 1 SCC 215

to house trespass. In order to sustain the conviction under Section 448 IPC it must be found that the intention of the accused was to commit an offence or to intimidate, insult or annoy the complainant. There must be unlawful entry and there must be proof of one or the other of the intentions mentioned in Section 441 IPC.”

42. In **Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath**², the Hon’ble Supreme Court held the following:-

“14. Section 441 of the Penal Code, 1860 defines criminal trespass as follows:

“441. Criminal trespass.— Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit ‘criminal trespass’.”

House trespass is punishable under Section 448 of the Penal Code, 1860. It is significant that when entry into or upon property in possession of another is lawful then unlawfully remaining upon such property with the object of intimidating, insulting or annoying the person in possession of the property would be criminal trespass. The offence would be continuing so long as the trespass is not lifted or vacated and intimidation, insult or annoyance of the person legally in possession of the property is not stopped. The authors of the Code had the following words to say:

“We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence, except when it is committed in order

² (1991) 2 SCC 141

to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances.

These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed.”

43. Section 35 of the Indian Evidence Act, 1872 states as follows:-

“35. Relevancy of entry in public record made in performance of duty.— *An entry in any public or other official book, register or 2 [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or 2 [record or an electronic record], is kept, is itself a relevant fact.”*

44. The Hon’ble Supreme Court held the following in **Rishipal Singh Solanki v.**

State of U.P.,³:-

“32.6. *Further, in Jabar Singh v. Dinesh [Jabar Singh v. Dinesh, (2010) 3 SCC 757 : (2010) 2 SCC (Cri) 484] , this Court considered a situation wherein the entry of date of birth in the admission form of the school records or transfer certificates did not satisfy the condition laid down under Section 35 of the Evidence Act i.e. the said entry was not in any public or official register and was not made either by a public servant, in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country and therefore the said evidence was not relevant for the purpose of determining the age of the accused in the said*

³ (2022) 8 SCC 602

case. In the aforesaid case, this Court set aside the order [Dinesh v. State of Rajasthan, 2006 SCC OnLine Raj 1460] of the High Court in revision and confirmed the order of the trial court holding that the accused therein was a juvenile at the time of the commission of the alleged offence.”

45. The Hon'ble Delhi High Court in **Kishan Yadav v. State (NCT of Delhi)**⁴ held the following:-

“19. The Hon'ble Supreme Court in the case of Biradmal Singhvi (supra) has held that to render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to the date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is not of much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. It has been held that the courts have consistently held that the date of birth mentioned in the school register or secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined.

20. The Hon'ble Supreme Court in the case of Alamelu (supra) while considering the decision in the case of Biradmal Singhvi (supra) decision in the case of Narbada Devi Gupta v. Birendra Kumar Jaiswal¹⁸ has set aside the conviction in the absence of sufficient evidence and various infirmities in the prosecution evidence with

⁴ 2022 SCC OnLine Del 3782

respect to the date of birth of the prosecutrix. The Hon'ble Supreme Court has noted the law laid down in the case of Narbada Devi Gupta (supra) to state that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the "evidence of those persons who can vouchsafe for the truth of the facts in issue".

46. In **Radhu v. State of M.P.**⁵, the following was held by the Hon'ble Supreme Court on the moot point of admissibility of the sole testimony of the prosecutrix when such does not inspire confidence: -

"13. *We are thus left with the sole testimony of the prosecutrix and the medical evidence that Sumanbai had an abrasion on the left elbow, an abrasion on her arm and a contusion on her leg. But these marks of injuries, by themselves, are not sufficient to establish rape, wrongful confinement or hurt, if the evidence of the prosecutrix is found to be not trustworthy and there is no corroboration.*

14. *Lalithabai says that when Sumanbai did not return, she enquired with Gyarsibai. Sumanbai also says that she used to often visit the house of Gyarsibai. She says that Radhu's parents are kaka and baba of her mother and Radhu was her maternal uncle. The families were closely related and their relationship was cordial. In the circumstances, the case of the prosecution that Gyarsibai would have invited Sumanbai to her house to abet her son Radhu to rape Sumanbai and that Gyarsibai was present in the small house during the entire night when the rape was committed, appears to be highly improbable in the light of the evidence and circumstances.*

16. *The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other*

⁵ (2007) 12 SCC 57

circumstances make it highly improbable that such an incident ever took place. The learned counsel for the respondent submitted that the defence had failed to prove that Mangilal, father of the prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of the accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix of the suggestion made on behalf of the defence that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money they had made the false charge of rape to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication does not have much relevance as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the trial court and the High Court erred in returning a finding of guilt."

47. PW-6 had produced a certificate issued on 14.07.2009 marked as Exhibit 3 however did not produce the admission register to prove its veracity.
48. The prosecution failed to establish the offence of house trespass to convict the appellant under Section 448 of the Indian Penal Code.
49. The prosecution could not establish the age of victim to be a minor as well as the role of the appellant to have committed rape upon the victim. The sole testimony of the victim is sufficient to convict the perpetrator provided her evidence is unsullied, truthful, trustworthy and free of vengeance.
50. In the instant case, the repulsive and uncorroborated evidence of the victim cannot indict the appellant to suffer an order of conviction.
51. Under the facts and circumstances of the case in absence of proof of commission of the offences by the appellant beyond reasonable doubt, the

prosecution has failed to prove its case and accordingly the appeal is allowed.

52. Accordingly, the instant criminal appeal stands disposed of.

53. There is no order as to costs.

54. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

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

(Ananya Bandyopadhyay, J.)