

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 711 of 2014

With

IA NO: CRAN 2 of 2021

Sanjib Talukdar @ Chattu & Ors.

Vs.

The State of West Bengal

With

CRA 766 of 2014

Palash Debnath

Vs.

The State of West Bengal

With

CRA 767 of 2014

Papai Roy

Vs.

The State of West Bengal

For the Appellant Nos. : Mr. Anjan Bhattacharya, Adv.
 1 and 3 in CRA 711 : Ms. Anita Shaw, Adv.
 of 2014

Amicus Curie : Mr. Partha Pratim Das, Adv.

For the Appellant in : Mr. Anjan Bhattacharya, Adv.
 CRA 766 of 2014 : Ms. Anita Shaw, Adv.

For the Appellant in CRA : Ms. Chandreyee Alam, Adv.
 767 of 2014 : Ms. Supria Ray Chowdhury, Adv.
 : Mr. Syed Nasim Aejaaz, Adv.
 : Mr. Sankar Ghosh, Adv.

For the State : Mr. Debasish Roy, Ld. PP
 : Mr. Nequive Ahmed, Ld. APP
 : Mr. Saryati Datta, Adv.

Hearing Concluded on : March 1, 2024
Judgement on : March 14, 2024

DEBANGSU BASAK, J.:-

1. Three appeals have been heard analogously as they emanate from the same impugned judgement of conviction and the order of sentence.
2. By the impugned judgement of conviction dated September 18, 2014 the learned Trial Judge had found the appellants guilty under Section 376D of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences Act, 2012.
3. By the impugned order of sentence, the learned Trial Judge had sentenced the appellants to undergo rigorous imprisonment for a term of twenty years for the offence punishable under Section 376D of the Indian Penal Code, 1860 and to pay a fine of Rs. 5000 each and in default to undergo further rigorous imprisonment for one year.
4. At the hearing of the three appeals, some of the appellants were unrepresented and consequently, we had appointed an amicus curiae.
5. Since the police case involved provisions of Section 376D of the Indian Penal Code, 1860 as well as Section 6 of the Protection of Children from Sexual Offences Act, 2012, we

would be referring to the appellants in abbreviation, in this judgement. Appellant No. 1 of CRA 711 of 2014 is referred to as SD, Appellant No. 2 and Appellant No. 3 therein as RM and RB respectively. Appellant in CRA 766 of 2014 is referred to as PB and appellant in CRA 767 of 2014 is referred to as PR.

6. Police had received a written complaint from the father of the victim on October 26, 2013 with regard to kidnapping, gang rape and aggravated penetrative sexual assault on a minor. Police had registered a formal First Information Report on October 26, 2013 under Section 376D of the Indian Penal Code, 1860. On the conclusion of the investigation, police had submitted charge sheet against the appellants.

7. Police had identified six persons as being involved in the crime. One of the persons being PW 23 had submitted a petition on January 30, 2014 before the jurisdictional Court praying for pardon expressing his willingness to be approver of the case. In view of such prayer, jurisdictional Court had sent him to segregation and thereafter examined him in Court on the point of becoming an approver.

8. By an order dated January 21, 2014, the jurisdictional Court had allowed prayer for pardon after such prayer was supported by the prosecution. Consequently, PW 23 had been

deleted from the column of the name of accused person and was put into the category of witnesses.

9. Charges under Section 376D of the Indian Penal Code, 1860 under Section 6 of the Protection of Children from Sexual Offences Act, 2012 had been framed against the five appellants herein on February 3, 2014. An additional charge under Section 363 of the Indian Penal Code, 1860 was framed as against ST.

10. At the trial, the case of the prosecution was that, ST on October 25, 2013 had kidnapped the victim, a minor from the lawful guardianship of her parents. The appellants had committed gang rape on the victim and acted in furtherance of such common intention, on October 25, 2013 at a field in a specified area, which given the subject matter of the case, is not stated in details herein, at about 10.30 PM onwards. The appellants had also committed aggravated penetrative sexual assault on the victim in furtherance of their common intention and therefore, committed an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

11. In order to prove the charges as against the appellant, prosecution had examined 35 witnesses and relied upon

various documentary and material evidence at the trial. On conclusion of the evidence of the prosecution, each of the appellants had been examined under Section 313 of the Criminal Procedure Code where they claimed to be innocent and falsely implicated. They had declined to adduce any evidence.

12. Learned advocate appearing for the PD, ST, RB has submitted that, there was a disconnect between the contents of the written complaint and the case sought to be made out at trial by the prosecution. He has referred to the deposition of the PW 1 who is the father of the victim in this regard.

13. Learned advocate appearing for PD, ST and RB has submitted that, the deposition of the mother of the victim being PW 2 cannot be relied upon. The victim and PW 2 had been sleeping in the same room. The victim had left such room in the night without PW 2 knowing about it. He has pointed out that, the victim came back home with a different wearing apparel. Moreover, he has pointed out that, neither PW 1 nor PW 2 could establish the age of the victim.

14. Learned advocate appearing for PD, ST and RB had submitted that, PW 23 who is an approver, cannot be relied upon. Evidence of an approver cannot form the basis of the

conviction as such piece of evidence was weak in nature. He has pointed out that, the evidence of the approver was not corroborated by any other evidence brought on record by the prosecution.

15. Learned advocate appearing for PD, ST and RB has submitted that, the doctor who examined the victim did not find any external injury on the victim. Such doctor did not mention anything about sexual assault on the victim. He has also pointed out the DNA approval test report of PD. He has contended that, the appellants should be acquitted.

16. Learned advocate appearing for PR has referred to the evidence of the approver. She has pointed out that, the approver did not refer to the empty house from where the plastic alleged to be used in the incident, was brought. She has pointed out that, the circumstances as against PR, was going to the grocery shop and arranging for the plastic sheet. None of those circumstances establish the charge against PR.

17. Referring to the evidence relating to the plastic sheet learned advocate appearing for PR has submitted that, the plastic sheet was claimed to be given by PW 9. She has referred to the time line of asking for, obtaining the plastic sheet and the rain happening as transpiring from the evidence

of the witnesses. She has contended that, such evidence did not inspire confidence. PW 9 in her examination-in-chief was not shown the plastic sheet by the prosecution. PW 11 did not state to the investigating officer that the plastic sheet recovered was the one as shown by PR. Plastic sheet was not sent for forensic examination. She has referred to the evidence of PW 15 who found sand and grain in the back of the head, hair, back, and legs of the victim. Therefore, she has contended that, the user of the plastic sheet in the incident was doubtful. Referring to the other aspect of purchase of glasses by PR, learned advocate appearing for PR has contended that, evidence of PW 7 in this regard was not reliable as, the incident is alleged to occur at a congested area.

18. Referring to the medical evidence learned advocate appearing for PR has submitted that, blood sample of PR was collected and that, no evidence of the presence of PR was found. She has referred to the deposition of PW 34 in this regard. She has also referred to the evidence of PW 35 and contended that, the CFSL report being Exhibit 29 does not speak of detection of any human semen.

19. On the aspect of approver and his evidence, learned advocate appearing for PR has contended that PW 23, the approver was arrested seventeen days before the statement was recorded. She has contended that, PW 23 did not make true and full disclosure of the incident at the trial and therefore, was unreliable.

20. Learned amicus curiae has contended that, the evidence of the approver is a weak piece of evidence and that law requires corroboration in material particulars with regard thereto from other independent evidence. According to him, there was no independent evidence corroborating the claim of the approver being PW 23.

21. Learned amicus curiae has submitted that the age of the victim was not conclusively proved. Ossification test had been carried out and the report gives a range of 15 to 17 years. Adding two years to the upper limit of the range of age was permissible and therefore, the Court has to take the age of the victim to be 19 years after adding two years to the upper age limit of 17. Consequently, the victim could not be said to be a minor at the time of the incident taking place.

22. Learned amicus curiae has submitted that, there was an element of consent of the victim involved, more particularly

with the age of the victim not being established conclusively. He has contended that, on the basis of the ossification test and adding two years to the upper limit of the age as appearing from the ossification test of the victim, then, the victim was an adult at the time of the incident and capable of giving consent. He has pointed out that the victim left the room in which she was sleeping with her mother without informing her mother at 10 PM at night. Victim had accompanied one of the appellants to the field voluntarily. He has contended that, no force was applied and even the approver did not say that the victim was subjected to force in course of sexual intercourse. This according to him are pointers to the fact that the victim had consented to sex.

23. Referring to the DNA test reports, learned amicus curiae had submitted that, no consent of the appellants were obtained prior to obtaining the blood samples for the DNA test. Therefore, the test report of the appellant in this regard should be discarded.

24. Learned amicus curiae has referred to the two statements under Section 164 of the Criminal Procedure Code recorded by the victim. He has pointed out that the victim could not be examined since the victim expired before the

commencement of the trial. Consequently, the 164 statement of the victim cannot be relied upon.

25. Learned amicus curiae has contended that, since, the appellants were identified by the approver and there was no corroboration from any independent evidence with regard to the identity of the appellants, they should not be convicted.

26. Learned advocate appearing for the public prosecutor has contended that, PW 23, the approver, had implicated all the appellants as well as himself as perpetrators of the crime. Deposition of PW 23 is inculpatory in nature. Evidence of PW 3 along with the statement of the victim recorded under Section 164 of the Criminal Procedure Code had established the charge as against the appellant beyond reasonable doubt.

27. Learned public prosecutor has referred to the deposition of PW 15, a doctor, who examined the victim on October 26, 2013. Such doctor had opined that the injuries suffered by the victim suggested sexual assault on the victim. The other doctor being PW 17 who had examined the victim on October 29, 2013 deposed that the victim was referred to the emergency department for examination of sexual assault. According to him, the doctors had confirmed that the victim was subjected to sexual assault.

28. Learned public prosecutor has contended that PW 1 and PW 2 have established the age of the victim to be 16 years. He has pointed out in the ossification test range was fixed between 15 to 17 years and that the evidence of the parents of the victim as her age fell within the range. Therefore, the contention of the appellants as to the victim being an adult should not be accepted.

29. Learned public prosecutor has drawn the attention of the Court to the deposition of PW 34 who held the DNA profiling test of PD. PW 34 had submitted the DNA test report which was marked as Exhibit 29. Such DNA test report had been marked as exhibit without any objection at the trial. Exhibit 29 had established that PD was the father of the child in the womb of the victim.

30. With regard to evidentiary value of the testimony of an approver learned public prosecutor has relied upon **1997 SCC (Cri) 972 (Balbir Singh vs. State of Rajasthan)** and **2017 (12) SCC 767 (Khokan Giri alias Madhab vs. State of West Bengal)**. He has contended that, the inculpatory testimony of PW 23 was corroborated by the forensic evidence and testimonies of other prosecution witnesses and therefore sufficient to convict the appellants. Learned public prosecutor

has contended that, in such circumstances the impugned judgement of conviction and the order of sentence should be upheld.

31. Prosecution had examined the father of the victim as PW 1, at the trial. He had stated that, he worked as a taxi driver. The incident had occurred on October 25, 2013 and that on October 26, 2013 in the early morning he returned home from work and found his wife sitting and crying. When questioned, his wife told him that the victim, their daughter was missing. Then he had gone to the police station with his wife and lodged a missing diary. They had attempted to search for the victim in the neighbourhood. At around noon, a resident of the locality had brought the victim to them. Victim was physically exhausted, unable to walk properly. Victim was crying and was in a very bad condition. After sometime, victim had disclosed to them that at the night when she had went to bed, ST had come to the house and told her that PW 1 called her and then forcibly dragged her out of the home by gagging her mouth, at about 10 to 10.30 PM. Victim had further stated that, ST took her to the nearby house and six persons raped her including ST. They had gone to the police station in the afternoon and lodged the written complaint recording the

incident. He had tendered the written complaint which was marked as Exhibit 1. He had identified his signature thereon which was marked as Exhibit 1/1. He had stated that at the time of incident the victim was 16 years and was born in the year 1997. He had also identified his signatures in the seizure list. He had stated that, the victim died an unnatural death thereafter.

32. PW 1 had been cross-examined at great length by the defence without anything favourable to the defence being extracted during such cross-examination.

33. Mother of the victim had deposed as PW 2. She had corroborated the evidence of PW 1. She had stated that, on October 23, 2013 she and the victim went to bed after dinner as PW 1 had gone to work. She had slept at the night. Next morning she had found that the victim was not at home. She had asked everybody including the neighbours in the surrounding about her daughter. In the meantime PW 1 had returned home when she told him that the victim was missing. They had thereafter gone to the police station and lodged the missing diary. After returning from the police station they had again tried to search the neighbourhood and adjoining area. Thereafter, a neighbour had brought their

daughter to them from the house of another person. The dress of the victim was wet. She had stated that, PW 4 sent the victim with the person concerned after arranging for change of dress. Victim was crying and was hardly able to speak when she was asked about what had happened. After couple of hours the victim had told her that ST had called her at the night of October 23, 2013 and told her that PW 1 called her. ST had taken her to the nearby field and along with 5 other youths raped her. She had been abandoned in a bad condition. Victim had named ST and PD as perpetrators. She had also stated that the victim was 16 years of age.

34. PW 2 again had been cross-examined at great length by the defence without the defence being able to extract anything favourable to them.

35. The scribe of the written complaint had deposed as PW 3. He had stated that the written complaint was written in his hand writing. He had read over and explained the contents of the written complaint to PW 1, who signed the same in Hindi. He had identified his signature on the written complaint which was marked as Exhibit 1/2.

36. Police had seized certain articles from the house of PW 4. PW 4 had identified his signature on the seizure list.

37. Another seizure list witness had deposed as PW 5. He has had also identified his signature on the seizure list.

38. PW 6 had stated that victim had come to her house at 8 O'clock in the morning. Victim was shivering and had stated hardly anything. She had seen the victim only twice. She had called the victim offered her clothes of her daughter. Victim had put on her daughter's cloth and left her wearing apparels in her house. Victim had remained in the house till about noon and then her uncle came and took her. She had also stated that in the night at about 12 one lady police came to the house and seized the clothes belonging to the victim girl. She had identified her signature on the seizure list as also the cloth of the victim girl seized.

39. A grocery shop owner who had sold plastic glasses to the appellants had deposed as PW 7. He had deposed that, he sold plastic glasses on the fateful day but failed to name the persons to whom he had sold such glasses. He had been declared hostile by the prosecution.

40. Prosecution had examined the person who took the victim from the house of PW 4 to the house of the victim as PW 8. He had stated that, he became aware that the daughter of PW 1 was missing on October 26, 2013 in the morning and

while trying to search the victim, he came to know that the victim was in the house of PW 4. He had gone to the house of PW 4 and found the victim there. He had told PW 4 and his wife that the parents of the victim were searching for her and that he would take the victim to her parents. He had brought the victim and handed over the victim to the parents at about 12 noon. At that time the victim was crying.

41. The lady from whom PR and PD had collected a black colour plastic sheet deposed as PW 9. She had stated that, at about 11 PM on October 25, 2013, PR and PD called on her by knocking at the door and asked for a plastic sheet. They had stated that they would be having picnic. She had stated that she did not have a plastic at home. They had insisted when she gave them a black colour plastic which they did not return. She had stated that her husband was also present in the house. She had identified PD and PB in Court. She had stated that thereafter PR and PB had gone towards the mango orchard.

42. Husband of PW 9 had deposed as PW 10. He had stated that, PR and PD had come to their house and asked for a plastic from PW 9. Initially PW 9 was unwilling to give them anything but had afterwards given them a plastic, black in

colour measuring about 7 feet/3 feet. PR and PD had thereafter gone towards the mango orchard. He had stated that, on November 1, 2013 police visited their house in the night. He had signed the seizure list dated November 1, 2013. Police had taken him and his son accompanied by PR to the mango orchard and from the bank of the pond as shown by PR, the plastic sheet was recovered. Police had packed a black coloured plastic, sealed and seized it. He has signed the seizure list along with his son. He had identified his signature on the seizure list. He had identified PR in Court. He had identified the black plastic sheet when shown to him in Court. Such plastic sheet had been marked as material exhibit at the trial.

43. Son of PW 9 and PW 10 had deposed as PW 11. He had identified his signature on the seizure list and the material exhibit being the plastic sheet.

44. Land lord of PW 1 had deposed as PW 12. He had stated that he rented a premises to PW 1 and that subsequently PW 1 had left such tenancy.

45. The Judicial Magistrate who recorded the statement of the victim under Section 164 of the Criminal Procedure Code had deposed as PW 13. He had stated that, the victim

recorded two statements on November 4, 2013 and November 18, 2013 under Section 164 of Criminal Procedure Code which he tendered in evidence and were marked as Exhibit 4 and 5.

46. A co-owner of the mango orchard had deposed as PW 14. He had stated that, there were many co-sharers to the mango orchard and that there was a pond also.

47. The doctor who had examined the victim on October 26, 2013 had deposed as PW 15. She had described the victim. She had stated that the victim told her that on October 25, 2013 at 11 PM, her boyfriend, ST who stays in the neighbourhood called her outside in a drunken state and raped her in a field near her house and later seven other boys joined him and raped her repeatedly. One of the friends had throttled her. She had stated that on inspection she observed external sand and grime on her back of head, hair, back and legs two inch long transverse bruise over right side of neck, bruise marks and tenderness over right breast. She had orally questioned the victim about her. She had stated that, the victim refused any internal examination. She had noted such refusal of the victim. She did not observe bleeding and could not see the hymen of the victim. The hymen was not freshly

torn or ruptured. She had taken the signature of the victim as also the lady sub-inspector present at the time of the examination of the victim. She had stated that the nature of the injury suggested sexual assault on the victim. She had tendered the medical examination report of the victim which was marked as Exhibit 6 at the trial.

48. The doctor who had drawn the blood sample of the victim had deposed as PW 16. He had tendered the consent given by the victim with regard to drawing of blood sample. He had stated about the process undertaken with the blood so collected.

49. The doctor under whom the victim was admitted for treatment for the period from October 29, 2013 to October 30, 2013 had deposed as PW 17. He had stated that, the victim was referred from the emergency for evaluation of sexual assault. The victim had told him that she was sexually assaulted on October 25, 2013 at about 11 PM. On examination he had found old abrasion mark on right aspect of face and neck. He did not find any injury mark on her private parts except rupture of torn hymen. Patient had complained of pain of abdomen. Patient had been treated symptomatically and was referred to psychiatrics for

psychometric analysis on October 30, 2013 and also referred to a surgeon. He had prepared a medico-legal report on the basis of the examination. He had stated that according to his observation, there were multiple old abrasion mark on the right aspect of the face and neck. He had explained that old injury normally means more than 24 hours. The report had been tendered in evidence and marked as Exhibit 8. The bed head ticket had been tendered in evidence and marked as Exhibit 9. In answer to a query to the Court he had stated that the injuries on the body of the victim girl may be due to friction with gravel, sand small particles.

50. The medical officer who had drawn blood from ST, PD, PR, PW 23 and RM for DNA forensic test deposed as PW 18. He had stated that, such blood was drawn for the purpose of DNA study for forensic work in connection with the police case. They had given the consent for the test. He had also drawn blood from RB for the same purpose and that RB had given consent for the same. He had described how he preserved the blood samples and handed over the same to the police officer.

51. A medical officer who had held the ossification examination for determination of age of the victim deposed as

PW 19. He had described the process under which such examination was taken. He had opined in his report which was tendered in evidence and marked as Exhibit 11 that, the age range of the victim was between 15 and 17 years.

52. A medical officer who had held the medical examination of ST, PD, PR, RM and RB after obtaining their consent, deposed as PW 20. He had tendered the report in evidence which were marked as exhibits. He had opined that there was nothing to suggest that the persons were incapable of performing sexual intercourse.

53. The medical officer who had examined PW 23 deposed as PW 21. He had stated that, such examination was held after obtaining the consent of PW 23. He had tendered his report in evidence which was marked as Exhibit 18. He had opined that there was nothing to suggest that PW 23 was incapable of performing sexual intercourse.

54. The doctor who had performed the post-mortem on the dead body of the victim deposed as PW 22. He had tendered the post-mortem report which was marked as Exhibit 19. He had stated that, there was evidence of pregnancy noted in the uterus. He had observed that, the hymen of the victim showed old healed tears. The victim had suffered burn injuries.

55. The approver had deposed as PW 23. He had stated that, he was arrested by the police on October 31, 2013 in connection with an incident which occurred on October 25, 2013 at about 10:30 PM. He had been examined by the police officer on October 31, 2013. He had been medically examined at the hospital for which he gave consent and that, his blood sample was collected on November 1, 2013. He had recorded a statement before the learned Magistrate. He had stated that, on the evening of October 25, 2013 he returned home from work at about 8:39 PM. While returning from the matrimonial home of his elder sister he met with his friends namely, PD, PR, RM and RB. They were going to the grocery shop and he had accompanied them. They had been carrying a bottle of liquor. They had then entered a house under construction in the vicinity and drank the liquor there. He had received a phone call on his mobile and went little away to the roadside. Then he had seen ST and the victim who had come to the locality as a tenant, walking towards a field. His friends had also seen them and they ran towards ST and the victim. All of them had gone towards the field. PD had come from the field side and called him so he went there. He saw ST to be having sex with the victim. Others were standing little away. As he

asked them, they had said that there will be no problem with the girl brought by ST as she had been paid. Thereafter, one by one, all of them had sex with the victim. They had even arranged a black coloured plastic. First of all, ST who had brought the victim left for his home. He had asked the others to reach the victim to her house. Rest 5 of them had remained there and after some time at about 1 AM it started raining and they got stuck. All of them had taken shelter in another house under construction. After 10 to 15 minutes as there was no sign of stoppage of the rain, they had asked the victim about leaving her at her house when she said that she will not go to her house as it was too late. About 5 minutes later, he and PD had left the place. He had identified all the 5 appellants before us, in court, at the trial. He had tendered his signature on his medical report and on other documents, in evidence.

56. PW 23 had been cross examined at great length by the defence. However the defence could not extract anything favourable to them during such extensive cross-examination.

57. The judicial Magistrate who had recorded the statement of PW 23 had deposed as PW 24. He had stated the manner in which the statement was recorded.

58. PW 25 is a police personnel who had drawn up the formal first information report which was tendered in evidence and marked as Exhibit 24.

59. A group D employee of the hospital had deposed as PW 26. He had tendered his signature on the bed head ticket of the victim which was marked as Exhibit 25/1 with objection.

60. The police personnel who had noted the missing diary in respect of the victim, at the behest of PW 1, on October 26, 2013 at 8:20 hours deposed as PW 27. The GD entry in respect of the missing information about the victim had been tendered in evidence and marked as Exhibit 26.

61. Seizure list witness in respect of the bed head ticket of the victim had deposed as PW 28.

62. The doctor who had examined the victim on October 29, 2013 and admitted her as an indoor patient deposed as PW 29. She had referred the victim to gynaecologist for evaluation regarding sexual assault.

63. The Clinical Psychologist who had treated the victim on October 30, 2013 deposed as PW 30. She had stated that during counselling of the victim, she found that the victim was not in a condition to accept counselling and so she advised her relaxation therapy for her relaxation. She had also

observed in that situation that the victim was unable to take counselling session. She had observed that the victim may need medication and drug. She had tendered the relevant portion of the bed head ticket of the victim at the Gynaecology Department in evidence. She had referred the victim for psychometry at a different medical facility.

64. The security guard at the hospital had deposed as PW 31. He had signed the seizure list in respect of the bed head ticket of such hospital. Another seizure list witness had deposed as PW 32.

65. The inspector of police who had attested the post-mortem report of the victim had deposed as PW 33. He had tendered his signature and seal on the post-mortem report which was marked as Exhibit 19/1.

66. The Senior Scientific Officer who had conducted the DNA profiling had deposed as PW 34. He had tendered the forensic examination report in evidence which was marked as Exhibit 29. He had described the process of the DNA profiling undertaken by him. He had stated that, his conclusion after the test which was that the genetic profile of PD is consistent as the biological father of the product of conception material of the victim. He had also opined that the tissue sample of the

victim matched with PD, PW 23, RM and RB. He had been cross examined on behalf of the defence with the defence not being successful in dislodging his opinion.

67. The investigating officer had deposed as PW 35. He had described about the conduct of the investigation, seizures effected by him, examining various witnesses and arresting the accused. He also described about the steps taken for the purpose of extending medical treatment of the victim. He had recorded the statement of the victim under Section 161 of the Criminal Procedure Code. He had facilitated recording of the statement by the victim under Section 164 of the Code of Criminal Procedure, twice. He had spoken about the samples taken being sent for forensic examination. He had submitted the chargesheet dated December 17, 2013 with the jurisdictional court. He had submitted supplementary chargesheet on March 3, 2014 against 6 accused persons. He had been cross examined at great length by the defence. Defence could not extract anything favourable to them despite such extensive cross-examination.

68. On conclusion of the evidence of the prosecution, each of the appellants before us had been examined under Section 313 of the Criminal Procedure Code when they claimed to be

innocent and falsely implicated. They had declined to adduce any defence witness.

69. Prosecution did not claim that there were eyewitnesses to the crime of kidnapping the victim and gang raping her except the victim and the 6 accused. Victim had expired due to burn injuries prior to the commencement of the trial. She had however recorded statements under Section 164 of the Criminal Procedure Code prior to her death. Her statements recorded under Section 164 of the Criminal Procedure Code had been tendered in evidence by the Judicial Magistrate who recorded the same being PW 13. Her statements dated November 4, 2013 had been marked as Exhibit 4 while her statement dated November 18, 2013 was marked as Exhibit 5.

70. Victim had suffered aggravated penetrative sexual assault on the night of October 25, 2013 and October 26, 2013. She was sleeping with her mother, PW 2, on such night at their residence to which PW 2 had testified. PW 2 had slept that night and was not aware of the victim being missing till the next morning. This had been corroborated by PW 1. She had gone missing from her home on such night. A missing diary had been lodged with regard thereto by PW 1, her father, on October 26, 2013 with the police. The police personnel who

had recorded the missing diary at the behest of PW 1 on October 26, 2013 with regard to the victim being missing had deposed as PW 27 and tendered such GD (General Diary) entry as Exhibit 27.

71. Victim had returned to her home with the assistance of PW 8 on October 26, 2013 when she after some time, confided in her mother, in presence of her father, as to the crime committed on her. Her father, PW 1 had lodged the police complaint being Exhibit 1. PW 3, the scribe of the written complaint had corroborated PW 1 with regard to the written complaint.

72. Victim had been taken to the medical facilities for treatment by the police and PW 35, the investigating officer, facilitated the same. Doctors treating the victim at the medical facilities, namely PW 15, 17 and 29, in unison had stated in their deposition that, the victim had been subjected to aggravated penetrative sexual assault.

73. Prosecution had examined PW 2 as an approver. He had stated that, he and the five appellants before us committed gang rape on the victim on the night intervening October 25, 2013 and October 26, 2013. Presence of PW 23 at the place and time of occurrence as well as PW 23

participating in the aggravated penetrative sexual assault on the victim had been established by the forensic test report being Exhibit 29. Apart from establishing the presence of PW 23 at the place and time of occurrence of the crime, it had also established the presence of PD, RM and RB at the place and time of occurrence of the crime. Exhibit 29 had also established that PD, RM and RB participated in the aggravated penetrative sexual assault on the victim.

74. PW 23 had in his testimony stated that apart from him, five others were present and participated in the aggravated penetrative sexual assault on the victim. The five others had been identified by PW 23 to be the five appellants before us. Exhibit 29 had established presence of PD, RM and RB with PD being identified as the biological father of the product of conception material sourced from the victim.

75. Out of six persons who had participated in the aggravated penetrative sexual assault on the victim, four had been placed by Exhibit 29 with the crime. Out of the four, one had turned approver who had had in turn implicated the remaining two accused to be present at the time and place of occurrence. Of the other two, namely, ST and PR, PWs 9 and 10 in their testimony had stated that, PD and PR had

obtained the black colour plastic from PW 9 on the fateful night. Black colour plastic so obtained had been recovered from the place of occurrence.

76. With the consent of the victim as also the six accused persons, samples for DNA forensic test had been collected from all of them. Samples so collected had been examined and matched with samples of the victim. The forensic examiner had deposed that, the genetic profile of PD was consistent as the biological father of the product of conception material of the victim. He had also stated that, the tissue sample of the victim matched with PD, PW 23, RM and RB.

77. That the appellants and PW 23 were capable of performing sexual intercourse had been established by the deposition of PW 20 and PW 21.

78. The prosecution had therefore, conclusively established that, PD, PR, RM, RB and the PW 23 participated in aggravated penetrative sexual assault on the victim on the intervening night of October 25, 2013 and October 26, 2013. Prosecution had also established that, they acted in furtherance of their common intention of aggravated penetrative sexual assault on the victim.

79. ST had taken the victim from her residence on October 25, 2013. PW 23 had seen ST and the victim walking towards a field. All the other appellants along with PW 23 had gone towards the field where ST and the victim were having sex. PW 23 had seen ST having sex with the victim. PW 1 and PW 2 had stated that, the victim told her that ST took her out of the room on the pretext of PW 1 calling her. Statement of the victim recorded under Section 164 of the criminal procedure code being Exhibit 4 and 5 had identified ST as the person who called her out from her room and took her on the pretext of PW 1 calling for her. She had also named ST as one of the perpetrators of the crime.

80. Evidence of PW 23 with regard to the nature of the crime committed on the victim and its perpetrators have been corroborated by independent witnesses as well as evidence produced by the prosecution, at the trial. Involvement of all the appellants including PW 23 in the crime has been conclusively established by the prosecution of the trial.

81. In ***Balbir Singh (supra)*** the Supreme Court had found the testimony of the approver to be sufficiently corroborated by other evidence brought on record and therefore held that, the conviction upheld by the High Court was correct.

82. *Khokan Giri (supra)* has noticed Section 133 and 114 of the Evidence Act, 1872 as well as previous authorities on the subject and observed that, the evidence of the accomplice should not be accepted without corroboration in material particulars. Further, such collaboration must connect the accused with the crime and also that this collaboration must be from an independent source, meaning thereby, one accomplice cannot corroborate another.

83. In the facts of the present case, PW 23 had deposed as an approver who had participated in the crime. His testimony with regard to the participants and the nature of the crime had been corroborated by forensic and other evidence brought by the prosecution, on record, at the trial.

84. Age of the victim had been stated to be 16 by her parents during the testimony. Ossification test of the victim had put the age of the victim within the band of 15 to 17 years. The learned trial judge had taken the age of the victim to be 16 on the basis of such ossification test as also the testimony of the parents of the victim. In absence of any other documentary proof of the age of the victim, the age specified by the parents of the victim which stands corroborated by the

ossification test report, was rightly accepted by the learned trial judge.

85. Absence of evidence with regard to the kidnapping of the victim from her home on the night of October 25, 2013 by ST had led the learned trial judge not to find ST guilty of the charge under Section 363 of the Indian Penal Code, 1860. State did not prefer any appeal from such finding of the learned Trial Judge.

86. Learned trial judge had found the appellants guilty under Section 376D of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences Act, 2012. The learned trial judge had sentenced the appellants to undergo rigorous imprisonment for a term of 20 years and to pay a fine and in default to undergo further rigorous imprisonment.

87. In view of the discussions above, we affirm the judgement of conviction and the order of sentence passed by the learned trial judge.

88. We place on record our appreciation of the assistance rendered by the learned amicus curiae.

89. Sentences awarded shall run concurrently and the period of detention suffered by the appellants should be adjusted against the substantial sentence.

90. A copy of this judgement and order along with the trial court records be remitted to the trial court forthwith.

91. CRA 711 of 2014 along with IA No.: CRAN 2 of 2021, CRA 766 of 2014 and CRA 767 of 2014 are dismissed accordingly. In view of the dismissal of the appeals, all interim applications are disposed of.

92. Urgent Photostat certified copy of this order if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[DEBANGSU BASAK, J.]

93. I agree.

[MD. SHABBAR RASHIDI, J.]