

Sl. No. 2

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

Present:

**The Hon'ble Justice Joymalya Bagchi**

**And**

**The Hon'ble Justice Ananya Bandyopadhyay**

**C.R.A. 326 of 2019**  
**With**  
**CRAN 2 of 2020 (Old CRAN 1200 of 2020)**  
**Abbas Sk. @ Abbas Hossain**  
**Vs.**  
**State of West Bengal**

**For the Appellant :** Mr. Pratip Kr. Chatterjee  
Mr. Gautam Banerjee  
Mr. Anjan Dutta

**For the State :** Mr. Sudip Ghosh  
Mr. Apurba Kr. Datta

**Heard on :** 11.08.2022

**Judgment on :** 23.09.2022

**Ananya Bandyopadhyay, J.:-**

The appeal is preferred against the judgment and order of conviction dated 13.02.2019 and 14.02.2019 passed by Ld. Additional District and Sessions Judge, Kandi, Murshidabad in Sessions Trial No. 04(08) 2018 arising out of C. Spl. CIS Regn. No. 22/2018 convicting the appellant under Section(s)

376(3) of the Indian Penal Code and also under Section 6 of the POCSO Act and sentencing him to suffer rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life and to pay fine of Rs. 50000/- in default to suffer further simple imprisonment for one year for the offence punishable under Section 376 (3) of IPC. The appellant was further sentenced to suffer simple imprisonment for life and to pay fine of Rs. 50000/- in default to suffer further simple imprisonment for one year for the offence punishable under Section 6 of the POCSO Act. The appellant was to suffer higher sentence as provided under Sections 376 (3) of IPC read with Section 42 of the POCSO Act.

The prosecution case emanated from a complaint dated 08.05.2018 wherein the complainant Jyotsna Begam stated that on 07.05.2018 at about 5 pm. the private tutor of their village namely Abbas Sk. @ Abbas Hossain lured the daughter of her brother-in-law aged about 8 years and forcibly raped her and escaped. The victim sustained bleeding injury. She was thereafter taken to Katwa SD Hospital and admitted therein. Her condition worsened and she was struggling with death. The matter was informed to the local people and the appellant had threatened them for doing so. She further prayed for necessary steps to be taken against the appellant after proper investigation.

Based on the written complaint Salar P.S case no. 70/18 dated 08.05.2018 under Section 376 (2)(i) of IPC and under Section 4/6 of POCSO Act was instituted against the appellant. A formal FIR was registered against

the appellant Abbas Sk. @ Abbas Hossain and the investigation ended in submission of a chargesheet being No. 05 of 2018 dated 16.07.2018 under Section 372(2)(i) IPC and under Section 4/6 of POCSO Act.

The prosecution cited 7 witnesses and exhibited certain documents in order to establish its case.

The Ld. Advocate for the appellant stated that the incident as per the complaint lodged by the aunt of the victim occurred at about 5 pm. on 07.05.2018 and Salar Police Station case no. 70/18 dated 08.05.2018 was registered at 10.35 hrs. PW 5 i.e. Dr. Rabindranath Mondal examined the victim girl on 07.05.2018 and the facts and circumstances of the prosecution story were inherently improbable and absurd and the appellant was liable to be acquitted. The scribe of the complaint namely Md. Salim was not examined. Moreover, the complaint did not bear a declaration to the effect that the contents thereof was written under the instruction and the dictation of the complainant i.e. Jyotsna Begam which according to the Ld. Advocate of the appellant was written under the direction of the police and therefore the prosecution case should be disbelieved. Surprisingly, a family consisting of 13 members residing in the house where the alleged incident took place could not detect the same at that particular moment. Nobody heard the victim girl crying as would be evident from the deposition of PW 5 wherein he stated that the victim would cry out of pain sustaining massive injuries on her private parts.

Moreover, there had been serious contradictions in the evidence of PW 1 and PW 5. The Ld. Trial Court should have disbelieved the prosecution case.

The complainant i.e. P.W 1 did not witness the commission of rape. The victim narrated the incident to her mother. The complainant was not aware of the contents of the written complaint, therefore, the Ld. Trial Court should not have taken cognizance of the said complaint. The delay to lodge the complaint was not explained. There were serious contradictions in the evidence of PW 3 i.e. the mother of the victim and PW 7 the S.I. who conducted the investigation in the case. The Investigating Officer stated he did not notice any blood on the floor of the first floor and also the stair case while the mother of the victim stated that the victim came down on the ground floor and she noticed blood of her daughter oozing down her leg. Moreover, PW 7, the Investigating Officer did not seize the articles with which the victim's hand and legs were tied nor they were shown to him namely the handkerchief or the rope with which her hands and legs were tied. PW 4 Dr. Avik Das in his evidence stated that he did not find any mark of injury on the private part of the accused.

It was strenuously argued that the Forensic Report issued by the Forensic Science Laboratory, Government of West Bengal reporting the results of the examination vide its report no. 4077/FSL dated 06.07.2018 clearly stated that *"no semen (no spermatozoa)" or any other biologically significant foreign body could be detected on the contents of the items marked A "leggings" B "panty" C "nighty" D "vaginal swab"* which clearly established the fact that

the appellant had been falsely incriminated in the instant case to serve ulterior motive of the complainant. *“The serological report issued by the Forensic Science Laboratory, Government of West Bengal vide no. 203 FSL/BIO/2321/18 dated 10.01.2019 stated that the blood group of the stains on the item noted there could not be determined for the reasons unstained control not available and the items were not sufficient for test.”* In view of contradictions in the evidence of PW 1, PW 2, PW 3, PW 4, PW5 and PW 7. The incident of rape had been concocted in order to implicate the appellant and accordingly the appeal should be allowed.

The Ld. Advocate on behalf of the State submitted the evidence of PW 1, PW 2 and PW 3 corroborated the prosecution case aptly justified by the report of the PW 5 i.e. Dr. Rabindranath Mondal marked as Ext. 7 collectively. The medical report marked as Ext.7 collectively substantiates the prosecution case and leaves no scope for disbelieving and discrediting the prosecution narrative and accordingly the appeal is liable to be dismissed.

PW 1 in her evidence stated that the victim was the daughter of her brother-in-law was being taught by the appellant on the first floor room of their two storied building alone on 07.05.2018. The other students had already left their house. At about 5 pm in the evening the appellant committed rape on the victim and she suffered serious bleeding injury in her private part and was admitted in Katwa SD hospital for treatment for 17 days. The age of the victim at the relevant time was 8 years. The police had interrogated her. She had

lodged the written complaint at the Salar PS scribed by one Md. Salim who read over the contents of the complaint and considering the contents to be correct she put her signature thereon marked as Ext. 1. The Police had seized the garments of the victim under a seizure list wherein she put her signature marked as Ext. 2/1. The garments were identified by her marked as MAT Ext. 1, MAT Ext. 2 and MAT Ext. 3 respectively.

PW 2 the victim in her evidence stated the incident took place on the first floor room of their house when she was being taught mathematics by the appellant who happened to be a private tutor. The appellant committed rape upon her and she sustained bleeding injury from her private part. The appellant bound her hands and legs with handkerchief and committed the offence. Thereafter, she came downstairs while the appellant remained on the first floor. She narrated the incident to her mother in exclusion. Thereafter, she was medically treated at the Hospital. She was produced before the Ld. Magistrate to whom she stated the fact experienced by her and put her signature on the recorded statement and identified her signature as Ext. 3. She also identified her garments worn at the relevant time of the incident marked as MAT Ext. 1 and 2. She further stated that the appellant used to impart tuition to her along with other students namely Babu, Asik, and her sister Surabhi. During her cross-examination she further stated that her hands were bound by handkerchief, her left leg was bound by a handkerchief and the end of the handkerchief was tied to a tool. The other leg was bound with a rope and the end of the rope was tied to a sack. Her legs were widened and she could not

shout when she was subjected to rape and she had been crying. The door of the room was closed at the time of commission of rape. Thereafter, she opened the door and went out to the ground floor and told the incident first to her mother. The rape was committed upon her on a "*Talai*" which was spread on the floor.

PW 3 during her evidence stated that her daughter was subjected to rape by the appellant on 07.05.2018 at around 4.30 pm. The appellant was the private tutor who taught her daughters and other students namely Babu, Asiq, Minarul etc. who used to come to their house for tuition. When the incident occurred the appellant and her daughter were only present as the other students were released by the appellant. PW 3 noticed blood oozing down the leg of her daughter and she told her that the appellant committed rape on her. The appellant who remained upstairs escaped while PW 3 and others were busy with her daughter who was thereafter taken to Katwa S.D. Hospital for treatment. The victim was aged about 8 years at the time of incident and studied in Class III. The police had seized the birth certificate of the victim under a seizure list signed by her dated 26.05.2018 marked as Ext. 4/1 and the seizure list was marked as Ext. 5. The police interrogated her after 3 days of the incident at the hospital.

PW 4 Dr. Abhik Das had examined the potency of the appellant and submitted a report marked as Ext. 6.

PW 5 Dr. Rabindranath Mondal, a Medical Officer was posted at Katwa SD Hospital, Purba Burdwan on 07.05.2018. He treated the victim who had a history of profuse bleeding from her vagina. He found the patient tossing on the bed. She was taken to the OT and under general anaesthesia was operated as her posterior vaginal wall was grossly lacerated and injured, perineal body was torn. The injuries were repaired meticulously. The vaginal swab was taken and the blood stained garments were preserved. The patient was admitted and treated in the Hospital for more than a month. He further stated that no foreign body was detected in her vagina. No sign of venereal disease was detected in her private part and further injury was not noted on other parts of her body. The Bed Head Tickets prepared by him with regard to treatment of the patient written in his handwriting and bearing his signature were marked as Ext. 7 collectively.

During his cross-examination he stated that it was possible to sustain injuries as an impact of violent force of the penis on her private part. The injuries as sustained by the victim may be caused within 2/3 minutes by violent thrust. The vaginal cavity of 9 years old victim would not allow entry of at least little finger.

PW 6 Dr. Sanjib Saha was the Medical Officer (Radiologist) posted at Katwa S.D. Hospital, Purba Burdwan conducted X-rays on different parts of the body of the victim and prepared a report along with 8 numbers of X-ray films marked as Ext. 8 collectively.



PW 7 S.I. Goutam Sarkar submitted that on 08.05.2018 the aunt of the victim lodged the complaint before Salar P.S. in the presence of the Duty Officer S.I. Brojo Gopal Debnath and the O.C the P.S S.I Abdus Salam Sk. The Duty Officer initiated Salar P.S. Case No. 70 of 2018 dated 08.05.2018 under sections 376(2)(i) of I.P.C and Sections 4/6 of POCSO Act. A formal FIR was drawn up and the signature of the complainant was taken thereon. He was directed by the OC, Salar P.S to investigate the case by endorsing the formal part of FIR in his favour which was marked as Ext. 9. The signature of the Duty Officer on the complaint was marked as Ext. 1/1.

PW 7 took up the investigation of the case on 08.05.2018, visited the place of occurrence, prepared a rough sketch map of the place of occurrence with an index marked as Ext. 10. Thereafter recorded the statement of the witnesses namely Md. Selim, the scribe of the complaint, the complainant Jyotsna Begum, Jabera Bibi, Atahar Khan, Surovi Khatun, Meghu Sk and Md. Nabi Box on 08.05.2018. He further recorded the statement of the witnesses namely Lopamudra Banerjee and Bjanhita Acharya on 12.05.2018. He further recorded the statement of the witnesses namely LC 1035 Mithu Saha on 22.05.2018, Constable 140 Tapas Modal on 23.05.2018, Alip Sarkar, Tapan Kr. Bairagya, Dr. Rabindranath Mondal and Dr. Sanjib Saha on 25.05.2018 and Tuni Bibi, the victim, Sarifa@ Buli Bibi, Babu Sk, Sarik Sk and Fazlul Haque on 26.05.2018. He seized the wearing apparels of the victim and a big “*Talai*” on 08.05.2018 and a seizure list in the presence of the witnesses including the complainant was prepared in his handwriting and signature along with

signatures of the witnesses marked as Ext. 2. He further seized a Bed Head Ticket of the victim from S.D. Hospital, Katwa, medical report of the victim issued by Dr. Rabindranath Mondal and ossification test report along with X-ray plates of the victim on 25.05.2018 under a seizure list bearing his handwriting and signature marked as Ext. 11. He further seized the birth certificate of the victim produced by her mother in the presence of the witnesses dated 26.05.2018 bearing his handwriting and signature as well as the signatures of the witnesses marked as Ext. 4 and the birth certificate of the victim was marked as Ext. 5. Thereafter, he took steps for recording statement of the victim under Section 164 Cr.P.C. and collected the copy of the same. The wearing apparels of the victim and a portion of the Talai severed from the big “Talai” were sent for FSL examination and the report in three sheets was collected by him from the FSL Department. The FSL Report relating to the wearing apparels of the victim and one circular mat/Talai were marked as Ext. 12. The serological test report (three sheets) of the victim’s wearing apparels and Talai cuttings were marked as Ext. 13 collectively. He arrested the accused on 19.05.2018 and produced him before the Court on the same day. The potency test of the accused was conducted in Katwa S.D. Hospital and the report was collected. After completion of the investigation he submitted the chargesheet bearing no. 110/2018 dated 16.07.2018 under Section 376(2)(i) of the IPC and Sections 4/6 of POCSO Act against the appellant. After collecting the FSL report he submitted a supplementary chargesheet being no. 5/2019

dated 11.01.2019 under Sections 376(2)(i) of IPC and Sections 4/6 of POCSO Act against the appellant.

During his cross examination he stated that he investigated the delay caused to lodge the complaint as the victim's mother was engaged in the treatment of the victim. PW 7 had recorded the statement of 3 students who used to take coaching along with victim at her house. He stated to have examined 8 independent witnesses and mentioned the dimension of the seized Talai though he stated he did not seize the articles with which the victim's hand and legs were tied and those were not shown to him.

In analysing the evidence of prosecution witnesses it transpired that the victim was hospitalised for a considerable period of time. The complaint in Bengali script submitted to the OC, Salar P.S marked as Ext. 1 mentioned the date of the complaint to be 08.05.2018 stating the incident to occur on 07.05.2018 at about 5 pm, based on which the formal FIR was registered. The formal FIR marked as Ext. 9 mentioned the date of information received on 08.05.2018 at 10.35 hrs. denoting the commission of the offence on Monday, 07.05.2018 at 17 hrs. The documents marked as Ext.1 and Ext. 9 without anomaly and ambiguity corroborate the incident of sexual assault committed on the victim by the appellant to be on 07.05.2018 at about 5 pm. The document marked as Ext.1 dated 08.05.2018 was endorsed to have been received at 10.35 hrs. whereupon Salar PS case no. 70/18 dated 08.05.2018 was started under Section 376(2)(i) IPC and 4/6 POCSO Act which was

received by the Duty Officer at the PS. S.I Brojo Gopal Debnath whose signature was marked as Ext. 1/1. The evidence of PW 7 SI Gautam Sarkar revealed the victim girl was seriously injured and required immediate medical treatment. The family attended the victim and the delay to lodge the case did not render the prosecution case false or improbable. The Bed Head Ticket issued by the Katwa SD Hospital marked as Ext. 7 collectively stated the date of admission to be 7<sup>th</sup> May, 2018 at 8.35 pm. The victim was brought to the Hospital in bleeding condition and admitted under Dr. Rabindranath Mondal. The Bed Head Ticket further revealed that the victim was discharged on 23.05.2018 at 2 pm. The victim during her hospitalisation underwent operation. At the time she was admitted, the hymen was found to be ruptured. During cross-examination PW 5 i.e. Dr. Rabindranath Mondal stated that it was *“possible to sustain injuries as sustained by the victim by violent force given by penis on her private parts. The victim sustained tremendous injuries on her private parts. The injuries as sustained by the victim may be caused within 2/3 minutes by violent thrust. The victim would cry by sustaining pain for sustaining such type of massive injuries on her private parts. There is no note in my report of the measurement of the victim’s vaginal cavity. The vaginal cavity of 9 years old victim would not allow entry of at least little finger. ”*

The victim on admission in the hospital had to undergo operation under general anaesthesia. Her posterior vaginal wall was grossly lacerated and the injured perineal body which was torn had to be repaired. It is, therefore, evident that forceful penetration of sexual assault resulted in such severe

injuries on the private part of the victim girl necessitating operation and hospitalisation for more than a fortnight.

The Ld. Advocate for the appellant argued that the scribe of the complaint namely Md. Salim was not examined and the complaint was devoid of a declaration to have been written under the instruction and dictation of the complainant Jyotsna Begam arguing the same to be a fabricated document prepared under the direction of the Police. The defence during cross-examination did not controvert the evidence of PW 1 i.e. the complainant about her signature on the written complaint. During her cross-examination PW 1 stated that the complaint was lodged in the Police Station in the afternoon of 07.05.2018 scribed by Md.Salim in the presence of herself and her mother-in-law. During her examination-in-chief PW 1 stated the incident to have taken place on 07.05.2018 at about 5pm. Minor contradictions in her evidence is negligible in presence of believable corroborating evidence. The prosecution witnesses did not deny the identity of the appellant to be a private tutor visiting the house of the victim for imparting private tuition to the victim, her elder sister and other students namely Babu, Asiq and Minarul of the locality. The defence did not adduce any evidence to refute the contention of the prosecution witnesses PW 1, PW 2 and PW 3. PW 2 in her statement recorded under Section 164 Cr.P.C. marked as Ext. 3 narrated her entire experience of being subjected to penetrative sexual assault by the victim which she reiterated and confirmed before the Court without any deviation. Her evidence could not be shaken by the defence rendering the same to be trustworthy and credible. It is

obvious that the family members gave more attention to the victim girl in pain, concentrated entirely on her physical condition which facilitated the appellant to escape taking the opportunity of the diversion of the attention of the family members towards the victim. The act of forceful penetrative sexual assault and its consequence on the body of the victim is corroborated by the nature of injury and the operation undergone by the victim enumerated in the medical report marked as Ext. 7 collectively. The Ld. Advocate for the appellant opined that PW 1 was not the eyewitness and a complaint lodged by her should not have been taken cognizance of without an explanation of such delay. It is evident from record itself that there had been a delay of less than 24 hrs. which can be attributed to the justified attention given to the victim girl owing to her injury, treatment and operation after her admission in the hospital and therefore, there is no manipulation, ill-will, premeditation or conspiracy to incriminate the appellant on the part of the complainant who otherwise is a family member residing in the same household had rightly lodged the complaint against the appellant while the mother of the victim was at the hospital beside the unfortunate daughter and under no circumstance of logical reasoning the delay could have arisen with an intention to falsely implicate the appellant. The Ld. Advocate for the appellant argued that PW 7 the S.I. did not notice any blood on the floor of the first floor and the staircase, contrary to the statement of the mother of the victim who noticed blood of her daughter oozing down of her leg. The Investigating Officer did not seize the articles with which the victims hand and legs were tied nor they were shown to him. The mother of

the victim i.e. PW 3 stated that the blood was oozing down the leg of the victim which might not have fallen on the floor. PW 3 did not state that the floor or the stairs of their house got stained with the blood of the victim. Failure to seize the articles with which the victim's hands and legs were tied can be a lapse on the part of the Investigating Officer but in the instant case in view of other incriminating materials on record it will not affect the credibility of the prosecution case.

In case of State of **Punjab vs. Gurmit Singh and others**<sup>1</sup>, the Hon'ble Supreme Court observed that,

*"The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons' lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an*

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<sup>1</sup> (1996)2 SCC 384

*accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain (1990 (1) SCC 550 Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:*

*"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. [The Evidence Act](#) nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under [Section 118](#) and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the [Evidence Act](#) similar to illustration*

*(b) to [Section 114](#) which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the*



*prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."*

The relationship between a teacher and a student is considered to be pious in Indian society. The victim girl under no circumstances would fabricate or concoct such a gruesome incident causing excruciating pain to her body as evident from the testimony of the PW 5 who stated that the victim was tossing on bed. The victim girl of 8/9 years of age generally considers a teacher with high regard and respect. She would not have fathomed or imagined such a cruel, deplorable and despicable act on her body which at such a tender age would devastate her entire persona creating far reaching effect on her mind to linger and haunt her in future. The family entrusting the children at the disposal of a teacher could never imagine the commission of such horrifying act disrupting their trust in a tutor or a teacher. This is not a crime or blow against a victim girl but entirely a catastrophe dismantling the strata of social confidence in the relationship between a teacher and a student. In absence of any other credible evidence the sole testimony of the victim whose tender body and mind suffered immensely subjected to such pain on record is sufficient to establish the prosecution case. Minor contradictions in the evidence of PW1, PW 2, and PW 3 do not affect the prosecution case as the medical report vividly describes the commission of the offence upon the victim.

The Ld. Advocate for the appellant argued that the FSL report dated 06.07.2018 ruled out the existence of semen (spermatozoa) or any other

biological significant foreign body on the contents of the items namely “leggings, panty, nighty, vaginal swab” to substantiate false incrimination of the appellant.

In the case of **Prithi Chand vs. State of Himachal Pradesh**<sup>2</sup>, the Hon’ble Supreme Court observed that,

*“Mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case.”*

In the case of **Datta vs. State of Maharashtra**<sup>3</sup> the Hon’ble Supreme Court observed that,

*“We, are, however, not inclined to accept this submission for the reason that medical report speaks of the fact that the hymen had been torn and there was a laceration on the posterior vaginal wall. Likewise, the doctor appearing as P.W. 1 stated that the possibility that the injuries had been caused to the hymen and the vaginal wall though partial penetration could not be ruled out. We find that the evidence of the doctor, P.W. 1 corroborates the fact that rape had indeed been committed. As a matter of fact, P.W. 2 who was barely a child herself stated that there had been only partial penetration of the vagina. In the light of the facts, we see no reason to discard the evidence of P.W.2 and P.W.3.*

5. Furthermore, in a similar matter in [Prithi Chand v. State of Himachal Pradesh](#) AIR 1989 SC 702, this Court has opined that merely because the doctor has found that the vagina admitted one finger with difficulty, it could not be inferred that there was no penetration as the vaginal muscles could

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<sup>2</sup> (1989) 1 SCC 432

<sup>3</sup> (2013) 14 SCC 588

*have contracted by then. This Court (in the same judgment) also held that mere absence of spermatozoa could not cast a doubt on the correctness of the prosecution case.”*

The Ld. Advocate for the appellant stressed on the fact that the Investigating Officer did not seize the articles in which the victim’s hands and legs were tied.

Negligence on the part of Investigating Agency or omissions etc. cannot be sole criteria for acquittal. In the instant case the lapse on the part of the Investigating Officer to seize the aforesaid materials cannot be termed as perfunctory investigation since there are strong evidence of probity the reliability of which generates confidence in its truthfulness.

In the case of **Karnel Singh vs State of M.P.** <sup>4</sup>, the Hon’ble Supreme Court observed that,

*“In cases of defective investigation, the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer, if the investigation is designedly defective.*

*The loopholes in the investigation were left to help the accused at the cost of the poor prosecutrix, a labourer. To acquit solely on that ground would be adding insult to injury.”*

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<sup>4</sup> (1995) 5 SCC 518

In **State of Rajasthan vs. Kishore** <sup>5</sup>, the Hon'ble Supreme Court observed that,

*“It is equally true that the Investigating Officer, PW-8, committed grave irregularity in omitting to send the burnt clothes and other incriminating material for chemical examination to lend corroboration to the evidence. Mere fact that the Investigating Officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be set aside to record acquittal on that account.”*

In **Amar Singh vs. Balwinder Singh and Others** <sup>6</sup> and **Sambhu alias Bijoy Das and Another vs. State of Assam**<sup>7</sup> the Hon'ble Supreme Court observed that,

*“If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful.”*

The prosecution has been successful and establishing its case beyond reasonable doubts and as such the appeal is dismissed and the conviction and sentence under Section(s) 376(3) of the Indian Penal Code and also under Section 6 of the POCSO Act is upheld.

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<sup>5</sup> (1996) 8 SCC 217

<sup>6</sup> 2003 (2) SCC 518

<sup>7</sup> 2010 (3) SCC (Cri) 1301

Connected applications, if any, also disposed of.

Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon him in terms of section 428 of the Code of Criminal Procedure.

Lower court records along with copies of this judgment be sent down at once to the learned trial court. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

**(Ananya Bandyopadhyay, J.)**

**(Joymalya Bagchi, J.)**