IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
(APPELLATE SIDE)

Present:
The Hon'ble Justice Debangsu Basak
&
The Hon'ble Justice Rai Chattopadhyay

C.R.A (DB) 18 of 2022
(CRAN 1 of 2022)

Suku Hembram & Ors.
Vs.
The State of West Bengal

Amicus Curiae : Mr. Angshuman Chakraborty.

For the State : Mr. S.G. Mukherjee,
Ld. P.P
: Mr.Partha Pratim Das,
: Ms. Manasi Roy.

Hearing concluded on: **26/04/2023**

Judgment on: 09/06/2023

Rai Chattopadhyay, J.

(1) This appeal has been preferred by the convicts/appellants assailing the judgment of conviction and order of sentence of the Additional Sessions Judge at Bolpur, Birbhum dated on 09.01.2022. The judgment was delivered in Sessions Trial No. 3(May)/2018, which was held in connection with Ilambazar Police Station Case No.11/2018 dated 30.10.2018. The case is for an offence under Section 376D of the Indian Penal Code (IPC).

(2) The prosecution was started pursuant to lodging of the First Information Report (FIR) as above in Ilambazar Police Station on 30.01.2018. The victim was the informant. The FIR was scribed by the person named Sk. Ahsan. The FIR disclosed the incident/alleged offence inter alia as below:-

> The complainant has stated to be residing at Vill:- Fulbagan (Dhalla), P.O:- Illambazar, Dist:- Birbhum, and being 26 years of age and also being wife to one Pradhan Mardi. She has alleged to have been gang raped by the present appellants. She has stated the date of incident to be 29.01.2018. The date was for immersion of goddess Saraswati, in the village. Loud speakers were being played. The time of incident is mentioned about 2:00 a.m. in the mid night. Appellant/convict Sarkar Mardi has been alleged to have entered into the house of the victim and raped her. The victim has written about employing force employed by the said person while committing sexual offence as above with her and also absence of any consent on her part. She says that one Mantri Kisku, Suku Hembram and "another person" (who happens to be the husband of any girl from the said village) also entered into her house and forcefully took her out from there and to the place behind the house. Allegedly, Mantri Kisku also raped her for the second time and fled away. The victim has stated in the FIR that on the next date she went to her parent's house at 'Hedogoria' and disclosed about the incident to her parents. That, thereafter on 30.01.2018 she came to the police station for reporting the incident. The victim has further stated that she could identify the accused persons in the electric light. She has also informed that her wearing apparels, particularly under garment (petticoat) has been washed off and during the period from the occurrence of the offence till her reporting the offence in the police station she

also has taken bath and cleaned herself. She has further stated that after contents of the said FIR being read over and explained to her, she has put her thumb impression.

(3) Thus, the police case started and police initiated investigation. Investigation has culminated into filing of charge sheet, against the present appellant under section 376D of the IPC. Charges were framed against all the 4 accused persons (now convicts) on 16.04.2019, to which they pleaded not guilty. Hence, the trial started.

(4) In the trial the prosecution has examined 13 witnesses. For best understanding about the prosecution's evidence let us categorize the witnesses in the following manner:-

Sl No.	*Witnesses Nos.*	
1.	P.W **2**& P.W **3**	Victim& Minor daughter of the victim; Both favour prosecution's case.
2.	P.W **4**, P.W **5**& P.W **6**	Either has been declared hostile or given no evidence at all.
3.	P.W **1**	The scribe of the FIR, no personal knowledge of the incident, proves the FIR.
4.	P.W **7**& P.W **12**	Doctors, to have tested the potency of the appellants and the victim respectively.
5.	P.W **8**& P.W **9**	Loud speaker operator and owner respectively.
6.	P.W **10**, P.W **11**& P.W **13**	Police witnesses, including the Investigating Officer.

(5) Certain documents have been exhibited and proved by the prosecution and two material exhibits, i.e, Bhojali (MAT Exhibit– I) and Nokia Mobile phone (MAT Exhibit– II) have also been proved.

(6) Defence has proved one document, i.e, Exhibit – A, which is the bengali calendar for the month of Magh 24 B.S corresponding 14th January, 2018.

(7) On the basis of the evidence as above the trial Court has come to the finding about the prosecution's success in proving the guilt of the accused persons, beyond scope of all reasonable doubt and thus held the accused persons guilty of the offence under Section 376D of the IPC and convicted them.

The sentence imposed is that each of the four accused persons are to suffer rigorous imprisonment for a term which shall not be less than 20 years. Also that a fine of Rs. 20,000/- would be payable by each of them and in default they would suffer further rigorous imprisonment for 1 year each.

(8) The said judgment and order dated 09.01.2022 of the trial Court has been challenged by the present appellants on the ground inter alia that the Court has strongly and solely relied on the evidence of P.W 2/victim, to come to the finding as regards the prosecution case being sufficiently proved beyond all reasonable doubt, which is a misplaced reliance in view of the gross discrepancy and lack of coherence in the evidence of the said prosecutrix. It has been urged that the prosecutrix is inconsistent as regards the time of occurrence of the alleged incident as well as is unable to explain her whereabouts, post occurrence. The prosecutrix is said to be inconsistent also regarding the whereabouts of the children, at the time of alleged occurrence as

well as during the occurrence and also at the post occurrence period of the alleged gang rape. It is further been pointed out that in view of those inconsistencies, the evidence of P.W 3, that is, of the minor daughter of the prosecutrix, also cannot be relied upon or given any credence. It has been argued that the trial Court has misjudged this aspect and unnecessarily given much leverage to the evidence of these two witnesses, only to reach to an erroneous finding. It has been further argued that the victim, though having explained that she could identify the accused persons at the time of occurrence, restrained herself to disclose their names, at the very first instance, before the doctor, examining her. According to the appellants, this is a doubtful circumstance on the basis of which subsequent identification by the prosecutrix, of the appellants, may not be held to be sacrosanct, but only after thought. Further it has been argued that the vital witness like the mother/parents of the victim who, according to the victim are the first persons to know from her about the incident, should be fatal for the prosecution's case. Withholding of the vital witnesses as these, should lead to the inference against the prosecution, which according to the appellants, the trial Court has not considered.

(9) There are certain circumstances put forth on behalf of the appellants as doubtful circumstances, posing question to the correctness and sanctity of the prosecution's evidence. Those may be listed as below:-

(a) 1st : FIR was drafted outside the police station and not before any police officer, in the police station;

(b) 2nd : Inordinate and unexplained delay in lodging the FIR;

(c) 3rd : No neighbouring people was informed at the first instance, on the following morning, but the victim travelled a considerable distance to her mother's place and there she disclosed about the incident for the first time, to her mother;

(d) 4th : Mother of the victim, though a vital witness, has not been cited by the prosecution, as a witness;

(e) 5th : Age of the victim has been differently mentioned in the FIR and the evidence of the victim;

(f) 6th : Discrepancy in evidence as to where the children of the victim were , before, during and after commission of the alleged crime;

(g) 7th : Absence of evidence, as to where the victim was, from 2 AM in the night till the dawn, creating noticeable break in the chain of circumstances;

(h) 8th : Discrepancy in evidence regarding date of occurrence;

(i) 9th : Wearing apparel (petticoat) washed off immediately; and that

(j) 10th : Victim did not approach police station immediately but on the next day, only after returning from her mother's place, raising doubt as to the genuineness of her version.

(10) Thus the arguments on behalf of the appellants was summed up stating that the impugned judgment is liable to be set aside, not having dealt with the evidence on record in its proper perspective and also that the appellants may be acquitted on the ground that the prosecution case has not been proved to the standard of beyond all reasonable doubts. Ld. Amicus Curiae, earlier appointed by this Court in absence of anyone to represent the appellants, has amply assisted this Court with his thorough analysis of the evidence of the case. The Court has noted the same with appreciation.

(11) Per contra, in this appeal, the State has supported the judgment of the trial Court, assailed in this case. It is mentioned that in the impugned judgment, the trial Court has duly and adequately considered the evidence on record in one hand, and also the settled principles of law governing the field, on the other. It has been pointed out that the evidence of the prosecutrix is unblemished, coherent and

beyond scope of any doubt which could jeopardise prosecution's case. It has been argued on behalf of the State that no defence case as to existence of any animosity between the parties, has been made out. It has further been argued that no defence as regards the appellants not being the perpetrator of the alleged offence or the appellants having acted upon on consent of the prosecutrix, have been made. There would not have been any justifiable ground as to why the prosecutrix would come forward with a false and fabricated case against the appellants. Thus according to the State, the version of the prosecutrix could not be flawed and the trial Court has properly considered the same. It has also been stated that the trial Court has made no wrong relying on the evidence of prosecutrix, which was worth credence, upon which the order of conviction was founded. It has been submitted that there is no cogent reason for which this appeal Court could interfere to the impugned judgment, in which the appellants were found guilty on the finding that the prosecution's case was proved beyond all reasonable doubts. State/prosecution has prayed for dismissal of the appeal.

(12) It is necessary that at the outset we discuss the offence, more particularly to understand better, as to what would be the ingredients, the prosecution would have to prove in this case to bring home the charges against the accused persons/appellants, beyond the scope of all reasonable doubts. The appellants have been convicted and sentenced for an offence under section 376D of the Indian Penal Code, that provides punishment for the offence of "*gang rape*"."*Gang rape*" has been made punishable under section 376 (2)(g) of the Indian Penal Code. *Explanation – I to section 376(2)(g)* defines "*gang rape*". That is, "*where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this subsection*". To bring the offences of rape within the purview of section 376(2)(g) of the Code read with Explanation I to this section, the

prosecution would be required to prove inter alia that – (i) more than one person had jointly acted; (ii) they had acted with the common intention to rape the victim; (iii) a plan amongst the offenders would be there, either preconceived or formulated at once at the time of commission of the alleged offence, which is reflected by the element of participation in action in any manner even excepting actual penetration or by the proof of overt inaction, when certain amount of action would have been required to prevent the offending act, and (iv) in furtherance of such common intention one or more persons of the group had actually committed offences of rape on the victim or victims. According to section 376D of Indian Penal Code, *"Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine;*

***Provided** that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim;*
***Provided further** that any fine imposed under this section shall be paid to the victim."*

(13) Now, it is necessary that evidence of the witnesses in the trial including the corroborating evidences may be scrutinised. While doing so, we may first weed out the evidence of hostile witnesses or of the witness who was tendered for cross examination but declined. P.W **4**, P.W **5** and P.W **6,** would come under this category.

(14) P.W.**2** is the prosecutrix/victim of the case. According to her instructions the FIR was written and she lodged the same on

30.01.2018. She deposed in the Court, on 19.7.2018. The following facts would emerge from her evidence in chief:

- The incident took place six months back, the day was Sunday;
- She went out in the night, with her two children, to see Saraswati puja;
- Her husband was out of station, at Bangalore, for his work;
- After coming back home, she went to bed with her two children;
- She describes her home to be an one room accommodation being guarded with a door made of slitted bamboo;
- Four appellants in a consortium broke through her house, Sarkar Maddi, Mantri Kisku forcefully entered her room, Suku [Hembram] and Jamai [@RobiBesra @Laxmiram @Jarde] were standing outside; She had identified all of the said persons on dock;
- Sarkar Maddi was first to commit rape upon her;
- Victim screamed and due to the bustle, her two children were awake;
- She was forcefully dragged outside the room by Mantri Kisku and threatened her to commit rape upon her and upload such photographs in the social media sites;
- The victim had identified all four of the appellants in the light of the electric lamp illuminated in the room which was also spread outside the room;
- Mantri, Suku and Jamai forcefully dragged her to the backside jungle of her house;
- There Mantri committed rape upon her and Suku andJamai were standing beside, at the time of commission of rape upon the victim by Mantri and were watching;
- Appellants threatened the victim with the dire consequences in case she divulged about the incident to any of the villagers;
- After the occurrence all the appellants went away from the place;

- The witness has mentioned the time of incident to be at about 2 or 2:30 AM, in the midnight;
- As the loudspeakers were being played at the time of alleged occurrence, no other person could notice her screaming;
- She returned home at the dawn and did not see her children in home; subsequently he traced out his children in custody of her mother-in-law (boro sasuri);
- While giving answer to a question by the Court as to her whereabouts, since after commission of the crime, till she returned to her abode, the witness answered that she was confined by the accused persons in the backyard of her house (that is after keeping mum for a while and then firstly saying that she could not say about that);
- Thereafter she went to her father's house with her two children and disclosed to her parents about the incident;
- Then she went to the police station with both of her parents, where she lodged the FIR, being drafted by P.W.1; she identified her left thumb impression on the FIR;
- She identified her wearing apparel seized during investigation, her left thumb impression on the statement recorded by the Magistrate under section 164 of the CrPC and also her left thumb impression on the medical report.

(15) P.W.**2** has been thoroughly cross examined, spreading over a period of two consecutive days. From the trend of cross examination it appears that the defence has tried to bring out a case that the victim did not keep good behaviour with any of her neighbouring people, relatives or acquaintances. However, nothing has revealed regarding any previous inimical countenance between the victim and the appellants. In the cross examination, three further assertions came from the prosecutrix, that is, firstly that she woke up when Sarkar Maddi pulled out her saree (wearing apparel), secondly that she sustained laceration in her right elbow and also that her house was a mud-build

house with floor made by morum-mud and was guarded by a bamboo made door. She has stated that none of the villagers including members of her matrimonial family were informed about the incident at the first instance. That she informed her parents first, on the next day after reaching to their place and informed her husband after six days from the date of incident, when he returned back home from work. This was the sum and substance of evidence of the prosecutrix.

(16) The next vital witness of the prosecution is P.W.**3**, that is the minor daughter of the victim/P.W.2. P.W.2 has stated this child to be present at the scene of occurrence, who was initially sleeping but awaken due to the flurry of activity in the room. P.W.**3** was eight years of age at the relevant time. Upon scrutiny of her evidence, the following emerge:

- The incident took place 6 months back, in the night, on a date of immersion of Goddess Saraswati idol.
- She being accompanied by her brother and mother (P.W.2) went to see Puja in the night;
- when they were sleeping in the night, Sarker and Mantri had entered into their room; Sarker did 'woeful work' with her mother (Mar sathe baje kaj Korlo).
- At this stage the trial Court has recorded the demeanour of this child witness, that she started crying in the witness dock. This Court finds this demeanour of the child witness to be of utmost significance and importance, in this case, the reasons thereof shall be unfolded later, at an appropriate time; the other notable demeanour of this witness was recorded on the date of cross-examination, when the same had to be deferred due to sudden indisposition of the child;
- Her mother was shouting at that time, which make them to wake up;
- She recognised those persons in the illuminating light of their room;

- Thereafter her mother was dragged outside by Mantri.

(17) While facing cross-examination this witness says that she and her brother were left alone in the house, till arrival of her mother in the morning, that her father was not at home that night, that her father was at work.

(18) P.W.**7**, the doctor conducted potency test of the appellants and upon his report, he has asserted about the appellants being sexually potent. P.W.**12** is the doctor who conducted examination of the victim, on the following day of the incident. He has asserted to have noted the history of rape, in his report, as described by the prosecutrix (P.W.2). In his cross-examination he has said that the victim did not name the rapists before him. Also that he did not find any mark of injury or any foreign body or mark of violence on her person. This is precisely the evidence of the experts/doctors.

(19) P.W.**9** is the business operator, who rented out the loudspeaker to one Chhoton Kisku, on the event of immersion of Goddess idol after Saraswati puja. P.W.**8** has asserted to have played the loudspeaker till 11.30 PM. He could not name any other person, who might have played the loudspeaker after that. None of these witnesses have mentioned any specific date of the incident or prior or subsequent to that. None of these witnesses would be of much assistance for the prosecution.

(20) Therefore the prosecution's case is primarily based on the anvil of the evidence of P.W.2 and P.W.3. The trial Court in its judgment has found that the evidence of the victim and that of her minor daughter (P.W.2 and P.W.3 respectively) has sufficiently proved prosecution's case, beyond all reasonable doubts. Thus it proceeded to find guilt of the accused persons/appellants, convicted them and imposed sentence, as above.

(21) The well recognised maxim that '*Evidence has to be weighed and not counted*' is enshrined in section 134 of the Indian Evidence Act, 1872, which has provided that "*No particular Number of witnesses shall in any case be required for the proof of any fact*". As it has been held by the Supreme Court as back as in the year 1957, that the Court is concerned with the quality and not the quantity of the evidence necessary for proving or disproving a fact [in the case of *V. Thever vs State* reported in *AIR 1957 SC 614*]. It is the time honoured principle that evidence has to be weighed and not counted. Later, in 2003, the said Court, in the case of *Sunil Kumar vs State Government of NCT of Delhi* [reported in *(2003) 11 SCC 367*] has held that the test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise and that on this principle stands the edifice of section 134 of the Evidence Act. Another case of 2004 may be mentioned, where the Supreme Court has held that the evidence of the solitary witness being clear, cogent and trustworthy, conviction can be founded on the same. In that event the Court has held that minor omissions and so called improvements would be immaterial. [*Sunil Kumar vs State* reported in *2004 CrLJ 819 (SC)*]. In the case of *Vithal vs State* [reported in *2009 AIR SCW 297*] the Supreme Court has laid down the following principles :

(i) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness overweighs the testimony of a number of other witnesses of indifferent character.

(ii) Unless corroboration is insisted upon by statute, the court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example, in the case of a child witness, or of a witness who is evidence is that of an accomplice or of an analogous character.

(iii) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

(22) In the light of these principles, when one looks for as to how the evidence of the victim/prosecutrix in a sexual offence like rape or gang rape [as it is in the present case], can be considered or dealt with, certain verdicts of the Supreme Court may be found, to have laid down principles as regards the same. Way back in 1972, the Supreme Court has held in the case of *Gurcharan Singh vs State* [reported in *AIR 1972 SC 2661*], that the prosecutrix is no accomplice and hence her testimony cannot be equated with that of an accomplice, requiring corroboration. The Apex Court has held that, however, as a rule of prudence, a Court will look for corroboration normally, so as to satisfy its own conscience. In another case, it has been held that excepting medical corroboration in a rape case the corroboration of a prosecutrix is not necessary unless her evidence suffers from any basic infirmities and improbability [*Bharwada Bhoginbhai Hirjibhai VS State of Gujrat* reported in *1983 CrLJ 1096 (SC)*]. Even in an appropriate case, the Supreme Court has dispensed with medical corroboration for proving sexual offence, on the ground of the prosecutrix belonging to a backward community [reported in *Sk. Jakir vs State of Bihar 1983 CrLJ 1285 (SC)*], as it is in the instant case.

(23) It is thus, now well settled that unimpeachable and sacrosanct quality of evidence of the prosecutrix, in case of a sexual offence, will suffice for conviction of the accused person, to be founded on the same. No inherent infirmity or improbability in the evidence of the sole victim of sexual offence should scathe the confidence of the court as to the same and the court should be sanguine about its unimpeachable reliable nature. Depending on the particular facts of the case, the

court may, as a matter of prudence, seek for corroboration in the form of ocular, documentary or other evidences. However the same is dispensable, as long as the court is confident about the reliable, trustworthy, dependable and unassailable nature of the evidence of the victim/prosecutrix.

(24) On the basis of the hypothesis of these principles, this Court is now to look into the evidence in this trial, to adjudicate whether the same has been considered in its right perspective by the trial Court to come to the finding of conviction of the appellants for an offence of '*gang rape*'.

(25) At the very outset it is necessary to assess that in this vast country of cultural diversity and economic taxonomy, to what socio-economic background the prosecutrix actually belongs. She is a 24/26 years old, illiterate lady. She is married and mother of two minors. She is the custodian as well as the care giver for those children. Her husband lives outside the State, for the purpose of avocation. The family belongs to the community of aborigines, which have been specially catagorised and scheduled in the Constitution of India. They have their abode at a place where a cluster of people from the backward community live [adibashipara]. The family is economically downtrodden. The prosecutrix pursues job of a labourer. The family has a mud-built one room accommodation to live, which has flooring of morum-mud and a door made of slitted bamboo. The lady/prosecutrix maintains a healthy, working relationship with her co-workers as well as the members of her matrimonial family. All these facts, derived from the evidence on record, are the strokes of a painting brush to elaborate on mental canvass of any prudent person, an obvious portrayal of a lady who is uneducated, not enlightened and unaware of her rights as a human being, deprived of basic facilities to live a bare minimum respectful human existence and only toiling to ensure two meals for the family. She may have a so called '*house*' to live in, though the manner the same has been constructed [mud built

walls and door made of slitted bamboo], her safety, security, privacy and modesty shall always be more dependent on the eschew of the intruders rather on the sufficiency of these protection gears.

(26) Such a lady allegedly falls prey to the lust of some miscreants, in the fateful night of 29.01.2018. She has alleged that, the appellants namely, Sarkar Maddi and Mantri Kisku, have committed rape upon her, while other 2 have been the bystanders not contributing in any way to prevent the alleged act and in a way, letting the alleged offence to be committed. As a matter of prudence, this Court looks for corroboration of victim's statement. It is found that the same has been corroborated by victim's statement recorded by the Magistrate under section 164 of the CRPC and the evidence of P.W.3, that is, the minor daughter of the victim. However, there is no support to the same by the evidence of doctor (P.W.12) or by any other material evidence seized in investigation, like wearing apparel et cetera. That means that there is no evidence in this trial of any injury to the private parts or any other parts of the body of the victim. There is also no sign of blood, sperm or pubic hair of the miscreants on either victim's body or her clothes. Defence has pointed out to this, to be a discrepancy, serious enough to nullify prosecution's case. This Court, however, finds that victim's statement is so clear, stable and coherent, that it may dispense with any corroborating medical or other evidences and conviction of the appellants can be well founded on the basis of the testimony of the prosecutrix alone. Considering the time line of commission of the alleged offence and that of investigation, these factors, may at best be termed as minor discrepancies to have and to hold no bearing to the otherwise coherent and unblemished testimony of the prosecutrix.

(27) The prosecutrix has been allegedly attacked at the dead hours, in the midnight. Vulnerable position of her room, has previously been discussed. Keeping that in consideration, therefore, there appears to

be no infirmity or improbability in her testimony, allowing this Court to find a pinch of doubt as to the same. It is worth consideration, that her 8 year old child has supported her statement. Defence has questioned as to the bearings of the child during the post occurrence period. So far that she was sleeping in the room, prior to the occurrence, has not been denied in this trial. According to P.W.2, she screamed being attacked, when her saree was pulled of and P.W.3 says that she woke up hearing her mother's voice. This aspect is unchallenged. P.W.3 deposed what she has witnessed that night, as discussed earlier. These categorically corroborates the statement of P.W.2.

(28) Adequate discussion is required to be made here, regarding the demeanour of P.W.3, noted by the trial Court. She broke down crying while deposing. It is not that she faced something in Court which might have resulted into her suddenly bursting into tears. There is no material as to the same, on record. It is of course worth attention as to what might have made this 8 year old eyewitness, to break into tears in the witness dock.

(29) In this regard, let us first go through the provision under section 280 of the CrPC. It deals with the remarks respecting the demeanour of a witness and it says that : "*Remarks respecting demeanour of witness. – When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.*" The object of the provision is to give the appellate court some aid in estimating the value of the evidence. Demeanour is also often used as part of the evidence probative of a witness's credibility. Demeanour refers to the outward actual conduct and/or appearance of an individual. Every verbal message like what the witness wants to say is accompanied by nonverbal clues like how he says it and what he looks like when it is being said. The nonverbal clues consist of

body language like posture, facial gesture, eye contact and numerous more, including the way of conduct while delivering. Demeanour of the witness is very significant in revealing insight into the credibility of a witness, which is one reason why individual presence at trial is viewed as of foremost significance and has extraordinary importance. That, opportunity of the trial Court to observe the demeanour of a witness is of great value, is a time tested phenomenon and has been accredited in the Courts of law, irrespective of any country in the world. The High Court of Australia, in the case of *State Rail Authority of New South Wales vs Earthline Construction Pty Ltd. (1999) 160 ALR 588 at para 88* has quoted a remark of Atkin L.J. : "*an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour*".

(30) The spontaneity of voluntary and unforced reaction of P.W.3, in breaking down into tears, while deposing about the ordeal of the fateful night, suggests unfailingly to the truthfulness of the fact she has deposed. It is only due to the fact, that the scar of the turmoil has been deeply imprinted to her memory. The very feeling of fear, insecurity and helplessness has crippled her senses and while describing the state of affairs of that night, she relives those moments again. In whatever socio- economic condition it is, a child is always blessed with the trait of innocence. It is beyond her normal disposition, to manipulate to the extent of falsely put up allegations of an offence like rape. It is inconceivable and improbable also. There is no apparent reason why P.W.3 would depose falsely in Court. Instead on consecutive two days, she could not complete her evidence in Court, being overpowered by the trauma of describing the horrific experiences of her. Demeanour of the child as noted by the Court, would provide sufficient insight, for an experienced and sensitised fact finder, to unearth the truth. After all, the very purpose of examination of witness in trial, is for unveiling the truth of the matter. Demeanour noted of the child as above, is the character evidence to be used to

establish that the same has rendered P.W.3 more prone to testify truthfully. Thus this Court is never in two minds for unhesitating commendation of the value or worth of evidence of this child eyewitness in due support or corroboration of the prosecutrix's version.

(31) Thus, in this trial P.W.3 has substantially corroborated the evidence of the prosecutrix. Both P.W.2 and 3 has brought on record, for the prosecution, clear, unambiguous, cogent and trustworthy evidence which the Court can bestow adequate weight to and rely on, as the fundamental for its judgment of conviction. In defence, no such case has been made out to doubt the truthfulness of the evidence as above. No previous animosity between the parties, is forthcoming. Neither any defence has been put forth in the form of suggestions at least, that the sexual intercourse had occurred with consent of the prosecutrix. The only defence of innocence has been slammed out by the convincing ring of truth, with which the prosecution's evidence is shielded. The question of false implication has been nullified in its entirety. The doubtful circumstances as have been pointed out on behalf of the appellants and discussed above, would only be the minor contradictions, so to say, to leave no scar to the otherwise sufficient prosecution evidence. The prosecutrix, illiterate, downtrodden and not worldly wise, could very naturally not follow the advisable and prudent path of immediately going to police for lodging FIR, or disclose the incident to the neighbouring residents despite being threatened with dire consequences (as per deposition of P.W.2, in her cross examination) or not having the prudence of carefully restoring her apparels to be examined in future in investigation. Instead it appears to be but the natural instinct of the hapless victim of the offence like gang rape and also threatening to life, who is mother of two children too, to immediately move to a place which she considers safe for her, and thus ends up at her parents. The proximity of time of her leaving the dreadful place where possibly the miscreants would be roaming

free and taking shelter of her parents, would rather be another implicating circumstance, in favour of the prosecution's case. Absence of medical or other evidence would not jeopardise the sanctity of the substantive evidence of the prosecutrix in this trial. Her not naming the miscreants before the doctor, would be securely covered by the ratio in the decision of *Sk.Jakir* (supra). It would be profitable at this stage to mention the case of *Krishan Lal vs State of Haryana* [reported in*(1980) 3 SCC 159*], in which the Hon'ble Supreme Court has been pleased to find as follows :

"*3.* **********

It is true that old English cases, followed in British-Indian courts, had led to a tendency on the part of Judge-made law that the advisability of corroboration should be present to the mind of the Judge "except where the circumstances make it safe to dispense with it". Case-law, even in those days, had clearly spelt out the following propositions: [Rameshwar v. State of Rajasthan, 1951 SCC 1213 : AIR 1952 SC 54 : 1952 SCR 377, 386 : 1952 Cri LJ 547]

"The tender years of child, coupled with other circumstances appearing in the case, such, for example as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed, to stand.

It would be impossible, indeed it would be dangerous to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with circumstances of each case and also according to the particular circumstances of the offence charged."

Observations on probative force of circumstances are not universal laws of nature but guidelines and good counsel.

4. *We must bear in mind human psychology and behavioural probability when assessing the testimonial potency of the victim's version. What girl would foist a rape charge on a stranger unless a remarkable set of facts or clearest motives were made out? The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence. More than all, it baffles belief in human nature that a girl sleeping with her mother and other children in the open will come by blood on her garments and injury in her private parts unless she has been subjected to the torture of rape. And if rape has been committed, as counsel more or less conceded, why, of all persons in the world, should the victim hunt up the petitioner and point at him the accusing fingers? To forsake these vital considerations and go by obsolescent demands for substantial corroboration is to sacrifice common sense in favour of an artificial concoction called "Judicial" probability. Indeed, the court loses its credibility if it rebels against realism. The law court is not an unnatural world."*

(32) The defence has also indicated about the alleged withholding by the prosecution of the vital evidence, i.e, the mother of the victim. It is understandable that as the prosecutrix discloses the alleged incident to her mother for the first time, than before anybody else, the defence has taken up this point. However, it is within the prerogative of the prosecution as to whom it would cite as a witness in the trial, since, from the above discussion, we could note that quantity of the witnesses would not be essential, but the quality thereof, to prove a case. It is for the prosecution to decide as to the qualitative superiority or weight of the deposition of its witness and to decide if any other evidence is to be adduced or not. Prosecution's evidence

cannot be outweighed due to non-examination of the mother of the victim, so far as the other evidence on record is qualitatively sufficient to find prosecution's case to have been successfully proved beyond scope of any reasonable doubt. Since in this case it has gone to be like the same, non-examination of the mother of the victim by the prosecution would not be fatal for the same.

(33) With reference to the definition of "Proved", "Disproved", and "Not proved", as are appearing under Section 3 of the Evidence Act, it can be conceived well that in proving or disproving of fact in the trial the legislature has not provided for the standard of proof to the extent of any mathematical precision. Instead the standard which the law has provided so as to find the fact as "Proved" in a trial is that of beyond scope of any reasonable doubt. However what would be a "reasonable doubt", has not been defined by the legislature anywhere. Section 3 as of the Evidence Act, while explaining the meaning of the words as mentioned within quotes above, lays down the standard of proof namely, about the existence or non-existence of the circumstances from the point of view of a prudent man. The Section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words, "believe it to exist" and secondly in which though he may not feel absolutely certain of a fact, the thinks is so extremely probable that a prudent man, would under the circumstances had an assumption of its existence. According to the Hon'ble Supreme Court in the judgment of *Vijayee Singh & Ors. Vs. State of U.P* reported in *1990 (3) SCC 190*, it is this degree of certainty to be arrived at, where the circumstances before a fact can be said to be proved.

(34) In a case prior to the decision in *Vijayee Singh* (*Supra*), i.e, *M. Narsinga Rao vs. State of A.P.,*reported in *2001 (1) SCC 691,* the Supreme Court, has said in the manner, as stated below:-

> *"**15.** The word "proof" need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word "proved" in the Evidence Act. What is required is production of such materials on which the court can reasonably act to reach the supposition that a fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. ……."*

Post *Vijayee Singh* (Supra), the same principle has again been reiterated by the Hon'ble Apex Court in the case of *Kuna alias Sanjaya Behera vs. State of Odisha* reported in *2018 (1) SCC 296*, in the following words:-

> ***"23.** The quintessence of the enunciation is that the expression "proved", "disproved" and "not proved", lays down the standard of proof, namely, about the existence or non-existence of the circumstances from the point of view of a prudent man, so much so that while adopting the said requirement, as an appropriate concrete standard to measure "proof", full effect has to be given to the circumstances or conditions of probability or improbability. It has been expounded that it is this degree of certainty, existence of which should be arrived at from the attendant circumstances, before a fact can be said to be proved."*

(35) This being the settled law as well as the principles upon which proving or disproving or not proving of a fact is dependent, in the case considering the facts and circumstances in totality and against the touch stone of the test of essentiality of the degree of certainty as envisaged under law, this Court is unhesitant to find that the prosecution's case is well established against the bed rock of the test of certainty, irrespective of minor deflections, in the form of discrepancies in evidence, which are not worth to give rise to any reasonable doubt in the mind of the Court. Reasonable doubt stands from insufficient evidence. Sufficiency of evidence would depend upon

the quality thereof. Unimpeachable superior quality of the witness's evidence in this case, has ultimately contributed the prosecution's case to have proved beyond scope of all reasonable doubt.

(36) So far as the four appellants are concern, the prosecutrix has alleged commission of rape against the appellants namely Sarkar Mardi and Mantri Kisku. Regarding the other two appellants, according to her deposition they were by standers, watching commission of the offence. The trial Court has found them guilty of the offence under Section 376D and very rightly so. As discussed earlier according to the statutory provisions a person comprised within the group, one or all of whom have committed the offence and has acted in furtherance of the common intention, would be punishable similarly as the person, who might have violated the women physically, though he may not have participated in the act of physical violation or may have helped assisted or allowed actively or passively, the commission of the offence. There is nothing on record to doubt presence of the other two accused persons in the scene of occurrence. They were present at door step of the prosecutrix and when she was been dragged to the back side and was raped there by one of the accused persons, as the evidence in the case reveals, the other two accused persons were all along present and followed the entire occurrence. Therefore their being in unison of intention to fulfil the criminal act, with the two other appellants and being in a group with them to jointly execute the said offensive act, is proved in this case beyond all reasonable doubts. Such being the fact there is no infirmity found in the impugned judgment regarding finding guilt of all four appellants and convicting them and sentencing them, in the manner the trial Court has decided.

(37) On the premises as above, the impugned judgment assailed in this case is found to have suffered with no infirmity, irregularity or illegality. The findings of the trial Court and its verdict of conviction of

the appellants for an offence under Section 376D of the Indian Penal Code, is upheld. Hence, the appeal fails.

(38) CRA No (DB) 18 of 2022 with CRAN 1 of 2022 is dismissed. Application connected with the same if any is also dismissed.

(39) A copy of this judgment and order along with the trial Court rewards be remitted to the appropriate Court forthwith.

(40) Urgent certified photostat copy of this judgment be given to the parties, if applied for, upon compliance of all the formalities, as per usual terms and conditions.

(Rai Chattopadhyay,J.)

(41) I agree,

(Debangsu Basak, J.)