

(2019) 11 CAL CK 0046

In the Calcutta High Court

Case No : Criminal Appeal (CRA) No. 59, 89, 90 Of 2011

Ajoy Biswas And Others

APPELLANT

Vs

State Of West Bengal

RESPONDENT

Date of Decision : 18-11-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 376, 376(2)(g), 450
Code Of Criminal Procedure, 1973 — Section 53A, 164, 164A, 313, 428
Evidence Act, 1872 — Section 114(g)

Citation : (2019) 11 CAL CK 0046

Hon'ble Judges : Sahidullah Munshi, J; Subhasis Dasgupta, J

Bench : Division Bench

Advocate : Sandipan Ganguly, Debangana Bhattacharjee, Milan Mukherjee, Rahul Ganguly, Sandipan Ganguly, Uday Sarkar, Bhaskar Seth, Puspita Saha

Final Decision : Allowed

Judgement

Sahidullah Munshi, J

By these appeals the appellants have challenged the judgment of conviction dated 23.12.2010 and order of sentence dated 03.01.2011 passed by the learned Additional Sessions Judge, Fast Track, First Court, Kalyani, Nadia in Sessions Trial No. (S.T. No.) II (Dec) 10, corresponding to Sessions Case No. 13(10)10, convicting the appellant, Shri Ajoy Biswas to suffer rigorous imprisonment for a period of 10 years for committing offence under Section 376 of the Indian Penal Code subject to the provisions of Section 428 Cr.P.C. and to pay a fine of Rs.1000/- in default to suffer simple imprisonment for one month and directing the other appellants namely, convicts Bhola @ Biswajit Das, Dipankar Roy and Raj Kamal Golder (now dead) to suffer simple imprisonment for four years and six months subject to the provision of Section 428 Cr.P.C. and to pay a fine of Rs.500/- each in default to suffer simple imprisonment for further one month.

All the above mentioned appeals arose from a single and common FIR (Exbt. 1) registered on the basis of the written complaint filed by Kaveri Das on 30th July,

2007 from which Sessions Trial case No. II (Dec.) 10 corresponding to Sessions Case No. 13(10)10 arose and were decided by the learned Court below analogously since common questions of law and facts are involved. Written complaint disclosed that the alleged offence was committed by Ajoy Biswas on 29.07.2007 in the evening at about 06.30 pm at the house of Ajoy Biswas. It is complained that on 29.07.2007 at 06.30 pm some boys of the neighbourhood called the de facto complainant at the house of Ajoy Biswas, accused in CRA No. 90 of 2011 and where she was intoxicated through some drinks and thereafter, she was physically tortured and raped by Ajoy Biswas. It is the specific allegation that friends of Ajoy extended cooperation to the alleged commission of the offence of rape on the complainant. Ajoy Biswas has filed this appeal being C.R.A. No. 90 of 2011 against the order of conviction and sentence similarly two other appeals being C.R.A. No. 89 of 2011 & C.R.A. No. 59 of 2011 were also filed by Bhola Das, Dipankar Roy and Raj Kamal Golder respectively. During pendency of the appeal filed before this Court Raj Kamal Golder died. Since identical questions and facts of law are involved in all these appeals they are taken up together for the sake of convenience.

The complaint dated 30th July, 2007 was received by the P.S. on 30 July, 2007 at 18.15 hours while the occurrence disclosed to be on 29th July, 2007 at about 18.30 hours which was a Sunday. FIR was registered under Section 376/120B IPC against accused (1) Ajoy Biswas; (2) Bhola Das; (3) Dipankar Roy and (4) Raj Kamal Golder.

Record reveals that complaint was filed by the victim at least with a delay of 24 hours.

The complaint further discloses that in the evening of 29th July, 2007 at about 6.30 pm the accused persons called the victim and she went to the house of Ajoy Biswas. She was intoxicated through drinks and was raped by Ajoy Biswas. Other accused persons being friends of Ajoy abated the offence of rape.

Charge was framed by an order dated 7th December, 2010 by the learned Judge under Section 376(2)(g) of the Indian Penal Code.

Altogether eight witnesses were produced and examined by the prosecution of which PW1 is the de facto complainant, who was aged about 20 years on the day of occurrence of the offence.

PW2 is the brother of PW1. PW3 to PW8 are neighbours of accused Ajoy Biswas. The victim initially refused to medical examination and for recording of statement under Section 164 of Code of Criminal Procedure. Police filed final report but no "naraji" petition filed by the defence. However, investigation proceeded further at the initiative of the learned Magistrate. Order dated 06.03.2008 and 26.03.2009 reveals that FRT was not accepted by the Magistrate concerned. Order dated 17th August, 2007 reveals that the victim refused to get her statement recorded under Section 164 of the Code of Criminal Procedure. The victim also refused medical examination which is apparent from the order dated 28.02.2008.

Significantly, victim's Jamai Babu who was the scribe of the written complaint was not examined. Case record also reveals that Investigating Officer who is a vital witness in this case has not been examined. Although, provisions of Section 53A and 164A are mandatory with effect from 23rd June, 2006 on Amendment, has not been complied with. It is further borne out from the record that wearing apparels of the victim were not seized; there is no FSL report. Investigating Officer took no steps for medical examination of the victim within 24 hours as required under Section 164A of the Amended Act and lastly Investigating Officer has not been examined in this case.

A forwarding report dated 02.08.2007 has been shown to draw our attention that IO Gobinda made prayer for medical examination but it was refused. On 28.02.2008 Ajoy Kumar Roy another investigating officer filed FRT but the ACJM did not take cognizance of such report and ordered for re-investigation in pursuance whereof charge-sheet was filed by subsequent Investigating Officer, namely, Bani Brata Dutta. Both Mr. Ganguly and Mukherjee appearing for the appellants submitted that failure to medically examine the victim would attract adverse inference under Section 114(g) of the evidence Act.

PW1 being the victim and de facto complainant in this case deposed that she went to the house of Ajoy Biswas as Ajoy requested her to go there. She was offered tea which was added with sedative. According to her, Ajoy committed physical torture on her and committed rape. PW1 says that other three accused persons kept the door bolted from outside. She decided to commit suicide but ultimately, did not do so and instead she informed the police and lodged a written complaint which was scribed by her brother-in-law Gobinda Choudhury, who has not been examined. She further deposed that she jumped into the river Ganges. In her cross-examination she deposed that she went to the house of Ajoy to open a savings account and she further deposed that she did not disclose in the written complaint that three other accused persons bolted the door from outside. It is her deposition that she jumped into the river Ganges but these boys did not rescue her. She has admitted in her cross-examination that she did not get herself examined by doctor.

On the one hand she deposed that she cried out when assaulted but she again deposed "I cried out after the incident. When I was inside the room I could not cry as I was not in my sense." She further deposed "after the incident when I was crying the inmates of Ajoy came and insulted me and I went to the river." She has further deposed "there may be fifty houses on the both sides of road leading to Ganga from the house of Ajoy."

After scanning the evidence of PW1 who is the de facto complainant it appears that she sought to make out a case that on the request of the prime accused Ajoy Biswas she went to his house to open a bank account but the said Ajoy Biswas physically violated her with the other three accused persons. She tried to commit suicide and jumped into the river Ganges. Some people rescued her. After she was rescued from the river Ganges she was taken to her house by two

men. They were not examined by the prosecution. Gobinda Choudhury the scribe was not examined. Although, she deposed that at the relevant time her family consisted of her elder brother, his wife, her mother, her sister but none of them was examined. She was not even examined by doctor. Although, she deposed that after the incident when she was crying inmates of Ajoy came and insulted her but none of them has been examined. According to her fifty houses are situated on both sides of the road leading to Ganga from the house of Ajoy but no one from those houses has been examined by the prosecution. The inmates of Ajoy about whom the victim speaks of being insulted, were also not made accused. The complainant when asked by the Court answered "I got married on 12.06.2008". How far such evidence of PW1 can be relied on to punish the accused persons will be discussed later on but before that the evidence of PW2 Swapn Das, who is the brother of the victim if considered, it comes out that he suppressed some fact regarding the delay in lodging the complaint. No explanation is also forthcoming as to why apart from this PW2 no other persons of the family could lodge a complaint before the police station on the same night when the allegation is so grave. In the cross-examination this witness admitted that while coming back to home he did not find his sister but this fact was never narrated to the Investigating Officer and he has also not made it clear as to whether was there any enmity between his sister and Ajoy if he had refused to marry his sister. Surprisingly, the witness claimed to have informed the incident to the local people but not a single name has not been disclosed and none of them has been examined by the prosecution.

The other witnesses from PW3 to PW8 although produced by the prosecution claiming to have knowledge about the incident, denied to dispel anything in the box. All the said witnesses took the same stand but prosecution did not declare them hostile.

From the examination of the witnesses under Section 313 of the Code it appears that they all took stand of innocence. Now this is for the prosecution to prove their case beyond any reasonable doubt. The learned Court below has arrived at a finding that the accused persons were not innocent and that the prosecution established the charges framed against them under Section 376(2)(g) of the Indian Penal Code.

In this case practically the entire sentence has been awarded by the Sessions Court based on the evidence of the victim de facto complainant. Although, her brother deposed before the Court but the evidence adduced by the victim would not be reliably corroborated by the evidence of her brother PW2. Rather we find certain contradiction in between the two.

Mr. Milan Mukherjee and Mr. Sandipan Ganguly, both appearing for the appellants in their respective appeals submitted that Court should be very very careful to pronounce conviction where the accused persons are to be sentenced on the basis of the sole testimony of the victim. The learned counsels have also made elaborate argument that sole witness can be relied on provided she is above all

doubts. Learned counsels submitted that apart from the genuineness of the evidence adduced by PW1, delay in making the complaint of such a serious incident could not be satisfactorily explained. Learned counsels submitted that the scribe who is none but the brother-in-law of the victim was not examined and the same also creates a doubt regarding the fact whether the complaint lodged was correctly recorded in writing before the police authorities. The learned Counsels also pointed out the frustrating manner, in which the prosecution proceeded by not taking recourse to examination of the victim by any doctor, although, the allegation is of rape. The trial Court has held that it is not for the fault of the victim but for the fault of the investigating agency the accused persons are not entitled to be acquitted. On behalf of the appellant it has also been argued that when the trial Court admitted the existence of the discrepancies in the oral testimony of the victim and that of his brother, the trial Court could not be justified to have arrived at a finding that the accused persons were guilty of the offence.

Mr. Ganguly, learned advocate appearing for the appellant relied on the following decisions:

- ? Rameshwar -Vs. - The State of Rajasthan reported in AIR 1952 SC 54;
- ? Sadashiv Ramrao Hadbe -Vs. - State of Maharashtra & Anr. reported in (2006) 10 SCC 92 &
- ? Bibhishan -Vs. - State of Maharashtra reported in (2007) 12 SCC 390;
- ? Vimal Suresh Kamble -Vs. - Chaluverapinake Apal S.P. Anr. reported in (2003) 3 SCC 175;
- ? Hemraj S/o Moti Ram -Vs. - State of Haryana reported in (2014) 2 SCC 395;
- ? Mussauddin Ahmed -Vs. - State of Assam reported in (2009) 14 SCC 541;

Mr. Panda appearing for the prosecution submitted that it is now the settled law that even victim's evidence alone is sufficient to inflict punishment upon the accused if no other witness is available. According to him even in absence of corroboration, if the victim's evidence is sound enough and is above any suspicion, Court should not feel hesitation to pronounce sentence. He relied on various decisions to show that non corroboration is no bar for sentencing the accused; sole testimony of prosecutrix can be relied to punish the guilty. Mr. Panda submitted that in this case Court should appreciate that the victim got married before the trial ended and that was one year after the incident. Such a courageous lady has come forward before the Court to take revenge of the violation caused to her chastity, dignity and social status. He submitted that the evidence on record is sufficient to hold that all the accused persons are guilty of the offence alleged to have been committed.

Mr. Panda relied on the following decisions:

- ? Vimal Suresh Kamble -Vs. - Chaluverapinake Apal S.P. & Anr. reported in

(2003) 3 SCC (Cri) 596 &

? Vijay alias Chineer -Vs. - State of Madhya Pradesh reported in (2010) 8 SCC 191;

? Dinesh alias Buddha -Vs. - State of Rajasthan reported in (2006) 3 SCC 771;

? State of Kerala -Vs. - Kurissum Moottil Antony reported in (2007) 1 SCC (Cri) 403

The decision cited by Mr. Panda for the State in Vimal Suresh Kamble (supra) is on the issue whether conviction can be made on the basis of the sole testimony of prosecutrix. He relies on the proposition that sole testimony is sufficient to hold conviction. The facts situation in the present case is distinguishable from the fact situation of the case in Vimal Suresh Kamble (supra) where the Hon'ble Apex Court holds that unless the evidence of the prosecutrix inspire confidence of the Court, the conviction based on sole testimony of the prosecutrix is not permissible. The risk of reliance of such sole testimony, in my view, is very high in this case because of the attending circumstances revealed from the evidence on record. Therefore, the sole testimony of the witness in this case with so many contradictions, will not be safe to be relied on for conviction and to uphold the order of conviction passed by the trial Court.

The finding arrived at by the Hon'ble Apex Court in this decision rather supports the case of the defence. The defence has already relied on the decision which we have discussed earlier.

The decision in Vijay alias Chineer (supra) has been relied on by Mr. Panda to argue that even if the sole testimony of the prosecutrix is sufficient for the conviction of the accused relying on paragraph 5 of the decision. Mr. Panda submitted that in a rape case, an accused can be convicted on the sole testimony of the prosecutrix. However, on going through the fact of the case we find that this case originates from an FIR under Section 376/34 IPC which was registered against the appellant and six others at a Police station under District Jabalpur. The Trial Court after concluding the proceeding convicted all the accused persons including the appellant for committing gang rape and sentence each of them to ten years rigorous imprisonment with a fine of Rs.500/-. Aggrieved by the said judgment and conviction passed by the Sessions Court, appellant and other accused persons preferred appeals before the High Court Madhya Pradesh at Jabalpur. The said appeal has been dismissed by the Hon'ble Apex Court. In dismissing the said appeal the Hon'ble Apex Court held that while appreciating evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the Court to reject the evidence in its entirety. The Hon'ble Apex Court further says that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. The Hon'ble Apex Court held that "after exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary

evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses." In the present case as we have analyzed, the discrepancies noted, are not at all trivial or minor in nature so that the same can be separated from the core issues involved in this case or can this be ignored.

Dinesh alias Buddha (supra) has been relied on by Mr. Panda to argue that corroboration, although, necessary but is not a sine qua non for conviction in a rape case. He submitted that a girl or woman who is raped is not an accomplice. Relying on the said decision Mr. Panda submitted that rape is not only a crime against a girl or a woman but it is crime against the entire society and therefore, it should be considered on a separate pedestal.

Although, going through the decision of the Hon'ble Apex Court it appears that the evidence of a victim of sexual offence is entitled to great weight notwithstanding the absence of corroboration but the present case is distinguishable on fact where trustworthiness of a victim is heavily doubted. However, the Hon'ble Apex Court in this case reduced the sentence to ten years from life imprisonment.

State of Kerala (supra) has been relied on by Mr. Panda is on the same line as that of the said decision in Dinesh alias Buddha (supra) principles are same and therefore, we do not deem it appropriate to reiterate the principles once again and such decision does not help Mr. Panda's contention to sentence the appellants.

We have heard the learned counsel for the parties and perused the materials on record. As indicated earlier we find that in this case order of conviction has been passed on the testimony of the victim alone. We have perused the oral testimony of the victim which contains lot of contradictions and the same has already been pointed out earlier. While scanning the oral evidence of PW1 we found in her deposition that she jumped into the river to commit suicide after the offence. She described that some of her family members were at home who knew about the matter but none of them was brought by the prosecution as witness. The persons said to have taken her from the river to her home after the alleged so-called incident of jumping into the river in order to commit suicide, were not examined. Although, she deposed that there were about fifty houses in and around the Ganges where she jumped but none of the residents of that locality were brought to the Court by the prosecution. Even PW1 deposed that many educated people used to reside in the said area including teachers, lawyers but nobody was examined. No reasonable explanation could be suggested by the prosecution through PW1 as to why these persons were not examined. No explanation is available in the evidence and PW1, as to why the victim was not medically examined after the commission of offence. It, however, appears from

the record that the victim refused to get herself examined by a doctor. Even she refused to get her statement recorded under Section 164 of the Code of Criminal Procedure. The deposition made by the victim would have been corroborated by other post occurrence witnesses but none came forward or called by the prosecution. The best person would have been the scribe who is the brother-in-law of the victim to corroborate her evidence as post occurrence witness but he also did not come forward. There is no evidence whether the complaint was written at the instruction of the victim. When victim is the sole witness this needs to be corroborated from other sources which is totally absent in the present case. In this case it is shockingly noticed that the learned Court below omitted to take conscious note of the apparent contradiction on the oral evidence of PW1 for less to speak of any corroboration by other witness. Therefore, in absence of corroboration and in particular when there are contradictions in the evidence itself and there is a contradiction between the statement in the written complaint and her oral testimony, the reliability on the testimony of the sole witness becomes risky.

Mr. Ganguly has rightly pointed out that the quality of evidence is very deprecating and cannot be relied on because it raises lot of suspicion. On this aspect it is important to point out that an accomplice is unworthy of credit unless is corroborated in material particulars. On the question of corroboration Mr. Ganguly, referred to the decision in Rameshwar (*supra*) the fact of that case if noted, the appellant Rameshwar was charged with committing rape on a young girl Mst. Purni, aged eight years. He was committed to Sessions and was convicted by the Assistant Sessions Judge, Sawai Jaipur, and sentenced to one year's rigorous imprisonment and a fine.

An appeal was made to the Sessions Judge at Jaipur and the learned Sessions Judge held that the evidence was sufficient for moral conviction but fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecution in such cases as a matter of precaution and the corroborative evidence, in so far as it sought to connect the appellant with the crime, was legally insufficient though morally enough. He was satisfied however that the girl had been raped by somebody. Accordingly, he acquitted the accused giving him the benefit of doubt.

State appealed against such acquittal to the High Court at Jaipur. High Court held that law requires corroboration in such cases but held that the girl's statement made to her mother was legally admissible as corroboration and considering that to be sufficient the Court set aside the acquittal and restored the conviction and sentence. After a leave was granted to file appeal under Section 134(1)(c) of the Constitution the Hon'ble Supreme Court dealt with the matter and dismissed the appeal. The Hon'ble Apex Court held "the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonable connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the

accused committed the crime. This does not mean that the corroboration as to identify must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that --- a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all... It would not at all tend to show that the party accused participated in it."

Unfortunately, in this case no manner of corroboration is at all available. We have only to rely on the evidence of PW1 which for the foregoing reasons are not safe as to inflict sentence upon the accused.

The decision relied on by Mr. Ganguly in *Sadashiv Ramrao Hadbe* (supra) is also on the point of solitary evidence how far can be relied on. It is the settled law that sole testimony of the prosecutrix can be relied in evidence if it is capable of inspiring confidence in the mind of the Court. The attending circumstances, in particular, non-examination of the victim by the medical expert rather refusal by the victim to undergo medical examination; to refuse to record her statement under Section 164 of the Code of Criminal Procedure; to file the written complaint after a lapse of 24 hours without reasonable explanation as regards the delay and her own evidence contending contradictions that too with the statement in the written complaint makes it highly improbable that PW1 did not lie before the Court. And in such circumstances, in my opinion the Court should be more careful to accept such sole testimony of the prosecutrix to impose sentence upon the appellant. So also the circumstances under which the victim implicated the appellant Ajoy for the commission of the offence under Section 376 of Indian Penal Code. Suspicion also arose as regards other accused persons abating the commission of offence of Ajoy and therefore, inflicting punishment upon the other appellants is also not sustainable inasmuch as attending circumstances also shows that the victim complained that these three other accused persons bolted the door from outside but no amount of evidence is available how the victim came out of the room after the alleged incident. The attending circumstances also reflect that the victim voluntarily went to the house of Ajoy and her story of serving tea for which she was stupefied also not above board because in her evidence itself she says that she was not in sense and in the next breath she stated that she cried after the offence. This self contradictory statement in the evidence destroys altogether the credibility of the evidence. In the present case as we have already pointed out that there was no seizure of wearing apparels, no FSL Report and so on which are pertinent for sentencing for the offence under Section 376 of the Indian Penal Code. With the striking similarity of this case with that of the decision of the Hon'ble Supreme Court in *Bibhishan* (supra) it can be safely opined that elements factually required for the commission of an offence under Section 376 of IPC is absent in the present case.

The prosecution has completely failed to explain why provisions of Sections 53A and 164A of the Code of Criminal Procedure could not be adhered to. The said provisions are set out below:

"S. 53A:- Examination of person accused of rape by medical practitioner-

1. When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

2. The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely-

i. the name and address of the accused and of the person by whom he was brought,

ii. the age of the accused,

iii. marks of injury, if any, on the person of the accused,

iv. the description of material taken from the person of the accused for DNA profiling, and".

v. other material particulars in reasonable detail.

3. The report shall state precisely the reasons for each conclusion arrived at.

4. The exact time of commencement and completion of the examination shall also be noted in the report.

5. The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section."

"S. 164A:- Medical examination of the victim of rape.-

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the

Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty- four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:-

- i. the name and address of the woman and of the person by whom she was brought;
- ii. the age of the woman;
- iii. the description of material taken from the person of the woman for DNA profiling;
- iv. marks of injury, if any, on the person of the woman;
- v. general mental condition of the woman; and
- vi. other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub- section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf."

The provisions have been incorporated in the Code by way of Amendment under Act 25 of 2005 operative from 23rd June 2006 whereas the alleged offence in this case was committed on 29th July 2007. Having regard to such vital omission it does not inspire confidence of the Court to hold that the prosecution has been able to prove the commission of offence beyond any reasonable doubt. Consequently, the conviction and sentence imposed by the Sessions Court cannot be sustained.

In the present case we also do not find any incriminating evidence from the

record so as to hold that there is a possibility of the accused Ajoy to have the offence committed with the active cooperation of the other appellants.

On an overall appreciation of the sole testimony of the prosecutrix and in particular her conduct we are not in a position to at all rely on the evidence of PW1. We also cannot hold that the evidence of PW1 not only does not inspire confidence but it certainly appears to be unnatural and unworthy of credit, inasmuch as she has contradicted herself in her evidence and no repair has been made by the prosecution by giving appropriate suggestions to the witness.

Mr. Ganguly has rightly relied on a decision in Vimal Suresh Kamble (*supra*) to argue that where all evidence of prosecutrix does not inspire confidence if totality of the circumstances are taken into consideration, Court cannot impose punishment simply on the basis of testimony of the prosecutrix. And therefore, the conviction so held against the appellants are liable to be set aside. Similar finding has been arrived at by the Hon'ble Apex Court in a decision in Hem Raj (*supra*) where allowing the appeal filed by the convict held- "Going through the prosecutrix's evidence, it becomes clear that it would be extremely dangerous to rely on such evidence. The prosecutrix obviously knew the appellant, being her neighbor. It is her case that she used to write letters to him. In the examination-in-chief, she stated at one stage that the appellant raped her and immediately thereafter retracted the statement and stated that he did not rape her but he attempted to rape her. She refused to acknowledge that the statement which was read over to her was made by her to the police. She expressed surprise as to how her signatures appeared on the said statement. The Public Prosecutor had to therefore declare her hostile. Hence, such evidence cannot be relied on. It would be hazardous to confirm the conviction on the prosecutrix's sole testimony. Even the evidence of PW1, the elder brother of the prosecutrix, is also far from satisfactory and incapable of offering any corroboration to the prosecutrix's evidence. He went to the extent of saying that he did not make any statement to the police. Also, the prosecution failed to examine the doctor who had examined the prosecutrix. The medico-legal report (MLR) was produced in the court by PW 6 (Medical Report Technician). This is a serious lapse on the part of the prosecution. MLR does suggest that the hymen of the prosecutrix was torn. It is also true that the prosecution has brought on record FSL report which shows that human semen was detected on the salwar of the prosecutrix and on the underwear of the accused. However, it is difficult to infer from this, that the prosecutrix was raped by the appellant. The prosecutrix herself has vacillated on this aspect. This is a case where the appellant must be given benefit of doubt. Hence, conviction of the appellant is reversed."

The said fact leading to the decision is a case where the prosecutrix (PW5) made out a case that went outside her house to relieve herself, after about midnight. The accused-appellant, who is her neighbor, was standing on the wall of his house and jumped from the wall, came to her house, and allegedly raped her. While the prosecutrix raised alarm, her elder brother PW1 came there and the

appellant ran away. The prosecutrix lodged her complaint on the basis of which investigation was started and the appellant was charged. High Court confirmed conviction of the appellant under Section 376 and 450 of the Indian Penal Code.

In this case the trial Court convicted the appellant and sentenced him as aforesaid. The High Court confirmed the conviction and sentenced the appellant. Against such conviction appeal was preferred by the accused/appellant in Hon'ble Supreme Court. Speaking of the need of corroboration of the evidence of the prosecutrix the Hon'ble Apex Court held that in a case involving charge of rape the evidence of the prosecutrix is very vital. If such evidence is credible and inspires total confidence, it can be relied upon even without corroboration. The Hon'ble Apex Court held that if the sole evidence of the prosecutrix is to be relied on the Court has to scrutinize it very carefully, because in a given case on that lone evidence a man can be sentenced to life imprisonment. According to the Hon'ble Apex Court, the Court must, therefore, with its rich experience evaluates such evidence with care and circumspection and only after its conscience is satisfied about its credit worthiness to rely upon it.

On a careful consideration of the evidence of PW1 it is very difficult to believe that the prosecutrix shows her truthfulness on the box, apart from the contradictory statements made during cross-examination. With deepest respect to the learned Sessions Court we must say that a person or persons cannot be held guilty of committing rape or abatement to rape on emotion and sentiment for the complaint has been made by a lady and it is also not desirable for the Court to come to a finding in favour of the complainant with regard to the commission of offence simply holding that because she is a lady nobody came forward to support her. Such sentiment has no place in the adversarial system where an offence if alleged to have been committed, is to be proved beyond any reasonable doubt, otherwise the accused persons are entitled to get benefit of doubt which may lead to their acquittal.

In a landmark decision in *Mussaiddin Ahmed* (supra) the Hon'ble Apex Court had occasion to deal with a situation where material contradictions regarding factual aspects of the incident has been seriously criticized by the Hon'ble Apex Court and also held that "it is the duty of the party (prosecution) to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114 Illustration (g) of the Evidence Act, 1872 notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence."

Fact scenario of our case has a striking similarity with the fact situation of the case in *Mussaiddin Ahmed* (supra) where the Hon'ble Apex Court acquitted the appellant from the charge under Section 376 IPC holding inter alia that the prosecution failed to prove its case against the appellant beyond reasonable doubt.

In this case we have noticed that the Investigating Officer has not been examined. No explanation is forthcoming from the prosecution as to why such a vital omission has been allowed to happen which ultimately, gives benefit to the defence because the defence is deprived of cross-examining the Investigating Officer who is the master of the prosecution. In such a situation the accused is certain to get some benefit for the lackadaisical manner of conducting the case by the prosecution. It goes without saying that where the Court deals with the sole testimony of the prosecutrix and decides to sentence the accused. Court must consider as to what is the startling quality of the evidence of the prosecutrix and how such evidence is to be weighed.

It is settled proposition of law that even if there are some emotions, contradictions and discrepancies the entire evidence cannot be disregarded. After exercising care and caution and shifting through the evidence to separate truth from untruth, exaggeration and improvement, the Court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. We all know that minor discrepancies are natural and bound to occur in the statements of the witnesses but where such contradiction is so fatal that it cannot inspire confidence of the Court the prosecution case is bound to fail which is a case here because the evidence of PW1 is not above doubts at all.

Corroboration is not a rule of law, but one of caution as an assurance. The occasion for the presence at the time of occurrence, opportunity to witness the crime, the normal conduct of the witness after incident, the nearness of the witness to the victim is pre-disposition towards the accused, are some of the circumstances to be kept in view to weigh the testimony of a witness. It is not at all the quantum of the evidence but its quality and credibility that lends assurance to the Court for acceptance. As we have already discussed earlier, from the very beginning we have noticed that the witness was not speaking the truth and she has contradicted herself apart from the discrepancies and other major lacuna on the part of the prosecution.

Importantly here, and most unfortunately, the Investigating Officer has not been interrogated. Therefore, we cannot agree with the submission made by Mr. Panda to uphold the order of conviction. We are inclined to reverse the judgment of conviction and sentence passed by the learned Court below.

We, therefore, set aside the order of conviction and sentence.

The appellants are acquitted of the offence alleged. Their respective bail bonds shall stand discharged.

The Criminal Section is directed to send down the lower Court records together with a copy of the judgment forthwith to the concerned learned trial Court.

Urgent Photostat certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance with all usual formalities.

I agree.