

(2016) 02 TP CK 0028
In the Tripura High Court
Case No : Crl. A. (J) No. 34 of 2013

Biswamohan Debbarma and Others

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 04-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 164, Section 313, Section 374

Penal Code, 1860 (IPC) — Section 366, Section 376(2)(g), Section 451, Section 457

Citation : (2016) 3 GauLJ 597 : (2016) 2 GauLT 905

Hon'ble Judges : Deepak Gupta, C.J. and S.C. Das, J.

Bench : Division Bench

Advocate : R. Datta, R. Purkayastha and P. Ghatak, Advocates, for the Appellant; R.C. Debnath, Addl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Das, J.—1. This Criminal Appeal, under Section 374 of Cr.P.C., is directed against the judgment and order of conviction dated 30.03.2013 and sentence, dated 01.04.2013, passed by learned Addl. Sessions Judge, Khowai, West Tripura in Case No. ST31(WT/K) of 2011, whereunder, the appellants were found guilty of committing the offences charged against them under Sections 451/366 and 376(2)(g) of IPC and accordingly sentenced them to suffer R.I. for 2 years and to pay a fine of Rs. 5000/- each in default of payment to suffer S.I. for 6 (six) months under Section 451 of IPC; again to suffer R.I. for 10 years and to pay a fine of Rs. 10,000/- each, in default to suffer S.I. for 10 months under Section 366 of IPC and further to suffer R.I. for life and to pay a fine of Rs. 10,000/- each, in default to suffer S.I. for 10 (ten) months for commission of offence punishable under Section 376(2)(g) of IPC. It is directed that all the sentences shall run concurrently.

2. Heard learned Counsel Mr. R. Datta for the appellants and learned Addl. Public Prosecutor Mr. R.C. Debnath for the State-respondent.

3. Prosecution case is that on 26.10.2010 at night, the victim prosecutrix, P.W. 7, (name kept withheld) was sleeping in her residence at village Tuikarma with her old grandmother, Sumitra Debbarma (P.W. 3). Her parents were away from the house to attend an invitation. At about 12-00 p.m. of the night the accused Biswamohan Debbarma and Parendra Debbarma trespassed in the house of the victim prosecutrix, forcefully lifted her from the house, took her to a nearby cowshed and both of them committed rape on her and thereafter they took her to the jungle in the eastern side of the house and again both of them committed rape on her. At dawn she returned home and informed the incident to her grandmother (P.W. 3) and to her uncle, P.W. 4, Jitendra Debbarma. Her parents returned home on the following day at about 10-00 a.m. and she reported the incident to her parents.

4. On 28.10.2010, P.W. 1, Charania Debbarma, father of the victim prosecutrix lodged an FIR at Mungiakami P.S. which was written by P.W. 5, Shanti Debbarma and on receipt of the same, O.C., Mungiakami P.S. registered Mungiakami P.S. Case No. 19/10, under Sections 457/376(2)(g) of IPC and S.I. Nandan Baidya, P.W. 10 was entrusted with the charge of investigation.

4.1 During investigation, Investigating Officer (P.W. 10) examined the victim girl, recorded her statement under Section 161 of Cr.P.C., arranged medical examination of the victim girl on that day itself, seized her wearing apparels and arranged for examination of those wearing apparels by the SFSL, produced the victim girl before Judicial Magistrate 1st Class, Khowai for recording her statement under Section 164 of Cr.P.C., examined all material witnesses and recorded their statements, collected medical report, SFSL report and ossification test report, etc. and thereafter submitted charge-sheet against the accused-appellants for commission of offences punishable under Sections 457/376(2)(g) of IPC.

4.2 After compliance of all formalities, the case was committed to the Court of Sessions and learned Addl. Sessions Judge on 16.02.2012 framed charges against the accused persons for commission of offences punishable under Sections 451/366 and 376(2)(g) of IPC to which they pleaded not guilty and claimed to be tried.

5. To prove the charges, prosecution examined 12 witnesses and proved the FIR, seizure list of wearing apparels of the victim prosecutrix as well as the seized alamats, medical examination report of the victim prosecutrix, etc.

6. After closure of the prosecution evidence accused persons were examined under Section 313 Cr.P.C. and in their turn, they declined to adduce any defence evidence.

6.1 Defence case so far suggested during cross examination of the prosecution witnesses was that the victim prosecutrix was spoiling Sukumar Debbarma, son of Parendra Debbarma and that parents of the victim prosecutrix proposed for marriage between Sukumar and the victim prosecutrix but that was refused by

Parendra and on that issue relationship was bitter between the accused persons and the family of the victim prosecutrix and as a result, a false allegation was made against the accused persons.

7. Learned Addl. Sessions Judge at the conclusion of the trial, held that the charges framed against the accused persons proved beyond reasonable doubt and accordingly sentenced them as stated hereinbefore.

8. Rape is a most heinous offence. It violates human rights of a female. A victim of rape is considered at par with an injured witness and to an extent more reliable and if the evidence of the victim woman is believed and if her sole testimony inspires confidence of the Court, no other corroboration is ordinarily required to record conviction.

9. The Court of law should remain alive while appreciating the evidence in a case of rape. What should be the duty of the Court in appreciating the evidence in a rape case has been categorically explained by the Apex Court in catena of decisions. We would like to quote here a few of the observations of Apex Court in some of the cases.

9.1 In the case of Kundula bala Subrahmanyam Vrs. State of A.P., reported in , (1993) 2 SCC 684, the Supreme Court has observed--

"The role of courts, under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner and not allow the criminals to escape on account of procedural technicalities or insignificant lacunae in the evidence as otherwise the criminals would receive encouragement and the victims of crime would be totally discouraged by the crime going unpunished. The courts are expected to be sensitive in cases involving crime against women....."

9.2 In the case of Bodhisattwa Goutam Vs. Subhra Chakraborty, reported in , AIR 1996 SC 922, the Supreme Court has observed--

"Rape is not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21....."

9.3 In the case of Punjab Vs. Gurmit Singh, reported in , AIR 1996 SC 1393 has observed--

"Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the

attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

9.4 In the case of *State of A.P. Vs. Gangula S. Murthy*, reported in , AIR 1997 SC 1588 the Supreme Court has observed--

"Before parting with the case we would like to point out that the Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more important because of late crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasise that the Courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation. One of us (Dr. Anand J.) has observed in *State of Punjab vs. Gurmit Singh and others* (1969) 2 SCC 384 thus:

"The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.

We think it is appropriate to reiterate those observations in this case."

9.5 In the case of *Ranjit Hazarika Vrs. State of Assam*, reported in , (1998) 8 SCC 635, the Supreme Court reiterated the same principles laid down by the Apex Court in the case of *Gurmit Singh* (supra).

10. Let us first travel through the evidence on record. The victim prosecutrix in her deposition stated--

"About 2 years back at about 12 hrs. when I and my grandmother were only present at our hut some knocking was made at our door then my grandmother opened the door. Biswamohan entered in my hut and Parendra stood outside the hut and Biswamohan forcefully taken me to a cow shed situated about 100 cubits away from my hut and there Biswamohan and Parendra raped me and took me to the jungle and there also both of them raped me. On the following morning they released me. My parents on that date was out of our house as they went to my maternal uncle house due to sraddha ceremony of my maternal aunt. On return home I informed the fact to my grandmother and then my uncle Jiten Debbarma. At noon my parents came and I reported the matter to them. Subsequently when the case is registered police brought me to Teliamura Hospital where doctor examined me and thereafter I was also brought to a judicial magistrate and I made statement to him. I put my LTI not RTI in the statement sheet of the Magistrate. Parendra and Biswamohon are present in the Court. Police also seized my wearing apparels. These are my violate colour panti, black colour salwar, blue colour torned kamiz as seized by police. Witness identified Ext. M.O. 1 series. I have no enmity with Parendra or Biswamohon."

In her cross examination on behalf of the accused persons she stated--

"I gave the statement to the police in Kakbarak. When police examined me, my mother was present and my mother explained my statement to police. My mother Smti. Usha Rani Debbarma is still living.

I stated to police that in the afternoon on the date of incident Parendera and Biswamohan visited our house but they did not make any query to me threatening me as to why I was spoiling Sukumar Debbarma, S/o. Parendra Debbarma.

On being drawn attention of the witness to her 161 statement with the help of interpreter, witness admits presence of such statement at her 161 statement recorded by IO and the portion of her statement in the original statement under Section 161 is marked as Exhibit-B, subject to confirmation by IO.

It is not a fact that Parendra and Biswamohan threatened that why I was spoiling Sukumar.

I stated to police that at the time of incident when accused persons knocked the door then my grandmother unlocked the door.

When police examined me I stated that when the door was knocked by the accused persons, I opened the door.

The fact that I myself opened the door is true.

The witness was asked what fact is true--whether her deposition before the Court that her grandmother opened the door is true or her statement before the

police that she opened the door is true?

The witness replied--both the statements are true as first time when the accused appeared my grandmother opened the door and second time, I opened the door.

I stated to the police that two times our door was opened.

The 161 statement written in Bengali was placed to the illiterate witness by the Learned Defence counsel in presence of interpreter asking her whether that statement was in her statement recorded under Section-161 of Cr.P.C., but the witness could not answer.

This time, Learned Defence Counsel drew the attention of the interpreter in respect of those facts. The interpreter had gone through those facts and stated that there was no statement of opening the door twice on the date of alleged incident.

I stated to police that my grandmother is short of hearing and vision.

The neighbouring hut of my house is the hut of Chutia Debbarma, my uncle.

It is not a fact that I stated falsely that Parendra and Biswamohan did not take me from my house and also did not rape me.

I have got no love relationship with Sukumar Debbarma, S/o. Parendra Debbarma.

I had no quarrel or dispute with Parendra and Biswamohan, prior to this incident.

It is not a fact that police did not seize my wearing apparels.

It is not a fact that I deposed falsely."

The material part of the victim's statement that she was forcefully lifted by the accused persons from her house and that both the accused persons committed rape on her, has not been shaken in cross examination. The prosecutrix was an unmarried girl. Accused Parendra is the cousin brother of her father. Other accused is her co-villager. She denied having any quarrel or dispute with accused persons. Why she should come out to make a false allegation of rape against the accused persons. Her evidence seems to be worthy enough and inspires confidence. Defence has failed to create any dent in her statement to throw doubt in her evidence.

11. The parents of the victim prosecutrix examined as P.Ws. 1 and 2. They have materially corroborated the victim prosecutrix and their statement that on the night of occurrence they were away from their house and that the victim prosecutrix and her grandmother i.e. P.W. 3 were only in the house and on the following day at about 10 a.m. they returned home and at that time the victim prosecutrix informed them that accused Biswamohan and Parendra came to their house and asked to open the door and when they opened the door Biswamohan entered into the hut and Parendra remained outside as guard and Biswamohan

pulled the victim prosecutrix out of the hut and both of them took her to the nearby cowshed and committed rape on her one after another and thereafter again they took her to the jungle and again committed rape on her. That part of the statement of these two witnesses, has not been shaken in any manner in the cross examination.

12. P.W. 3 is the grandmother of the victim prosecutrix. She was an old lady and she stated that Biswamohan knocked the door and at that time the prosecutrix opened the door and Biswamohan forcefully took out prosecutrix from the hut and on that night the victim prosecutrix returned and told her that she was raped by both the accused persons.

13. P.W. 4 is the uncle of the victim prosecutrix and P.W. 6 is a member of the Panchayat, a resident of the locality and both of them corroborated the prosecution case saying that they were informed about the incident.

14. P.W. 11 is the Medical Officer who examined the victim prosecutrix on 28.10.2010 i.e. on the date of lodging the FIR and she opined that sexual intercourse might have taken place which may be confirmed by examination of the vaginal swab. She found labia majora and labia minora were normal and hymen was ruptured. In cross examination she stated that it appeared to her that victim was habituated to sexual intercourse and that she did not find any injury on her private parts. The opinion of the witness materially supports the allegation of rape. Even if it is accepted that the prosecutrix was habitual in sexual intercourse, it does not give a license to the accused persons to invade upon her body without her consent. Further, absence of spermatozoa on vaginal smear does not necessarily falsify the version of the prosecutrix. Penetration does not necessarily lead to the discovery of spermatozoa, particularly where the victim was examined on the third day after occurrence and in the mean time she might have taken bath. An overall appreciation of the medical evidence supports the prosecution case.

15. In a case of rape normally a victim is the sole witness of occurrence. If her evidence inspired confidence, it is settled by judgment laws that conviction of the accused is maintained. As a rule of prudence the Court looks for some additional assurance to rule out the possibility of a false implication. If the victim's evidence is so consistent and inspire confidence of the Court, a conviction may be recorded.

16. In this case we have already reproduced hereinbefore the deposition of the victim prosecutrix before the Court. Except some superficial discrepancies in respect of the fact as to who opened the door, there is nothing else to challenge credibility of the deposition of victim prosecutrix. The medical evidence did not rule out the possibility of rape rather supported the victim's evidence. Defence simply made suggestion to P.W. 1 that the victim prosecutrix was spoiling Sukumar Debbarma, S/o. Parendra Debbarma and that parents of the victim prosecutrix wanted to give marriage of the prosecutrix with Sukumar Debbarma

which Parendra Debbarma refused and therefore, there was inimical relation for which a false case was instituted. The defence story seems to be quite unnatural that the parents planted their young unmarried girl to make a false allegation of rape against the accused persons for the reason that marriage proposal with the son of one accused was refused. Had it been so, allegation could have been made against Sukumar Debbarma, but here the allegation is against father of Sukumar and another young man. The suggestion seems to be a cooked story to somehow make out a defence story and nothing else.

17. In the cross examination of P.W. 1 it is brought on record that Parendra is the cousin brother of P.W. 1 Charania Debbarma and so he was uncle of the victim prosecutrix. In their examination under Section 313, Cr.P.C. the accused persons stated nothing about their plea taken at the time of cross examination of the prosecution witnesses.

A mere suggestion not supported by any specific statement made by the accused persons and not supported by any defence or prosecution evidence would have no evidentiary value. No importance could be attached to such suggestion made during cross examination.

18. Learned counsel, Mr. Dutta appearing on behalf of the appellants submitted that the FIR was lodged on 28.10.2010 whereas the incident occurred on 26.10.2010 at mid night. The parents of the victim, so far the prosecution case is concerned, returned on 27.10.2010 at about 10-00 a.m. but on that day FIR was not lodged and, therefore, there was scope of embellishment and the prosecution case cannot be believed.

19. Learned Addl. P.P. has submitted that delay has been adequately explained and therefore, there is no reason at all to suspect the prosecution case. The Supreme Court in the case of State of Himachal Pradesh Vrs. Gian Chand, reported in , (2001) 6 SCC 71 has observed that delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the FIR. Delay has the effect of putting the Court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.

20. The above principle is applicable generally in case of delay in lodging FIR. But, in a case of rape, the law has further been elaborated by the Apex Court. In the case of Gurmit Singh (supra) the Supreme Court has held--

".... A girl, in a traditional bound non-permissive society as in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, she would be conscious of the danger of being

ostracized by the society or being looked down upon by the society....."

On the facts of that case the Court has observed that her informing to her mother only on return to the parental house and no one else at the examination center prior thereto, is in accord with the natural human conduct of a female. The Court has further observed that the Courts cannot over-look the fact that in sexual offences delay in lodging of the FIR can be due to variety of reasons, particularly, the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family.

21. In the case of *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujrat*, reported in , AIR 1983 SC 753, the Supreme Court has observed--

".... A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated...."

22. In the case of *Karnel Singh Vs. State of M.P.*, reported in , (1995) 5 SCC 518, the Supreme Court has observed that delay in lodging complaint in such cases in India does not raise inference that complaint was false. Reluctance to go to police is because of society's attitude towards the woman victim.

23. In the present case, the incident occurred on the mid night of 26.10.2010. The victim on her return home narrated the occurrence to her grandmother and to her uncle. Her parents returned on 27.10.2010 at about 10 a.m. and thereafter she narrated the incident to her parents which was quite natural. FIR was lodged by the father of the victim prosecutrix on 28.10.2010 at about 08-05 hours. It is clearly stated in the FIR i.e. Exbt. 1 that delay has been caused on account of waiting for village adjudication. In his evidence, P.W. 1 clearly stated that he had delayed in lodging the FIR because he waited for village settlement. That part of evidence of P.W. 1 has not been questioned by the defence. Mr. Datta, learned counsel, though argued that there was embellishment in the story narrated in the FIR, but has failed to show, referring to the evidence on record, as to which part of the story was the result of alleged embellishment due to the delay. So in our considered opinion, delay in lodging the FIR by the father has been sufficiently explained and the explanation is acceptable since it is a case of rape of an unmarried young girl. This argument of learned counsel Mr. Dutta,

therefore, merits no consideration.

24. The next argument advanced by Mr. Dutta, is that the victim prosecutrix stated that she was first taken to the cowshed by the accused persons and that cowshed belonged to Dayananda Debbarma and Dayananda Debbarma has not been examined and so adverse inference should be drawn. We find no merit at all in this argument of learned counsel Mr. Dutta that Dayananda Debbarma is a material witness. Nothing is there in the evidence on record that Dayananda was informed by the victim or her parents or that Dayananda came to the house of the victim prosecutrix and learnt about the occurrence or that in any other manner he was connected with the occurrence. Therefore, in our considered opinion, non examination of Dayananda is not at all material for consideration by the Court.

25. Mr. Dutta, learned counsel further argued that the victim prosecutrix stated that she was first taken to the cowshed and raped there and thereafter she was taken to the jungle and was raped there also. In the hand sketch map I.O. has only shown the cowshed where the victim prosecutrix was raped but did not at all ascertain the second place of occurrence i.e. the jungle and so the version of the victim cannot be believed.

26. Learned Addl. P.P. has submitted that it was the fault of the I.O. that he did not visit the second place of occurrence in the jungle and that lapse of the I.O. cannot damage the prosecution case as a whole. On perusal of the evidence and materials on record we find that in the FIR the informant i.e. P.W. 1 stated that the prosecutrix was taken to the jungle in the eastern side of the house and was raped there. The statement of the prosecutrix was recorded under Section 164 of Cr.P.C. on 03.11.2010 and she made clear statement that she was raped in the cowshed and thereafter in the jungle. The victim in her deposition made clear and specific statement that she was raped both in the cowshed as well as in the jungle which is supported by the evidence of her parents. I.O. (P.W. 10) in his evidence stated that he visited the place of occurrence and prepared hand sketch map with index. He made clear statement that he did not investigate regarding the place of occurrence at jungle and that he did not go to the jungle with the victim. Since there was specific statement in the FIR as well as in the 164 Cr.P.C. statement of the victim, I.O. was supposed to visit both the place of occurrence and mention it in the hand sketch map. Failure of I.O. in mentioning the same in the hand sketch map in our considered opinion should not be attached with a great importance to disbelieve the version of the victim prosecutrix.

27. The Supreme Court in the case of Karnel Singh (supra) in Para 5 of the judgment has observed--

"..... In cases of defective investigation the Court has to be circumspect in evaluating the evidence but it would not be right in acquitting the 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....."

28. In the present case, the Investigating Officer himself stated that he did not go to the place of occurrence in the jungle with the victim girl and did not ascertain it. It is the callousness and failure of the Investigating Officer for which we find no reason at all to doubt the prosecution case.

29. The next argument advanced by learned counsel, Mr. Dutta is that the victim prosecutrix at the time of her taking away did not raise any alarm. Her grandmother also did not raise any alarm which was quite un-natural and under such circumstances, the prosecution story itself is doubtful and therefore, the accused persons should be given benefit of doubt.

30. Learned Addl. P.P. has submitted that the victim is an illiterate tribal girl. Her parents also are of same status. The accused Parendra was a middle aged man and the accused Biswamohan was a young person of about 20/25 years. They forcefully took her away. In her statement before the Magistrate while examination under Section 164 of Cr.P.C. she made clear statement that she tried to raise alarm but her mouth was pressed and also she was also threatened. Under such circumstances of the case the argument of the defence that for not raising alarm the statement of the victim should be doubted cannot be accepted.

31. In her deposition before Court the victim did not state that she tried to raise alarm. Defence also did not raise any question to the prosecutrix as to whether she tried to raise alarm or not. It was the duty of the prosecution to examine the victim to unearth the truth. It is a fact that the victim is an illiterate tribal resides in remote village. It is a human conduct of raising alarm but if alarm was not raised or could not be raised, does not necessarily mean that the facts stated by the witness should be a suspect unless there are other cogent and emerging materials to destroy the authenticity of the statement of the victim.

32. P.W. 3, the grandmother of the victim was an old lady with short of eyesight. In cross examination she stated that she did not raise alarm when victim was taken forcefully. She cannot see properly. Before return of her son and son's wife she informed the incident to the local people. During night time also she informed the local people but nobody came at night. P.W. 3, the grandmother was also an illiterate woman and it appears that she did not raise any alarm when the victim prosecutrix was allegedly lifted by the accused persons. It is the human conduct to raise alarm, but for not raising the alarm, we find no reason to throw doubt on the entire prosecution case since the victim's statement that she was raped by both the accused persons has not been shaken in any other manner.

33. Mr. Dutta, learned counsel for the accused persons has further submitted that in her deposition the victim stated that her grandmother opened the door. But her grandmother stated that the prosecutrix opened the door and when the victim was questioned in cross examination as to which of the statement was

correct, she stated that both the statements were correct since her grandmother first opened the door and the second time she opened the door. There was no case that the door was opened for the second time.

This is a minor discrepancy in our considered opinion. The door might be opened by either the victim or the grandmother. The basic evidence is that both of them were in the house on the night of occurrence and there was none else in the house. There was no nearby house adjacent to the house of the victim. So this minor discrepancy does not shake the basic version of the witnesses. Discrepancies which do not go to the root of the case should not be attached with undue importance. Minor discrepancies are rather guaranty of truth.

34. The evidence has to be appreciated as a whole and some discrepancies here and there should not be picked up to throw the prosecution case as a whole.

The Supreme Court in the case of Inder Singh V. State, reported in , AIR 1978, SC 1091 has held that credibility of testimony, oral or circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary, that proof beyond reasonable doubt should be adduced in all criminal cases. It is not necessary that it should be perfect. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of foolproof concoction.

35. Here in this case, the prosecution case is that the accused Biswamohan and Parendra trespassed in the house of the victim prosecutrix at mid night. Accused Biswamohan entered into the room and pulled out the victim from the house and that both Parendra and Biswamohan took her to the cowshed, raped her there and again took her to jungle and raped her there. This statement of the victim inspires confidence since it is supported by her parents and the medical evidence also. No other corroboration is required. The discrepancies which are noted by the learned defence counsel, in our considered opinion, is not a material discrepancy which shakes the backbone of the prosecution case.

36. We are inclined to put here the observation of the Apex Court in the case of Krishna Mochi & Ors. Vrs. State of Bihar, reported in , AIR 2002 SC 1965, Para 76 of the judgment wherein the Apex Court observed-

"Thus, in a criminal trial a prosecutor is faced with so many odds. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, court should tread upon it

but if the same are boulders, court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find this Court in recent times has conscientiously taken notice of these facts from time to time. In the case *Inder Singh and another v. State (Delhi Administration)*, , AIR 1978 Supreme Court 1091, Krishna Iyer, J. laid down that "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes." In the case of *State of U.P. v. Anil Singh*, , AIR 1988 Supreme Court 1998, it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. In the case of *State of West Bengal v. Orilal Jaiswal and another* , (1994) 1 Supreme Court Cases 73, it was held that Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law. In the case of *Mohan Singh and anr. v. State of M.P.* , (1999) 1 Supreme Court Reports 276, it was held that the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused."

37. Mr. Dutta, learned counsel also argued that prosecution has failed to prove the age of the victim girl and so the victim girl cannot be considered as a minor.

38. In the facts of the present case, the age of the victim girl has become irrelevant since there is no case of the accused persons that the victim girl was a consenting party. Both the victim girl and her parents are illiterate persons. In her statement recorded by the Magistrate under Section 164 of Cr.P.C. on 03.11.2010 so far the record shows that she stated her age as 12 years. She gave her evidence before Court in 2012 and at that time she stated her age as 14 years. The Medical Officer i.e. P.W. 11 recorded the age of the victim girl as 12 years as per the statement of the police. The parents did not state the age of the victim girl at the time of occurrence and only one suggestion was given to P.W. 1 at the time of cross examination that the victim girl was more than 20 years. I.O., P.W. 10 in his deposition stated that ossification test of the victim girl

was done at G.B. Hospital and as per the report, the age of the victim girl was more than 12 years and less than 14 years. The ossification test report has not been proved. But the statement of I.O. in respect of age of the victim girl pursuant to the ossification test has not been disputed by the defence. So in the given circumstances of the case, as to what was the age of the victim girl at the time of occurrence is totally immaterial and we find nothing to consider the submission of learned counsel on this score.

39. Learned counsel, Mr. Dutta has finally submitted that the punishment under Section 376(2)(g) is excessive and harsh and he prayed for taking a lenient view.

40. Learned Addl. P.P. left it open to the Court for consideration as to whether the punishment should be reduced or not. The trial Court has held the accused appellants guilty of committing offence punishable under Sections 451/366 and 376(2)(g) of IPC. There is no argument in respect of the evidence proving the ingredients of offence punishable under those sections. We are also of considered opinion on consideration of the evidence on record that the ingredients of offence are proved.

In respect of punishment under Section 376(2)(g) of IPC, considering the age and social strata of both the accused-appellants, we are of considered opinion that rigorous imprisonment for 12 years and a fine of Rs. 10,000/- each, in default of payment to suffer S.I. for six months under Section 376(2)(g) of IPC shall meet the ends of justice.

The punishment under Sections 451 and 366 of IPC are maintained. All the substantial sentences shall run concurrently.

41. Subject to modification of sentence under Section 376(2)(g) of IPC, as aforesaid, the appeal is found to be devoid of any merit and it stands dismissed.

42. Send back the L.C. records along with a copy of this judgment.