
(2006) 08 CAL CK 0030
In the Calcutta High Court
Case No : Cr.A. No. 266 of 2003

Gopal Bhowmick

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 18-08-2006

Acts Referred:

Constitution of India, 1950 — Article 15
Evidence Act, 1872 — Section 119
Penal Code, 1860 (IPC) — Section 376

Citation : (2006) 4 CHN 526

Hon'ble Judges : Dipankar Datta, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Subhendu Sekhar Roy and Uttam Kumar Ghosh, for the Appellant; Abdul Salam and Sirin Sultania, for the Respondent

Final Decision : Allowed

Judgement

Amit Talukdar, J.

INTRODUCTION:

1. In the fringe areas of the City of Calcutta at a place known as Mathur Babu Lane, within the jurisdiction of Tangra Police Station there lived an elderly lady known as "Shibani Ghosh" (P.W. 2), the wife of one Dilip Ghosh.

The family consisted of three daughters and one son. Shibani Ghosh (P.W. 2) used to cook for different families. Her youngest daughter Durga Ghosh (P.W. 7) was deaf and dumb. They resided at premises No. 4/1/H/20. The family of the appellant also resided in the adjoining premises. P.W. 7 the prosecutrix and the appellant in fact grew up together.

FACTS OF THE CASE:

2. An otherwise humdrum existence of an elderly lady who eked her living by way of preparing meals for different families, concentrated on the still waters of

her family consisting of three daughters and her only son, suffered a ripple on account of the dastardly act of the appellant which have stirred up an action the cause of which is required to be dealt by us.

3. Factual matrix as adumbrated through the version of Shibani Ghosh (P.W. 2) is required to be set forth for a grasp of the entire prosecution.

4. As seen by us earlier, Shibani Ghosh (P.W. 2) was a cook, engaged in preparing meals in different homes. It was a hot evening of September 27, 2001. As usual she had gone on her errands and after her return from work at about 10-00 p.m. in the said evening she found the inmates of her house were discussing about the occurrence. Her youngest daughter Durga (P.W. 7) went to fetch water from a tubewell by the side of the road. The appellant came there and caught hold of her and took her to the side of the lane and forcibly entered her. She raised a cry and after committing such act due to such violation P.W. 7, Durga was profusely bleeding and an injury was caused. She heard about the incident as soon as she returned home.

Investigation:

5. After coming to know about the incident she along with her daughter (P.W. 7) Durga rushed to the Tangra Police Station and lodged the written information (Ext. 9) which was treated as the formal FIR (Ext. 10) by P.W. 13, Animesh Hawladar. He was also entrusted with the investigation.

6. Pursuant to the entrustment with the investigation by the Officer-in-Charge of the Tangra Police Station, after P.W. 13, Animesh Hawladar took the victim girl, Durga (P.W. 7) along with her mother (P.W. 2) to the Sir Nil Ratan Sirkar Medical College and Hospital where she was examined by Prof. Sankar Nath Mitra (P.W. 1), the Assistant Professor of Gynecology attached to the said hospital, who at the relevant time was the Clinical Tutor and Resident Medical Officer in the said Department. Prof. Mitra examined Durga (P.W. 7) on 28.9.01 at about 05.40 p.m. Prof. Mitra in his report (Ext. 1) did not find any scar mark or nail mark in the breast. He also did not find any external injury on the lower abdomen and inner side of the thigh. Prof. Mitra's examination revealed there was no external injury on the genital organ of P.W. 7, Durga. Prof. Mitra also did not find the presence of any bleeding and he stated that vagina was admitting the tip of the finger. Prof. Mitra referred the victim to the Forensic and State Medicine Department.

7. P.W. 13, Animesh Hawladar, the Investigating Officer thereafter went to the place of occurrence and arrested the appellant from his house and prepared a seizure list (Ext. 1) pertaining to the seizure of wearing apparels of the victim girl, Durga Ghosh (P.W. 7) in front of the premises No. 4/1/H/ 20, Mathur Babu Lane in the presence of P.W. 4, Pradip Kumar Mondal; P.W. 3, Dr. Pulin Chandra Mondal and her mother (P.W. 2), Shibani Ghosh.

8. The Investigating Officer (P.W. 13) after preparing the seizure list sent the articles for forensic examination. The statement of the victim girl (P.W. 7) was

recorded through a Teacher of the Deaf and Dumb School on the basis of his requisition and subsequently after obtaining the chemical report and forensic test report he submitted the chargesheet in connection with G.R. Case No. 315 of 2001 arising out of Tangra Police Station Case No. 126 against the appellant on 06.4.2002.

During The Trial:

Charge:

9. The appellant was placed before the Fast Track Court, Sealdah in Sessions Trial No. 2(3) 2003 to answer the following Charge:

That you, on or about the 27th day of September, 2001 at about 22.00 hrs on the backside of premises No. 4/1/H/20, Mathurbabu Lane, P.S. Tangra, Kolkata - 15 committed rape on a deaf and dumb girl aged about 16 years namely Durga Ghosh and thereby committed an offence punishable u/s 376 of the Indian Penal Code, and....

10. There was a plea of not guilty; as such the appellant was put on Trial and the prosecution in order to prove its case examined as many as 13 (thirteen) witnesses, the break up of which is set out.

The Prosecutrix:

11. P.W. 7 Durga Ghosh was examined with the help of P.W. 8, Dilip Kumar Chatterjee of the Calcutta Deaf and Dumb School who was entrusted with the said job by the Principal of the Calcutta Deaf and Dumb School under his authority (Ext. 3) pursuant to the requisition made by the Investigating Officer (P.W. 13), Animesh Hawladar. She narrated the prosecution story, relevant portions of which are quoted hereinbelow:

Q. What has happened?

A. While I went there my hands were caught.

Q. Who caught your hand?

A. Witness could not specify but (identified the interpreter and Id. P.P. in-charge).

Q. What the miscreant has done?

A. Witness identified the accused and states that her wearing apparels were turned by the accused.

Q. What the miscreant has done thereafter?

A. The witness identified the accused and stated that she was subjected to rape by the accused. * * * * *

* * * * *

Q. Besides mother have you stated anything about the incident to any other

person?

A. Yes apart from my mother I have narrated the incident to the inmates of my house.

Q. What was your physical condition after the occurrence?

"A. After the occurrence bleeding was coming out from my private parts and I was shocked.

Cross-examination by the Defence:

12. "Q. Did you cry when your hands were caught hold?

A. Yes.

Q. Did you try to resist yourself?

A. I tried by forcing my fingers upon the accused;

Q. Did you bite the accused?

A. Yes I did.

Q. Did the aced apply force on your person?

A. Yes I got injuries on my person including my private parts due to application of force by the accused.

Q. Did you show the injuries to your mother?

A. Yes.

Q. What happened to your wearing apparels after the occurrence?

A. Profuse bleeding was coming out from my private part and my wearing apparels were wet and the wearing apparels of the accused was also wet. *****

Q. Are you tutored about the statement to be made in the Court?

A. Yes.

Q. Have you been asked to identify the accused in the Court?

A. Yes. *****

Q. Have you stated that Pradip Mondal committed the offence after the incident?

A. Yes.

Q. Who told you to tell the name of Gopal?

A. My mother.

De Facto Complainant:

13. P.W. 2, Shibani Ghosh was the author of the FIR and her evidence, as seen earlier, shows that immediately after she came back from her daily work she heard about the incident and took the victim before the police.

Seizure List Witnesses ;

14. A.P.W. 3, Dr. Pulin Chandra Mondal and his son Pradip Kumar Mondal (P.W. 4) the neighbours of the victim's family were signatories to the seizure list (Ext. 1) pertaining to the wearing apparels of the victim Durga Ghosh (P.W. 7).

B.P.W. 5, Sanjit Bhowmick, the brother of the appellant along with P.W. 6, Dipak Roy also signed on the seizure list (Ext. 2) prepared at the police station in respect of the wearing apparels of the appellant.

Medical:

15. P.W. 1, Prof. Sankar Nath Mitra's evidence has already been noticed by us. From the evidence of Prof. Mitra we find that there was no external injury detected in the genital organ of the victim Durga Ghosh. Prof. Mitra also could not find any bleeding and her vagina only admitted tip of the finger. In his cross-examination Prof. Mitra deposed that he could not find any semen or blood-stains; nor any fluid was found by him.

16. For a while it would be pertinent to advert to the injury report (Ext. 1) prepared by Prof. Mitra which shows "Pt. Very much non-co-operative. resist to examination -- in spite of that following findings are seen....

17. P.W. 9, Dr. Samar Sinha Das, Demonstrator of Sir Nil Ratan Sircar Medical College and Hospital examined the appellant on 29.9.2001 at about 11.30 a.m. in the morning. Dr. Sinha Das on examination opined that appellant was potent and no visible evidence of any injury or foreign body seen over his genital. His report was marked Ext. 5. In his cross-examination Dr. Sinha Das admitted that he did not find any injury on the person of the accused including his genital region. Dr. Sinha Das further admitted that in the event a male organ is put on a vagina there is possibility of abrasion on the same.

18. P.W. 12, Prof. Section Batabyal, the Professor and Head of the Department of Forensic and State Medicine of Bankura Sanmellani Medical College and Hospital was at the relevant time attached to Sir Nil Ratan Sircar Medical College and Hospital as its Associate Professor in the Department of Forensic Science and State Medicine. On 29.9.2001 Prof. Batabyal medico-legally examined P.W. 7, Durga Ghosh and found: "Attempt to forcible sexual intercourse cannot be ruled out as per medical terminology 2. Recently sexual intercourse and suffering from S.T.D. opinion will be given after receipt of the report of the chemical examiner

from the preserved swab and slide; 3. Regarding age report will be given after receipt of the radiological report; 4. No marks of injury on the private parts of the body are found; 5. Nothing significant." His report was marked as Ext.8. Prof. Batabyal in his cross-examination further stated: "Prosecutor did not complain or I did not see any difficulty during her walking.

Forensic Science:

19. Dr. Sipra Roy (P.W. 10), Senior Scientific Officer of the Biology Department of the State Forensic Sciences Laboratory on 11.10.2002 examined the wearing apparels of the victim girl and the appellant and submitted her report (Ext.6). She could not detect semen either in the frock, undergarment of the victim girl (P.W. 7) or in the black full pant, full sleeve shirt and undergarment of the appellant. She further could not detect any semen in the vaginal stains of the victim girl (P.W. 7) and also urethral swab of the appellant. However, she detected blood in the (a) frock and (b) the underwear of the victim girl (P.W. 7).

Chemical Examiner:

20. P.W. 11, Dr. Subhra Chakraborty, the Assistant Serologist and Chemical Examiner in the Institute of Serology on 06.9.2002 examined the wearing apparels of the victim girl (P.W. 7) and in her opinion (Ext. 7) she said that the blood in the frock cuttings and the underwear blood-stains were disintegrated and the origin could not be determined.

Interpreter:

21. P.W. 8, Dilip Kumar Chatterjee, who interpreted the evidence of the victim girl Durga Ghosh (P.W. 7) also recorded her statement (Ext. 4) on 7.10.2000. In his cross-examination it is found that at the time of examination of the prosecutrix her mother was present.

END RESULT:

22. Fast Track Court, Sealdah on conclusion of the trial held that the prosecution has been successful in proving the charge in respect of the offence complained of against the appellant and directed him to suffer a penal term of rigorous imprisonment of ten (10) years and to pay a fine of Rs. 3,000/-; in default, to suffer further rigorous imprisonment for one (1) year.

AT THE BAR:

23. To wriggle out from such situation arising out of his conviction Shri Roy assisted by Shri Uttam Kumar Ghosh for the appellant submitted if the Court takes note of the evidence of P.W. 12, Dr. Batabyal it is sufficient to discredit the prosecution case. According to Shri Roy the medical evidence as spoken through P.W. 12 does not support the prosecution case at all. Shri Roy submitted since rape was not actually proved through the medical evidence it was extremely unsafe to uphold the conviction of the appellant on the basis of the evidence of P.W. 7, Durga Ghosh, who has stated different things at different times. Shri Roy

read out from the evidence of P.W. 7 and submitted that her mother Shibani Ghsoh (P.W. 2), in fact, tutored her to implicate the present appellant.

24. Shri Roy also submitted that P.W. 4 was after all the villain of the piece and in order to safeguard him the present appellant has been roped in out of local dispute. According to Shri Roy the evidence of the prosecutrix (P.W. 7) does not in any manner support the prosecution case; more so, as the medical evidence (P.W. 12) has belied the same the conviction should be set aside.

PER CONTRA:

25. Shri Abdul Salam with Mst. Sirin Sultania put up a very strong case on behalf of the prosecution. According to Shri Salam none of the contentions raised on behalf of the appellant deserved any merit. Shri Salam would say that the evidence of the prosecutrix itself was sufficient to prove the prosecution case even if the same was uncorroborated version of the said girl. He submitted before the Court that there is no occasion to disbelieve her evidence and it is simply the evidence of the said victim girl which was sufficient for the Court to form an opinion with regard to the fulfilment of the charge brought against the appellant on behalf of the prosecution.

26. Shri Salam did not find any fault with the medical evidence as according to him it was after all an opinion of the doctor and could not persuade the Court to come to any formidable conclusion with regard to either the innocence or the guilt of the accused. He was of the view that as the evidence of the prosecutrix (P.W. 7) herself read with the evidence of her mother (P.W. 2) and the fact of seizure of the articles which has been proved by P.Ws.3, 4, 5 and 6, the prosecution case was quite happily proved.

27. Lastly, Shri Salam would also say that in a case involving offence against woman the Court should not abide by technicalities but act on broad probabilities taking a wholesome view of the prosecution case.

Section 119 of the Evidence Act:

28. What is the Law? Section 119 of the Evidence Act rules the field in respect of the evidence relating to artists which reads as follows:

119. Dumb witnesses.--A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

29. When a person is adduced as a witness who is bereft of any power of speech the Court has to take care to ascertain before such person is examined, that he/she possesses the requisite amount of intelligence and cognate understanding to the questions put by the Court. In fact, modern science has showed that persons physically challenged in such fashion are more intelligent and susceptible to a higher intellect than it was once supposed.

30. We find that the Fast Track Court after duly satisfying itself with regard to the capability of the victim girl (P.W. 7) to testify before the Court through the interpreter (P.W. 8) proceeded to examine her. That way we must say the Fast Track Court has observed all the legal formalities pertaining to the provision of Section 119 of the Evidence Act.

EVIDENTIARY VALUE OF A PROSECUTRIX:

31. It is by now a trite position of law that the evidence of a prosecutrix in a trial involving sexual violence is more reliable than that of an injured evidence and it is of vital impact. She is not an accomplice in the crime. The Court has to place her evidence on a very high pedestal. Recently the Supreme Court in *Kamalanantha and Ors. v. State of T.N.* 2005 SCC (Cri) 1121 has held:

34. It is trite law that the prosecutrix is not an accomplice. The evidence of a victim of sexual assault, if inspires confidence, conviction can be founded on her testimony alone unless there are compelling reasons for seeking corroboration. Her evidence is more reliable than that of an injured witness. In a case of sexual assault corroboration as a condition for judicial reliance is not a requirement of law but a guidance of prudence....

... It is also well-established principle of law that minor contradictions or insignificant discrepancies in the statement of the prosecutor should not be a ground for throwing out an otherwise reliable prosecution case.

32. In *State of M.P. Vs. Dayal Sahu, , H.K. Sema, J.* speaking for the Bench of H.K. SEMA AND G.P. MATHUR, JJ. has held:

... once the statement of prosecutrix inspires confidence and accepted by the Courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the Courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given fact and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not cause fatal to the prosecution case, if the statements of the prosecutor and other prosecution witnesses inspire confidence.

33. The version of a prosecutrix is although as good as a witness who has suffered some form of injury is always the best witness and corroboration cannot be an imperative criteria for the Court to arrive at a conclusion while trying an offence of sexual violence. A realistic approach based on pragmatic views has to be adopted by the Court and it cannot itself be a victim of hyper technicalities and insignificant contradictions which cannot be fatal.

OFFENCES AGAINST WOMEN:

34. Crime against women, which has escalated beyond leaps and bounds has to be dealt with a firm hand. Soft justice and tender views for offences relating to women would only give bonanza to prospective wrong doers. Obviously there has to be stricter laws with more teeth and Court should be furthermore sensitive while dealing with cases relating to offences against women who fall within the majestic sweep of Clause (3) of Article 15 of the Constitution of India. While dealing with this case we remind ourselves of the dictum of *State of Punjab v. Gurmit Singh and Ors.* 1996 SCC (Cri) 316, where Dr. Anand, J. (as The learned Chief Justice of India then was) held:

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.

35. We have also taken note of the passage from *The State of Karnataka Vs. Krishnappa*, where, after referring to *State of Punjab v. Gurmit Singh* (supra) a 3-Judge Bench of the Supreme Court in paragraph 16 held:

16. A socially sensitized Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

36. We have also apprised ourselves of the observations in *State of M.P. v. Munna Choubey and Anr.* 2005 SCC (Cri) 559:

The physical scar may heal up, but the mental scar will always remain. When a woman is ravished what is inflicted is not merely physical injury but a deep sense of some deathless shame.

The decision of *State of H.P. v. Asha Ram* 2006 SCC 296 has, also in similar lines with the aforesaid decisions, held:

It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

DISCUSSION:

38. Experienced by the submissions, made at the Bar; the perception of the materials on record including the evidence it would now be incumbent upon us to appreciate the same and see as to whether conviction recorded by the learned

Fast Track Court can be sustained.

39. The defining evidence of the prosecution comes from the victim girl (P.W. 7) Durga Ghosh. Earlier we have adverted to the same in the light of the evidence of her mother (P.W. 2) Shibani Ghosh. As such, it would be redundant to refer to the same in details. However, her evidence recorded through the interpreter of Calcutta Deaf and Dumb School (P.W. 8) Dilip Kr. Chatterjee shows that she had reported about the incident to other inmates of her house. It is borne out from the evidence of P.W. 2, Shibani Ghosh, her mother that she had two other sisters and one brother and it can be deemed that her father also stayed in the family as there was no contrary indication.

40. Now, apart from P.W. 2, Shibani Ghosh none has come forward to depose in Court. Even though the sole evidence of the prosecutrix is absolutely sufficient to record a finding of guilt in respect of a sexual offence, which is by now a well-settled legal position, but in the instant case this position assumes some significance.

41. It is not understood as to why other inmates of the family of the prosecutrix were not examined. P.W. 3, Dr. Mondal and his son (P.W. 4) Pradip Kumar Mondal were witnesses to the seizure (Ext. 1) in respect of the garments of the prosecutrix. P.W. 5 and P.W. 6, two other neighbours were signatories to the seizure list (Ext. 2) pertaining to the seizure of the wearing apparels of the appellant which was seized at the police station. Even if we weed out from consideration P.W. 5, Sanjit Bhowmick, who happens to be the brother of the appellant neither P.W. 6, Dipak Roy nor P.W. 3, Dr. Mondal or his son (P.W. 4) Pradip Mondal said anything substantial touching on the actual incident, although it is found from the evidence that it was a closely knit densely populated habitat.

42. As such, non-examination of the inmates of the house assumes great importance. This position would be further buttressed from the cross-examination of P.W. 13, Animesh Hawladar, who visited the place of occurrence almost immediately after receiving the information from P.W. 2, Shibani Ghosh about the incident. Let us see what he said.

I had been to the house of the victim (P.W. 7) and also went to the place of occurrence. I went to the place of occurrence on the night of the occurrence. On the night I examined 7/8 witnesses. I did not cite all of them as witness. Excepting seizure list witness (read: P.Ws.3, 4, 5 and 6) nobody stated to me about the occurrence.

The house in which the victim lives there are so many co-tenants. I examined them but they did not say anything. Seizure witnesses (read: P.Ws.3, 4, 5 and 6) did not say anything about the occurrence.

43. Once we have gained control over this evidence we feel clouds have started gathering. It becomes deeper and darker.

44. Going back to the cross-examination of the prosecutrix (P.W. 7) it would be

apparent that she cried when her hands were purportedly held by the appellant. P.W. 6 a contiguous neighbour in the same premises Shri Dipak Roy admitted in his cross-examination "Durga can make sound loudly". If that be so, although we cannot go by any presumption but is very well-established through the evidence that the locality where the family of the prosecutrix (P.W. 7) resided, was densely populated and is situated on a 8 feet wide lane and the doors and windows of all the houses remain open on the said lane during hot season.

45. P.W. 3, Dr. Mondal has stated in his cross-examination "The area is overcrowded and people gossip late night." and some people used to sleep in their khatia on the road. P.W. 3, Dr. Mondal further deposed that his chamber is situated just opposite the tubewell. He also deposed that his chamber remains open till 09-00 p.m. in the evening; sometimes extending to 12-00 p.m. in the night which has also been admitted by P.W. 2 in her cross-examination.

46. It also appears that there is a tubewell, which remains always crowded. The prosecution case is that the prosecutrix (P.W. 7) went to fetch water from a tubewell by the side of the road when the appellant came and caught hold of her by the side of the lane and forcibly violated her. In her cross-examination P.W. 2 the mother of the victim has admitted "There is only one tubewell in Mathurbabu Lane." which is also spoken by P.W. 6, Dipak Roy in his cross-examination that the tubewell is the only source of water in that lane, and just opposite to he said tubewell is the Chamber of Dr. Mondal (P.W. 3).

47. If that be so, first we have that the night of incident was a very "hot night", as deposed by P.W. 2, Shibani Ghosh; there is only one source of water i.e. tubewell -- water tap was not flowing at the relevant time as stated by P.W. 6, Dipak Roy. The prosecutrix (P.W. 7) had been to the said source for collecting water when the incident happened. We have already found from the evidence on record that it was a densely populated area and people used to loiter at that time of the night on the road; many persons slept on the road by spreading out their khatiahs and as it was hot season all the doors and windows opened on the lane where the incident took place. Furthermore the source of water is situated just opposite to the Chamber of Dr. Mandal (P.W. 3).

48. In addition to the said position from the cross-examination of P.W. 6 it would be found that by the side of the tubewell there is a tea-stall and P.W. 5, the brother of the appellant, Sanjit Bhowmick has in his cross-examination stated that in the tea stall people used to take tea till 11-00 p.m. at night.

49. If the said pieces of evidence are stitched together it reveals a complete picture showing that the night of the incident was extremely hot; the lane, where the incident took place, was just 8 ft. in width; there was only one source of water, situated just opposite to the Chamber of P.W. 3, Dr. Mondal and there was a tea-stall and people used to frequent the lane and even some of the persons slept on the road. We feel that an incident took place in the manner as sought to be shown by the prosecution but strangely none heard the cries of the

prosecutrix (P.W. 7) although she could make loud sound, as revealed from the cross-examination of P.W. 6, Dipak Roy, a neighbour.

50. The gathering clouds seen by us hanging over the prosecution case seems to have developed in a thunder squall once we enter to the other phase of the prosecution case relating to the medical evidence.

51. P.W. 1, Prof. Sankar Nath Mitra, the Clinical Tutor and Resident Medical Officer of Sir Nil Ratan Sircar Medical College and Hospital on the very same night of the incident i.e. on 28.9.01 examined the prosecutrix (P.W. 7) and noted his finding which we have seen earlier. It would be of abiding interest to note that just after a few hours of the incident when Prof. Mitra examined P.W. 7, the prosecutrix, in his report he specifically mentioned that P.W. 7 the prosecutrix was found to be non-co-operative and resistible while she was being examined. Prof. Mitra found there was no injury on her genital organ and did not detect any bleeding and her vagina admitted the tip of the finger.

52. Let us stop here for a moment.

53. P.W. 2, Shibani Ghosh, mother of the prosecutrix as well as the prosecutrix (P.W. 7) herself stated that she bled profusely and suffered injuries on her private parts. This piece of evidence of both the Prosecutrix (P.W. 7) and her mother (P.W. 2) Shibani Ghosh runs directly contrary to the evidence of Prof. Mitra, who was of formidable experience, acting in a very responsible position in one of the eminent Medical College and Hospitals.

54. Prof. Mitra's evidence has to be read along side the evidence of P.W. 10 Dr. Sipra Roy, the Scientific Officer of the State Forensic and Science Laboratory. In her examination Dr. Roy, however, in Ext. A and Ext. B relating to the wearing apparels and under-garments of the prosecutrix respectively found blood whose origin could not be detected by P.W. 11. Dr. Subhra Chakraborty, the Serologist as it was disintegrated origin of blood. We don't find any fault in that respect as both Dr. Roy and Dr. Chakraborty (P.W. 10 and P.W. 11 respectively) had the samples tested before them nearly a year after the incident took place.

55. Be that as it may, we cannot also lose sight of the fact that both the wearing apparel (Ext. A) and the under-garment (Ext. B) examined by Dr. Roy was not available in the Court room while she deposed before the learned Trial Court. These articles were seized by the Investigating Officer (P.W. 13) almost contemporaneously after the incident on the strength of the seizure list (Ext. 1) in presence of P.W. 3. Dr. Mondal and his son P.W. 4. Pradip Mondal.

56. Dr. Roy (P.W. 10) in her cross-examination after having not found the said wearing apparels of the prosecutrix admitted "There may be bloodstains on the under-garments during period. In case of washing there may be stains of blood in the under-garments during mensuration."

57. Although we cannot rush to any conclusion simply on the basis of such opinion of Dr. Roy (P.W. 10), but we have to see the same piece of evidence as

an organic whole.

58. Prof. Batabyal (P.W. 12), Professor and Head of the Department of Forensic and State Medicine, Bankur Sanmellani Medical College and Hospital was at the relevant time serving as the Associate Professor of Forensic and State Medicine of Sir Nil Ratan Sircar Medical College and Hospital. Prof. Batabyal in his finding opined, which has been noticed by us in the foregoing paragraphs, that there was an attempt of forcible sexual intercourse which cannot be ruled out; but Prof. Batabyal at the same time found no marks of injury on the private parts. Prof. Batabyal also deposed that in her vagina he found "annular" i.e. ring form [See: Stedman's Medical Dictionary, Third Unabridged Lawyers' Edition]. Prof. Batabyal also found no tear; and no external injury was found by Prof. Batabyal which have been noticed by us. Prof. Batabyal examined P.W. 7, the prosecutrix on 29.9.01 just within one day of the incident. We have before us the authoritative evidence of Prof. Batabyal's eminence.

59. In our humble view it would be a dicey decision to form an opinion on the basis of the medical evidence on record. We cannot lose sight of the fact that after all the evidence of Prof. Mitra (P.W. 1) and Prof. Batabyal (P.W. 12) are opinionative in nature and the Court cannot be bound by their evidence. For a moment we don't feel simply guided by the evidence of P.W. 1, Prof. Mitra and P.W. 12, Prof. Batabyal who are eminent in their respective fields.

60. But, if the evidence of Prof. Mitra (P.W. 1) and Prof. Batabyal (P.W. 12) are read along side the testimony of the witnesses, which we have just noticed few paragraphs ahead, the clouds which had developed into a thunder squall is also accompanied by lightning in the process of revealing certain features which if isolatedly seen may not be sufficient to make a dent on the prosecution case but if read as a whole is perhaps sufficient to discredit it.

61. P.W. 2, Shibani Ghosh, the mother of the prosecutrix (P.W. 7) in her FIR (Ext. 9) mentioned that the inmates of her house were discussing about the incident. None of them, however, have been examined. Even if we do not draw an adverse presumption in that respect but we cannot lose sight of the fact that in her FIR (Ext. 9) she has stated "and after the incident Gopal (the appellant) fled away. Thereafter Durga Ghosh (the prosecutor) started crying returning to the house and narrated me the whole thing." Her evidence stands contradicted from her substantive evidence in that respect. Furthermore, it would be found from the evidence of P.W. 13, Animesh Hawladar, the Investigating Officer that in the same night he came to the place of occurrence and arrested the appellant from his house. As such, the question of his abscission cannot be accepted.

62. Also we have before us the evidence of P.W. 6, Dipak Roy who admitted in his cross-examination that

It is true in the Para, P.W. -2 blamed the son of Dr. Pulin Mondal i.e. Pradip Mondal P.W. 4. At the time of giving such blame Durga was present there.

63. For a while we are again required to see the cross-examination of P.W. 2, Shibani Ghosh. According to her after reaching the police station with P.W. 7, the prosecutrix P.W. 3 Dr. Mondal and his wife (not examined) and his son (P.W. 3) went to the police station. She stated in her cross-examination:

An allegation was raised in the locality that Pradip (P.W. 4) son of Dr. Mondal (P.W. 3) committed the offence, Subsequently the name of the accused came into the picture.

64. This has been corroborated by P.W. 6, Dipak Roy.

65. Now, we will go to the cross-examination of the prosecutrix (P.W. 7) which has been already copiously quoted by us in the heading "DURING THE TRIAL" Sub-Heading: "The Prosecutrix". From a recapitulation of the same it would appear that there was multiple injuries caused by nail biting. But surprisingly neither Prof. Mitra (P.W. 1) nor Prof. Batabyal (P.W. 12) found any such injury. It is also found that she admitted that she was tutored to make the statement and was asked to identify the appellant in Court and mentioned the name of the appellant by her mother (P.W. 2).

66. Earlier we have discussed the impact of the evidentiary value of a prosecutrix in a case of rape. We have found that the sole uncorroborated testimony of a prosecutrix is sufficient to record an order of conviction, if it inspires confidence.

67. However, what is required from an amalgam of the entire evidence on record is to see as to whether her evidence, at all, inspires any confidence in the mind of the Court.

68. If so, then there is the end of the road. Nothing more is required for the prosecution to prove its case. If not, we have to assess the other corroborative evidence.

69. In conjunction with the evidence of P.W. 7, the prosecutrix we have to read the evidence of P.W. 8, Dilip Kumar Chatterjee, the instructor of Calcutta Deaf and Dumb School. Shri Chatterjee specifically stated that on 03.4.03, i.e. the date when the prosecutrix (P.W. 7) was first examined in Court, in spite of repeated questions the prosecutrix could not answer and could not identify the appellant. The said witness (P.W. 8) recorded the statement (Ext.4) of the prosecutrix (P.W. 7) on 17.10.01 although the incident took place on 27.9.01 and the prosecutrix was very much available for recording her examination. P.W. 8, Shri Chatterjee further deposed that at the time of examination of the prosecutrix (P.W. 7) her mother (P.W. 2) was present.

70. Winding up we cannot also be oblivious to the finding of Dr. Sinha Das (P.W. 9), Demonstrator of Sir Nil Ratan Sircar Medical College and Hospital, who examined the appellant on the same day (29.9.01) when the prosecutrix (P.W. 7) was examined by Prof. Batabyal (P.W. 12). Dr. Sinha Das in his cross-examination stated:

I did not find any blood, semen, phomatoya fluid and mud were not found in the person of the accused. I did not find any injury on the person of accused including genital region. If a penis is put on the vagina there is possibility of abrasion on the penis.

CONCLUSION:

71. From the entire evidence, considered by us, we are of the view that the prosecution has not been able to bring home the charge against the appellant in a full-proof manner. There are several grey areas which cannot be reconciled. We have taken into consideration that the appellant stands charge for an offence, which is most depraved in character and has to be deprecated to the fullest extent.

72. We cannot for a single moment lose sight of the fact that we have before us an Artist girl (P.W. 7), who has alleged the commission of an offence by the appellant which has involved a "deathless" shame for her and the trauma suffered by her mother (P.W. 2), a geriatric lady, who ekes out her living as a cook. In all they come within the weaker Section of the society. She is also seeking justice. But, it has to be just justice.

73. We have also taken note of the decisions: State of Punjab v. Gurmit Singh (supra), State of Karnataka v. Krishnappa (supra), State of M.P. v. Munna Choubey and Anr. (supra) and also State of H.P. v. Asha Ram (supra).

74. But, we feel that the evidence of the prosecutrix (P.W. 7) does not inspire confidence in our mind. In order to arrive at our conclusion we have assessed and reassessed her evidence with utmost circumspection. After we came to the conclusion that as her evidence, without meaning any least disrespect, not inspiring any confidence in our mind then we turn to the other evidence for corroboration. But we find there also we draw a blank.

75. In such a situation our judicial conscience does not permit us to affirm the conviction and as a necessary corollary the appellant is entitled to an order of acquittal.

JUST JUSTICE:

76. Appeal is allowed.

77. The conviction and sentence recorded by the learned Fast Track Court is set aside.

78. Appellant is directed to be released forthwith.

Dipankar Datta, J.

79. I agree.