

(2014) 02 TP CK 0031
In the Tripura High Court
Case No : Criminal Appeal (J) No. 13 of 2012
Kartik Saha Vs State of Tripura

Date of Decision : 13-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 162, 164, 292
Evidence Act, 1872 — Section 113A, 113B, 114A, 144
Penal Code, 1860 (IPC) — Section 307, 34, 375, 376, 376(2)(g)

Citation : (2014) 3 GLD 542 : (2014) 2 GLT 69

Hon'ble Judges : Deepak Gupta, C.J.; Utpalendu Bikas Saha, J

Bench : Division Bench

Advocate : S. Kar Bhowmik in Criminal Appeal J No. 13 of 2012, Mr. S. Chakraborty in Criminal Appeal J No. 18 of 2012 and Mr. Sekhar Datta in Criminal Appeal J No. 2 of 2013, for the Appellant; R.C. Debnath, for the Respondent

Judgement

Deepak Gupta, C.J.—These three appeals are being decided by a common judgment since they arise out of one judgment delivered by the learned Additional Sessions Judge, North Tripura, Kamalpur in case No. S.T. 42 (N.T./KMP)/2009 whereby the appellants were convicted u/s 376(2)(g) and section 307 read with section 34 of the Indian Penal Code (IPC). The learned trial Court sentenced all the three appellants to undergo rigorous imprisonment (RI) for 10 years with a fine of Rs. 3,000/- and in default of payment of fine to suffer simple imprisonment (SI) for 3 (three) months in connection with the conviction u/s 376(2)(g) of the I.P.C. All the appellants were also sentenced to undergo RI for 4 (four) years with a fine of Rs. 2,000/- and in default of payment of fine to suffer SI for 2 (two) months in regard to the commission of offence punishable u/s 307 read with Section 34 of the I.P.C. In case of two of the appellants, Prasanta Das and Prafulla Debnath, the sentences were ordered to run consecutively and in respect of Kartik Saha the sentences were directed to run concurrently.

2. The prosecution story in brief is that the prosecutrix was raped by the appellants on 22.12.2008 at about 11.30 p.m. The prosecutrix was a student of the Gandacharra school and was living in the hostel. A science fair was being held at the school. According to the prosecution, Prasanta Das called the

prosecutrix behind the hostel on the pretext that he wanted to talk to her and, thereafter, he and the other two appellants forcibly raped the prosecutrix and thereafter tried to kill her by throttling. The prosecutrix informed the night guard, P.W. 2 and his wife P.W. 3 who in turn took her to the superintendent of the hostel P.W. 11. The Superintendent contacted the Headmaster of the school and thereafter all these persons along with P.W. 5 a retired teacher went to the Police Station and the matter was reported to the police at midnight. Admittedly, no FIR was lodged at midnight. No GD entry has been proved on record as to what action the police took when the prosecutrix along with her hostel superintendent and other teachers went to the Police Station. The FIR by the police was recorded at 6.05 a.m. on 23.12.2008 after a written complaint was filed by the prosecutrix. Thereafter the police investigated the matter, recorded the statement of the witnesses and filed charge sheet against the accused. The accused have been tried and convicted as aforesaid. Hence this appeal.

3. We have heard Sri. S Chakraborty, learned counsel for the appellant Prasanta Das, Sri. Sekhar Dutta, learned counsel for the appellant Prafulla Debnath, Sri. S Kar Bhowmik, learned counsel for the appellant, Kartik Saha and Sri. R.C. Debnath, learned Additional Public Prosecutor for the State.

4. Sri Chakraborty, learned counsel for the appellant Prasanta Das, contends that the impugned judgment is totally illegal and liable to be set aside. According to him, there is no evidence to show that any rape was committed; he further submits that the doctor has not given any final opinion that rape was committed and that no spermatozoa was found in the private part of the prosecutrix. He also submits that the complaint was admittedly written by the sister of the prosecutrix but neither the sister nor any other relatives have been examined. According to Sri Chakraborty, the original version has been suppressed and he submits that when the prosecutrix along with the other persons visited the Police Station at about midnight there was no allegation of rape and, therefore, neither any GD entry nor any FIR was recorded. He also submits that there was some affair between the accused and the prosecutrix and she had filed this case with a view to teach a lesson to the Prasanta Das as he had refused to marry her. Lastly, it is submitted by Sri Chakraborty that the story of the prosecutrix does not inspire confidence and conviction cannot be sustained on the basis of her statement alone.

5. Sri. Sekhar Datta, learned counsel for the accused Prafulla Debnath, submits that he adopts the arguments of Sri Chakraborty and in addition thereto his main submission is that Prafulla Debnath was not properly identified by the prosecutrix and in the absence of proper identification he could not have been convicted.

6. Sri S. Kar Bhowmik, learned counsel for the appellant Kartik Saha is concerned, urged that no case whatsoever is made out against his client. He submits that Kartik Saha along with his brother Priyajit Saha had rescued the prosecutrix from the clutches of the other two accused. He submits that in the first complaint and FIR Kartik was not implicated in the rape and the story

against him is totally false. Sri Kar Bhowmik also submits that the prosecution has not examined Priyajit Saha and, therefore, the statement of Priyajit Saha recorded u/s 161 Cr.P.C. may be read in evidence. He has also filed one application being CrI. Misc. Appl.108 of 2012 in which the prayer is that the trial Court be directed to take additional evidence and examine the cited witness Priyajit Saha. In the alternative he submits that the statement of Priyajit Saha recorded under 161 Cr.P.C. be read in evidence.

7. Before dealing with the merits of the case we shall first deal with the Criminal Misc Appl. No. 108 of 2012. A statement of a witness recorded u/s 161 Cr.P.C. cannot be used as evidence for the benefit of either party. Section 162 of the Cr.P.C. clearly provides that this statement can only be used for confronting the witness with the statement when his statement is recorded in Court. Section 161 of Cr.P.C. entitles police officers to record the statements of witnesses. Section 162 of the Cr.P.C. however provides that no such statement, if reduced in writing, shall be got signed by the person making the statement. The statement cannot be used for any purpose except that when the witnesses called for by the prosecution in an enquiry or trial then that portion of the statement recorded u/s 161 Cr.P.C. which is proved in accordance with law can with the permission of the Court be used to contradict such witness in the manner provided u/s 144 of the Indian Evidence Act. Such statement may also be used during the re-examination of a witness for the purpose of explaining any matter which may have come out in the cross-examination. The statement recorded u/s 161 Cr.P.C. can never be read in evidence and, therefore, the prayer of Sri. Kar Bhomik that the statement of Priyajit Saha recorded u/s 161 Cr.P.C. cannot be accepted. As far as examination of Priyajit Saha is concerned, at the outset we may point out that the said Priyajit Saha is the brother of appellant Kartik Saha. According to the prosecution, Priyajit Saha had been won over and, therefore, the prosecution did not want to examine him. It is for the prosecution to decide which witnesses it wants to examine but if it does not want to examine any witness then at best the Court can draw an adverse inference against the prosecution. The Court, however, cannot compel the prosecution to examine a particular witness unless the Court in terms of the Section 311 of the Cr.P.C. is of the opinion that it is necessary to summon a material witness for examination. There is nothing which prevented Kartik Saha from examining his brother as a defence witness. No objection in this regard was taken at the time when the trial was going on. This is a case where the prosecutrix is not only the victim but also the main witness and in case we believe the prosecutrix then the examination or non-examination of Priyajit Saha is immaterial because he admitted that he reached the scene of occurrence after the occurrence had taken place. Therefore, we find no merit in the application which is accordingly dismissed.

8. Before discussing the evidence we may refer to the FIR which was lodged at 6.05 a.m. on 23.12.2008. In this FIR it was stated that the prosecutrix was a student of Class IX in Gandacherra school. On 22.12.2008 the prosecutrix participated in the science fair and performed a solo dance. The fair was held at

the school ground. At about 11.30 p.m. Prasanta Das, who was studying in Class-XII, called the prosecutrix on the pretext that he wanted to talk to her. Thereafter he took her behind the hostel to the bank of the river near Laipada Para and forcibly raped her after pressing her mouth. Subsequently, one unknown person of "shat card" locality came there. The unknown person raped the prosecutrix and Kartik Saha embraced and kissed her. The accused tried to kill her by throttling. In the meantime Partha Kr. Tripura the night guard reached the spot and then the culprits fled away. The night guard informed the incident to the headmaster and other teachers of the school.

9. The version given by the prosecutrix in Court is more elaborate but there are also some contradictions. She states that after performing the dance at the science fair she came back to the hostel and changed her dress. Thereafter she again went to the science fair in the school field. At about 10.30 p.m. she became hungry and returned to the hostel to have her meal. At that time accused Prasanta Das called her on the pretext that he wanted to have conversation with her. When she went with Prasanta Das then he and the other two accused, Kartik Saha and Prafulla Debnath, forcibly took her to the bank of Surma river and raped her. First she was raped by Prasanta Das, then by Prafulla Debnath and lastly by Kartik Saha. The accused persons pressed her neck so that she could not talk or raise alarm. She identified the accused persons in Court. After commission of the rape she raised an alarm and then the accused fled away. Then she started walking towards the hostel and on the way she met the night guard Partha Kr. Tripura, P.W. 2, who then took her to the school superintendent and she (the victim) informed the superintendent about the occurrence. Thereafter the matter was reported to the headmaster. Thereafter the headmaster, the school superintendent and the night guard took her to the Gandacherra Police Station at about midnight. She also lodged the written ejahar (complaint) which was written by her elder sister. The FIR is signed by her. She also identified the handwriting of her sister. Next morning she was taken to the Gandacherra hospital where a doctor examined her. Thereafter she was taken to the scene of occurrence by the Investigating Officer (I.O.) where she got recovered her shawl, pair of chappals and an imitation jewelry chain. The police officials also seized her wearing apparel. On 26.12.2008 she was produced before the Court at Kamalpur where her statement was recorded u/s 161 Cr.P.C.

10. She further states that accused Prasanta was a student of Class - XII and Kartik was her classmate. According to her, at the time of incident she could not identify Prafulla Debnath. However, on the next morning the I.O. brought accused Kartik Saha along with Prafulla Debnath and then she could identify him as one of the rapists. After a few days she was taken to Kamalpur sub-jail where Test Identification Parade was held and there she also identified Prafulla Debnath amongst a row of eight persons. In cross-examination she admitted the suggestion that the complaint was written by her sister at her instance. Suggestions have been put to her that she knew Prasanta from before and had a love affair with him. She was also confronted with the statement u/s 164 Cr.P.C.

wherein there is no mention that the accused persons pressed her neck. She denied the suggestion that she had proposed marriage to Prasanta Das and when he refused she quarrelled with him and threatened to settle scores with him. She was also confronted with the ejahar in which it is not mentioned that Kartik Saha committed rape on her. She stated that she did not know any Priyajit Saha and denied having made any statement to the I.O. that Priyajit Saha saved her life at the place of occurrence.

11. P.W. 2, Partha Kumar Tripura, was the night guard. According to him, he heard some people talking near the school boundary and when he switched on his torchlight he saw the prosecutrix. Then he and his wife took the prosecutrix to the superintendent of the school where the prosecutrix told the superintendent that she was forcibly taken away by some persons towards Saikia road. According to this witness, he thereafter left the room of the superintendent and did not hear anything thereafter. The witness was declared hostile and confronted with his statement recorded by the police u/s 161 Cr.P.C. wherein it is recorded that the prosecutrix had stated that the three accused had taken her to an area near shut card locality and thereafter raped her.

12. His wife Smt. Balati Tripura was examined as P.W. 3. According to her, at night her husband called out for her and when she came out she found her husband with the prosecutrix. Thereafter all three of them went to the hostel superintendent where the prosecutrix told the hostel superintendent that three Bengali persons had raped her. However, according to her she had not named the assailants. According to the hostel superintendent, P.W. 11 Chaturjoy Tripura, the night guard and his wife came to his house along with the prosecutrix at about 12.20/1 a.m. and the prosecutrix told him that when she was returning to the school after completion of science fair the accused Prasanta Das called her and she went along with him. Thereafter two accused persons namely, Kartik Saha and Prafulla Debnath arrived and they all forcibly took the prosecutrix to the Surma cherra and after crossing the rivulet they took her to Laipada para and there Prasanta Das and Prafulla Debnath raped her. He also stated that the prosecutrix told him that accused Kartik Saha had caught hold of her but had not raped her. He, thereafter, informed the headmaster and another teacher of the school and one retired teacher Subodhbabu over mobile phone. He also informed about this occurrence to his neighbour Nikhil Sarkar. Thereafter he along with Pragyajoti Chakma, Sukhendu Das, Subodhbabu, the night guard and his wife took the victim to the Gandacherra Police Station. Thereafter she was taken to the Gandacherra Primary Health Centre (PHC).

13. P.W. 4 Sukhendu Das states that at about midnight he received telephonic information from P.W. 11 that the prosecutrix had been raped by some miscreants. He, therefore, told P.W. 11 to report the matter to the headmaster of the school. After about 5 minutes headmaster Pragya Joti Chakma and a retired teacher Subodh Chandra Sarkar came to his house and then they all went to the hospital where they found the prosecutrix along with the hostel superintendent,

P.W. 11 and night guard P.W. 2 and his wife, P.W. 3. On repeatedly being asked she told P.W. 11 that she had been raped by Prasanta Das and Prafulla Debnath. The doctor at Gandacherra hospital advised them to take the victim to the Police Station and there the victim also told the name of another accused Kartik Saha. He states that the prosecutrix had told him that Kartik Saha caught hold of her and kissed her. Within half an hour the police officials brought Prasanta Das, Prafulla Debnath and Kartik Saha to the Police Station at Gandacherra. They remained with the victim in the Police Station and at 8.00 a.m. in the next morning the prosecutrix was sent to the Gandacherra hospital for medical examination.

14. P.W. 5, Subodh Chandra Sarkar, is a retired teacher of the Gandacherra school. The headmaster Pragyajoti Chakma was his tenant. According to him, on the night intervening 22nd December/23rd December, 2008 when he was asleep, he was woken up by the headmaster Pragyajoti Chakma and night guard of the school. He was informed that one girl student of the school had been taken to hospital. P.W. 4, Sukhendu Das was also called. Then they all went to the hospital. Thereafter the doctor advised that she be taken to the Police Station where the police officials talk with the girl separately. After about one hour the police brought the accused persons to the Police Station in the early hours of the morning.

15. P.W. 15 is Pragya Joti Chakma the headmaster of the school. He states that on the night intervening 22nd December/23rd December, 2008 he was woken up by the night guard P.W. 2 and his wife P.W. 3 and the hostel superintendent P.W. 11. The prosecutrix was accompanying them and she was crying. When asked what had happened, first she hesitated but when asked by P.W. 3 the prosecutrix told in the presence of the witnesses that she had been raped by Prasanta Das, Prafulla Debnath and Kartik Saha on the bank of the Surma river. She further told that after commission of rape they had tried to throttle her. In cross-examination he again reiterates that they had first gone to the hospital and then to the Police Station and they reached the Police Station at about 2.30/3.00 a.m.

16. These are the witnesses whose statements are material because they are the witnesses to the events which happened immediately after the occurrence and talk about the conduct of the accused. P.Ws. 6 and 7 are witnesses to the seizures. They turned hostile and, therefore, no reliance can be placed on their evidence. P.Ws. 8 and 9 are the wardens of the sub-jail where the Test Identification Parade was conducted and P.W. 14 is the Magistrate who got the Test Identification Parade conducted. We are not referring to their statements in detail because the Test Identification Parade is of no value whatsoever because the prosecutrix and the other witnesses have clearly stated that the police brought all the accused including Prafulla Debnath to the Police Station in the morning and, therefore, the accused Prafulla Debnath was shown to the prosecutrix before the Test Identification Parade and, therefore, the Test Identification Parade is meaningless in these circumstances.

17. P.W. 10, Buddha Debbarma, recorded the FIR after the written ejahar was lodged.

18. P.W. 12, Dr. Manash Gope, conducted the medical examination on the prosecutrix along with Dr. Jayabrata Roy. They found as many as 11 injuries on the person of the prosecutrix.

The detailed injury report reads as follows:

DETAILS OF INTERNAL INJURY OF THE VICTIM

1. Small laceration, 3cm x 0.5 cm over left molar region.
2. Lacerated wound 1 c.m. x 0.5 c.m. over anterior aspect of left sternocleidomastoid, 5 c.m. above from upper border of medial side of left clavicle.
3. Lacerated wound 1 c.m. x 0.5 c.m. over anterior border of left sternocleidomastoid, 7 c.m. above medial end of right clavicle.
4. Bruise over lower half of right arm, 5 cm x 3 cm, red in colour and fresh bruise.
5. Bruise over lower half of left arm, 4 cm x 2cm and fresh bruise.
6. Upper part of Right Deltoid Soiled by mud.
7. Lacerated wound over right eyebrow 2.5 cm x 0.5 cm, fresh in nature.
8. No bite or injury mark seen over breast.
9. Lacerated mark 3 cm x 5 cm, over right 12th rib.
10. Lacerated mark 4 cm x 0.5 cm, over right lumbar region, 4 cm lateral to midline.
11. Bruise 10 cm x 0.5 cm, medial aspect of left thigh.
12. Hymen not intact, remnant of hymen present over margin. Area around hymen and vagina congested.

The hymen was not intact and the area round the hymen and vagina was congested. The doctors collected the vaginal swabs etc. and thereafter only gave preliminary medical opinion and kept the final opinion pending till the report of the forensic analysis was received. P.W. 13 Dr. Arijit Sinha examined the accused Kartik Saha, on 23.12.2008 and found one bite mark on the left index finger of Kartik Saha. He, however, did not state the age of the injury. Dr. Suvankar Nath, P.W. 17 is the senior scientific officer. As per his report, no semen or spermatozoa was found in the vaginal swabs of the prosecutrix and seminal blood was only detected on the underwire of the prosecutrix. We are only relying upon that portion of the report which is proved by doctor. It is true as contended by Mr. Chakraborty that the doctor has not stated that the prosecutrix was raped.

Therefore, we are not relying upon this medical evidence to come to the conclusion that she was raped. We are however, of the view that the statement of the prosecutrix coupled with other corroborative evidence amply proves that she was raped.

19. P.W. 18, S.I. Amendra Debbarma was the Investigating Officer in this case. In view of the directions that we propose to pass we are dealing with his evidence in detail. According to him, on 23.12.2008, the Officer-in-Charge Mr. Buddha Debbarma endorsed the case to him for investigation. Thereafter he visited the place of occurrence, prepared hand sketch map and examined 15 witnesses including the victim and recorded their statements. He also recovered one shawl, one pair of shoes, one golden colour imitation chain, ear rings, pubic hair etc. from the place of occurrence and seized them. He also collected and seized the wearing apparel of the victim. Thereafter he produced the prosecutrix before the SDJM for recording her statement. In cross-examination it is stated that the victim lodged the FIR in writing. According to him, he recorded the statement of the victim in the morning at about 7.00 a.m. on 23.12.2008. He could not explain why he conducted the Test Identification Parade after delay. He also did not collect any age proof certificate of the victim from any institution. He also did not examine the parents, brothers and sisters of the victim. He did not inquire how many persons were present at the fair ground at about 11.30 p.m. He did not examine any other students of school where the victim was residing. His map does not indicate the number of houses or the families by the side of the road from school to Surma river bank or at Lipada para. He also states that he did not enquire from the victim how she subsequently came to know the name of the unknown accused to be Prafulla Debnath. He admitted that when the prosecutrix gave her statement she stated that one Priyajit Saha had rescued her.

20. From the evidence on record what clearly stands out is that in the written ejahar, recorded on 6.05 a.m., the name of Prafulla Debnath was not mentioned and with regard to Kartik Saha there was no allegation of rape. Learned counsel for the appellant submits that in view of this contradiction in the statement of the prosecutrix her statement should not be believed. We are not at all in agreement with such submission. The prosecutrix may have made certain improvements but where her statement is consistent we must believe her. In Indian society no young school girl would make a false allegation of rape because her entire future would be at stake. The Apex Court has repeatedly held that conviction in a rape case can be based on the sole testimony of the prosecutrix if it inspires confidence.

21. Coming to the facts of the case. The prosecutrix is a school girl. According to her, one of her seniors and one unknown person raped her. As far as her classmate Kartik Saha is concerned, initially she had not stated that Kartik had raped her though in Court she stated so. Even in Court she stated that at the time when the occurrence took place she could not identify accused Prafulla Debnath. However, next morning the I.O. brought Kartik along with Prafulla

Debnath and then she could identify the accused. Unfortunately, this portion of the statement of the prosecutrix cannot be believed because the I.O. has not said a word in this regard. According to him, he did not even enquire from the prosecutrix how she came to know the name of Prafulla Debnath. Admittedly, Prafulla Debnath was not known to the prosecutrix earlier. The incident occurred on a cold foggy night. In the statement of the prosecutrix she had given no hint about the identity of the unknown person. The prosecution has made no effort to place on record any material to show how Prafulla Debnath was later identified by the prosecutrix. The identification parade is a total sham because by that time the accused had already been shown to the prosecutrix. Therefore, Prafulla Debnath has not been identified legally by the prosecutrix and we are constrained to observe that we have to acquit him mainly on the ground that the police officials have not done their job properly.

22. Coming to the appeal of Prasanta Das. The statement of the prosecutrix is consistent throughout. Both in Court as well as in the initial statement she had stated that she was called by Prasanta Das and he took her across the river Surma and raped her at Laipada Para. Whether Kartik Das came earlier or later with the unknown person makes no difference. The fact remains that according to the prosecutrix she was raped by the Prasanta Das. The defence of Prasanta Das is that the prosecutrix has lodged a false complaint of rape against him because earlier they had some relations but when the prosecutrix proposed marriage and the accused refused, she got very angry and threatened to teach him a lesson. Here it would be pertinent to mention that the accused Prasanta Das had sought to re-cross-examine the prosecutrix which prayer was not allowed by the learned trial Court. A revision was filed in the Agartala Bench of the Gauhati High Court which was allowed and, thereafter, re-cross-examination was allowed. The prosecutrix was shown some letter which she stated was not written by her. This letter was not marked at all.

23. At that stage an application was filed to take the sample handwriting of the prosecutrix which was allowed by the learned Judge on 13.06.2011 and thereafter on the request of the accused the writing of the prosecutrix was sent for comparison to the Director of Forensic Science, Gauhati at Assam. The report of the expert was received and kept on record. Thereafter the accused led evidence in defence. The only witness examined in defence was DW.1 Smt. Rina Das classmate of the prosecutrix. According to this witness, the prosecutrix told her that she was in love with accused Prasanta. The prosecutrix also wrote some letters to Prasanta which were delivered by the witness to Prasanta. Once she went to the house of Prasanta to deliver a letter. Prasanta's mother took the letter and thereafter the matter was reported to Chanda Tripura the sister of the prosecutrix. The prosecutrix was rebuked by her sister in the presence of this witness and Prasanta's mother. She also states in her presence that Kajal Tripura threatened Prasanta saying that if he did not marry her then she would teach him a lesson. In cross-examination she admits that she had appeared in the Court at the request of Prasanta Das who had called her over phone to come to

Court that day. No reliance can be placed on the statement of this witness. After her classmate Kartik and senior Prasanta were arrested she took no initiative to inform about the so called letters to either the police or to any person in authority such as the principal of the school, any school teacher or the hostel superintendent. She is a procured witness.

24. Coming to the letters the same have not been produced in accordance with law. When in re-cross-examination the prosecutrix was confronted with some piece of paper/letter the same was not marked. Thereafter, her handwriting was taken and sent with some letter to the handwriting expert. No doubt the report of the hand writing expert is on record but the handwriting expert has not been examined. The report of a handwriting expert is not per se admissible in evidence and the handwriting expert has to appear in Court to prove his evidence. u/s 293 of the Code of Criminal Procedure only the reports of scientific experts such as Chemical Examiner or Assistant Chemical Examiner to Government; the Chief Controller of Explosives; the Director of a Finger Print Bureau; the Director, Haffkeine Institute, Bombay; the Director and other authorities of the Central or State Forensic Science Laboratories; the Serologist to the Government or any other notified Government scientific expert can be read in evidence without their examination. Handwriting experts are not covered under Sections 292 and 293. It is a well-known fact that the science of identification of handwriting is not an exact science and is more in the nature of an expert opinion. The report of a handwriting expert cannot be read in evidence until the person giving information is examined in Court and is permitted to be cross-examined by the other side. The defence has led evidence, got the letter compared but did not care to examine the handwriting expert. Therefore, no reliance can be placed on this report.

25. Having held so we have gone through the letter which is strongly relied by the respondent Prasanta Das. This is not the letter written by a girl who is angry. In fact this letter clearly shows that the person who wrote the letter was very sorry for having caused hurt to the person to whom the letter was addressed. Assuming for the sake of appreciating the contention that this letter was written by the prosecutrix to the accused Prasanta, all that can be deciphered from this letter is that the prosecutrix was very sorry that because of her behavior the accused could not study properly. She told him that he should listen to his parents and study properly because if he fails then everybody will blame her. She also states that she has been insulted but has resigned to her destiny. She professes her love for the accused and states that she will never forget him but also tells him that now he cannot meet her. This is not the letter of a person who has threatened to take action against him.

26. It has been urged by Sri Chakraborty that the doctors have not finally opined that the prosecutrix had been raped. True it is, that the doctors have not given any final opinion but when we read the statement of the victim with the injuries found on her person including bruises and lacerated wounds and also the fact

that the area of hymen and vagina are congested, the statement of the prosecutrix is corroborated by the medical version. The statement of the prosecutrix is also corroborated by the witnesses P.Ws. 5, 6, 11 and 15 in all material particulars as far as the accused Prasanta Das is concerned. They all stated that she had named the accused Prasanta Das as one of the assailants. Even the two witnesses, who turned hostile P.Ws. 2 and 3, partly support the prosecution version. The night guard P.W. 2 stated that he took the prosecutrix to the Superintendent but then left the room. This version is not believable. It is against human conduct when a person who is the night guard of a hostel takes a girl inmate of the hostel to the hostel superintendent late at night he must have taken her to the hostel superintendent because of some problem and he would be interested in hearing what the complaint of that girl was. As far as P.W. 3 the wife of the night guard is concerned, she has clearly stated that the prosecutrix told the hostel superintendent that she had raped by three Bengali persons. To this extent she supports the prosecutrix. In this view of the matter we have no doubt in our mind that the prosecutrix was raped by Prasanta Das.

27. As far as Kartik Saha is concerned, there are two conflicting versions. In the FIR it is not stated that he raped the prosecutrix. Some of the witnesses referred to above have also stated that when the prosecutrix gave her initial version she had not named Kartik Saha as one of the persons who raped her. The allegation against him was that he caught hold of the prosecutrix and kissed her. Even the learned Court below has held that he is confused whether Kartik committed the rape or not. In our view there can be no confusion in this regard. In a criminal case either the case has to be proved beyond reasonable doubt or it is not proved. In view of the contradiction in the statements of the prosecutrix herself we are of the view that Kartik Saha cannot be said to have raped the prosecutrix.

28. The question that next arises is whether Kartik Saha can be held guilty of committing gang rape u/s 376(2)(g) of I.P.C. which reads as follows:

376. Punishment for rape.--(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either

description for a term of less than ten years.

Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

29. In the present case there is sufficient corroboration of the statement of the statement of the witness as held by us above. However the law is well settled that the conviction in a rape case can be solely based on the evidence of the victim provided the statement inspires confidence. In this behalf reference may be made to the following judgments of the Apex Court:

The Apex Court in AIR 2003 SC 2136 has held as follows:

18. It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as an accomplice, but could only be characterized as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in a sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if there is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material.

The Apex Court in Rajib and others v. State of Madhya Pradesh, (2008) 15 SCC 133 also held as follows:

10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

12. Reference has been made in Gurmit Singh case to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption u/s 114A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should,

without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

30. Sri S. Kar Bhowmik has vehemently argued that the appellant Kartik Saha was the protector and not the rapist. We see no merit in this argument. Though the prosecutrix did not accuse Kartik Saha of rape in the first instance but her statement is consistent throughout that Kartik Saha was part of the entire group and also that Kartik Saha kissed her and embraced her. A savior does not kiss a victim. It has been urged by Sri Kar Bhowmik that in the melee the prosecutrix might have mistaken the savior for the assailant. This argument deserves to be rejected straightway because Kartik was a classmate of the prosecutrix and there is no reason why she should have falsely implicated him.

31. Even a person who was not raped the accused can be held guilty of the offence of gang rape, if there is a meeting of minds between the persons about one of the group committing the crime. There is a slight contradiction in the statement of the prosecutrix as to whether Kartik Saha was there right from the beginning or came later. If he had come with Prasanta and the unidentified person then without any manner of doubt he would be guilty of gang rape. Assuming he came later with the unidentified person, once it is proved that the unidentified person raped the prosecutrix and Kartik Saha instead of trying to save the prosecutrix kissed her and embraced her he is also guilty of the crime though the fact that he did not rape her may be taken into consideration while awarding the sentence. Therefore we find Kartik Saha guilty of having committed an offence punishable u/s. 376(2)(g) of I.P.C.

32. As far as the conviction u/s 307 is concerned we are clearly of the view that this conviction is totally unjustified in regard to all the three accused. There is no evidence of throttling. The statement made by the victim in Court is that the accused persons pressed her neck so that she could not talk or raise an alarm. While appearing in Court she had not stated that the accused tried to throttle her or tried to kill her. Even the medical evidence which has been set out in detail hereinabove does not show evidence of throttling. Therefore, we convict the accused Kartik Saha and Prasanta Das for commission of offence punishable u/s 376(2)(g) and acquit Prafulla Debnath by giving him benefit of doubt since he has not been identified properly in Court. As far as sentence is concerned, the sentence imposed by the learned trial Court u/s 376(2)(g) with regard to Prasanta Das is upheld. However, as far as Kartik Saha is concerned, keeping in view the fact that he was only a little over 18 years of age and also the fact that he was a junior of the main accused Prasanta Das and did not actually rape the prosecutrix and also keeping in view the fact that the common intention to rape the prosecutrix may have arisen at the scene of occurrence itself, we are of the considered view that this is a fit case where a sentence of less than 10 years should be imposed. We may also mention that this case is governed by the

provisions of the Indian Penal Code as it existed on the date of occurrence. Keeping in view all the facts and circumstances we feel that the interest of justice shall be met if Kartik Saha is sentenced to undergo RI for 5 (five) years and to pay a fine of Rs. 5,000/- and in default of payment of fine to suffer SI for 6 months.

33. Before parting with the case we would be failing in our duty if we did not point out many glaring lapses both procedural and legal in the case:

(i) As far as the police is concerned, it stands proved on record from the statement of all the witnesses including the police witnesses that the prosecutrix came to the Police Station soon after midnight. Then why was the FIR not recorded immediately? There is no answer to this question by the police. Section 154 of the Code of Criminal Procedure clearly provides that "every information relating to the commission of a cognizable offence, if given orally or to an Officer-in-Charge of Police Station, shall be reduced in writing and thereafter read over to the informant and then signed by the informant. This information is required to be recorded in the FIR register." The claimant is also entitled to be given a copy of the FIR recorded free of cost. One fails to understand why the police in the State of Tripura is hesitant to record the FIR straightway. This is a duty cast upon it by law and once a cognizable offence is disclosed the Officer-in-Charge of the Police Station is duty bound to record the FIR. In this case this is the first lapse on the part of the police and the police waited for a young 16 years old girl to lodge a formal complaint in writing before swinging into action.

(ii) This is a case of rape of a 16 years old girl. She may have been over 16 or below 16. The investigating officer admits that he took no steps to obtain any document regarding the date of birth of the prosecutrix either from the school or from the birth and death register or from any other authority. This is the second major lapse.

(iii) There are two versions with regard to the third lacuna-

(a) The first is that the prosecutrix along with her teachers first went to the dispensary and then to the Police Station. If she had gone to the hospital first then the doctor should have called the police to the hospital where FIR should have been recorded and the doctor should not have sent the prosecutrix to the Police Station. In case she had gone straight to the Police Station then the FIR should have been lodged immediately and the prosecutrix should have been taken to the hospital then and there.

(b) The record especially the medical report shows that the claimant was examined at 9.30 am on 23.12.2008. Why she was not examined earlier when it was a case of rape?

(iv) According to the prosecutrix, the I.O. produced Prafulla Debnath before her along with Kartik Saha on the morning of 23.12.2008. This has been stated by certain witnesses also. Once the prosecutrix had not identified a victim the police

officials should have known the basic law that he was required to get Test Identification Parade conducted. The I.O. should have arrested Prafulla Debnath and could have got the Test Identification Parade conducted the very same day. He has rendered the Test Identification Parade totally useless by first producing the accused before the prosecutrix. He in his statement in Court stated that though he recorded the statement of prosecutrix at 7.00 a.m. on 23.12.2008 he could not have given any explanation for the delay in conducting the Test Identification Parade.

(v) He also could not give any explanation for not collecting any age proof certificate of the victim from any institution.

(vi) This I.O. did not even feel it fit to examine the parents, brothers and sisters including the sister who had prepared the FIR and was a proper witness in the case.

(vii) As indicated by us above the map prepared by the I.O. does not depict many things and hides more than it reveals. This I.O. would have this Court believe that he did not even inquire from the prosecutrix as to how she came to know the name of Prafulla Debnath. Either this I.O. is totally stupid and incompetent or he thinks that he can take rest of the world for a ride.

(viii) This inquiry officer did not even deem it fit and proper to collect the report of forensic science laboratory and bring it to the notice of the doctors who had examined the prosecutrix and obtained their final opinion.

34. It appears to us that this I.O. was trying to shield some of the criminals because though in the FIR the names of Prafulla Debnath and Kartik Saha were mentioned this witness in Court stated that the victim gave a statement disclosing that she was called by a student of the school but did not disclose his name. This statement on the face of it is false because in the FIR other than Prafulla Debnath who is not a student of the school the other two accused persons were named. We are, therefore, of the considered view that this I.O. does not deserve to continue in the post which he is holding. We, therefore, direct the Director General of Police to conduct disciplinary proceedings against the Investigating Officer, P.W. 18 Sri Amendra Debbarma, the then S.I. of Chawmanu P.S., for misconduct and dereliction of duties and he shall complete the entire inquiry of disciplinary proceedings in accordance with law within a period of 3(three) months from today.

35. The Director General of Police shall file his personal affidavit in this Court stating what action he has taken against the said I.O. For this purpose the matter be listed again this Court on 8th May, 2014. In view of the above discussion the appeal filed by Kartik Saha being CrI. A(J) No. 13 of 2012 is partly allowed. His conviction u/s 307 of I.P.C. is set aside but his conviction u/s 376(2) (g) of I.P.C. is upheld. His sentence is modified and he is directed to undergo RI or 5(five) years and to pay a fine of Rs. 5,000/- and in default to payment of fine to suffer SI for 6(six) months. The CrI. A(J) No. 18 of 2012 filed by Sri Prasanta

Das, is partly allowed and his conviction u/s 307 of I.P.C. is set aside. However, his conviction u/s 376(2)(g) of I.P.C. as well as the sentence imposed upon him by the learned trial Court is upheld. The Crl. A(J) No. 2 of 2013 filed by Prafulla Debnath is allowed and he is acquitted and directed to be set free forthwith.