
(2002) 05 CAL CK 0027

In the Calcutta High Court

Case No : Criminal Appeal No. 236 of 1993 with C.R.A. No's. 245 of 1993 and 33 of 1994

Nil Kamal Ghosh alias Nilu

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 21-05-2002

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Penal Code, 1860 (IPC) — Section 366, 376

Citation : (2002) 3 CALLT 618

Hon'ble Judges : Sujit Barman Roy, J; Pradip Kumar Biswas, J

Bench : Division Bench

Advocate : Sadhan Roy Chowdhury, S. Samanta and Roy and Chandrayee Alam, in C.R.A. 236 of 1993 and 33 of 1994, for the Appellant; S. Moitra, Additional Public Prosecutor and R.K. Ghosal, for the Respondent

Judgement

P.K. Biswas, J.—These three appeals were directed against the judgment of conviction and sentence passed against these appellants by Sri M.K. Sengupta, Additional Sessions Judge, 5th Court, Alipore on 3.9.93 and 4.9.93 respectively in connection with Sessions Trial No. 1(1) of 1993/ Sessions Case No. 23(77) of 1992 arising out of Phool Bagan P.S. Case No. 108 dated 23.9.92 (G.R. Case No. 2081 of 1992), whereby the learned trial Judge was pleased to pass an order of conviction against the appellant, Nil Kamal Ghosh u/s 376 of IPC as also u/s 366 of IPC and also pleased to sentence him to suffer Life Imprisonment for the aforesaid offence u/s 376 of IPC and again pleased to sentence him to suffer rigorous imprisonment for 6 years and to pay a fine of Rs. 1000/- in default to suffer rigorous imprisonment for 5 months for the offence u/s 366 of IPC and also passed orders that both the sentences shall run concurrently.

2. The learned trial Judge was also pleased to sentence the other two appellants namely Bhola Nath Ojha and Sanatan Murmu to suffer rigorous imprisonment for 6 years each and to pay a fine of Rs. 1000/- each in default to suffer rigorous imprisonment for 5 months for the offence u/s 366 IPC.

3. Briefly stated the prosecution case as mainly emerged from the recital contained in the FIR lodged by Nehar Banu, is as under :

4. Nehar Banu, a Muslim woman aged about 27 years and forlorn by her husband, was sleeping with the minor son, sister and her minor daughter in the "Jhupri" on the pavement of CIT Road in front of Central Government Quarters on 23.9.92 at 2 a.m. Some political parties of West Bengal had given a call to observe "Bangla Bandh" from the next morning.

5. At that time i.e., on 23rd September, 1992 at about 2 a.m., the appellant, Nil Kamal Ghosh, Special Constable of Phool Bagan P.S., who was in "mufti", entered inside the "Jhupri" with a torch in his hand. He asked Nehar Banu to accompany him in connection with a case as the Officer-in-charge called her. Nehar Banu refused to go with him at the dead hours of night and told that she would go in the next morning. Nil Kamal left the place and went away.

6. Shortly thereafter, appellant Nil Kamal again came to the place in a police vehicle driven by another appellant, Bhola Nath Ojha and in that vehicle another appellant Sanatan Murmu was also present.

7. Nil Kamal got down from the vehicle, entered into the "Jhupri" once again and dragged Nehar Banu out of that "Jhupri" by pulling her hand. He then forcibly took Nehar Banu to the P.S., in that police vehicle by placing her in the front seat of the vehicle and she was made to sit in the front seat in between driver Bhola Nath Ojha and appellant Nil Kamal Ghosh.

8. Coming near to the P.S., Nil Kamal got down from the vehicle and took Nehar Banu Inside the Mezzanine floor room in which Nil Kamal Ghosh along with others used to stay and the said room was used by them as police barrack.

9. Nil Kamal after taking Nehar Banu inside the mezzanine floor room, locked the door from Inside and then committed rape against her will and by force.

10. Before the commission of the offence, the other persons who were sleeping on that mezzanine floor woke up and Nil Kamal told them something by whispering in their ears and they all laid down their beds.

11. After commission of the offence of rape, Nehar Banu was compelled to stay inside the mezzanine floor room upto 4.40 a.m. and at 5 a.m., she was allowed to leave the mezzanine floor room and she went to her "Jhupri" in crying condition.

12. There at "Jhupri" she reported the incident to her sister, Ayesha Khatoon (PW 4), her cousin brother, Sk. Kasem (PW 5) and wife of Kasem, Tasli Bibi (PW 6). They asked her to go to police station and to report the incident to the O.C.

13. Nehar Banu thereafter first went to her working place and performed some work there and thereafter she came to the Phool Bagan P.S., around 7/8 a.m. She was then crying sitting under a tree. The O.C. of the P.S., was not present at that time. After sometime O.C., of the P.S., came and called her inside his room

and asked her why she was crying. Nehar Banu then reported the entire incident to the O.C.

14. Niladri Das Gupta, the O.C. of the P.S., asked S.I. Chanchal Sarkar to record the statement of Nehar Banu and to register a case against the accused persons. Accordingly, S.I., Chanchal Sarkar recorded the verbal statement of Nehar Banu and it was then read over and explained to her and Nehar Banu put her left thumb impression on it.

15. Treating that statement as complaint, S.I., Chanchal Sarkar started Phool Bagan P.S., case No. 108 dated 23.92 against these appellants and three others.

16. The case was initially endorsed to S.I. Chanchal Sarkar for investigation by the O.C. of the P.S., and subsequently, the investigation was taken up by the Detective Department, Lalbazar and S.I., M.A. Saleh of Detective Department, Lalbazar was directed to investigate the case by A.C. (Anti Rowdy Section), D.D., Lalbazar. Then S.I., M.A. Saleh conducted the investigation being assisted by S.I. Kanchan Naha, S.I., Supriya Mondal, and S.I., Prembrota Majumdar, all of detective Department, Lalbazar and after completion of the investigation, the I.O., S.I., M.A. Saleh submitted charge-sheet against all the six accused persons on 09.11.92.

17. Upon hearing both sides, the learned trial Judge framed charges against the three appellants u/s 366 IPC and the learned trial Judge also framed charge u/s 376 IPC against the appellant Nil Kamal Ghosh and apart from the aforesaid two charges, charge u/s 376/114 IPC was framed against the two appellants, Bholanath Ojha, Sanatan Murmu and three others namely, Kalipada Murmu, Sadhan Chandra Bhowmick and Rdbi Lochan Mahato and the learned trial Judge had also framed charge u/s 354 of IPC against Kalipada Murmu, Sadhan Chandra Bhowmick and Robi Lochan Mahato.

18. The defence taken by Nil Kamal Ghosh, as it appears, is that he has been falsely implicated in this case as he was an Office-bearer of the Association and since he had protested against the illegal acts of the O.C., Phool Bagan P.S. that is why in collusion with others the O.C. of the P.S. has implicated him in this case. Further defence, as taken by him, is that Nehar Banu, the victim woman in this case was a whore and she was working as a maid servant in the quarters of the O.C.

19. The defence taken by Bhola Nath Ojha, the driver of the vehicle, is that he has done his official duty and in no way he is connected with the offence, alleged to have been committed by Sri Nil Kamal Ghosh. The defence of the accused Sanatan Murmu is that he is innocent and he has been falsely implicated.

20. The prosecution in this case in order to bring home the charge, as aforesaid, has examined in all forty-two witnesses including the police personnel. Judicial Magistrate, Medical Officers and Forensic Experts. From the side of the defence, witnesses (DW 1- Debojit Bhattacharyya, DW 2-Sanat Kr. Ganguly and DW 3-

Arun Kumar Singha) were however examined.

21. The learned Additional Sessions Judge, 5th Court, Alipore, after recording the evidence of 42 prosecution witnesses and after hearing both sides came to the conclusion that the accused/appellant Nil Kamal Ghosh raped the victim lady, Nehar Banu on 23.9.92 after forcibly taking her from her "Jhupri" on the dead of that night, and accordingly Nil Kamal Ghosh was held to be guilty of the offence under Sections 366 & 376 of the IPC and from the evidence and materials on record the learned trial Judge also found that the accused/appellant Bholanath Ojha and the accused/ appellant Sanatan Murmu to be guilty of the offence punishable u/s 366 of IPC and found both of them to be not guilty for the offence u/s 376/114 of IPC. The learned trial Judge awarded Life Imprisonment to the accused/appellant Nil Kamal Ghosh for the offence u/s 376 of IPC and also sentenced him to suffer rigorous imprisonment for 6 (six) years and to pay a fine of Rs. 1000/- in default to suffer rigorous imprisonment for 5 (five) months for the offence u/s 366 of IPC and at the same time, the learned trial Judge also sentenced convict appellants Bholanath Ojha and Sanatan Murmu to suffer rigorous imprisonment for 6 (six) years each and to pay a fine of Rs. 1000/- each in default to suffer rigorous imprisonment for 5 (five) months for the offence u/s 366 IPC.

22. Being aggrieved by and dissatisfied with the findings of guilt recorded against the aforesaid convicts/appellants and the respective sentences awarded against each of them, these criminal appeals have, been filed by the convicts/appellants which are being disposed of by this single judgment since those arise out of single judgment of the trial Judge.

23. We have heard the learned counsel Sri S. Roychowdhury appearing for the convict/appellant N.K. Ghosh at length as also Mrs. C. Alam appearing for the other two convicts/appellants as also the learned Additional Public Prosecutor Sri S. Moitra appearing for State/respondent and all of them have taken us through the evidence of those 42 prosecution witnesses, so also through the impugned judgment and order of the learned Additional Sessions Judge, 5th Court, Alipore.

24. The learned counsel, appearing for the convict/appellant N.K. Ghosh, has assailed this judgment awarding punishment against his client Nil Kamal both under Sections 376 and 366 of IPC, on technical grounds and also on merits alleging that investigation in connection with this case had been started prior to the recording of the FIR and it was further contended by him that the unexplained delay in sending the FIR to the concerned Court renders the prosecution case to be doubtful and further drawing our attention to the evidence on record, it has been contended by him that no such incident of rape, as alleged by the prosecution had ever happened.

25. Mrs. C. Alam, appearing for the other convicts/appellants in course of her submission has forcefully contended that on the given facts and circumstances and on the evidence, so adduced from the side of the prosecution, it cannot at all

be said that her clients had any mens rea for involving themselves with regard to the offence of abduction u/s 366 of IPC and the basic ingredients necessary for proving the offence u/s 366 of IPC have not been established against her two clients.

26. The learned Additional Public Prosecutor, representing the State has forcefully contended that the evidence adduced by the victim lady, PW 3 (Nehar Banu), and supported by the oral testimony of PW 4 (Ayesha), PW 5 (Sk. Kasem), PW 6 (PW Tasli Bibi), PW 7 (Idris Ali Gazi) and supported by other witnesses namely PW 8 (Rabindra Basu) and the aforesaid evidence coupled with the medical evidence as has been adduced by the prosecution is sufficient enough to conclude that there has been rape, committed upon the victim Nehar Banu and it was further contended by him that since it has come out from the evidence on record that at the time of taking Nehar Banu to Phool Bagan P.S. on that fateful night from her "Jhupri" in police van, these two convicts/appellants namely Bholanath Ojha and Sanatan Murmu were very much there and had active participation in the matter of taking Nehar Banu to the P.S. forcibly, knowing it to be likely that she will be forced or seduced to illicit intercourse and in view of such evidence offence u/s 366 of IPC has been well established against both of them.

27. I shall now deal with the technical pleas taken by Mr. Roy Chowdhury first. Sri Roy Chowdhury, drawing my attention to the statement of the victim recorded u/s 164 of Cr.PC has stated that victim Nehar Banu narrated the entire incident to a policeman of the Phool Bagan P.S. near the gate of the P.S. at 5 p.m., and in the said statement she has further stated that she came to the Phool Bagan P.S. at 7/8 a.m. and, thereafter, the Officer-in-charge of Phool Bagan P.S. came to the Police Station and she narrated the entire incident to the Officer-in-charge of Phool Bagan P.S.

28. Sri Roy Chowdhury has further contended that in her aforesaid statement, it was also there that the Officer-in-charge first took the victim woman to the mezzanine floor where the alleged incident of rape took place and upon the asking of the Officer-in-charge, she identified the cot where the alleged incident of rape took place and she also identified Nilu who was there in the said room and that the Officer-in-charge asked questions to and that the various police personnel were also present at the spot when the victim was taken to the mezzanine floor and thereafter, as per direction of the O.C., PW 41. S.I. Chanchal Sarkar recorded the statement of the victim which has been taken as FIR in this case.

29. Pointing out to the deposition of PW 41, Chanchal Sarkar, it was contended by him that FIR was recorded after 11.30 a.m. and this has also been stated by PW 3 Nehar Banu that her statement was recorded in the Phool Bagan P.S. at about 11 a.m.

30. He has further contended that from the available evidence, it is quite clear

that some sort of investigation was started in connection with this case before lodging of FIR and, therefore, the investigation is wholly unauthorized in law and the prosecution based on such FIR should, therefore, fail solely on that ground.

31. It has further been contended on behalf of the convict/appellant that the statement of the victim, even assuming was recorded validly during the investigation, the said statement cannot be treated as FIR as it is hit by Section 162 of Cr.PC and such statement is inadmissible in evidence. In this connection, Mr, Roychowdhury has referred to a decision reported in CLT 1999(2) HC 152 in the case of Joydev Das Jogi v. State of West Bengal.

32. The FIR of this case has also been attacked on another ground alleging that the FIR was lodged on 23.9.92 and the said FIR was sent to the learned ACJM, Sealdah on 29.9.92, but no explanation has been given explaining such delay in sending such FIR to the Court and. therefore, the unexplained delay in sending the FIR to the Magistrate renders the prosecution to be illegal. And, in this connection, relying on the evidence of DW 1 (Debojit Bhattacharjee), DW 2 (Sri Sanat Kumar Ganguly) and DW 3 (Sri Arun Kumar Singha), it has been contended on behalf of the convict/ appellant that it has been established that the FIR was subsequently manufactured.

33. To buttress his above contention, Sri Roychowdhury has placed his reliance on a decision reported in Thulia Kali Vs. The State of Tamil Nadu, in the case of Thulia Kali v. State of Tamil Nadu as also on the decision reported in Ishwar Singh Vs. State of U.P., .

34. The learned Additional Public Prosecutor in refuting the above contentions raised from the side of the accused/appellant has contended that nowhere in the evidence during examination of the prosecution witnesses, it was suggested to them and particularly to the victim PW 3, Nehar Banu and PW4 0, O.C., Sri Niladri Dasgupta and PW 41, S.I. Chanchal Sarkar that there was another FIR lodged in connection with this case earlier to the present one. And, from the statement of the victim, PW 3, it is clear that in course of reporting the incident as per the asking of O.C., she showed the place where she was raped and the cot on which she was raped and in course of same transaction, she also showed Nilu who was then lying on that cot and, thereafter, she was brought down-stairs and her statement was recorded and the entire chain of incidents, as above, was in connection with the same transaction and as such it cannot be said by any stretch of imagination that the real investigation commenced earlier, prior to the recording of statement of the victim woman, Nehar Banu.

35. So, in view of the above position, the FIR in the instant case can neither be held to be invalid, nor the investigation started on the basis of such FIR can be said to be wholly unauthorised in law and since nothing could be taken out or established by the defence that there was any earlier FIR, it will not be hit by Section 162 of Cr.PC.

36. He has further submitted that although it has been alleged that the FIR was

placed before the learned ACJM, Sealdah on 29.9.92, yet, for such simple reason of placing it before the learned ACJM, Sealdah on 29.9.92, it can not be said that there was embellishment or concoction in drawing up the FIR, unless it has been so provided or established by cogent evidence.

37. He has further submitted that true it is that FIR has to be sent normally to the nearest Court as early as possible preferably within 24 hours, but this being not done in the instant case, this is certainly a lapse, but this lapse does not by itself, lead anyone to hold that in fact, there was no FIR on 24.9.92 against the convict/appellant and others and the FIR was subsequently manufactured at the instance of O.C. of the concerned P.S., as from the available materials, it has come out that the accused persons of the concerned case were produced before the learned ACJM, Sealdah on 24.9.92 along with the prayer made by the I.O.. and on the same date, seizure list along with alamats were produced and the victim woman was also produced before him and the case diary of the concerned case was also forwarded and produced before him. So, by any stretch of imagination, it cannot be said that there was no FIR on 24.9.92.

38. It has, therefore, been contended by him that the contentions raised by the convict/appellant relating to the FIR of the instant case, cannot at all be accepted and the decisions, cited above, do not come to any aid to the defence.

39. We have given our anxious consideration with regard to the contentions of the parties and we have also examined the materials and the evidence on record in connection with the above matter.

40. On examination of the aforesaid materials, we are of the opinion that since in this case, it has not been suggested or alleged from the side of the convict/appellant that there was another FIR which was lodged in connection with this case, the present one cannot be held to be hit by Section 162 of the Cr.PC and the evidence of PW 3, the victim woman, makes it abundantly clear that in course of reporting the incident before the concerned Officer of the P.S., she had shown the place where she was raped and the cot where she was raped. But, that does not mean that investigation of this case was already started and while reporting the entire incident to the O.C. of the P.S. in course of same transaction, her statement was recorded by PW 41 as per the direction of O.C., PW 40, Niladri Dasgupta, So, from the above, it cannot be said that the investigation of this case commenced earlier so as to say prior to the recording of the FIR.

41. It is the mandatory requirement under the law that the FIR should be despatched to the nearest Court as early as possible preferably within 24 hours and not complying with the same is certainly a lapse, but that does not mean that the FIR of the case should be regarded as a manufactured one and here in this case, although the FIR was not sent to the concerned Court within 24 hours, yet, the other alleged papers such as seizure list and the case diary were forwarded to the Court for taking appropriate action in relation to the accused persons of the concerned case and relating to victim woman of this case. So,

being in agreement with the submissions made by the learned Additional Public Prosecutor, we are to hold that the technical pleas taken by the convicts/appellants are of no avail to them and it does not at all affect the merits of this case.

42. Now, turning to the main allegation of rape as envisaged u/s 376 of IPC and abduction as envisaged u/s 366 of IPC, we find that the prosecution story in this regard is that on the fateful night at about 2 a.m. prior to Bangla Bandh day, while the defacto complainant Nehar Banu was sleeping in her Jhupri on the pavement of CIT Road in front of Central Government quarters, then the accused Nil Kamal Ghosh came there with a torch in his hand and called her. She woke up and the accused said to her that she was called by the O.C. of Phool Bagan P.S. in connection with a case and when she refused to go at the dead hours of night and told that she would go in the next morning and then the accused left the place. After some time, accused Nil Kamal again came there with a police vehicle and asked her to go to the P.S. and in that van there was driver and another man sitting on the rear portion of the vehicle and when Nehar, Banu again refused to go, accused Nil Kamal forcibly took her away catching her hands and forcibly made her to sit in the front portion of the vehicle.

43. It was further alleged that the victim Nehar Banu was taken in a mezzanine room on the 1st floor of the P.S., where some other persons were also there as lying and as Nehar Banu started crying some of them woke up, but became silent as Nilu told them something and after that Nilu made her to lie down on a cot and ravished her.

44. To substantiate the aforesaid allegation as said earlier, the prosecution has examined as many as 42 witnesses. The learned counsel appearing for the accused Nil Kamal has submitted before us that the prosecution version of this case is totally unbelievable inasmuch as in a Police Station where so many police personnel were present on their duties, it is quite impossible and thus unbelievable that the victim Nehar Banu could be taken to the upstairs of the Police Station being unnoticed by any of the police personnel present in the Police Station.

45. It has further been contended that the alleged fateful night was the night before the day of "Bangla Bandh" and in that view of the fact, the police personnel of all the Police Stations were kept on alert and in such a situation, it is equally impossible and unbelievable that Nilu and other two persons namely Bholanath and Sanatan would take the victim woman upstairs of the Police Station totally being unnoticed by any police personnel.

46. It has further been contended that it was the further allegation of the prosecution that Kalipada Murmu, Sadhan Chandra Bhowmick and Robi Lochan Mahato were also there at the alleged place of occurrence and against these three persons there was also a charge under Sections 354/ 376/114 of IPC. But the aforesaid 3 persons have been acquitted by the learned trial Judge with a

finding that the prosecution failed to bring home the charges against Sadhan, Kalipada and Robi Lochan on the same set of evidence. And in a situation like this, a question will certainly crop up as to whether learned trial Judge was justified in placing any reliance upon the version of the prosecution on the same set of evidence to implicate accused Nilu for commission of an offence under Sections 376/366 of PC and against rest of accused/appellants u/s 366 of IPC. It was contended by him further that on the same set of evidence, when the trial Judge has disbelieved the allegation in respect of Sadhan Chandra Bhowmick, Kalipada Murmu and Robi Lochan Mahato, the trial Judge was not at all authorised or justified to place his reliance again on the same set of evidence for convicting the accused Nil Kamal and other two appellants of this case.

47. It has further been contended on behalf of the accused persons that as per the report of the Serologist, the semen group could not be detected as those were dis-integrated and as such the report of Serologist does not confirm the fact of rape upon the victim and drawing our attention to the finding of the learned trial Judge, appearing in page 265 of the Paper Book, it has been submitted on behalf of the convict/appellant Nil Kamal that the learned trial Judge placing reliance on the medical examination of the accused Nilu has accepted that Nil Kamal was potent at the relevant time and was capable of sexual intercourse and in connection with the above matter, it has been submitted by the learned counsel appearing for the accused appellant whether an alleged testimony as to finding an accused to be potent and capable of intercourse can be sued against the accused/ appellant in a criminal trial in violation of the guarantee under Clause 3 of the Article 20 of the Constitution of India.

48. Drawing our attention to the evidence on record, specially the evidence of PW 3 Nehar Banu (prosecutrix) it has been submitted that this witness, nowhere in her statement has stated that she was raped and she had only stated that her "izzat" was taken, by Nil Kamal and taking the plain meaning of "izzat" which means outraging of modesty and not rape. It cannot be extended to that extent to hold that she was actually raped and moreover, this witness in course of her cross-examination had stated further that the accused pulled her saree and tore it and he also bit her breasts, face and body, and she had received biting injuries on her body.

49. Referring to the evidence of PW 8 (Dr. Rabindra Basu) which has revealed clearly that PW 3 had not bleeding injury or biting injuries on her person and with reference to the materials such as saree (Mat. Ext. II) which was not torn one and the "saya" (Mat. Ext. III) which was not torn, it was contended that in view of such exaggeration and embellishment made by the victim in course of her evidence before the trial Judge, no reliance can be placed on such evidence and the above fact taken together with the fact that when on the previous day of "Bangla Bandh", all the Police Stations were kept on alert, hardly it can be believed that the victim woman Neahar Banu would be taken to the upstairs of

the P.S. in the mezzanine floor room where some other police personnel were also there and the rape would be committed upon her under such a situation.

50. It has, therefore, been submitted on their behalf that the whole edifice of the prosecution case, therefore, stands disbelieved, discredited and in view of the exaggeration made in the evidence of the prosecutrix, no reliance can be placed either on such exaggerated evidence of the victim or on the unfounded medical evidence for inflicting punishment upon convict/ appellant upon allegation of commission of rape upon such victim and consequently, no conviction can be maintained against Nil Kamal either u/s 376 of IPC or u/s 366 of IPC on such exaggerated and uncorroborated testimony,

51. Mrs. Chandrayee Alam appearing for other two convicts/appellants has submitted before us that the evidence as has been adduced by PW 3, PW 4, PW 5, PW 6 and PW 7 goes to suggest that Bholanath and Sanatan had not taken any active part in the alleged abduction of the victim woman, Nehar Banu from "Jhupri" to the Police Station in a police van and even if, it is assumed for the sake of argument without admitting the same that both of them were in the police van, can it be said that they had mens rea for abduction, since Nehar Banu, the victim woman of this case was involved with a case of abduction in the same Police Station and in connection of which she had visited the aforesaid P.S., twice earlier.

52. It was further contended by her that in the background of the aforesaid fact, it cannot be conceived that the alleged taking of Nehar Banu to the Police Station in the police van was made only for the purpose of abduction with intent that she may be compelled to illicit intercourse or knowing it to be likely that she will be seduced to illicit intercourse. And furthermore, there is not an iota of evidence adduced from the side of the prosecution to show that these two accused/appellants took any active part for taking the victim inside the thana premises precisely to the upstairs of the thana premises or that they were anywhere present in the mezzanine floor room when rape was allegedly committed upon victim.

53. On such premises, it was contended that there is nothing to hold that Sanatan and Bholanath were guilty of any offence u/s 366 of IPC.

54. The learned Additional Public Prosecutor in refuting the aforesaid contentions of the learned counsels appearing for the accused/appellants has submitted before us that in the present matter corroboration is not a sine qua non for a conviction in rape case and in the Indian setting, the refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. It has, further, been submitted by him that a victim girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any such incident which is likely to reflect her chastity had ever happened and she would be conscious of being ostracized by the society or being looked down upon by the society including her own family

members, relatives, friends and neighbours as she would face the risk of losing the love and respect of her own near and dear ones and also of her matrimonial home. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable family. And in view of these similar factors, the victim and her relatives are not too keen to bring the culprit to book and when even on the face of such factors, the crime is brought to light, there is a built-in assurance that the charge is genuine rather than fabricated. In support of his contention, he has placed reliance on a decision reported in *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*,

55. It has further been contended by him that the testimony of victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court 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 and seeking corroboration of her testimony before relying upon the same, as a rule, in such cases, amounts to adding insult to Injury.

56. It was further submitted by him that the Court while appreciating the evidence of a prosecutrix may look for some assurance for her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.

57. The evidence of a victim of sexual assault stands at par with the evidence of an injured witness, and to an extent, is more reliable. He has further submitted that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under given circumstances.

58. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she was an accomplice.

59. Inferences have to be drawn for a given set of facts and circumstances with realistic diversity and not with dead uniformity, lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. In this connection, in support of his contention, the learned Additional Public Prosecutor has placed his reliance on the ratio decided in the case of *State of Punjab Vs. Gurmit Singh and Others*, .

60. The learned Additional Public Prosecutor has also referred to the ratio decided in the case of *State of Andhra Pradesh Vs. Gangula Satya Murthy*, in which it was, inter alia, held that the Courts are expected to show great responsibility while trying a case on charges of rape and such cases must be dealt with utmost sensitivity and 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 the allegations of rape. And it must be emphasized that the Court must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in totality of the background of the entire case and not in isolation.

61. Sri Moitra again referring to the ratio in the case of State of Maharashtra Vs. Chandraprakash Kewalchand Jain, has submitted that when a crime of rape is committed by a person in authority that is by a police personnel, the Court's approach should not be the same as in other case involving a private citizen. In our criminal law, wide powers are conferred on the police Officers investigating cognizable offences.

62. The infrastructure of our criminal investigation system recognises and indeed protects the right of a woman to decent and dignified treatment at the hands of the Investigating Agency. The Court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped.

63. She suffers from a tremendous sense of shame and the fear of being shunn"ed by society and her near relatives including her husband. And instead of treating her with a compassion and understanding as one who is an injured victim of crime, she is, more often than not, treated as sinner and shunned.

64. It must, therefore, be realised that a woman who is subjected to sex-violence would always be slow and hesitant about disclosing her plight.

65. The Court must, therefore, evaluate her evidence keeping in mind the above settled and established position of law.

66. Now having considered the case laws referred to above, it appears that the appreciation of evidence in a case like rape stands slightly on a different footing from other general cases. The women in our society are not accustomed with sexually free society like their western counter-parts and they are always under tremendous psychological set-back, inhibition and taboo as regards to the sexual affairs, and when ultimately, after having overcome such constraints, they come out with such allegations before the Court or the authorities, certainly the Courts are required to be guided by the rule of prudence and not to be swayed by minor contradictions or insignificant discrepancies in the statement of witnesses.

67. Applying the aforesaid principles in the instant case in assessing and/or evaluating the testimony of the prosecutrix, it is seen that although she has made some exaggerated statement in her evidence in cross by alleging that her apparel which she was wearing were torn and the accused Nil Kamal beat her breasts, face and body and she received biting injuries on her person, and those have not been substantiated on the testimony of PW 8 (Dr. Rabindra Basu), yet, on the face of such exaggerated and incorrect statement, her entire evidence cannot be thrown outright and it is the duty of the Court to separate the grains of an acceptable truth from the chaff of exaggerations and improbabilities which

cannot normally be accepted or acted upon.

68. It has come out from the evidence of PW 8 (Dr. Rabindra Basu) that the victim woman had three injuries and one of the injuries was on her private parts. And in course of her oral testimony as PW 3 she has categorically stated that her "izzat" was taken by Nilu and the aforesaid oral evidence together with the medical evidence and scientific evidence to the effect that semen was traced in vaginal swab and smear (Item C & D) and semen was also found in the saya cuttings, in the gamcha cuttings, bed sheet cuttings and semen was traced in the urethral, swab and semen (Item No. A & B) of Nil Kamal lead us to conclude that there has been rape as alleged.

69. It is also true that serologists could not group or match this semen with the semen of Nil Kamal for the reasons mentioned in the report itself, but the entire scrutiny of the materials has established the fact that the semen found in connection with this case was a human semen and evidence of PW 8, Dr. Rabindra Basu, has revealed clearly that the clinical examination of the victim woman together with the evidence of forensic examination unmistakably proved beyond doubt that PW 3 Nehar Banu had recent sexual intercourse.

70. The medical examination done on Nil Kamal Ghosh has also proved that he was potent and capable of intercourse. Much comment, was, however, made from the side of the convict/appellant that the medical examination of the accused and the consequent evidence that the accused was potent and capable of intercourse cannot be used against Nilu in this criminal trial in violation of guarantee of Clause 3 of the Article 20 of the Constitution of India.

71. Article 20(3) embodies the principle of protection against compulsion of self-incrimination which is one of the fundamental canons of the British system of criminal jurisprudence and which has been adopted by the American system and incorporated as an Article of Its Constitution. It has also, to a substantial extent, been recognised in the Anglo-Indian administration of criminal justice in this country by incorporation into various statutory provisions.

72. In order to avail the protection of Article 20(3), three conditions must be satisfied;

The person must be accused of an offence.

The Element of compulsion to be a witness should be there.

It must be against himself.

73. All the three ingredients must necessarily exist before protection of Article 20(3) is available. If any of these ingredients does not exist, Article 20(3) cannot be invoked.

74. Here, in this particular case, it has not been alleged that the accused was compelled to become witness and there is no allegation that his medical examination or collection of semen etc., and urethral, swab were done under

"duress". So, we find from the available materials that during aforesaid medical examination in relation to the convict/appellant Nilu and for collecting his urethral swab and smear or during the clinical examination, force was never applied against him so as to bring those under the rigour of Article 20(3) of the Constitution.

75. So, we find no force in the aforesaid contention of the accused/ appellant and the same is, therefore, discarded.

76. So, from the statement of victim, Nehar Banu together with the medical evidence and scientific evidence as has been discussed in the foregoing paragraphs, we are rather prompted to hold with certainty that she was sexually abused and the oral evidence adduced by other witnesses specifically the "Jhupri dwellers" and the police personnel of Phool Bagan P.S. have clearly proved the involvement of accused appellant Nil Kamal in committing the rape upon Nehar Banu and from the evidence that has come out in this case, there is nothing to hold that this victim woman was a consenting party to the aforesaid sexual act.

77. So, the facts that have emerged from the evidence on record are that Nehar Banu was taken out from "Jhupri" with the intention that she would be raped and in fact accused Nil Kamal took her to mezzanine floor room of Phool Bagan P.S. where Nehar Banu was ravished against her will and the situation that there were other constables in the mezzanine floor room does not in any way discredit the testimony of PW 3 as because it has come out in the evidence that they were lying in their respective cots and did not wake up on being whispered by Nilu and as such this heinous crime could be committed by Nil Kamal upon Nehar Banu.

78. So, being in agreement with the findings of the learned trial Judge, we also hold that the charges framed under Sections 366 and 376 of IPC against the accused Nil Kamal Ghosh have been fully established from the evidence and materials on record and we find no infirmities in the aforesaid findings of the learned trial Judge requiring our interference in such findings and accordingly, we hold further that accused/appellant Nil Kamal was rightly convicted under Sections 376/366 of IPC by the learned trial Judge.

79. Coming to the question of imposition of sentence upon the convict/appellant, Nil Kamal Ghosh, we find that the learned trial Judge after finding this convict/appellant, Nil Kamal Ghosh guilty of the offence u/s 376 of IPC and as also u/s 366 of IPC has inflicted separate kinds of sentences--sentence to suffer life imprisonment for the offence punishable u/s 376 of IPC and sentence to suffer rigorous imprisonment for 6 years and to pay a fine of Rs. 1000/- in default to suffer rigorous imprisonment for 5 months for the offence u/s 366 of IPC with further order that both sentences are to run concurrently taking the view that the rape was committed inside the Police Station which is a place regarded to be the safest by the public in general and has taken the view further by holding that by his diabolic act, he has smeared the image of law enforcing agency of this metropolis with indelible shame and disgrace and the sagging

morale of this force has taken a further dip.

80. We also find that incidence of this kind is the rarest of the rare in which protector of law which is entrusted with keeping the law and order of the society and to protect the life and property of the people at large is involved in an offence of rape committed inside the Police Station in bringing that victim woman from her "Jhupri" in the dead of night in a police van to fulfill his carnal lust.

81. In a situation like this, we are of the view that the learned trial Judge was fully justified in inflicting the aforesaid punishment and separate kinds of sentence to the aforesaid convict/appellant Nil Kamal Ghosh and we find no reason whatsoever for any interference in respect of such punishment awarded by the learned trial Judge.

82. Now, turning to the case u/s 366 of IPC against two other appellants namely Bholanath Ojha and Sanatan Murmu, we find that prosecution allegation against these two convict/appellants that they along with Nil Kamal abducted the victim woman Nehar Banu with the intent that she may be compelled to illicit intercourse against the will and knowing it to be likely that she will be forced or seduced to illicit intercourse.

83. But, in course of the evidence, as has been adduced from the side of the prosecution by examining good number of witnesses, it has come out that both these convict/appellants Bholanath Ojha and Sanatan Murmu were in the van when Bholanath Ojha was only driving the police vehicle and Sanatan Murmu was sitting in the rear portion of the said van but nowhere in the evidence of prosecution, it has been stated by any of the witnesses that either Bholanath or Sanatan had any active participation in abducting and/or kidnapping the victim woman Nehar Banu from her "Jhupri" on that fateful night prior to "Bangla Bandh" by that police vehicle.

84. The learned trial Judge, however, taking the view that out of the two convict/appellants, Sanatan being the driver took out the vehicle at night without the permission of the authority concerned, and in that connection, it was further held by him that Bholanath Ojha and Sanatan Murmu to be guilty of the offence punishable u/s 366 of IPC for helping the convict/appellant Nil Kamal Ghosh in abducting the victim woman Nehar Banu from her "Jhupri". The learned trial Judge at the concluding portion of the judgment has found further that it has transpired that the log book of the police vehicle has not been properly maintained and the position is such that even a constable could take out the vehicle at dead hours of night without any hindrance and there was none to check the daily movement of the vehicle.

85. In view of the aforesaid position and taking into consideration the nature of the evidence as has been adduced by the prosecution witnesses involving convict/appellants Bholanath Ojha and Sanatan Murmu in the matter of kidnapping and/or abducting the victim woman Nehar Banu from her "Jhupri" and taking her to the upstairs of the Police Station with the intention that she may be compelled to

illicit intercourse against her will or knowing it to be likely that she will be forced or seduced to illicit intercourse, we find from the evidence on record that there was nothing in the statement of witnesses including the statement of the victim PW 3 (Nehar Banu) that these two persons namely Bholanath Ojha and Sanatan Murmu had any active participation either in kidnapping/abduction of the aforesaid victim woman Nehar Banu from her "Jhupri" and/or taking her to the upstairs of the Police Station with the aforesaid intention and on the face of such evidence, hardly it can be said that these two convict/appellants had any requisite mens rea in kidnapping and/or abducting the victim Nehar Banu from her "Jhupri" with the intent that she may be forced or seduced to illicit intercourse against her will.

86. Now, since the vital ingredients for establishing the offence u/s 366 of IPC have not been proved or established against these two convict/appellants, the conviction of those two convict/appellants namely, Bholanath Ojha and Sanatan Murmu u/s 366 of IPC cannot be sustained in law.

87. Having considered the facts and circumstances of the evidence and the materials on record, we are of the clear view that the conviction imposed upon those two convict/appellants--Bholanath Ojha and Sanatan Murmu u/s 366 of IPC cannot at all be maintained and as such the same is liable to be set aside and accordingly the conviction imposed upon these two convict/appellants u/s 366 of IPC and the sentence awarded against them are liable to be set aside and these convict/appellants are entitled to be acquitted from the aforesaid charge u/s 366 of IPC and as such they should be set at liberty at once.

88. Now, in view of what has been discussed in the foregoing paragraphs, the appeal preferred by the convict/appellant Nil Kamal Ghosh is dismissed on contest and the judgment of conviction and sentence passed by the learned trial Judge, so far as it relates to convict/appellant Nil Kamal Ghosh is, hereby, affirmed.

89. The appeals preferred by the convict/appellants Bholanath Ojha and Sanatan Murmu are, hereby, allowed on contest and the judgment of conviction and sentence, so far as it relates to the conviction and sentence imposed upon these convict/appellants, passed by the learned trial Judge are, hereby, set aside and these two convict/appellants are, hereby, acquitted from this case and they be set at liberty at once.

A copy of this judgment along with the LCR be sent down to the Court below for necessary information and compliance.

S.K. Banerjee, J.

I agree.