(2019) 11 CAL CK 0045

Calcutta High Court

Case No: Criminal Appeal (CRA) No. 743 Of 2014

Bimal Pradhan		APPELLANT
	Vs	
State Of West Bengal		RESPONDENT

Date of Decision: Nov. 18, 2019

Acts Referred:

- Indian Penal Code, 1860 - Section 376(2)(f)
- Evidence Act, 1872 - Section 35, 114(g)
- Code Of Criminal Procedure, 1973 - Section 164

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

Bench: Division Bench

Advocate: Ayan Basu, Shiladitya Banerjee, Prabir Kumar, Das, Sumit Routh, Binoy Kumar Panda, Subham Kanti Bhakat

Final Decision: Disposed Of

Judgement

Subhasis Dasgupta, J

This Criminal Appeal being no. 743 of 2014 is directed against the judgment and order of conviction dated 14.3.2014 and 15.3.2014, passed by

Learned Additional Sessions Judge, 1st Court, Darjeeling in Sessions Trial No.01/2009, arising out of Sessions Case No. 26/2008, convicting the

appellant under Section 376 (2) (f) of the Indian Penal Code and thereby sentencing him to suffer rigorous imprisonment for life and to pay fine of

Rs.5000/- (rupees five thousand), in default to suffer 1 (one) year Simple Imprisonment.

The factual position in a nutshell, as established in trial, is that on 19.7.2008, at about 2 p.m., the complainant/mother went to participate in the

procession of Gorkha Nari Mukti, conducted by Gorkha Janamukti Morcha, keeping her seven (7) year old daughter (victim) under the temporary care

of one Sankar Tamang (husband of PW-3), a neighbour of complainant. The convict/appellant during the absence of de-facto complainant/mother took

her daughter from the house of Shankar Tamang to his rented house at about 4 p.m. After participating in the procession, the complaint/mother

returned home at about 4 p.m., and while searching for her daughter, she could find her daughter/victim lying in unconscious condition with evidence

of bleeding from her private parts and further her wearing apparels becoming stained with blood.

After regaining sense, the victim/daughter, on a query being raised by complainant/mother, told her mother that accused had ravished her taking her to

his rented house.

Police took up investigation on the basis of such complainant. Both victim and the accused person as well were put up for medical examination. Victim

was subjected further to ossification test for determination of her age.

The statement of the victim (PW-2) and two other witnesses (PW-4 and PW-9, marked as Exhibits-10, 11 and 5 respectively) was recorded. The

birth certificate recording date of birth of victim, dated 14.12.2001, was produced.

The victim had to be admitted in the hospital for three days. The injuries sustained in the vagina of the victim were repaired taking her in the operation

theatre of the hospital. The wearing apparels of both victim and convict appellant were sent to FSL examination and report. The report was collected.

On conclusion of investigation, police submitted charge-sheet.

The Trial Court after framing charge against the accused under Section 376 (2) (f) of the Indian Penal Code, examined as many as 17 (seventeen)

witnesses including the parents of the victim girl (PW-1, PW-5) and the doctor, who medically examined the victim girl being a gynaecologist of

Darjeeling Sadar Hospital (PW-12).

The court conducting the trial, after collection of evidence proceeded to hold the appellant guilty of offence, already charged with, relying upon the

evidence of PW-2 (victim), her mother (PW-1), PW-4 and PW-9, who found convict/appellant taking away the victim to his rented house and also

returning to the place, where from the victim was taken away together with the medical evidence of doctor examining the victim girl (PW-2).

Learned advocate for the appellant assailed the order of conviction and sentence thereunder principally on two grounds, one on contradiction

contained in the evidence, and another on disproportionate sentence awarded against the appellant. The contradiction in evidence, according to

convict/appellant rendered the prosecution case to be highly improbable. The discrepancy, according to appellant was there first in the testimony of the

PW-1 (the FIR maker) and that of the FIR, relying upon which the prosecution case was set in motion, and those two versions cannot go together.

Thus, according to FIR, the victim was found lying on road with evidence of bleeding, but PW-1 spoke in her evidence that while searching for her

daughter after returning from procession, she went to the house of PW-3, a neighbour, being wife of Sankar Tamang, and found her there with

evidence of bleeding on her private parts. In order to establish this contradiction more and more, our attention was drawn to the testimony of PW-3, to

whom victim (PW-2) reported about the incident for the first time, wherein PW-3 claimed that when she had started going to the house of victim after

becoming aware of the incident, the victim became unconscious and fell down.

The further contradiction attempted to be established was with regard to giving one rupee to victim by convict/appellant after the occurrence, as stated

by the victim, PW-2, and her mother, PW-1 in their evidence, but could not be disclosed in the FIR itself, causing the prosecution story a doubtful

episode as per version of appellant.

PW-3 is a witness, in whose house the victim was kept deposited by her mother, while leaving for participation in a procession of Gorkha Nari Mukti,

organised by Gorkha Janamukti Morcha on 19th July, 2008, and she was the first person to know about incident, pursuant to the disclosure of victim

(PW-2). PW-3 could notice that victim was wearing pant belonging to the son of the accused with marks of bleeding not only on her wearing apparels,

but also from her private parts. Victim on her arrival to the house of PW-3 was found shivering with restlessness.

Referring this part of the evidence, learned advocate for the appellant attempted to establish contradiction regarding the pant being worn by the victim

soon after the incident in the house of convict/ appellant by co-relating with the evidence of PW-2, wherein victim herself stated that before bringing

her to the house of PW-3, accused himself put on the pant of his son, and thus, according to appellant, there developed serious contradiction, for which

the prosecution case would not be taken into confidence.

According to respondent/State, the contradiction shown in the evidence and attempted to be capitalised, should not be seriously considered, because

the discrepancies shown in the evidence pertain to trivial matters. Thus according to State respondent, the contradictions are on trivial matters being

minor in nature, not affecting the core of the prosecution case.

Herein in this case a Seven (7) year old girl was ravished by the convict appellant after taking her to a rented house from the house of PW-3, where

she was kept deposited temporality by her mother for taking part in a procession, conducted by Gorkha Nari Mukti of Gorkha Janamukti Morcha.

Admittedly, PW-3 had the occasion to know about the incident for the first time after being disclosed by victim, PW-2, when the victim was looked to

be shivering and suffering from restlessness condition. PW-3 admitted in her testimony that the mother of the victim got the victim deposited in her

house soon before the occurrence, when her husband (Sankar Tamang) was watching T.V programme in the house. PW-2 started enjoying T.V.

programme along with husband of PW-3 in her house. Suddenly at about 2.30 PM convict/appellant visited the house of PW-3 and joined the T.V.

watching programme. PW-3 had to go then to her kitchen for preparing and serving tea to her husband as well as to convict/appellant. Till such time,

the victim was found playing near the door of the house of PW-3. Soon thereafter PW-3 indulged in talking with a guest, who suddenly appeared in

her house, standing in her kitchen. After returning form kitchen and also after departure of the guest, PW-3 did not find victim present in her house,

and naturally PW-3 started searching here and there of her house including toilet and first floor of her house. On the same day at about 4 PM

convict/appellant came again in the house of PW-3 taking victim with him and left the place having a glass of water. The victim was found then

wearing a pant belonging to the son of accused. PW-3 could identify the pant quickly, worn by victim, as the son of the convict appellant would

frequently visit the house of PW- 3. On being asked, the victim disclosed everything to PW-3 stating that accused had committed rape on her taking to

the house of convict appellant. PW-3 found then profuse bleeding from the private parts of the victim oozing out, and her wearing apparels getting

stained with blood. Incidentally, having found the father of the victim passing the house of PW-3, she asked the father of victim to send his wife

immediately. When PW-3 started proceeding to the house of victim, the victim suddenly fell down being unconscious, and in the mean time the mother

of victim came towards her house of PW-3. PW-1 while visiting the house of PW-3, found her daughter wearing a pant belonging to the son of the

accused, as already testified by PW-3.

The evidence referred above is to demonstrate the sequential events, and in such background, the contradiction sought to be established, in our

considered view, has to be addressed.

PW-2 victim consistently stated in her version that convict appellant took her to his own house from the house of PW-3 and performed a â€œBaje

Kajâ€ after getting her undressed and committed rape on her. After the incident, victim was taken to the house of PW-3, when she was found

wearing a pant belonging to the son of convict appellant. PW-3 though had the first occasion to know about the incident, but she stated without any

ambiguity in cross-examination that she had not been interrogated by the police during investigation.

PW-4, another neighbour of PW-1, though found the accused person taking victim girl towards down hill, but he denied to have been interrogated by

the police during investigation in his cross-examination. His evidence as such not being examined by the police during investigation would be without

any consequence.

PW-9 is a house wife by profession living in the same locality, where both convict/appellant and the victim with her mother had their ordinary

respective residence, intervened by some distance. PW-9 is thus a co-villager, having pre-acquaintance with convict/appellant. She had no enmity to

settle an old scar against the appellant, while testifying the incident before the Trial Court. The house of accused/appellant is visible from the house of

PW-9 being situated in the same upper direction. PW-9 categorically stated with all emphasis that on the relevant date of incident at around 3.00 PM,

she found accused person taking victim towards his house by holding her hand. Subsequently, PW-3 came to know that the victim had been ravished

by convict appellant. PW-9 also fond the wearing apparels of the victim to become stained with blood, when victim was going to Sonada Police out-

post on the same date. She graphically stated in her cross-examination that the house of victim was situated below the house of convict appellant, and

intervened by distance of 15 minutes on foot. PW-9 has her own house in the same upper direction lying to the above of the house of convict

appellant. She further clarified in her cross-examination that the house of convict appellant was situated in between her house and the house of victim

girl. Both the houses of victim and the house of convict/appellant, as well as the house of PW-9 are at the same upper direction of hill. The credibility

of this witness could not be shaken to be doubt during cross-examination. Though, PW-3 and PW-4 could not be believed, for they not being examined

by the I.O during investigation, but the evidence of PW-9 could be safely accepted, for the testimony of PW-9 not being impeached to doubt.

PW-12 medically examined the victim and found two injuries:

(I) Vertical tear at the posterior wall of the perineum of 1 inch.

(II) Tear of 1.5 inch long on the posterior wall of the Vagina.

Hymen was found not intact. There was profuse bleeding from vagina, when the doctor was medically examining the victim, as a result of which, the

victim had to be taken to O.T. for repairing her vaginal wounds.

According to doctor, the injury was caused due to forceful rape upon the minor girl. The medical examination report was proved in evidence, and

marked as Exibit-6. Though the injury sustained might be caused due to falling on the hard rocks or any sharp edged rocks, but the doctor eliminated

the possibility in his cross-examination by testifying that the wound, which the victim was found to have sustained inside her vagina, could not be

caused by any sharp edges.

The testimony of victim claiming to have been ravished by the convict appellant thus stood objectively established with the evidence of PW-12, who

was definite in his opinion that the vaginal injury sustained by the victim was due to forceful rape upon minor girl.

The complainant mother produced the birth certificate of her victim daughter together with discharge certificate of the hospital recording the date of

birth as 14.12.01, which was seized by the police during investigation by seizure list marked as Exhibit-3. Apart from the collection of the birth

certificate of the victim, she was put up for ossification test, and the ossification test report marked as Exhibit-7 revealed that the victim girl was above

six years old, but bellow seven years on the date of holding ossification test, done on 19.08.08. The evidence thus adduced in proof of age of victim,

revealed that victim was much below the age of 12 years, when she had to be a victim of sexual assault. The FSL report received in respect of

analysis of wearing apparels of both victim as well as convict appellant, and vaginal swab, transpired nothing favourable for the prosecution, but at the

same time the FSL report, however, could not outweigh the probative value of evidence, adduced by doctor, who held medical examination of the

victim soon after the incident and gave definite opinion of rape upon visualising the vaginal injuries, sustained by victim together with evidence of

bleeding from her private parts.

As has already discussed that the entire exercise of the appellant was to make the prosecution case doubtful showing the contradiction, discrepancy

contained in the evidence, but the point requiring decision by this court is whether a different appreciation of evidence, compared to the Trial Court,

could be made by the Appellate Court in the given context of this case, when there was no apparent inconsistency in due appreciation of evidence by

Trial Court. Undoubtedly, the Trial Court before whom evidence was given had the opportunity to form the opinion about the general tenor of

evidence given by the witnesses. The Appellate Court, which has no such benefit, will have to attach due weight to the appreciation of evidence by

the trial Court, if not improperly made making departure of the principles of law, and unless there are reasons weighty and formidable, and it would not

be proper to reject the evidence on the ground of minor variations or infirmities in the mater of trivial details.

Respondent State on this score rightly referred a decision delivered in the case of Vijay Alias Chinee vs. State of Madhya Pradesh reported in (2010)

8 SCC 191 submitting that even honest and truthful witnesses might differ in some details unrelated to the main incident, because power of

observation, retention and reproduction differ from individual to individual. Herein in this case the evidence of witnesses, referred above, appears to

have been lawfully believed and accepted ignoring the discrepancies in the evidence upon critically evaluating the evidence in its entirety. It is settled

proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. Thus, the undue

importance should not be attached to the omissions, contradictions, and discrepancies which would not go to the heart of the matter, and shake the

basic version of the prosecution witness.

Upon appreciating the evidence of witnesses, the Trial Court appears to have rightly disregarded the minor discrepancies on trivial matters, which did

not affect the very core of the prosecution case and accordingly should not be taken into consideration while reading the evidence as a whole.

The time contradiction, however, was grossly stressed to be capitalised, favourable to the purpose of appellant, by submitting that while PW-1 herself

spoke in her evidence that she produced the wearing apparels of the victim to police on 20.07.08 at about 10.00 A.M. for seizure of the same by

police, another seizure witness, PW-10 contradicting the version of PW-1, stated that the mother of the victim girl deposited the same to police on

20.07.08 at about 11.30 A.M. rendering the two versions to be irreconcilable and the benefit of which definitely would go in favour of accused

appellant.

Another time contradiction was seriously sought to be established by drawing our attention to the cross-examination of PW-9 transpiring to the effect

that on the relevant date at about 3.30 P.M., when she approached towards the house of accused appellant, she found PW-3 and PW-15, the

recording officer being officer-in-charge of Jorebunglow P.S. present in the house of accused appellant, and referring this part of evidence, learned

advocate for the appellant persuaded us to believe in exercise of his honest effort that had there not been any incident held prior to 3.00 P.M. on the

relevant date, the police would not have reached to the house of the accused appellant at 3.30 P.M., which was purposefully kept

concealed/suppressed, thereby paving the way to draw adverse presumption under Section 114(g) of the Evidence Act against the prosecution

evidence.

Here in this case the PW-1 is the mother, while PW-5 is the father of victim/PW-2. Admittedly PW-5 is a â€˜Coolieâ€™ (Porter) by profession. The

cross-examination was not even directed to reveal the educational background of the witnesses, if there be any, in order to establish the time

contradiction, grossly focused by the learned advocate for the appellant to make the prosecution case a doubtful episode. Witnesses examined so far

are from a different background being people of hill area having no education, and they are naturally may not be expected to give a precise account of

the incident with all perfection. In the absence of education, witnesses of this category sometimes they take care of time for their chronometric sense

(determination of time by looking at the sun). In a case of this nature, where witnesses are bereft of sufficient education, time contradiction would not

matter much. It is impossible to lay down with precision the chain of events, more particularly, when illiterate hill person villagers with no sense of time

are involved. If we consider this aspect, the contradiction of time, as shown by appellant, would be without any significance, as it does not go to the

very root of the prosecution case. In the cross-examination of the witnesses, no material inconsistency was surfaced, except some minor, which is but

natural.

The important fact is that omission to state handing over of one rupee note to victim by convict appellant in the FIR itself, what the witnesses like PW-

1, PW-2 and PW-3 stated in their respective version, though would likely to create contradiction in the prosecution story, but such contradiction is not

patent and vital one so as to give benefit to the accused appellant, as it would not reach to the very root of the matter of the prosecution case creating

a turbidity in the prosecution story.

Upon visualizing the entire evidence, adduced by the prosecution in its entirety with care and caution, it appears to us that the victim was ravished by

the accused appellant taking her to his house at any time during post lunch session on 19.7.2008, when the mother of the victim left the victim to the

house of PW-3 for taking part in a procession and returned home on the same day at about 4.00 P.M. in the afternoon.

The other witnesses examined so far are mostly related to the seizure of the items made in connection with this case, and they are in the nature of

hearsay evidence.

For the discussion made here-in-above, if we disbelieve the testimony of PW-3 and PW-4 for not being examined by I.O. during investigation, the

prosecution story will not be liable for rejection, as the testimony of PW-9 is there, which will definitely rescue the prosecution in holding the accused

appellant to be guilty with the aid of medical evidence of PW-12. There is independent version of victim, which is inherently probable and bereft of

any ambiguity, and it would inspire confidence.

Learned advocate for the appellant proceeded further to assail the testimony of doctor submitting that whatever injuries found in the vagina were all

inflicted on the posterior wall of the vagina, and in the absence of any evidence transpiring commission of any injury on the anterior vaginal wall, the

entire prosecution episode of having committed rape on the victim was a doubtful episode.

According to the appellant, perineum starts after vagina and extends up to anus. Referring the vertical tear at the posterior wall of the perineum of one

(1) inch, learned advocate of the appellant argued with all humility that in the absence of any vaginal injury on its anterior wall, there could not be any

rape, as alleged.

It is not alone the vertically tear found on the posterior wall of the perineum of one (1) inch, but there was further tearing of 1.5 inch long on the

posterior wall of the vagina. Therefore, it is not the perineum alone, but the vagina also got wounded, and the position of the perineum and vagina are

very critically located side by side. According to Medical Jurisprudence and Toxicology of â€œCoxâ€ 7th Edition, the vagina may be regarded as an

irregular shaped pocket with its anterior wall in six (6) centimeter in length. These walls are normally in opposition and the whole organ is markedly

distensible. Since a girl, below twelve (12) years of age, a tender aged girl, was subjected to rape, when her soft tissues involved in her private parts

are not sufficiently matured enough to give a strong and permanent shape. As in the absence of successful vaginal penetration, there could not be any

injury in the vagina, has been specifically emphasized by the doctor in her testimony (PW-12), so absence of injury found on the anterior vaginal wall

of victim, would not matter much, because the ferocity of the thrust into the vagina together with its momentum and direction are the striking features,

to be taken into account, while making consideration of injury found on posterior vaginal wall. So, absence of anterior vaginal wall injury would not

mean that there was no penetration. The argument on such core, as advanced by the defence, would not be an acceptable stand.

Learned advocate for the appellant disputing with the age of the victim submitted that the age of the victim could not be satisfactorily proved and thus

quoting the provision of the Section 35 of Evidence Act, submitted that evidence of PW-11, who being an ex-Pradhan of Gram Panchayat simply

proved the age of the victim by making statement alone before the court without producing the original register recording the date of birth of the

victim, and same would not ipso facto prove the age of victim girl in terms of the provisions of law.

There was no cross-examination to I.O., who could have possibly offered an explanation as to why the relevant register recording date of birth of the

victim could not be requisitioned at the relevant point of time, when PW-11 adduced evidence before the Trial in order to prove the age of the victim.

More so, the ossification test report for ascertaining the age of the victim was marked as exhibit without any objection from the side of defence. The

ossification test report thus can be safely taken to have been accepted without any resistance. That being the position, what was not established in the

cross-examination regarding non-production of the relevant register, would be a subject of less importance and no benefit as such would follow in

favour of the appellant.

Learned advocate for the appellant submitted that since the prosecution story was a concocted version and an afterthought production, the same even

got reflected in the conduct and behavior of the father of victim, who even after being informed that his daughter had been ravished and that too by

PW-3 on his way to home in the afternoon, the father PW-5 without immediately responding to such sensational information by visiting to the house of

PW-3, where the victim daughter could have been found, the father chose to return home straightaway and such conduct of the father was highly

improbable, being contrary to the ordinary course of conduct of human being, indicative of a fact being embellished, suitable to the purpose of

prosecution.

It is the categorical evidence of PW-5 (father) that on being reported about the incident by PW-3, he straightaway proceeded towards his house and

sent thereafter, immediately his wife/PW-1to the house of PW-3. PW-3 however, supporting the testimony of PW-5 candidly stated that she having

found PW-5 coming towards his house, at the relevant time, she called him requesting to send his wife immediately to her house.

The conduct of a person should not be visualized by adopting a straight jacket formula. Admittedly, the father of the victim is a porter by profession.

The father was called upon by PW-3, seeing him returning home at the relevant point of time. PW-5 on being requested by PW-3, sent his wife

immediately towards the house of PW-3, respecting to the request of PW-3. It is not the position that the father did not even give any regard to the

information, furnished by PW-3.

Subsequently, the father after sending his wife to the house of PW-3, left home for searching Bimal Pradhan, but he could not be found out. The

father performed his duty by taking his wounded daughter to the police station and ultimately to hospital for treatment. If such conduct of PW-5/father,

be viewed sequentially, no abnormality, contrary to the ordinary course of conduct of a human being could be directed. The argument thus, raised on

this issue by the appellant would be without any importance.

It was the case of the appellant that though in the F.I.R. it was mentioned that the complainant mother left her daughter to the house of Sankar

Tamang, being husband of PW-3, but he could not be examined in this case in furtherance of prosecution. Similarly, the guest, with whom PW-3 had

the occasion to talk standing in her kitchen at the relevant point of time, when the victim was taken away by the accused appellant to his rented house

for committing the crime, could not be examined. The defect of the investigation was thus sought to be capitalized by the appellant mentioning the

evidence, referred above.

Respondent/ State referring the decision delivered in the case of Viveswaran vs. State Rep. by S.D.M. reported in (2003) 6 SCC 7 3submitted that

defective investigation, if any, would not result in acquittal.

In the case referred above the identity of the appellant was disputed for not holding Test Identification Parade. The ratio decided in such case was

that acquittal would not follow as natural corollary for not holding T.I.P. in a case, where identity of the appellant was disputed, provided sufficient

convincing materials were there. It was propounded further that identification of accused either in Test Identification Parade, or in court, is not a sine

qua non in every case, if from the circumstances the guilt is otherwise established. It would be relevant here to quote Para-12 of such decision on this

score.

Para-12: â€œBefore we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to

be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost

sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required

to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The

evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in

view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the

only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective

investigation.â€

Thus, the important aspect to be kept in mind is that the discrepancies or irregularities in investigation would not necessarily lead to rejection of

prosecution case, when there were otherwise convincing materials unerringly pointing out the accusing finger towards the guilt of the appellant beyond

any reasonable doubt.

Argument was further raised by appellant submitting that though the victim made her statement under Section 164 Cr.P.C. before the learned

Magistrate, and the victim put her L.T.I. on such recorded statement, but neither thumb impression was attested by a person, nor the person proving

the L.T.I of victim was examined during trial, and as such the testimony of victim claiming to have made statement under Section 164 Cr.P.C. would

be construed to be the first disclosure regarding such incident before the court.

Thus, according to the appellant the statement of the victim girl recorded under Section 164 Cr.P.C. not being duly proved in evidence, no credence

could be attached on it.

The complainant/mother of the victim (PW-1) categorically and consistently stated in her version that the victim daughter made statement under

Section 164 Cr.P.C. before the learned Magistrate, and it was duly recorded. Victim/PW-2 herself claimed to have made statement under Section 164

Cr.P.C. Thus, both PW-1 and PW-2 were consistent in their respective version that the victim made statement before the learned Magistrate and it

was duly recorded.

The I.O./PW-17 in course of evidence, candidly stated that he got the statement of the victim and two other witnesses recorded under Section 164

Cr.P.C. and the statement of the victim was marked as Exhibit-10.

True it is that the statement of the victim under Section 164 Cr.P.C. could not be duly proved in evidence in accordance with the provisions of law, but

when there is specific evidence of witnesses claiming to have made statement under Section 164 Cr.P.C. by the victim, we should not adopt a hyper

technical approach to disbelieve the prosecution version altogether merely on the ground of valid proof of statement under Section 164 Cr.P.C. The

technicality thus, pointed out by the appellant, as such would not be a matter of serious consideration, as sought to be done by the appellant in this

case.

Submission was made by appellant focusing much stress that complaint and evidence of PW-1 being at complete variance with, the prosecution case

should be looked with doubt, and the sequence of events as narrated by the witnesses, highly improbablished the prosecution version.

Though, time and again contradictions, discrepancies and the deficiencies in the evidence were strongly pressed in to service by the learned advocate

for the appellant after pointing out the same to our attention in order to persuade us to believe that the prosecution story was a not believable version,

and the witnesses ought not be relied upon, but as has already discussed that there were clinching circumstances unerringly indicated the guilt of the

appellant beyond any reasonable doubt.

The act complained of on the part of the appellant got sufficiently connected with the vaginal injuries sustained by the victim, which was objectively

proved in evidence inspiring confidence to hold the accused guilty beyond any reasonable doubt, irrespective of non-disclosure of name of culprit by

victim to some other witnesses, examined in this case.

Though, respondent/State while supporting conviction, had taken shelter to a decision of the Apex Court, delivered in the case of State of Uttar

Pradesh vs. Pappu @ Yunus & anr. reported in (2005) 3 SCC 594, but the proposition of law as laid down there, would hardly have any relevance

over the facts and circumstances of the case, what was rightly contended by the learned advocate for the appellant, because it was decided therein

that though the victim was previously accustomed to sexual intercourse, but that would not be a determinative question, if the victim was subjected to

rape or not.

It was the case of the appellant that for want of sufficient corroboration, the prosecution case was highly improbable. Respondent/State countered the

submission of appellant referring a decision delivered in the case of State of Kerala vs. Kurissum Moottil Antony reported in (2007) 1 SCC 627,

wherein the ratio decided was that an accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case

spoken to by the victim strikes a judicial mind, as probable.

The plea about lack of corroboration in the given circumstances of the case has no substance, as the testimony of the victim received substantial

support not only from PW-9, but also from her parents, who had the occasion to know about the incident soon after occurrence. No case was made

out in cross examination that there was pre-existing hostility between complainant family and the accused appellant, supportive of false implication.

That being the position, the girl being victim of sexual assault, should not be viewed with doubt, disbelief and suspicion.

The prosecution case thus, having established, the respondent/State did his honest endeavour to apply the ratio decided in (2003) 3 SCC 175 delivered

in the case of Vimal Suresh Kamble vs. Chaluverapinake Apal S.P. & anr., wherein it was decided that the conviction on the basis of sole testimony

of the prosecutrix was permissible provided the evidence of the prosecutrix inspires confidence and appears to be natural and truthful.

For the discussion made above, we are of the considered view that the Trial Court after due consideration of evidence held the accused appellant

guilty of the offence under Section 376 (2) (f) I.P.C. after duly appreciating the evidence, adduced in this case, without making any departure of

established principle of law. The conviction would thus, go unaltered.

Learned advocate for the appellant strenuously argued that the sentence awarded in this case was grossly inappropriate than the required, as already

prescribed. According to appellant, the conduct of the accused, the state and age of the sexually assaulted victim, and the gravity of the criminal act

could not be appropriately evaluated, while sentencing the accused appellant to suffer rigorous imprisonment for life and to pay fine of Rs.5000/-

(rupees five thousand), in default to suffer one (1) year simple imprisonment in the given set of facts.

Learned advocate for the State/respondent submitted with much stress that the offence under Section 376 (2) (f) I.P.C. having being specifically

established and that too upon a minor of below twelve (12) years of age, imprisonment for life could be awarded in order to give effect to the

legislative intendment.

The socio-economic status, religion, race, caste or creed of the accused or victim are irrelevant consideration in sentencing policy. Protection of

society and deterring the criminal are the avowed objects of law, and that are required to be achieved by imposing an appropriate sentence. Sexual

violence committed upon minor victim in the instant case not only left a physical injury, but more indelibly a scar on the most cherished possession of a

women. It degraded the victim for she being helpless and innocent minor child. The traumatic effect caused upon the victim, while considering the

gravity of the offence, complained of critically, needs to be looked into, while sentencing the culprit for his guilt having been proved.

The sentencing court as such is, therefore, expected to consider all relevant facts and circumstances bearing on the question of adequacy and

stringency of sentence, and proceed to impose a sentence commensurate with the gravity of the offence. The sentencing court is, therefore, obliged to

hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender age, as in the instant case, and

respond by imposition of proper sentence recording proper reasons, after making adherence to parameters of sentencing policy. Interestingly, there

are no extenuating or mitigating circumstances available on the record, which could justify imposition of any sentence less than the prescribed

minimum on the appellant.

The proviso under Section 376 (2) (f) I.P.C. lays down that the normal sentence in a case of rape, committed on a child below twelve (12) years of

age, is not less than 10 years of rigorous imprisonment.

Thus, it is clear that a minimum sentence of ten (10) years has been statutorily prescribed and upon considering attendant circumstances, the

imprisonment for life in a given case may be awarded. The Trial Court while sentencing the accused appellant to rigorous imprisonment for life was

completely silent about the attendant circumstances, justifying imposition of stringent sentence, which may extend to life. Recording of sufficient

satisfaction, supported by reasons in respect of attending circumstances, by the trial Court, in our view, is a must, before calling upon application of

stringent sentence, than the minimum sentence statutorily prescribed.

In the absence of strong and sufficient attending circumstances being satisfactorily established, awarding a sentence of rigorous imprisonment for life

together with fine, would be contrary to the sanction of law, in exercise of authority by Trial Court.

Reliance may be placed on a decision reported in (2006) 3 SCC 771 delivered in the case of Dinesh @ Buddha v. State of Rajasthan as referred by

the respondent/State.

Argument thus raised by appellant being restricted to modification of the sentence, awarded against the appellant, by scaling down to ten years,

minimum sentence statutorily prescribed in this case, in our considered view of this case, needs strong consideration.

It was submitted by the appellant that the convict/appellant had already suffered imprisonment of more than 11 years in the mean time. The entire trial

was conducted taking the accused in custody since 20.07.2008. There was nothing shown regarding deposition of fine as already ordered by the

Sentencing Court.

Upon consideration of the entire facts and circumstances of this case, we are of the considered view that sentence of life imprisonment, as already

awarded in this case by the Sentencing Court, may be modified, and reduced to ten years with fine, as already imposed, maintaining the conviction.

Accordingly, the sentence of life is reduced to ten years with a fine of Rs.5000/- (five thousand) in default to suffer simple imprisonment for one year.

Department is directed to send a copy of this order to concerned Superintendent of Correctional Home, where the convict/appellant is detained for

taking steps, provided the sentence, as modified, is served out.

Department is further directed to send a copy of this judgment along with L.C.R. (Lower Court Record) to the concerned Trial Court forthwith by

Special Messenger of this court, the cost of which will be borne by appellant.

The appeal thus stands disposed of.

Urgent certified copy of this order and judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with the

all necessary formalities.

I agree.