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Uday Narayan Jana Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: Aug. 7, 2006

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 156(3), 164, 313, 377, 378
Evidence Act, 1872 â€" Section 114A
Penal Code, 1860 (IPC) â€" Section 34, 363, 365, 366, 375

Citation: (2007) 1 CHN 258

Hon'ble Judges: Sankar Prasad Mitra, J; Amit Talukdar, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Amit Talukdar, J.

INTRODUCTION

1. The victim girl P.W. 2 who was a minor resided at Atilaguri with her parents. Misfortune stuck her on the fateful day when she went out of her

house. P.W. 2 in the evening of 2.6.1985 went to collect the dues from the various shops towards the supply of milk and curd supplied by her

father P.W. 1 and also for doing some marketing. Since her father P.W. 1 was unwell she was entrusted with the said job, on that particular day

and her mother (not examined) was also away from home.

BEGINNING OF HER ORDEAL

2. While she was proceeding towards the market after completing her, collection, she came across the appellant Mantu (Criminal Appeal No.

283/1988). She was given a betel by him and after consuming the same, she felt uneasy and was not in a position to talk. She was taken in a

risckshaw and thereafter by a bus to Digha.

3. AT DIGHA : Where she was kept in a room by appellant Mantu. Appellant Mantu gave her a tablet when she had asked for water. For four

days he stayed with P.W. 2 and violated her and bit her breast. After he left accused Bapi and appellant Uday (in Criminal Appeal No. 2S0/1989)

also forcibly ravished her for two days continuously. Thereafter, appellant Mantu again came and gave some tablets to her. It is after she was

administered with such tablets she lost her power of speech.

4. AT CONTAI : Both appellants along with accused Bapi on the false plea of taking her home, boarded a bus and came to Contai. She was

lodged in a house situated before a Radhakrishna Temple. She was kept in a room of the said house. She remembered that the house belonged to

a person having some distinguishable features.

5. TOWARDS CALCUTTA : From hell to hell. She was put on a taxi and both the appellants along with accused Bapi brought her to Calcutta

and was taken in a small room with a ''dirty bed''. Appellant Mantu stayed in that room for 4/5 days and raped her and when she opposed she was

assaulted. Thereafter, he kept her in the hands of accused Bapi and appellant Uday where at least 4/5 persons used to visit the room in the night in

quick succession of each other. Before each person was allowed entry she was given a tablet by accused Bapi and appellant Uday. She stayed

there for about 1 and 1/2 years under confinement. Both the appellants including accused Bapi left after some days. After about 1 and 1/2 a years

accused Bapi and appellant Uday came and she was transferred to the house of one ""Hindusthani person"" where she was engaged as a maid

servant. She worked there for 2/3 months.

LONG WALK TO FREEDOM

6. One day discovering that the gate of the house was open she made good her escape. She trudged on foot and came to a railway station where

she boarded a train and ultimately reached the terminus of the said train, which on enquiry she come to know was Krishnanagore Station.

SHELTER : A GOOD SAMARITAN

7. After proceeding for a certain distance she took refuge under a banian tree and was weeping. An elderly person come to her rescue and took

her to his house where she was entrusted with the job of doing ""Thakurseva"". Here she was told by the said elderly person that he has given a

letter to her father (P.W. 1), she resided there for 2/3 months.

HOME AT LAST

8. One night while she was weeping an old woman came to her and wanted to know whether she intended to go back to her parents. She

followed her and boarded a train and reached a place after crossing a bridge from where she took the Digha bound bus and reached at Contai.

INVESTIGATION

9. P.W. 1 the father of the victim girl (P.W. 2) after finding that she did not return on the fateful day (2.6.1985) he searched for her and after a few

days lodged the General Diary (Ext. 4) on 14.6.1985 which was proved by P.W. 8. On 21.6.1985 on the basis of the complaint (Ext. 2) lodged

by the P.W. 1, P.W. 8 registered Contai P.S. Case No. 8. initially the case was registered against the appellant Mantu and others however, after

completion of investigation P.W. 9 submitted chargesheet against both the appellants. It is pertinent to state that P.W. 1 also took one petition

(Ext. 1) before the learned SD JM, Contai on 19.6.1985 alleging commission of offence punishable under Sections 363, 365, 366, 376, IPC

against both the appellants and one Himangshu (not sent up) for causing investigation into the allegations made therein by treating it as an FIR u/s

156(3), Cr.PC. P.W. 12 also partly investigated the case and arrested the appellant Uday on 8.7.1985 and the appellant Mantu on 27.1.1986. He

further deposed on 25.1.1987. P.W. 1 came to the police station along with P.W. 2 and both of them was asked to make their statement. He

produced P.W. 2 before the Contai Court on 26.1.1987 for her examination and recording of her statement.

AT THE TRIAL

10. CHARGE : Pursuant to the chargesheet submitted by P.W. 9 the appellants were placed in Sessions Trial No. S.T. XV Dec. 1987 before the

learned Additional Sessions Judge, Midnapore:

That you in furtherance of common of you both or about 2.6.85 corresponding to 19th Jaistha, 1392 B.S. and thereafter on few dates at Digha,

P.S. Digha committed gang rape on Kumari Gouri Barik and thereby committed an offence punishable u/s 376(2)(g)/34 of the Indian Penal Code

and within the cognizance of the Court of Sessions.

That you on or about 2.6.85 corresponding to 19th Jaistha, 1392 B.S. at Atilaguri, P.S. Contai abducted a woman to wit Kumari Gouri Barik with

intent that she may be compelled to marry against her will or in order that the said woman Kumari Gouri Barik may be forced to illicit intercourse

and thereby committed an offence punishable u/s 366 of the Indian Penal Code and within the cognizance of the Court of Sessions.

11. EVIDENCE : In order to substantiate its case the prosecution examined. P.W. 1 the father of the victim girl P.W. 2. P.W. 1 corroborates his

daughter P.W. 2 with regard to the absence of his wife on the date of occurrence and that he was ill as such. P.W. 2 went out of the house for

making the collection on his behalf. As she did not return home he made entreaties in different places for his daughter and made a General Diary

and subsequently lodged the complaint before the police. P.W. 2"s evidence have been seen by us earlier in details. Thereafter, we have the

evidence of P.W. 3 who came to know from P.W. 1 that his daughter was taken away by appellant Mantu and he accordingly advised him to take

the assistance of the panchayat. P.W. 4 was a Pradhan of Alankapur where appellant Mantu resided. He was approached by P.W. 1 for tracing

out the victim. P.W. 4 was informed by P.W. 1 about missing of P.W. 2 and her kidnap by Mantu. P.W. 5 also a co-villager of appellant Mantu

was similarly approached by P.W. 1 and he made a search for tracing the victim. P.Ws. 6 and 7 turned hostile.

POLICE WITNESSES

12. P.W. 8 recorded the formal FIR (Ext. 2) and proved the G.D.E. (Ext. 4) P.W. 9 submitted the chargesheet and P.W. 12 partly conducted the

investigation and arrested both the appellants.

MEDICAL BOARD

13. P.W. 10 was the Sub-Divisional Medical Officer, Contai and the Superintendent of the Sub-Divisional Hospital. He was Chairman of the

Medical Board consisting of Dr. P.N. Majhi, Gynecologist and P.W. 11 Radiologist of the same hospital. P.W. 10 on examining the victim P.W. 2

on 28.1.1987, found ""the body built of the girl was average. On breasts I found one small old scar mark. On the wreota both breasts suggesting

teeth bite. But no pregnancy charges on the breast was found at the time of examination. No foreign hair was found on pubis. On examination of

vaginahymen absent, orifice admits two fingers clearly suggesting habituated to sexual intercourse. Infection was present.

14. P.W. 11 another member of the Board opined, after he radiologically examined the victim P.W. 2 ""In my opinion the victim girl between 15 to

16 years of age on the date of examination consisting geography, distribution race and shape."" However the Gynecologist Dr. P.N. Majhi was not

examined.

CONCLUSION OF TRIAL

15. CONVICTION: Appellant Mantu was found guilty of the charge of Section 366 of the Indian Penal Code. Both the appellants Mantu and

Uday were found guilty of the charge of Section 376(2)(g)/34, IPC.

16. SENTENCE : Appellant Mantu and appellant Uday each was sentenced to suffer rigorous imprisonment for ten years and also to pay a fine of

Rs. 500/- in default to suffer further rigorous imprisonment for two months in respect of charge of Section 376(2)(g)/34 of the IPC.

17. Appellant Mantu was sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs. 500/- in default to suffer further

imprisonment for two months in respect of charge of Section 366, IPC.

APPEAL

18. C.R.A. No. 280/1988 and C.R.A. No. 283/1988 : Assailing the impugned conviction and sentence recorded by the learned Trial Court on

29.6.88 both the above appellants preferred two separate appeals.

19. Since those arose out of a common judgment, the same are being disposed of by this common judgment being heard analogously.

AT THE BAR

20. Shri Sekhar Kumar Bose with Shri Jaymalya Bagchi for appellant Uday he took us through the evidence and submitted that the very conduct

of the victim P.W. 2 was highly improbable. According to Shri Bose while she was taken to Digha and thereform to Contai and to Calcutta she did

not raise any alarm which was absolutely a suspicious circumstance and the Court should not believe her evidence in this respect. He referred to

that part of the evidence of P.W. 2 showing her stay in the house at Calcutta for 1 and 54 years from where she ultimately escaped; this evidence

was absolutely unbelievable according to Shri Bose as it did not stand to reason. Shri Bose sought to impress upon us that from the time she went

missing and till she returned home the period did not tally. According to Shri Bose her statement (Ext. 3), the General Diary lodged by her father

P.W. 1 (Ext-4) and the complaint (Ext. 2) materially differred from each other and should not be given any credence.

21. Relying on the evidence of P.Ws. 1 and 2 Shri Bose submitted that the appellant Uday was not initially suspected but he was later on

implicated and the chance of false implication could not be ruled out. He wandered although P.W. 2 gave the description of the owner of the house

at Contai and the situation of the same near the Radhakrishna Temple no investigation was carried out to locate the said place or was there any

workout with regard to the information given by her as to her residence in Krishnanagore. He prayed for setting aside the order of conviction

against appellant Uday as the evidence did not go to support the charge.

22. Shri Sailendu Rakshit for appellant Mantu referred to the charge framed against him and submitted that it was vague and the place of

occurrence was not clearly mentioned. Shri Rakshit was of the view that this has prejudiced the appellant Mantu in the trial. He was of the further

view that as the identity of the appellant Mantu was not properly established, the prosecution case stood on a very weak ground.

23. PER CONTRA: Shri Mallick relied on a written notes of argument. He would submit that if the evidence of P.W. 2 who was a minor, is

accepted then the prosecution case stands proved and nothing remains in the appeal. Shri Mallick referred to certain decisions in support of his

argument.

24. Shri H.K. De, learned Senior Advocate for the de facto complainant filed written notes of argument and desired to make his submissions.

CROSS ROADS

25. Shri Bose, learned Senior Counsel took preliminary objection to the appearance of Shri De for the dc facto complainant. According to Shri

Bose in any criminal appeal the de facto complainant has no role to play and he submitted that Shri De should be injuncted.

STATUS OF THE DE FACTO

26. Since this question crops up in several matters we decide to decide the said question threadbare as in oxir view this is of some importance.

27. Before proceeding to deal with the merit of the appeal we find that it is felt necessity to address ourselves on this point.

TO HEAR OR NOT TO HEAR

28. Is it a matter of courtesy that we hear the de facto complainant in criminal appeals? Or we hear him as a matter of right?

QED

29. It is neither.

REASONING

30. On this preliminary point we have thoroughly heard the learned Counsels for the parties as we have decided to look into the law on this

question and decide it as a preliminary point. We have addressed our attention to the said question in a very detailed fashion. To sanctify his

appearance Shri De for the dc facto complainant has taken refuge to the decision of a learned Single Judge of this Court in Kanchan Kumar Saha

v. State and Anr. 2002 CCR 1005 and submitted that the de facto complainant can very well be added as a party and there is no difficulty in this

regard. He also referred to the decision of J.K. International v. State 2001 SCC 547 and submitted that during the hearing the de facto

complainant can be accommodated. Shri De further submitted that it is on the basis of the complaint of his client the entire case has started as such

unless he is heard, he will suffer serious prejudice.

31. Against this Shri Bose submitted that he has absolutely no right of audience before this Court, and no legal basis is there which would permit

him to appear. Shri Bose referred to the decisions of In re : Rakhan Ojha @ Rakhal Chandra Ojha 1987 (1) CHN 422 and Haradhan Sen and

Nemai Ghatwal Vs. State, and distinguished J.K. International v. State (supra) which related to a case in connection with the revisional application

and was not applicable in an appeal.

32. For this purpose we have to take a very close look to Chapter XXIX of the Code of Criminal Procedure. In Section 385 of the New Code it

lays down the procedure for hearing appeal, which has not been dismissed summarily. We find from the said provision that the Appellate Court

when it does not dismiss the appeal summarily, ""shall cause notice of the time and place at which such appeal will be heard to be given-

(i) to the appellant or his pleader;

(ii) to such officer as the State Government may appoint in his behalf;

(iii) it'' the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant,

(iv) if the appeal is u/s 377 or Section 378., to the accused, and shall also furnish such officer, complainant and. accused with a copy of the

grounds of appeal.

(2) * * * *

(3) * * * *

33. As such, from the perception of the provisions of Section 385 of the Code of Criminal Procedure it would appear that there has been a

specific provision in Clause (iii) of Sub-section (1) of Section 385 that in the event an appeal is preferred from a judgment and order of conviction

in connection with a case which is ""constituted upon complaint to the complainant"". Whereas it would be of interest to note that in the Clauses (i)

and (ii) i.e. in any other appeal notice need be given to the appellant or his pleader or to such officer as the State Government may appoint meaning

thereby the State itself through the Public Prosecutor.

34. In other words, in the New Code there has been a specific thrust for issuance of notice of an appeal before it is finally disposed of by the High

Court upon the complainant where the case was instituted on the basis of a complaint. By necessary implication Clause (i) and Clause (ii) would

manifest that the same need not be complied with if the case is not instituted on the basis of a complaint. It would be of some interest if we shift our

attention to the part materia position of Section 385 in the old Code of 1898, which corresponds with Sections 422 and 423. Section 422 of the

old Code in its Chapter XXXI reads as follows:

422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such

officer as the local Government may appoint in this behalf, of the time and place at such appeal will be held, and shall, on the application of such

officer, furnish him with a copy of the grounds of appeal; and, in cases of appeal Section 417, the Appellate Court shall cause a like notice to be

given to the accused.

35. The provision of Clause (iii) of Sub-section (1) of Section 385 in the new Code, which was absent in the old Code makes all the difference.

36. The instant appeal arises out of the judgment and order recorded by the learned Trial Court, which was instituted on the basis of a police

report. Necessarily the question as to whether the complainant has any right to be heard assumes some importance. A Division Bench of our Court

in Behari Majhi Vs. Hari Majhi, , where John Lort-Williams and Satyendra Chandra Mallick, ICS, JJ. has held while dealing with the provisions of

Section 423 of the Code of Criminal Procedure of 1898 corresponding to Section 386 of the new Code laying down powers of the Appellate

Court in disposing of the appeal held that the private complainant has no right to be heard in a criminal appeal. Similarly the insertion of Clause (iii)

in Sub-section (1) of Section 385 of the new Code by necessary implication repeals the locus standi of a complainant in a appeal arising out of a

case instituted on the basis of a police report and Clause (iii) of Sub-section (1) of Section 385 of the new Code will have no manner of

application in such cases. The Code is quite clear in this aspect.

37. In the decision of the Supreme Court in Shiv Kumar Vs. Hukam Chand and Another, , the role of a private Counsel to conduct a prosecution

case has been very clearly elaborated. From the ratio of the said decision we can find that the role of a private Counsel is limited and he has to act

under the direction of the Public Prosecutor during the trial. Explaining the impact of Sub-section (2) of Section 301 the Supreme Court in the said

decision held:

The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a Counsel engaged by any private party. It limits his

role to act in the Court during such prosecution ""under the directions of the Public Prosecutor"". The only other liberty which he cat'' possibly

exercise is not to submit written arguments after the closure of evidence in the trial, but that too can be done only if the Court permits him to do so.

38. The Division Bench decision of In re : Rakhan Ojha @ Rakhal Chandra Ojha clearly lays down the proposition ""in other words Lawyer

engaged by a private person has no right of audience in a case which is in charge of a Public Prosecutor"". That way the said Division Bench

decision In re : Haradhan Sen and Nemai Ghatwal Vs. State, , in our view fructifies the position so far as the question of appearance of the de

facto complainant Lawyer been in an appeal is concerned. However, the Division Bench decision of Haradhan Sen and Nemai Ghatwal Vs. State,

, to which one of us (Sankar Prosad Mitra, J.) was party would be more appropriate and have direct bearing on the point in issue.

39. Taking a wholesome view on the basis of position which has been seen by us, the argument of Shri De in our view would have little persuasive

effect on the question of appearance in an appeal by the de facto complainant through his Lawyer. The decision of the learned Single Judge in

Kanchan Kumar Saha v. State 2002 CCR 1005 , cannot be said to a good law in view of the ratio of the Supreme Court decision in Shiv Kumar

v. Hukam Chand and Anr. (supra) as also the Division Bench decision in Haradhan Sen v. State with Nemai Ghatwal v. State (supra). Accordingly

the decision of the learned Single Judge in Kanchan Kumar Saha v. State and Anr. (supra) is overruled.

40. A Division Bench of our Court in Nanda Prathihar v. State 1985 (1) CHN 388 , held that been when a compensation is awarded the de facto

complainant need not be heard distinguishing thereby the earlier Division Bench decision of Bharasa Now Vs. Sukhdeo and Others, .

41. In all, from the discussion held hereinabove it would be clear that the de facto complainant has no inherent right of audience before the Court of

Appeal as a matter of course. However, he can only supplement the argument made on behalf of the State under its augis. Briefly speaking the de

facto complainant cannot be admitted in a recognized capacity in an appeal.

42. Keeping in mind the aforesaid legal position we cannot hear Shri De on the basis of any statutory right of hearing. He has no independent right

of audience before the Court in course of hearing of an appeal on behalf of the complainant in a case, which is not instituted on the basis of a

complaint.

DISCUSSION : ON THE MERIT

43. Now, coming back to the merit of the case we take up the submissions of Shri Bose and Shri Rakshit collectively. It is found from the evidence

of P.W. 2 that the foundation of the prosecution case has been laid before the Court on the basis of her evidence which has been supplemented

and rather substantiated by the evidence of her father P.W. 1 the other attending evidence of P.Ws. 3, 4, 5 - P.Ws. 6 and 7 turned hostile for

reasons best known to them. And the evidence of the Medical Board (P.Ws. 10 and 11).

44. The agony of Shri Bose that P.W. 2 the victim did not raise any alarm in while transit after her kidnap, at the first blush may be of some appeal

but if we take a deeper look than we would find that firstly she was drugged and her faculty obviously was impaired as she suffered ""uneasiness

and ""could not talk"" she also lost her speech after being administered with some tablets before she was taken to Contai. This explains the position.

So far as her transfer to Calcutta, we find that it was in the ""last part of the night"" she was taken by a taxi and when she was weeping the accused

persons threatened her. As such the absence of raising of any alarm in transit as shown by Shri Bose, in our view, would have no effect on her

evidence.

45. Shri Basu has submitted that the version of P.W. 2 in her statement (Ext. 3) before the learned Magistrate and those by P.W. 1 her father in

the GDE (Ext. 4) and the FIR (Ext. 2) were at variance. We have carefully looked into the same and feel that it will not have ultimate bearing on

the strength of the prosecution case. We have to appreciate the agony of P.W. 1 who suffered the trauma of losing his daughter P.W. 2 and ran

pillar to post (read approaching P.Ws. 3, 4, 5, 6 and 7). Obviously there may be some deviation in his version which in our view cannot affect the

strength of the prosecution.

46. Mr. Bose have submitted on the strength of the decision of Deelip Singh v. State of Bihar (supra) that as P.W. 2 has wilfully participated in the

act the rigours of Section 375, IPC could not apply. In our view the said argument does not in any manner impress us. As we find from the

evidence that she was violated by the accused against her will. She is specific on this point ""the accused persons committed rape on me against my

will and consent"". In Calcutta while she was ravished by the appellant Mantu she opposed but was assaulted by him. In our most humble new the

evidence of P.W. 2 on this point is very clear and we find that the entire stream of events starting from her enticement to her violation, all was done

against her consent. The ratio of Deelip Kumar Singh''s decision cannot be applicable as also the factual matrix of the said case was quite dissimilar

with the present case.

47. Shri Bose had further submitted that the version of the prosecutrix (P.W. 2) was improbable on the point of time mentioned by her saying, her

stay in Calcutta and the date of return to her home. We have taken note of the same. The date of incident related to 2.6.1985 the father of the

victim (P.W. 1) approached P.Ws. 3, 4, 5, 6 and 7 after her disappearance, and conducted search for tracing out P.W. 2. Thereafter, he lodged a

G.D. entry (Ext. 4) on 14.6.1985. Then on 21.6.1985 finally the FIR (Ext. 2) was filed by him showing the appellant Mantu as an accused. The

evidence of P.W. 12 is of some importance on this point. P.W.12 from his evidence we find that on 25.1.1987 P.W. 1 came to the police station

along with P.W. 2 where their statement; was recorded. On 26.1.1987 she was produced before the Court for recording her statement u/s 164,

Cr.PC.

48. Before proceeding any further we feel this part of the submission of Shri Bose cannot have any impact even if the stretch of time as mentioned

by P.W. 2 does not fit exactly with the narration of events we have to appreciate the same from the point of view of a teen aged girl who suffered

the ignominy of being kidnapped and thereafter her flesh being savoured by a pack of wolves (read the accused and the persons ""4/5 of the man in

the room in the night"" at Calcutta.) Accordingly this argument of Shri Bose has no manner of any appeal before us. We also do not even for a

moment find any reason to consider the argument of Shri Bose that the appellant Uday was implicated falsely as his name did not transpire in the

first instance. This submission of Bose cannot have any value. It is true that the FIR (Ext. 2) was lodged against the appellant Mantu only. The FIR

was lodged on 21.6.1985 as seen by us earlier. But in the petition u/s 156(3) Cr.PC on 19.6.1985 the name of appellant Uday very much stands.

Clear description of the role of Uday have been given by P.W. 2 in her evidence as such the argument of Shri Bose carries no weight and has to

be discarded.

49. Shri Rakshit has argued that the charge was defective as the place of occurrence was not pointed out clearly in the formal charge. We feel the

said point has to be rejected out right. The appellant Mantu had effectively participated in the trial and cross-examined the witnesses and answered

the questions put to him in course of his examination u/s 313, Cr.PC. As such it can be taken that he was aware of the charge and as he had

adopted a proper defence there was no question of any prejudice on this point. Question of identity raised by Shri Rakshit similarly has no effect as

he was specifically named from the beginning and identified by the victim P.W. 2 all through. Even the attending evidence of P.Ws. 4, 5, 6, 7

establish the identity of this appellant and there cannot be any confusion in this regard.

50. We find the submissions made at the Bar to retrieve the appellants from the conviction does not appeal to us. On the contrary we find

substance in the submission of the State and the various decisions cited by him are quite applicable which we would see later.

FINDING

51. Apart from any other aspect of the matter we cannot lose side of the fact that the victim P.W. 2 at the time of his examination by the Medical

Board was 15 to 16 years of age. The opinion of the Medical Board clearly shows that she was a minor at the time of the incident. Leaving aside

the question of her being a minor, we find that as she was violated against her will, which would be very clear from the evidence. The evidence with

regard to the question of gang rape hearing being established, the rigors of Section 114A of the Evidence Act would at once apply with full force.

This part of the evidence in fact, covers great portion of the prosecution leaving little scope for the defence.

52. Simply the evidence of victim in a case of Section 376, IPC who is not an accomplice, can be acted upon without any corroboration when it is

found the same inspires confidence and true. See State of M.P. Vs. Dayal Sahu, .

53. The decision of State of H.P. v. Shree Kant Shekari 2005 SCC 327 , placed on behalf of the State is fully applicable in the facts and

circumstances of the present case as we are of the considered view the evidence of P.W. 2 inspires confidence in the mind of the Court and there

is no scope for coming to any other conclusion other than the one reached by the learned Trial Court. So also the Division Bench decision of Barun

Duley and Anr. v. State of W.B. 2004 (1) CLJ 20 , to which one of us (Arnit Talukdar, J.) was a party is fully applicable in the facts and

circumstances of the present case. The evidence of the victim P.W. 2 on the whole fits in with the other part of the evidence particularly, the

opinion of the Medical Board, the Court cannot disregard her evidence. The decision of the Supreme Court cited on behalf of the State in Vishnu

alias Undrya v. State of Maharashtra 2006 (1) SCC 217 , State of Punjab v. Ramdev Singh 2004 SCC 307 , Bhupinder Sharma v. State of

Himachal Pradesh 2004 SCC 31 , are absolutely applicable in the facts and circumstances of the present case.

54. That apart we find the other attending witnesses and the opinion of the Medical Board fully support the evidence of the victim P.W. 2. It would

be of great necessity to advert to the relevant portion of the Medical Board''s opinion ""on examination I found the body built of the girl was

average. On breasts I found one small old scar mark. On the wreota both breasts suggesting teach bite. But no pregnancy charges on the breast

was found at the time of examination. No foreign hair was found on pubis. On examination of vagina-hymen absent, orifice admits two fingers

clearly suggesting habituated to sexual intercourse. Infection was present.

55. The opinion of the Medical Board brought before us by P.W. 10 shows at the first instance-the victim girl P.W. 2 was ravished, at the second

instance it was found that she was infected and there was an old scar mark on her breast. All these findings of the Medical Board has been amply

corroborated by the victim girl herself. She has specifically stated that appellant Mantu ""bit my breasts"" and that she was continuously violated

since her kidnap till such time she could free herself from the house where she was kept by the appellants and the accused Bapi. We further found

from her evidence that she was given a tablet by accused Bapi and the appellant Uday while she had to entertain several people at night in the

room where she was kept by appellant Mantu. We find from her evidence that even at the initial stage when she was violated after being

kidnapped by Mantu she was also administered tablets. The finding of the Medical Board that she was ""habituated to sexual intercourse"" and she

suffered from infection just suggests the mass scale violation which was perpetrated upon her.

56. The Medical Board fully supports the case of the victim girl in its totality. Sustained cross-examination by the defence could neither shake any

of its members from their deposition nor the victim from her stand.

JUST JUSTICE OF KIDNAP:

57. After all the evidence of P.W. 2 amply proves the elements of her being kidnapped by the appellant Mantu on the date of incident. We are

satisfied that the prosecution has been successful in bringing home the said charge against appellant Mantu that he kidnapped P.W. 2 to Digha

while she was on her way to the market after giving her a betal.

OF GANG RAPE:

58. Evidence of P.W. 2 brings out the elements of the above charge. We have seen how at Digha and then at Calcutta she was plundered

collectively by the accused. Her devastating plight has been testified by the Medical Board.

JUST DESERT:

57. The investigating agencies could have done well if it had directed its investigation to placate the house at Contai and the house at Krishnagar

and work out on the lead given by P.W. 2 regarding the old man and the place of confinement in Calcutta. But it is just a lapse. The Court cannot

brood over it and find fault. The situation has to be retrieved.

JUST DECISION:

60. Even if we weed out from consideration the narration of P.W. 2 about her journey to Krishnagar and returning home guided by the unknown

lady, we cannot brush aside her take told in Digha, Contai and Calcutta. It is too difficult to disbelieve.

CONCLUSION

61. In all, we find on the basis of our considered analysis of the evidence and other materials on record that the prosecution has been successful in

bringing home both the charges against the appellant very successfully. Accordingly, having found no merit we dismiss both the appeals.

DIRECTIONS

62. Appeals dismissed. The appellants who are on bail are directed to surrender to their bail bond which stands cancelled.

Sankar Prasad Mitra, J.

63. I agree.