

**HIGH COURT OF TRIPURA
AGARTALA**

Crl. A (J) 10 of 2014

Shri Bimal Acharjee,
S/o Late Dharendra Acharjee of
Durganagar, P.S. Khowai,
District: West Tripura.

----Appellant(s)

Versus

State of Tripura

----Respondent(s)

For Appellant(s)	:	Mr. S Sarkar, Adv.
For Respondent(s)	:	Mr. A Roy Barman, Addl. PP.
Date of hearing	:	21.06.2018.
Date of pronouncement	:	
Whether fit for reporting	:	YES/NO

HON'BLE MR. JUSTICE ARINDAM LODH

Judgment

Unsuccessful appellant has approached this Court against the judgment dated 29.01.2014 passed by the leaned Addl. Sessions Judge, Khowai, West Tripura in connection with Sessions Trial No. 02(WT/K) of 2011 thereby convicting the appellant to suffer RI for seven years and to pay a fine of Rs.3,000/-, i.d. to suffer SI for three months for commission of offence punishable under Section 376(1) of IPC and to suffer RI for one year and to pay fine of Rs.1,000/-, i.d. to suffer SI for one month for commission of offence punishable under Section 354 IPC. Both the sentences were ordered to run concurrently. Further, the appellant was sentenced to suffer RI for six months and to pay a fine of Rs.500/- i.d. to suffer SI for 15 days for

commission of offence punishable under Section 451 of IPC, which shall run consecutively to the aforesaid sentences.

2. Gravamen of the prosecution case is that on 25th July, 2009, one Smt. Purnima Ghosh lodged a written complaint/ejahaar stating inter alia, that on 23rd July, 2009, she being a group-D employee under the Khowai Block was engaged in her duty for counting of votes of panchayet election. During the relevant period, she was a tenant in the house of one Smt. Puspa Ghosh at Office Tilla. On that date, before she left her house she requested the landlady to take care of her child and sleep with her children if she failed to return from duty at night. Accordingly, the landlady spent the night with the children, including the prosecutrix.

3. On 24.07.2009 at 6 a.m. the complainant returned home and her daughter-prosecutrix (name withheld) reported that at dead of night accused Bimal Acharjee banged the door and the landlady who was sleeping with the prosecutrix opened the door and allowed the accused to enter in to the room since he was known to her. Then accused Bimal Acharjee requested the landlady to go to her own hut and as per the instructions of the mother of the prosecutrix, the said accused would sleep with her daughter and then the landlady returned to her own hut and Bimal locked the door.

4. The accused first put off the light and on protest the accused again put the lights on. Thereafter, the accused Bimal Acharjee forcibly molested her daughter by kissing and touching her breasts and raped her and thereafter he put something fluid material from his penis in a sack. After committing the incident the accused Bimal Acharjee talked with somebody on high volume through his mobile and then he left. Again the land lady entered into the house and then the prosecutrix narrated the entire incident to the landlady. Thereafter, the landlady stayed there for the night and at dawn she went to her own hut.

5. When the mother of the prosecutrix came back to her hut, the land lady narrated the entire incident to the complainant when she became puzzled but the landlady asked her to keep mum as that would damage the reputation of the house of the landlady. At about 9.00 a.m. the landlady left for Agartala due to some reason best known to her.

6. The complainant, being the mother, examined the body of her daughter and seeing everything she became puzzled and she went to the BDO, Khowai and informed the incident in detail. She also informed the said fact to the local MLA. In the complaint, she also informed that the accused Bimal Acharjee is a class-III employee of her office. After the incident, she first saw the accused in the room of the BDO, Khowai on call by the BDO.

7. Thereafter, she went to the house of her brother-in-law and with him she went to the Bar Library, Khowai and got the ejahar written through an advocate-clerk and she lodged the ejahar before the Officer-in-Charge of the Khowai Police Station.

8. Upon receipt of the ejahar on 25.07.2009, the Officer-in-charge registered a case vide Khowai P.S. Case no. 64/2009 under Sections 376 of the IPC and entrusted the investigation to Shyamal Debbarma, Sub-Inspector but subsequently, the Officer-in-Charge of the Khowai P.S. Sri Rangadulal Debbarma himself took up the task of investigation on transfer of the former IO.

9. On completion of investigation, police submitted charge sheet and the learned SDJM, Khowai, West Tripura took cognizance of the offence under Section 376 IPC against the appellant. The case was committed to the learned Addl. Sessions Judge, Khowai, West Tripura for trial. The following charges under Section 451/354/376 IPC were framed against the appellant to which he pleaded not guilty and claimed to be tried.

"CHARGE

I, Sri Udit Choudhuri, Addl. Sessions Judge, Khowai, West Tripura, do hereby charge you namely,

Sri Bimal Acharjee

as follows:-

Firstly, that, on 24.07.2009 Thursday, before dawn, at about 3 am in the rented hut of the informant Smt. Purnima Das situated in the house of one Sri Sunil Ch. Ghosh, of Office Tilla, Khowai, you committed house trespass in the hut of the informant and remained there unlawfully for the purpose of committing an offence punishable with imprisonment and as such you have committed an offence punishable under Section 451 of the Indian Penal Code and within my cognizance.

Secondly, that, on the aforesaid date and time in the rented house of the informant as mentioned above, you used criminal force to Smt. Sushmita Ghosh, minor daughter of the informant, aged about 12 years, intending to outrage her modesty or knowing it to be likely that you thereby outraged her modesty and thereby committed an offence punishable under Section 354 of the Indian Penal Code and within my cognizance.

Thirdly, that, on the aforesaid date and time in the rented house of the informant as mentioned above, you committed rape on Smt. Sushmita Ghosh, minor daughter of the informant, aged about 12 years, and thereby committed an offence punishable under Section 376(1) of the Indian Penal Code and within my cognizance.

AND I hereby direct that you be tried on the said charges.”

10. As many as 11 witnesses have been examined to prove the prosecution case. Some documents also have been exhibited. After examination of the prosecution witnesses the appellant was examined under Section 313 CrPC and hearing the arguments of both sides, learned Addl. Sessions Judge, Khowai, West Tripura passed the judgment of conviction and sentence on 29.01.2014 convicting the appellant as afore-stated.

11. The most vital witness is the prosecutrix herself who has been examined as PW-2. She has deposed during the cross-examination on trial that the incident took place in the intervening night of 23rd /24th July, 2009 when she and her brother (Biplab Ghosh) were sleeping along with their land lady, Pushpa Rani Ghosh, who she used to called as 'thamma' because her mother was busy in election duty. On the request of her mother, Smt. Purnima Ghosh, the land lady Pushpa Rani Ghosh slept with them as she might not return back from her duty during night. She has stated in her deposition that her age was 13 years and her brother Biplab Ghosh is younger than her

by 3 years. She has stated that it would be about 2.30 to 3.00 am, the accused-appellant Bimal Acharjee to whom she used to address as 'mami' knocked at the door calling her name, requesting them to open the door. The land-lady, Smt. Pushpa Rani Ghosh who was sleeping with her opened the door when Bimal Acharjee entered and asked Pushpa Rani Ghosh to go to her own hut informing that her mother had sent Bimal Acharjee to take care of them. The accused-appellant is a colleague of her mother and on earlier occasion also he visited their house. As such, the accused-appellant was known to the prosecutrix. After the land-lady being left their company, Bimal Acharjee locked the door from inside and put off the light when she became frightened and told Bimal Acharjee that she should go to the room of the land lady and the accused-appellant should sleep with her younger brother. After that, the accused-appellant again put on the light. Her younger brother was in deep sleep. Thereafter, Bimal Acharjee forcibly removed her 'white coloured tapejama' and 'green coloured pant' and the accused-appellant also removed his pant and then he started to kiss her and also put pressure on her breast. Thereafter, the accused-appellant pushed his penis into her vagina forcibly. She suffered pain and tried to cry out, but she failed as the accused-appellant put pressure on her mouth. After sometime, the accused removed his penis and then he put some white colour material from his penis in a sack which was used by them as foot-mattress. She has further stated that thereafter, the

accused wore his pant and lighted a cigarette and he started to speak with somebody in high sound through his mobile phone, but at that time also she remained naked. Hearing the sound of the accused, her younger brother woke up and then hurriedly she put on her dress. Then, the accused-appellant open the door and walked away. Immediately after departure of the accused-appellant, Pushpa Rani Ghosh entered into her hut when Pushpa Rani Ghosh disclosed the prosecutrix that she had seen the incident which took place through a small hole of bamboo wall of their hut. The prosecutrix also narrated the entire incident to Pushpa Rani Ghosh and after that Pushpa Rani Ghosh left her hut. The prosecutrix and her brother were inside their own hut with electric bulb lighted on. At dawn, she simply opened the window. She has further stated that her mother returned back at about 6.00 am of 24th July, 2009 when the prosecutrix narrated the entire incident to her mother. Pushpa Rani Ghosh then called by her mother to take tea. Accordingly, her mother went there who disclosed the above fact to her mother. At about 8/9 am, Bimal Acharjee again visited their hut and seeing him, her mother scolded him when he went away. Thereafter, her uncle Ratan Ghosh came and she again narrated the incident to him. Thereafter, her mother went to office and informed the fact to the BDO who was her Officer. At about 11.00 am, police came and examined the prosecutrix and other persons there. Thereafter, police had taken the prosecutrix to Khowai police station and from there she was taken to Khowai

hospital and the Medical Officer examined her and from there she was taken to her hut. After two days of the incident, the police took her to the court where the Judicial Magistrate recorded her statement. During the course of trial, the prosecutrix identified the accused in the dock. She has further stated that police personnel had also taken away her 'tape jama' and the 'pant' which she was wearing at the relevant time and the police also took one 'tubelight and sack' on which Bimal Acharjee poured the white fluid from his penis. She also identified her 'green coloured pant' which was marked as MO-1. She has also identified the seized sack marked as MO-2. She also has identified the seized tube light which is marked as MO 3. She has further stated that her seized 'tape jama' was absent in the court when the court asked for malkhana register and found receipt of the 'tape jama', but the court inspector could not give any explanation regarding missing of the seized 'tape jama.

During cross-examination, the prosecutrix has denied the questions put by the defence that in that intervening night of 23/24th July, 2009 neither her mother was on night-duty nor requested the land lady, Pushpa Rani Ghosh to sleep with her and her brother. She has further denied the question that she was not aged about 13 years at the time of trial and she has falsely stated that in the intervening night of the incident Pushpa Rani Ghosh stayed with her in the hut. She has also

denied the suggestion that the accused-appellant had ever entered into the room of the prosecutrix on that night. Her attention was drawn to her statement recorded under Section 161 and 164 (5) of the Cr.P.C. when the prosecutrix has admitted absence of such statement that after Pushpa Rani Ghosh left for her hut the accused-appellant locked the door from inside and put off the light. The attention of the witness was also drawn to her statement that she became frightened and requested the accused-appellant that she should go to the hut of the land lady and he should sleep with her younger brother. She has denied the suggestion that she stated those facts falsely being tutored by her mother. On being drawn her attention to her statement recorded under Section 161 and 164(5) Cr.P.C. the statement since she was frightened, the accused-appellant put on the light again. Her further attention was drawn to her statement before the Judicial Magistrate that her mother requested the land-lady to sleep with her and her brother at their hut as she would be late in arriving due to her engagement in election duty. The prosecutrix admits the absence of such statement. The statement of the prosecutrix recorded before the Magistrate that on the date of the incident, her mother was engaged at her office for election duty, is found absent in her statement recorded under Section 164(5) Cr.P.C. her attention was further drawn to her statement to the police or to the Magistrate that the accused had forcibly removed her 'tape jama' when she admitted the absence of such statement

recorded under Section 161 and 164(5) Cr.P.C.. The attention of the prosecutrix was also drawn to her statement that the accused-appellant had forcibly opened her pant and also opened his pant and forcibly pushed his penis into her vagina and after sometime he removed his penis and dropped some white fluid into a sack which was used by them as foot-mattress, when she admitted absence of such statement recorded under Section 161 and 164(5) Cr.P.C. The statement of the witness recorded under Section 161 and 164(5) Cr.P.C, it was also found absent on her attention being drawn to her statement which was made during the course of trial that the accused-appellant lighted cigarette and after sometime he started to talk by a mobile phone in high sound when she remained naked and her younger brother woke up and she hurriedly put on her pant and that her brother woke up hearing the sound of the accused talking with other over mobile phone.

I have perused the statement of the prosecutrix in her cross-examination where her remaining statement in examination-in-chief are found absent in her statement recorded under Section 161 and 164(5) Cr.P.C.

During her cross-examination, the prosecutrix denied the suggestion from the defence that the accused-appellant visited their hut on 24.07.2009 at about 8/9 am to claim Rs. 50,000/- which he made advance to her mother and only to evade the liability of her mother to refund Rs. 50,000/-, the prosecutrix

lodged a false complaint against the accused-appellant being tutored by her mother. When her attention was drawn to her statement made in her examination-in-chief that her uncle visited their house when she narrated the incident to her uncle. Such statement is found in her statement recorded under Section 161 and 164(5) Cr.P.C. On being asked, the prosecutrix has stated that on 24.07.2009 she did not attend the school, though it was open. She has denied the suggestion that her mother lodged a complaint when another boy tried to open her pant before filing of the instant case.

At this stage, on perusal of the statement of the prosecutrix (PW-2) recorded under Section 164(5) Cr.P.C., it is revealed that the statement against which attention of PW-2 was drawn are found missing in her statement recorded under Section 164(5) Cr.P.C.

12. PW-4, Smt. Purnima Ghosh, the mother of the prosecutrix has deposed the similar fact as was deposed by her daughter (PW-2). She has further deposed that she informed the fact to Mr. Samir Deb Sarkar, MLA and also to the BDO. She also went to Bar Library, Khowai and got an ejahar being written through an Advocate Clerk and thereafter she put her signature on that and submitted the same to the police station. She has identified her signature on the FIR. She has stated that she saw the accused in the chamber of the BDO on being asked by the BDO before she went to the police station. She has

further deposed that the police has seized the wearing apparels of her daughter and the 'tape jama and a sack' by preparing seizure list where she put her signature. During her examination, she has identified those as MO 1,2 and 3 respectively.

In her cross-examination, it is denied that she made a false statement to evade her responsibility from paying Rs. 50,000/- which she received from the accused as lone. Her attention was drawn to her statement made in the FIR that her daughter reported to her that the accused also spread some white fluid in a sack from his penis where she admitted the absence of such statement in the FIR. She has admitted that she has mentioned in the FIR that since the accused-appellant threatened her son and daughter, her daughter did not wanted to disclose the fact at the first instance.

13. PW-1, Ratan Ghosh, is the uncle of the prosecutrix. According to him, he was informed about the incident from Purnima Ghosh, who visited his house on the next date. He has also deposed that Pushpa Rani Ghosh also informed him about the incident which are described by PW-2 and PW-4.

14. The statement of PW-4 made in her deposition before the trial court that after the alleged incident, the accused talked with somebody with loud voice through mobile when her daughter woke up and noticed the accused incident the hut and

the land-lady came before her and narrated the entire fact to her and the land-lady spent the remaining portion of the night at her hut and told her to keep mum as that would damage the reputation of her house are found absent in the FIR. Her statement during the course of deposition that seeing the body of her daughter and seeing everything she became puzzled is also found absent in the FIR. The statement which she has made during the course of deposition that she informed the matter to the MLA and BDO are also not found in the FIR.

15. PW-5, Rajib Datta, was colleague of PW-3 who works in the same office of BDO. According to him, PW-4 informed him about her daughter being raped by the accused-appellant and after that he advised PW-4 to take shelter of law. He has further deposed that the accused-appellant came to the office on being asked by the BDO, but he did not admit the allegation. To the court, he has stated that normally the accused-appellant has good reputation in the office who also discharge his duty in time and he also was very friendly with other staffs.

In his cross-examination, he has stated that he did not tell to the police that PW-4, the mother of the prosecutrix visited his house accompanied by one Hindustani woman and asked to go to his office, but the witness volunteers that the police did not ask him any question in that regard. The statement which the said witness made during his examination-in-chief have not been stated in his examination under Section

161 Cr.P.C. the statement under Section 161 Cr.P.C. has been exhibited which is marked as Annexure A subject to proof by the investigating officer.

16. PW-6, Biplab Ghosh is the brother of the prosecutrix. He has stated during his examination that when he woke up at the relevant point of time, he noticed that Bimal Acharjee (whom he used to address as mamu) was saying something over mobile with loud voice. He found his sister, the prosecutrix sitting in a chair in the hut, but he did not find Pushpa Rani Ghosh in the hut. After 5/6 minutes, Bimal Acharjee left the hut asking them to sleep. Thereafter, his sister, PW-2 called Pushpa Rani Ghosh. Thereafter, his sister stated something to Pushpa Rani Ghosh taking her at their kitchen at a crying state. He has further deposed that Sabita Ghosh and one Suruchi Gope also used to stay in the house of Pushpa Rani Ghosh. He has further stated that when he went to bed to sleep, he was in one side and his sister was in another side and Pushpa Rani Ghosh was in the middle. He has stated that on 25.07.2009 he met with the police. Attention being drawn to his statement that he stated to police that after departure of Bimal Acharjee, his sister called the land lady Pushpa Rani Ghosh. Such statement is found absent in his examination recorded under Section 161 Cr.P.C. Attention was also drawn to his statement which he made during his deposition before the court that he say his sister to say something to Pushpa Rani Ghosh in crying state taking her

to the kitchen. It is found that the said statement is absent in his examination under Section 161 Cr.P.C.

17. PW-7, Basanti Telenga was also a colleague of the mother of the prosecutrix who works in the same office. She has stated in her deposition that 23.07.2007 was the day fixed for counting of panchayat election votes and PW-3 and other staffs were engaged in counting program. At about 2.30 am on the following day, at night she and Purnima Ghosh both came out of the office after completion of their duty. Since the house of Purnima Ghosh is situated at a distance, she took her to her house. In the morning of 24.07.2009, Purnima Ghosh came out of the house to go to her own house and at about 10.30 am, she again came to the office and met her and reported that on the previous night at about 2.30/3.00 am, the accused-appellant Bimal Acharjee has visited her rented hut and requested the land lady who was sleeping with her children to go to her hut, when Bimal Acharjee raped her daughter (PW-2) in absence of Pushpa Rani Ghosh. She wanted to accompany her to report the said incident to the BDO. when the said fact was narrated to the BDO who advised them to take the shelter of law. On the following day, she along with Purnima Ghosh again visited the quarter of the BDO at about 8/8.30 am when they met Bimal Acharjee where the BDO had discussed something with Bimal Acharjee. Both PW-2 and PW-7 after taking leave from the BDO went to take shelter of law and

desired to inform the fact to the MLA first who also suggested them to take shelter of law.

During her cross-examination, it is found that her statement to the police that Purnima Ghosh reported the fact to her at office was found absent in her 161 statement. Her other statements in her deposition before the court are also found absent in her statement recorded under Section 161 Cr.P.C. which the witness herself admitted in the cross-examination. Her statement under section 161 Cr.P.C. has been exhibited and marked as Exhibit-3 subject to proof by the investigating officer.

18. PW-8, Biswajit Debroy, is the Advocate clerk who drafted the ejahar based on the fact supplied by PW-2 on 25.07.2009. In his cross-examination, he has admitted that the informant did not state to him that the accused put off the light and again he put on the light being resisted by her daughter and that the accused first kissed her daughter and touched her breast and spread some white fluid from his penis in a sack and the story that the accused talked with somebody with loud voice from his mobile and when her son woke up and found the accused inside the hut and that on the following day of the incident, the land lady came before her narrating the entire fact to him and that for the remaining portion of the night she slept with the children of PW-4 and that the matter was reported to the MLA. He has further stated in his deposition apart from his engagement as Advocate clerk he also used to work as a

reporter and when he tried to contact with the victim, PW-4 did not allow him to talk with the victim.

19. PW-9, Dr. Dhanjoy Reang, who examined the victim had given the following opinion:

- (i) I did not find any mark of violence at the private parts, cheek, thigh and breast of the victim;
- (ii) I did not find any foreign hair around her private parts;
- (iii) No semen was found around the private parts;
- (iv) I found old rapture of hymen.

The report being identified marked as Exhibit-4. He also collected the vaginal swab of the victim and sent the same to SFSL with the help of police. The forwarding report being identified marked as Exhibit-5, but this court finds that the report (Exhibit-4) is silent about the date and time of examination. It is also silent where he examined the victim and who had identified the victim.

In cross-examination, he has stated that generally police used to produce the victim. He has stated to the court that when a patient is examined in the hospital, his/her name is entered in the register of the hospital, but in respect of this victim, there is no entry in the hospital record. The witness volunteers that due to hurriedness, he failed to enter her name in the hospital register. In his cross examination, he has stated that the name of the patient is supposed to be entered into the emergency register and he has examined the victim since case number was there.

20. PW-10, Rangadulal Debbarma is the first investigating officer who being the O.C., Khowai police station endorsed the case and started investigation. He has stated that during the course of investigation, he recorded the statement of the witnesses and also seized the wearing apparels 'the tape jama' and the sack. On 26.07.2009, he arranged for examination of the victim before the Medical Officer and thereafter seized vaginal swab of the victim in two small containers as collected by Dr. T. Reang. He has further stated that the victim was taken to the hospital by one constable accompanied by her mother. Lateron, he collected the medical report from the hospital. Being asked by the court, he has stated that the report of the Medical Officer does not bear any registration number of the hospital and the date and time of the examination was wanting in that report. During cross-examination, he did not support the statement made by PW-1, PW-2, PW-3, PW-5, PW-6 and PW-7 which they have deposed before the court during the course of trial and supported the statement of the said witnesses which he had recorded under Section 161 Cr.P.C.

21. In the present case, the accused-appellant also have examined three witnesses as DW-1, DW-2 and DW-3.

DW-1, Subrata Nath Sharma, is his statement has stated that in response to the summon of the court, he appeared before the court. He also received summon as

prosecution witness, but he was not examined. He has stated that on 23.07.2009, he performed duty in the panchayat election for counting of votes. In that counting of votes, the charge of providing refreshment to the deputed persons was vested to Bimal Acharjee. Smt. Purnima Ghosh (PW-4) and Smt. Basanti Telenga (PW-7) did not perform duty in that counting. He has further stated that counting of votes started at 8.00 am on 23rd July, 2009 and completed in the following day morning at 6.00 am. He has deposed that the persons deputed for counting of votes have no scope to go out of the counting hall and that counting hall was protected by deployment of police personnel. There is no substantial cross-examination.

DW-2, Sri Pradip Sarkar, was working as the BDO, Khowai RD Block on 15.03.2010. At that time in response of an application of one Bimal Acharjee seeking information under RTI, he provided the information as sought for. The said witness who also was in-charge of SPIO provided information regarding memo of the Returning Officer (BDO), Khowai RD Block and also supplied information regarding particulars of employees deployed in the panchayat election, 2009 and he also had identified those documents marked as Exhibit D-1 and his signature on those documents as Exhibit D-2. The cross-examination was declined to the said witness by the prosecution

DW-3, Smt. Sabita Gope, had stated that she knew Purnima Ghosh who was her tenant in her house. She also knew

Bimal Acharjee who was a frequent visitor in the hut of Purnima Ghosh. She has stated that she came to the court as prosecution witness in response to the summon, but she was not examined. Narrating the incident, she has stated that in the middle of July, 2009, on the day of counting of panchayat vote she had seen Purnima Ghosh in her hut upto 9 to 10 pm. In the early morning of the following day, she also had seen Purnima Ghosh in her hut doing some household works and at that time, the son and daughter of Purnima returned home after plucking flowers and legs of the son of Purnima Ghosh was found stained by bitumen when Purnima Ghosh scolded her son and daughter. Thereafter, Bimal Acharjee came to the house of Purnima Ghosh and it was about 8/8.30 am when there was an altercation in between Bimal Acharjee and Purnima Ghosh relating to demand of returning the loan money to Bimal Acharjee taken by Purnima Ghosh few months back. She has further stated that in that morning both son and daughter of Purnima Ghosh went to her hut and had given some plucked flowers to her.

In her cross-examination, she has stated that the rented hut of Purnima Ghosh belongs to Pushpa Rani Ghosh. There is no substantial cross to the said witness by the prosecution.

22. From the landscape of the above discussion of evidences, it is found that PW-3, Pushpa Rani Ghosh, is the independent witness. According to the prosecutrix, PW-3 was sleeping with her and on being asked she left her company for

her own hut. Further, the prosecutrix has stated that PW-3 had just immediately after departure of the accused Bimal Acharjee entered into the room of the prosecutrix when the prosecutrix narrated the entire incident to PW-3 who also informed the prosecutrix that she had seen the entire incident through a bamboo hole of the hut to which the prosecutrix resided and stayed at that night. But PW-3 in her deposition has stated that she knows Purnima Ghosh who was a tenant and on that date of the occurrence there was counting of panchayat election, but Purnima Ghosh i.e. mother of the prosecutrix did not make any request to her before she left for duty. So, the story of the prosecutrix and her mother Purnima Ghosh, that Purnima Ghosh requested PW-3 to stay with the prosecutrix during that night has totally been contradicted by PW-3 in her evidence during her examination. She was declared hostile. Her contention was drawn to the statement she made under Section 161 Cr.P.C. During her cross-examination by the prosecution, she had totally denied that on 23.07.2009, Purnima Ghosh requested her to sleep with her child if she fails to return that night from office and accordingly, when Purnima Ghosh returned, she started to sleep with her children at her hut. She also denied that she peeped into the hut through the hole of the thatched wall and noticed that Bimal Acharjee, the accused in a half naked condition was lying upon the prosecutrix and the prosecutrix was trying to resist her and seeing the same her body was trembling out of fear and shame. During her cross-examination

by the defence, that on receipt of the information about the illness of her daughter, she left for Agartala on 24.07.2009 at about 9.00 am. She has further stated that her house was surrounded by bamboo made fencing with a height of about 5 feet and the entry gate was made by wood, which, if remains locked from inside, nobody could enter into her house. She has further stated that if a person intends to enter into her house, then, it would have to be opened by inmates of the house. She has further stated that when police examined her, then some of her neighbours namely, Chinu Ghosh, Nripendra Ghosh, Jiban Ghosh and Makhan Das were present and Chinu Ghosh is a member of Panchayat. She has made a statement that she heard from Purnima Ghosh, PW-4 i.e. mother of the prosecutrix that about 2/3 months prior to the incidence she had taken a loan of Rs.50,000/- from Bimal Acharjee.

23. Mr. S. Sarkar, learned counsel appearing for the appellant submits that statement of the brother of the victim, Sri Biplab Ghosh was recorded under Section 164(5) of Cr.P.C. who is aged about 9 years and the victim herself is 12 years old. Considering their age, a high degree of evidence is required as they should be called as 'starling witness' and it would be very risky to accept their version without any corroboration from other witnesses. In support of his submission, Mr. Sarkar, learned counsel has relied upon a decision in **Rai Sandeep**

alias Deepu vs. State (NCT of Delhi) reported in **(2012) 8 SCC 21**, wherein the apex court in para 22 held as follows:

“22. In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ‘sterling witness’ whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged”.

On the anvil of the above principles, if I test the evidence of the prosecutrix, it becomes evident that the prosecutrix has improved and exaggerated the story in her deposition before the court at the time of trial. The statement which she has made during the course of trial, are found absent when her attention was drawn to her statement recorded under Section 161 and 164(5) of the Cr.P.C. Similarly, the evidence of PW-4, the mother as well as her brother, PW-6, are found absent in the statements recorded under Section 161 and 164(5) of the Cr.P.C, which means that the statement of PW-3 that she was not asked by PW-4, the mother of the prosecutrix

to stay with her daughter, is found to be correct. According to this court, this crucial aspect of the prosecution case has raised a serious doubt about the guilt of the accused-appellant herein.

Mr. Sarkar, learned counsel has also submitted that FIR was lodged after 2(two) days and by the passage of time many embellishment and many developments were caused. Mr. Sarkar, learned counsel also has submitted that the wearing apparels were also seized by the I.O. but the prosecution did not produce any evidence in this regard including the SFSL report, presumption of which also goes against the prosecution.

24. On the other hand, DW-1 and DW-3 were shown as prosecution witness in the charge-sheet, but they were not examined by the prosecution for the reasons best known to them. In response to summon, they appeared before the trial court and has stated that the accused-appellant was vested with the charge of providing refreshment of the deputed persons of the counting of votes which began at 8.00 am on 23rd July, 2009 and completed in the following day morning at 6.00 am. The said witness has categorically stated that the persons deputed for counting purpose has no scope to go out of the counting hall as counting stations are protected by deployment of the police personnel. DW-3, who resides in the same house, but in a different hut has stated that Purnima Ghosh was her tenant and the hut to which Purnima Ghosh and the prosecutrix used to reside was situated at a distance of about 10/12 cubits. She has

stated that earlier also she has come to the court as prosecution witness in response to summon, but she was not examined. Narrating the incident, she has stated that she saw Purnima Ghosh in her hut upto 9.00 to 10.00 pm doing her household works in the early morning of the following day. She has further stated that at that time, son and daughter i.e. prosecutrix and her brother returned to home after plucking flowers and the legs of the son of Purnima Ghosh was found stained with bitumen when Purnima Ghosh scolded her son and daughter. She has further stated that Bimal Acharjee came to the house of Purnima Ghosh relating to demand of making refund the loan money to Bimal Acharjee which was taken by Purnima Ghosh few months back. Moreso, she has stated that the prosecutrix and her brother also went to her hut to give plucked flowers. Her cross examination could not shake her evidence in chief. There is no explanation from the prosecution side why the said was withheld by the prosecution. This has raised serious doubt in the prosecution case.

DW-2, the BDO, was the Incharge of State Public Information Office of Khowai RD Block. In view of a RTI application, he furnished the documents which are marked as exhibit D/1 is a memo dated 22nd July, 2009 wherein DW-2 being the Returning Officer has distributed responsibility and duty to be performed by the employees of the concerned Block on the date of counting of votes. From these documents, it is

found at column 'g' that Bimal Acharjee, LDC was given the charge of refreshment which further supports the version of DW-1. Further, in the list of deputed employees for counting, the name of Purnima Ghosh, PW-4, mother of the prosecutrix is not found. Further, I have noticed that Purnima Ghosh first informed the matter to the BDO, DW-2, but he did not say anything about the fact that PW-4 and PW-7 after coming to know about the incident of rape from PW-2, PW-6 and PW-3, they met with the BDO and explained the incident in detail.

25. The genus of the story that PW-4, the mother of the prosecutrix was absent due to her duty for counting of votes, but that genus is found to be false since the documentary evidence (D-1) did not support that she was on duty on that night, which makes the prosecution story more doubtful.

26. This court has considered the medical examination report and the statement of the doctor, PW-9, who has stated that after examination of the prosecutrix he did not find any mark of violence on the private part, cheek, thigh and breast of the victim. He did neither find any foreign hair round her private parts nor any semen round her private parts. Further, the doctor found old rapture of hymen. Needless to say, if the hymen were found to be raptured recently, then it can easily be revealed from the examination of the doctor. I have noticed that the doctor did not indicate the date and time of examination of the prosecutrix and who produced the victim before him and

who had identified the prosecutrix. The doctor has further stated that he has sent the vaginal swab of the prosecutrix to the SFSL with the help of police, but the prosecution has failed to bring the SFSL report into evidence. In view of the aforesaid fact, I have given my anxious look to Section 114(g) of the Indian Evidence Act, which reads as follows:

“(g)That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it”.

27. Applying the same law, this court hold the view that it is the duty of the prosecution to produce the SFSL report and non-production of the same will definitely draw an adverse presumption against the prosecution story. Further, it is also the duty of the prosecution to clarify how old the rapture of the hymen is and how the same rapture was related to the rape in the present case, but the prosecution has miserably failed to give any clarification on this aspect. This court has further noticed that PW-4, the mother has specifically stated that the BDO had advised her to take shelter of law on 24th July, 2009 at 9.00 am, but I find that there is no reasonable explanation what prevented her to lodge the FIR on 24th July, 2009 and why she lodged the FIR on 25th July, 2009 when the incident occurred in the intervening night of 23rd/24th July, 2009. I may gainfully refer a decision in ***Jalwanti Lodhin vs. The State***, reported in ***1953 CRI.L.J. 1344***, wherein the Division Bench of the Patna high has stated thus:

“The whole controversy centres round the evidence of the child, Chanda (P. W. 11), aged about six or seven years. When she was examined under S. 164, Criminal P. C., on 11-4-1950, a day after the occurrence, she stated that she was asleep when Jalwanti (accused) beat her mother on the head with a 'martaul' (hammer). It is not clear whether she had woken up at the time of the actual assault. If she was indeed asleep and if there was only one blow given, then it was not probable for her to see the fatal blow being struck. Before the Committing Magistrate, this witness deposed that she was roused by the sound and that she saw her mother being killed by her 'mausi-ma' (aunt), the accused, with a hammer. She further said that the accused took her towards the 'kotha' and, on returning to her mother, she again gave another blow with the hammer on the head. I have already shown that, from the injuries on the persons of the deceased, it is difficult to say whether two blows with a hammer were administered on the head. In the Court of Session the witness gave a complete go-by to her previous statements and added that the police had instructed her to say so. She also made some very inconsistent and improbable statements for which she can hardly be relied upon. It may be that according to the provisions of S. 118, Evidence Act, she was a competent witness to give evidence in Court, as, it appears from her deposition, she could understand the question put to her and give rational answers thereto, but it has justly been laid down in - 'Darpan Potdarin v. Emperor', AIR 1938 Pat 153 at p. 158 (A), that the evidence of children is notoriously dangerous unless immediately available and unless received before any possibility of coaching is eliminated. I would rather go further and advise closer scrutiny of the evidence of child witnesses before the same is accepted by a Court of law. Kenny has observed in his Outlines of Criminal Law at page 420 (1952 edition) that children are a most untrustworthy class of witnesses, and it is found from common experience that they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, although intelligent children are very often acutely observant of facts and events external to themselves and remember them with great accuracy. His observations have been adopted by a Division Bench of the Lahore High Court in 'Abbas Ali v. Emperor', AIR 1933 Lah 667 at p. 668 (B). Children, in the age of about seven, are in a stage of maturation when the higher mental processes are forming. They are then creatures of will, emotion and action and sometimes subjected to hallucinations and illusions. Karl Buhler in his book, The Mental Development of the Child, has said at page 85 : "The 'fibs' of childhood are known to every one. A little mite of 3 or 4 will tell us in all seriousness that he has met a bear on his walk, and the like. These things must not be regarded as serious moral lapses, for the child has a vivid imagination and often cannot distinguish memories from events which have been merely imagined." Dr. Hans Gross, who has been described by many as the father of criminal research, has set out in his book, Criminal Investigation, 1934 edition, at pages 61-62, the nature and character of evidence given by children. He has said that in one sense the best witnesses are children of seven to ten years of age as at that time love and hatred, ambition and hypocrisy, considerations of religion, rank, etc., are yet unknown to them. He has, however, pointed out the great drawbacks which have made men distrustful of the capacity of children. They are apt to say much more from imagination than they actually know. To quote his words,

"the child, as yet devoid of principles, places great faith in the words of grown up people; so, if a grown up person brings influence to bear on it, especially some time after the occurrence, the child will imagine it has really seen what it has been led to believe".

At another place the eminent author has remarked as follows :

"The result is the same, when the influence is undesigned. An important event happens; it is naturally much talked of, all sorts of hypotheses are started, there is gossip of what others have seen or might in certain circumstances have seen. 'If a child, which has itself seen something of the occurrence, hears these conversations, they become deeply engraved on its own mind, and ultimately it believes it has itself seen what the others have related' " (the underlining (here in ' ') is mine).

From the evidence on the record, I am rather inclined to think that this child witness heard different versions from the crowd which had gathered at the time of the incident and drew her own inferences from her imagination that her mother had been killed by the accused”.

28. Applying to the ratio of the above proposition, this court is of the considered view that undoubtedly rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. Further, it not only degrades and defiles the soul of a helpless girl/woman, but also shakes the very core of a life. I am not unmindful of the fact that the rape is a crime against the entire society and violates the human rights of the victim, apart from being inflicted a serious blow to the supreme honour of a woman, and offence, both, her esteem and dignity. Moreso, it causes psychological and physical harm to the victim, leaving upon her indelible marks.

29. Keeping this established aspect suffered by the victim of rape, if this court consider the factual matrix of the case and apply the principles laid down above by the Patna High Court, there might be a delay in lodging the FIR when it is a case of rape , but there must be reasonable explanation what caused the delay in lodging the complaint to the police. In the case in hand, the incident occurred in the intervening night of 23rd/24th July, 2009 and the matter was also informed to the BDO and local MLA, though the matter went to public. Under those circumstances, what prevented PW-4, being mother not to lodge the FIR in the same day has not been explained. In the instant case, I have already discussed that there are so many improved versions and huge variations from the statements

which the prosecutrix, her mother, her brother, her uncle and PW-7 have stated in their statement recorded under 161 Cr.P.C. I find force in the submission of learned counsel appearing for the appellant that in the context of the said case, the delay of lodging the FIR is fatal to the prosecution case and the appellant deserves to get the benefit of doubt.

30. This court has further noticed that the very genesis of the case started when PW-4, the mother, requested the land lady (PW-3) to stay on the night of 23rd/ 24th July, 2009 as she would be busy with the election duty on that night, as appeared to be false. The genesis of the occurrence of the offence started due to the absence of PW-4 at that night, but the statement of DW-1 reveals that the appellant was all along on his duty which he was vested with the Returning Officer (BDO) during the entire night. The prosecution also could not unearth anything from DW-2, the BDO, about any version between him and PW-4. The local MLA was also not called by the prosecution. On the contrary, the defence has been able to substantiate the presence of the appellant in the election duty and also from the evidence of DW-3, it is evident that PW-4, the mother was all along with her children at that night and the prosecutrix and her brother also plucked flower in the morning and also gave some flowers to DW-3. The other circumstances also does not support the prosecution case and there is completely missing of the chain of circumstances. Moreover, in my opinion, if the genesis

is found to be false, then the whole story would lead to be false. Furthermore, I have noticed that the victim has so many statements for the first time before the court. It would be apposite to refer a decision in ***Pandurang Sitaram Bhagwat vs. State of Maharashtra***, reported in **(2005) 9 SCC 44**, wherein the apex court in para 16 held as follows:

“16. The approach of the learned Trial Judge as noticed supra that ordinarily a lady would not "put her character at stake" may not be wrong but cannot be applied universally. Each case has to be determined on the touchstone of the factual matrix thereof. The law reports are replete with decisions where charges under Sections 376 and 354 of IPC have been found to have been falsely advanced.

I also may gainfully refer to a decision in ***Panchhi and others vs. State of U.P. with National Commission for Women vs. State of U.P. and others*** reported in **(1998) 7 SCC 177** wherein the apex court in para 11,12 and 13 has held as under:

“11. Shri R.K. Jain, learned Senior counsel contended that it is very risky to place reliance on the evidence of PW1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law.

13. PW.1 is one of the two survivors in the family (the other was a suckling child). It is greatly probable that PW 1 would have escaped from the notice of the assailants otherwise he would not have been spared as is clear from the fact that his younger sister Sony was also murdered. His narration of the incident was quite natural though he saw only some part of the occurrence. That part is so decisive as to clear all doubts regarding identity of the assailants”.

31. Applying the ratio decidendi to the above discussion in regard to legal issues, this court is of the considered view that the prosecution has failed to prove the case beyond reasonable doubt and consequently, the appellant is entitled to get the benefit of doubt. This court is conscious of the fact that

in a matter of rape, the statement of the prosecutrix must be given primary consideration but, at the same time the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that the prosecutrix would always tell the entire story truthfully. In the present case, this court is at a loss to understand what prevented the prosecutrix to divulge the entire story of occurrence of the incident during her statement recorded under Section 161 and 164(5) of the Cr.P.C and further what prompted the prosecutrix to improvise her story during her examination in course of the trial.

32. Hence, in the context of the instant case, it would be very risky to hold that the appellant has committed the offence charged against him under Section 376 of the IPC. The judgment and sentence dated 29.01.2014 passed by the Additional Sessions Judge, Khowai in Sessions Trial no. 02 (WT/K) of 2011 is interfered with. Accordingly, the appeal filed by the appellant is allowed. I order his acquittal. Consequently, the appellant shall be released forthwith, if not wanted in connection with any other case.

JUDGE