

**HIGH COURT OF TRIPURA
AGARTALA**

Crl. A(J) No.34 of 2024

Sri Dipak Debnath,

Son of Lt. Swapan Debnath, of Purba Mirza, P.S Kakraban, Gomati, Tripura.
..... Appellant(s)

V E R S U S

The State of Tripura,

Represented by the Secretary, Department of Home, New Capital Complex, P.S.
N.C.C., Agartala, West Tripura.

..... Respondent(s)

For Appellant(s)	:	Mr. D. Datta, Advocate.
For Respondent(s)	:	Mr. Raju Datta, P.P. Mr. Rajib Saha, Addl. P.P.
Date of hearing	:	<i>17th January, 2025.</i>
Date of delivery of Judgment	:	<i>21st March, 2025.</i>
Whether fit for reporting	:	YES

**HON'BLE MR. JUSTICE ARINDAM LODH
HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA**

JUDGMENT & ORDER

S. Datta Purkayastha, J.

The appeal arises out of the judgment dated 03.04.2024 and sentence dated 06.04.2024 passed by learned Additional Sessions Judge, Gomati Judicial District, Udaipur whereby the appellant Dipak Debnath was convicted under Section 376(2)(1) of the Indian Penal Code (for short IPC) and was sentenced to suffer rigorous imprisonment for 10(ten) years and to pay fine of Rs.25,000/-.

[2] The FIR was lodged by the mother of the victim (PW-1) on 20.06.2020 at Kakraban police station alleging, inter alia, that on 16.06.2020 at around 10.00 am, she went to Mirza market to consult a doctor leaving her disabled daughter (the victim) and one grandson (aged about 3 ½ years) in the

house, and at around 01.30 pm when she returned, she learnt from her said grandson that the appellant had committed some filthy acts with her daughter. Thereafter, on asking her daughter also told her that the appellant coming to her house initially asked her daughter about the informant and hearing that she had gone to market, he pulled the victim on the backside of their house and raped her there. Thereafter, the informant informed the matter to the wife of the appellant and also neighbours, Sri Sital Sarkar (PW-3) and the Pradhan of their gram panchayat. The Pradhan thereafter instructed her to take recourse of law and then the FIR was lodged by her with an explanation that delay in lodging the same was occasioned as the victim was a disabled person unable to speak properly.

[3] The police authority registered the FIR as Kakraban PS case No.53 of 2020 under Section 376(2)(1) IPC and Sub-Inspector Smt. Madhabi Debbarma (PW-17) conducted the investigation and finally laid the charge sheet under Section 376(2)(1) IPC against the appellant.

[4] During investigation, the investigating officer collected and seized dried blood sample of both the victim and the appellant, vaginal swab, pubic hair and once black/blue colour panty of the victim and also smegma of appellant and sent all those items to the State Forensic Science Laboratory and after DNA examination, Dr. Subhankar Nath, Deputy Director of said Forensic Science Laboratory (PW-11) opined that seminal stain which was detected in the panty of the victim was not of the appellant. The Investigating Officer ignored said opinion while submitting the chargesheet.

[5] The appellant in the Trial Court denied the charges framed under Section 376(2)(1) of IPC regarding commission of alleged rape upon the victim, on 16.06.2020 at around 10.00 hours to 13.30 hours at East Mirza who allegedly was suffering from mental or physical disability.

[6] The prosecution during trial examined total 17(seventeen) witnesses and also proved certain documents into evidence and finally, learned Trial Court held him guilty for commission of said crime. While doing so, learned Trial Court observed that the victim was mentally retarded to the extent of 75% and she was not in a position to understand the good or bad aspect of sexual assault and as such the absence of any injuries on her person by itself was not sufficient to disbelieve her. While discarding the evidence of forensic expert who excluded presence of any semen of the appellant in the panty of the victim, learned Trial Court also observed that the Court was not bound by the said result of forensic examination as it was only of advisory in nature. Learned Trial Court also gave much reliance on the evidence of the victim and her mother and two neighbouring people and finally came to conclusion that the charge was established against the appellant.

[7] Mr. D. Datta, learned counsel during hearing submits that learned Trial Court has misappreciated the evidences on record and illegally discarded the evidence of forensic expert. According to Mr. Datta, learned counsel, there was no reason to disbelieve the evidence of said scientific expert inasmuch as the prosecution itself relied on said evidence and said witness was also not declared hostile by the prosecution. Mr. Datta, learned counsel further contends that if the evidence of scientific expert is taken into account, it belies the entire

prosecution case of alleged commission of rape upon the victim by the appellant. Mr. Datta, learned counsel also submits that there was unexplained delay of four days in lodging the ejahar giving passage to the prosecutrix or her mother to falsely implicate the appellant in the case, more particularly, in view of the fact that it was admitted by the victim in her evidence that they had bad relation with the appellant who was their next door neighbour.

[8] Mr. Rajib Saha, learned Addl. P.P., however strenuously argues that the evidence of the victim was cogent, reliable and trustworthy and therefore, learned Trial Court was completely justified in convicting the appellant. According to him, the mother of the victim also corroborated the victim on all material points which was further bolstered by way of corroboration of evidences of two other witnesses viz. PW-3 and PW-4 (the two co-villagers) and none of the witnesses, according to learned Addl. P.P., could be discredited by the defence during their cross-examination. Learned Addl. P.P. also contends that the delay in lodging the FIR was also properly explained by the prosecution. Regarding the forensic report, Mr. Saha submits, the evidence of PW-11 and said report were of advisory nature and therefore, the Court was not bound to rely on it.

[9] We have taken note of the rival contentions of the parties and the materials placed on record. As it appears, out of 17(seventeen) witnesses as examined by the Prosecution, the key witnesses of the case are the victim herself (PW-2) and her mother (PW-1). Other important witnesses examined by the prosecution are PW-3, PW-4 and PW-5 who are their co-villagers and two of them are Pradhan and Upa-pradhan of the local gaon panchayat. Other two

witnesses i.e. Dr. Subhankar Nath, the forensic expert (PW-11) and Dr. Gayatri Debnath (PW-16) who physically examined both the victim and the appellant, are also important witnesses of the case. Rest witnesses are either seizure witnesses or scribe of the FIR or certain official witnesses whose evidences are not much significant so far the charge is concerned.

[10] PW-2, the victim deposed that about six months ago her mother went to the chamber of one dental surgeon and at that time the appellant came to their house and enquired about her mother. Then she informed him that her mother went to market. Thereafter, the appellant took her to the backyard of her house by pulling her hands, opened her panty and committed sexual assault upon her forcefully. On return of her mother, she informed the said incident to her. In her cross-examination, she stated that she could not say the exact date of the alleged incident but she could reply properly to any queries. She also admitted that they did not maintain good relation with the appellant.

[11] The mother of the victim (PW-1) also stated that about 6/7 months ago, she went to the chamber of one dental surgeon at Mirza market and on her return to the house at around 1.30/2.00 pm she learnt from her physically challenged daughter and her grandson of age 3/4 years (not examined in the case) that the appellant had visited their house and enquired about her and then taking her daughter on the backyard, forcefully opened her panty and committed sexual assault on her. She immediately informed the matter to one of her neighbour namely, Sri Sital Sarkar (PW-3) and then to panchayat Pradhan Sri Sadhan Debnath (PW-4) and Upa-pradhan Sri Swapan Kar (PW-5) and all of them suggested her to take shelter of law and thereafter, she lodged

the FIR. She further stated that there was delay of 2/3 days as her daughter was physically challenged girl. In her cross examination, she stated that her house was surrounded on the southern side by the house of Sital Sarkar (PW-3), on the northern side by the house of Subal Hrishidas (not examined), on the eastern side by the house of Bhanu Biswas (PW-7) and on the western side by the house of the appellant. There was no further significant cross-examination of said witness.

[12] According to PW-1, her daughter was a physically challenged person. PW-3 and PW-4 stated that the mother of the victim informed them that the appellant committed sexual assault upon her physically challenged daughter in her absence. But none of them stated anything about any sort of mental disability of the victim. To convict or punish a person under the provision of Section 376(2)(1) IPC, it is incumbent upon the prosecution to satisfactorily prove that the rape was committed upon a woman suffering either from mental or physical disability. In the FIR, mother of the victim mentioned that the victim was a differently able person as she was not in a position to speak properly, though in her evidence she did not depose anything in that manner. In the evidence of the victim or in the related order of the learned Trial Court of the relevant date of examination of the victim, there is no indication that learned Court noticed any sort of disability of the victim, either physical or mental. From the evidence of investigating officer (PW-17) it appears that one disability certificate of the victim was seized by her but neither the doctor issuing such certificate was examined nor said disability certificate was proved into evidence.

[13] Prosecution examined one medical officer namely, Dr. Subhash Kanti Datta (PW-14) who issued a letter to the investigating officer on verifying the records of the office of District Disability Rehabilitation Centre, Udaipur informing the investigating officer that as per the office record a disability certificate was issued from said office in respect of the victim who was having 75% disability of mental retardation. However, said letter is not sufficient to establish the fact of mental retardation of the victim of permanent nature unless and until said original disability certificate is duly proved by examining the issuing authority of said certificate. PW-14 neither examined the victim nor issued any such disability certificate and he did not depose anything of having any personal knowledge of any such disability. Mere oral evidence of the mother of the victim that her daughter was physically challenged person was not sufficient enough to convict the appellant on a charge under Section 376(2)(l) IPC.

[14] The important stakeholders in the process such as the investigating officer, the prosecutor, the medical officer as well as the Court are required to be more sensitive while dealing with a case of any offence of sexual abuse committed upon any physically or mentally disabled woman. It is always to be borne in mind that such a disabled person, especially the mentally disabled woman, are very soft target or of easy prey of any such sexual offence and are vulnerable to such nature of crime and therefore, all the above stakeholders are to play their own role with utmost sensitivity, care and alertness. Even a major amendment was brought in Section 164 of Code of Criminal Procedure by the Law makers vide Amendment Act No.13 of 2013 w.e.f. 03.02.2013 by

incorporating sub-section bearing No.(5A) in Section 164 Cr.P.C. in the following terms:

(5A) (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed;

Such amended provisions therefore stipulates that while recording a statement the victim of above said offences, who is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement and even, such recording shall be videographed. Here the statement of the victim was recorded by a Judicial Magistrate (PW-15) who in her evidence stated nothing as such that she had noticed any sort of disability either physical or mental of the victim while recording her statement and there is also no indication in her evidence or in the record that the above said amended provision of Section 164 Cr.P.C. was followed in the instant case. Even Dr. Gayatri Debnath (PW-16), who examined the victim after the alleged crime, was also completely silent about existence of signs of any such disability of the victim. But despite the same, learned Trial Court found the appellant guilty of

commission of offence under Section 376(2)(1) IPC without having any cogent evidence in the matter of alleged disability of the victim.

[15] The mother of the victim i.e. PW-1 in her evidence stated that she came to know about the incident from the victim and also from her grandson who was at that time aged about 3/4 years. The investigating officer produced said grandson before the said Judicial Magistrate (PW-15) for recording his statement under Section 164 Cr.P.C. and same was also recorded. Said statement of the grandson was marked as Exbt.P-13 and on perusal of said Exbt.P-13, it appears that he could not say anything meaningful to the Magistrate with reference to the alleged commission of crime and may be, for that reason, the prosecution did not examine him during trial. Therefore, it also creates a serious doubt as to how PW-1 came to learn about the incident from her said grandson at the first instance.

[16] Now, amongst the neighbouring people on whom the learned Trial Court heavily relied on, Sri Sital Sarkar (PW-3) stated that about 1 & ½ year ago in the evening, the informant visited his house and informed that in the noon of that day in her absence, the appellant committed sexual assault upon her daughter and thereafter, said witness advised her to inform the matter to village panchayat. In his cross-examination, he categorically stated that he did not make any statement to the investigating officer and after hearing the incident from the mother of the victim, for the first time he was disclosing the said fact in the Court. Therefore, it appears that he for the first time deposed in the Court without having any previous statement in this regard.

[17] Sri Sadhan Debnath (PW-4), the concerned panchayet Pradhan also similarly stated that on the subsequent day of alleged incident, the mother of the victim came to his house and stated that the appellant had committed rape upon her daughter and then he asked her to take shelter of law. Both above said PW-3 and PW-4 are witnesses of hearsay nature.

[18] Sri Swapan Kar (PW-5), the Upa-pradhan, on the other hand, did not utter anything about commission of rape upon the victim by the appellant rather he stated that one day the informant came to his house and only informed that two days ago the victim was taken to the backyard of her house by pulling her hands by one person whose surname was Debnath and father's name was Late Swapan Debnath. Thus, there is also discredoration found in respect of verbatim given by the mother of the victim to PW-3 and PW-4 on one part and to PW-5 on the other part. It is also noticeable that according to the Pradhan, just on the subsequent day of alleged incident, the informant met him and he advised her to take shelter of law but without following such instruction she on the next day visited the house of Upa-pradhan and informed the matter of only pulling of hands of the victim by the appellant. Therefore, it also otherwise indicates that the informant was more busy in informing the village level leaders about the alleged incident on different dates than to take recourse of law.

[19] There has been delay of four days in lodging the FIR. As per the printed form of FIR, the distance of the place of occurrence from the police station was only about 9 km. Though in the FIR and also in the evidence, PW-1 tried to give some explanation that as her daughter was a physically challenged

girl there was some delay in lodging the same but such explanation is not convincing and acceptable. Such alleged disability cannot be a ground of causing delay in lodging the FIR unless she was prevented for other certain probable reasons from lodging the FIR in all promptitudes. Rather it appears that despite the advice of the Pradhan to take shelter of law, she caused further delay of two days in lodging the FIR. In *Thulia Kali vs. The State of Tamil Nadu; AIR 1973 SC 501* it is held by the Hon'ble Supreme Court that delay in lodging first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore essential that delay in lodging of FIR should be satisfactorily explained. It is also observed by the Apex Court in *Ramdas and others vs. State of Maharashtra, AIR 2007 SC 155*, that mere delay in lodging the first information is not necessarily fatal to the case of the prosecution, however, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice and this fact has to be considered in the light of other facts and circumstances of the case. In the instant case in hand, we are not satisfied with the explanation offered by the informant for the reasons as discussed above.

[20] The next vital point as raised is that Dr. Subhankar Nath (PW-11) was the Deputy Director of DNA Typing Division at State Forensic Science Laboratory, Narsingarh who examined a portion of dried blood sample of the victim girl (marked as Exbt.A in the Laboratory) and dried blood sample of

appellant (marked as Exbt.E) and also a portion of semen stained cloth i.e. black/blue colour panty of the victim (marked as Exbt.G), for DNA isolation by organic extraction method and he deposed that he examined the same from 29.06.2020 to 20.07.2020 in the Laboratory and finally came to conclusion that the semen stain which was detected in the panty of the victim did not originate from the dried blood sample of the appellant. His said report was proved by the prosecution as Exbt.P-10. Such report when relied on by the prosecution itself without any dispute, give rise to a serious suspicion of presence of semen of somebody else than the appellant in the panty of the victim. When the prosecution did not make any attempt to discard said evidence of PW-11 and his said report, learned Trial Court committed serious error in discarding it without any valid reason. Just because the evidence of PW-11 was of advisory nature, learned Trial Court was not at all justified to ignore the same without finding any fault with it. Such observation of learned Trial Court appears to be highly irrational. Learned Trial Court relied on many decisions of the Apex Court in the impugned judgment to support the conviction but without much discussion on the evidence actually available in the case. Making of reference of different decisions of higher courts cannot strengthen a case of prosecution nor can cure inherent defects inbuilt in the evidence and also in the decision making process of the Court.

[21] Regarding evaluation of DNA analysis report, the Apex Court in ***Dharam Deo Yadav vs. State of Uttar Pradesh; (2014) 5 SCC 509*** observed as follows:

“36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made up of a double stranded structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked

with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW 20 and PW 21. The Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangled Diana to death and buried the dead body in his house.”

Said principle was again reiterated in the case of *Manoj and others vs. State of Madhya Pradesh; (2023) 2 SCC 353*. In *Pattu Rajan vs. State of Tamil Nadu, (2019) 4 SCC 771*; the Apex Court in Para 52 of the judgment observed as follows:

“52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.”

There is no dispute that the DNA analysis report bears certain probative value like other opinion evidence and Courts in the country are also relying on such reports, however such probative value differs from case to case.

The result of such DNA analysis though depends on the quality control and quality procedure maintained in the Laboratory, but it is at all justified to discard such evidence at the threshold without tracing it's fallibility, especially when it was relied on by the prosecution and it helped the accused. Discarding of the same without any justified reason is itself violative of the basic principle of presumption of innocence of the accused as embedded in the criminal administration of justice.

[22] Dr. Gayatri Debnath (PW-16), the medical officer also deposed that on examination, she found the hymen of the victim was ruptured but there was no physical injury or mark of struggle and finally on receipt of forensic report she opined that the victim had sexual intercourse. But she did not give any opinion about any recent sexual intercourse or about any forceful intercourse. As per her report, such tearing of hymen was old one. But, learned Trial Court missed sight of the same, rather while discussing such medical examination report, learned Trial Court even went to the extent of observing that the perpetrator of crime was an able bodied youth bustling with energy and determined to fulfill his lust having an ill motive in his mind and having succeeded in forcefully removing the victim to a secluded part of the house where there was none around to help the prosecutrix in her defence. It was also observed that the injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in ordinary course of nature within 2 to 3 days of the incident. The approach of learned Trial Court appears to be very unsafe and

dangerous inasmuch as it has made such observations based on certain imaginary facts and hypothesis without it's availability in the evidence.

[23] In view of above discussions, we find no other option but to interfere with the impugned judgment of conviction and sentence. As a result, the impugned judgment of conviction dated 03.04.2024 passed in Sessions Trial No.06 of 2021 and related sentence passed on 06.04.2024 by learned Addl. Sessions Judge, Gomati, Udaipur are set aside.

The appellant is set at liberty and bail bond liability of his surety stands discharged.

Return the Trial Court record with copy of the judgment.

Pending application(s), if any, also stand disposed of.

(S. DATTA PURKAYASTHA, J)

(ARINDAM LODH, J)