

GAHC010004372012



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./52/2012

MUFOSIL ALI @ MUBOSIL ALI
S/O LATE HAZI ISMAIL ALI, R/O VILL. TILAGAON, P.S. PATHARKANDI,
DIST.KARIMGANJ, ASSAM.

VERSUS

THE STATE OF ASSAM

For Appellant	:Md. M. H. Rajbarbhuiyan, Advocate
For respondent	:Ms. S. Jahan, Additional Public Prosecutor, Assam
Date of judgment	:30.08.2023

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT AND ORDER (CAV)

Date : 30-08-2023

(Mridul Kumar Kalita, J)

- 1.** Heard Md. M. H. Rajbarbhuiyan, learned counsel for the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the State of Assam.
- 2.** This Appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973, by the appellant Mufosil Ali @ Mubosil Ali, impugning

the judgment and order dated 24.02.2012, passed in Sessions Case No. 03/2011 by the learned Additional Sessions Judge (FTC), Karimganj whereby the present appellant was convicted under Section 376 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 2,000/-, and in default of payment of fine to undergo simple imprisonment for a period of another one month.

3. The facts relevant for adjudication of the instant Criminal Appeal, in brief, are as follows:

(i) That on 11.02.2010, one Abul Hussain lodged an FIR before the Officer-in-Charge of Patharkandi Police Station, *inter-alia*, alleging that about eight months prior to lodging of the FIR, when the daughter of the first informant, who was aged about 15 years at that time, went to fetch water to the house of the accused Mufosil Ali @ Mubosil Ali (present appellant), he forcefully committed rape on her and threatened her that he would kill her if she discloses the matter to anyone.

(ii) It is also alleged in the said FIR that thereafter the appellant made physical relationship with the daughter of the first informant on several occasions on the assurance of marrying her and as a result of which the daughter of the first informant became pregnant. It is also stated in the FIR that the first informant was not in his home during this period as he was in jail for four months in connection with some criminal case and when he came home after getting released from the jail and when he noticed the condition of his daughter, he enquired from his daughter who narrated the incident to him. It is also stated in the FIR that in the intervening night of 6th and 7th February, 2010, at about 3.00 am, the

daughter of the first informant gave birth to a stillborn baby girl.

- (iii)** On receipt of the said FIR, Patharkandi P. S. Case No. 22/2010 under Sections 376(e)/417 of the Indian Penal Code was registered and one Durjamoni Singha, S. I. of police was entrusted to conduct the investigation.
- (iv)** After completion of the investigation, charge-sheet was laid against the present appellant under Sections 376(e)/417 of the Indian Penal Code.
- (v)** Though, the present appellant was arrested during the course of investigation, however, he was released on bail by order dated 26.05.2010 passed in Criminal Misc Case No. 163/2010 and thereafter, he faced the trial remaining on bail. On 21.01.2011, learned Additional Sessions Judge (FTC), Karimganj framed charges under Section 376 and Section 417 of the Indian Penal Code against the present appellant and when the said charges were read over and explained to the present appellant, he pleaded not guilty to the said charge and claimed to be tried.
- (vi)** During trial, the prosecution side examined ten(10) numbers of prosecution witnesses including the victim girl. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, during which he pleaded his innocence and denied the incriminating evidence adduced against him by the prosecution witnesses. The defense side also adduced three(03) numbers of defense witnesses in support of the case of the present appellant. On completion of the trial, the present appellant was convicted and sentenced by the trial Court in the manner as stated in paragraph No. 2 herein before.

4. Before considering the rival submission of learned counsel for the appellant as well as learned Additional Public Prosecutor, let me go through the evidence which is available on record.

5.1 PW-1, Md. Abul Hussain, who is the first informant in this case, has stated in his deposition that the victim is his daughter and she was about 15 years of age when the incident occurred. He has also stated that he was in jail in connection with a case at that time and after getting released from jail when he came back home, he found his daughter pregnant and he learnt from his daughter and his wife that when his daughter went to fetch water from the house of the present appellant, he committed rape on her.

5.2 PW-1 has deposed that he informed the villagers about the incident, however, the matter could not be resolved in the village meeting and his daughter gave birth to a stillborn baby and thereafter, he lodged the FIR which was exhibited by him as Exhibit-1.

5.3 During cross-examination, PW-1 has stated that he spent four months after being accused of murdering the son-in-law of the present appellant and during the period of his imprisonment his wife went to the jail and informed him that the present appellant had committed rape on their daughter. He has also stated that for holding a *Bichar* (a village meeting which is held to settle disputes among villagers), a written notice was served upon Kazi Mustafa, Abdus Sattar and others, and Idgah committee to convene the said meeting and a prayer was made for holding the village meeting against the present appellant. He answered in negative to a suggestion that he asked for the village

meeting against one Sahadat Hussain, son of the present appellant. PW-1 has also stated in his cross-examination that he bought his homestead land from Akmal Ali who is the younger brother of the present appellant. He has also stated that the house of his father-in-law Akmal Ali is in between his house and the house of the present appellant. He has also stated that the present appellant committed rape on his daughter near the plantain and other trees on the bank of the pond. He has answered in negative to a suggestive question that that though the water of the pond of his father-in-law and his own pond is suitable for use, he lodged a false case against the present appellant making fabricated allegations against him. He has stated that he lodged the FIR as he did not get justice in the village meeting (*Bichar*) which was held in his village. He has also stated that his daughter was six months pregnant when he returned home from jail and he immediately asked for *Bichar* and it took about one month for holding the *Bichar* and thereafter, he lodged the case. He has denied the suggestion that he lodged the case against the present appellant out of grudge as he had previous enmity with him.

6.1 PW-2, Lutfur Rahman, has deposed that the daughter of the first informant (victim) was unmarried and was aged about 15 years when she gave birth to a stillborn baby and he had put his signature on the inquest report of the stillborn baby. This witness was declared as hostile by the prosecution side and during cross-examination by the prosecution side he had denied the fact that he had stated before police that he learnt from Md. Abul Hussain and his wife Khosrun Nessa that when the victim went to fetch water from the appellant's pond, he committed rape on her and thereafter, he established physical relationship with her with a promise of marrying her.

6.2 During cross-examination by the defense side, PW-2 has stated that

subsequent to lodging of the FIR, the victim made a prayer before the Idgah Committee to hold a village meeting (Bichar) against Sahadat Hussain, who is the son of the present appellant. However, no settlement could be arrived at the village meeting made and he saw the present appellant surrounded by the police.

7.1 PW-3, is the victim "X" (real name not disclosed), who has deposed that about a year and a month ago (*prior to her deposing before the Court as PW-3*) she gave birth to a stillborn baby when she was carrying seven months of pregnancy. She has also deposed that she went to the house of the present appellant to fetch water, he gagged her and committed rape on her forcibly. She had stated that she resisted but he did not pay to any heed to it. It is also stated by her that the present appellant committed rape on her near the pond of his house. She has also stated that as the present appellant threatened her not to divulge the fact to anyone, she did not disclose the incident to anyone, and she informed about this fact to her parents, only after she became pregnant. It is also deposed by the PW-3 that the present appellant thereafter also committed rape on her with a promise of marrying her. She has also stated that her father asked for a village meeting (*Bichar*) against the present appellant however, no decision was taken in the said village meeting. She has also stated that the present appellant is the father of her stillborn child. She has also stated that at that time she was 15 years of age and the present appellant was her related maternal grand-father and marriage within people in that relationship is acceptable. She has also stated that her statement was recorded before the Magistrate which is exhibited as Exhibit-2.

7.2 During cross-examination, the victim (PW-3) has stated that the name of the son of the present appellant is Sahadat Hussain who is aged about 15-16

years. She has also stated that she did not go to any village meeting (*Bichar*). She has also stated that she went to fetch water around 4.00 pm and the house of the Akmal Ali is situated to the north-east of the pond of the appellant and the house of Nurul Islam is situated to the south-east of the pond and there is a plot of agricultural land in between the pond of the appellant and the house of the victim and she went to the house of the appellant through the road. She also stated that she brought drinking water from the house of the appellant and the other people also used to bring water from his house. It is also stated by the PW-3 that the present appellant committed rape on her for about 10-12 days during day time under the plantain near the pond, subsequent to committing rape on her for the first time.

7.3 She has also stated that the wife of the appellant was alive and used to stay in the house of the appellant. It is also stated that there is a *ghat* (Shore) of stones on the bank of the pond of the appellant. She has also stated that there were 15-20 plantains near the pond of the road. She has also stated that the appellant committed rape on her by lying her down and her cloth got soiled. It is also stated that the appellant committed rape on her about 10-12 times within a month and she informed her mother about her pregnancy after four months only after her monthly cycle had stopped. She has also stated that she was beaten up by "*Dura*" (*a kind of stick which is used for inflicting customary punishment as per decision adopted in the village meeting*). She denied the suggestion that her father asked for a *Bichar* before the Kaji against Sahadat. She has also stated that on the first day of incident, she had not informed about the incident to her own maternal grandfather, whose house was adjacent to the house of the appellant about the incident.

8.1 PW-4, Abdul Rouf, has deposed that when he went to the house of the

PW-1, he came to know that his daughter has given birth to a stillborn baby and she has informed that the present appellant had committed rape on her and he was the father of the stillborn baby.

8.2 During cross-examination, he has stated that the name of the son of the present appellant is Sahadat Ali and he is not aware about the fact that the victim girl was canned or not in village meeting. He has denied the suggestions given by defense side during his cross-examination.

9. PW-5, Asab Uddin, has also deposed that he came to know about the victim giving birth to a stillborn baby and he heard that the present appellant was the father of that stillborn baby. During cross-examination, PW-5 has deposed that he does not know if the victim has lodged any complaint against Sahadat Hussain who is the son of the present appellant.

11. PW-6, Simul Ahmed, has deposed that he came to know that the victim gave birth to a stillborn baby and that the present appellant is the father of that stillborn baby. During his cross-examination he has stated that he knew nothing prior to the birth of the child and he also stated that Akmal Ali's house is situated on the Eastern boundary of the victim and Amir Ali's house is on the western side.

12. PW-7, Khosrun Nessa, who is the mother of the victim girl has deposed that she came to know about the incident when her daughter was carrying four months of pregnancy and when she asked her, her daughter told her that when she went to fetch water from the house of the present appellant, he committed rape on her and as a result of which, she became pregnant and she delivered a stillborn baby. She has also stated that her husband was in jail when she learnt about the pregnancy of her daughter. During, cross-examination, she has stated

that she does not know Sahadat, son of the present appellant. She has also stated that the present appellant is her own uncle. She has also stated that house of her father Akmal Ali is situated on the Eastern boundary of her house and no Bichar (village meeting) was held in connection with the incident. She has answered in negative to certain suggestive question put to her by defense.

13. PW-8, Dr. Swapan Kr. Sen, who conducted the post-mortem cross-examination of the stillborn baby of the victim girl, has stated that on 07.02.2010, when he was working as Sub-Divisional Medical & Health Officer at Karimganj Hospital, he conducted the post-mortem examination of a newly born female baby and as per his opinion the cause of death was due to immature delivery of the immature baby. He exhibited the post-mortem report as Exhibit-3.

14.1 PW-9, Durjaimoni Singha, who was the Investigating Officer of the Patharkandi P. S. Case No. 22/2010, has deposed that on 07.02.2010, when he was working as Sub-Inspector of Police of Patharkandi Police Station, the first informant Abul Hussain verbally informed him that when he was in jail the appellant committed rape on his daughter and as a result of which, his daughter became pregnant and later on, the appellant established physical relationship when his daughter making a promise to marry her and after his release from jail, the first informant asked for a village meeting on this matter. On receipt of the said verbal information, the PW-9 made a GD Entry in the Police Station namely, G. D. Entry No. 147 dated 07.02.2010 which is exhibited as Exhibit No. 4. On the basis of the said G. D. Entry, the PW-9 visited the place of occurrence and prepared one sketch map, which is exhibited as Exhibit-5 and he sent the stillborn baby of the victim girl for post-mortem examination. Later on the PW-1 lodged an FIR in this connection before Patharkandi Police Station and the

Officer-in-Charge of the Police Station entrusted the PW-9 to conduct the investigation. Thereafter, he recorded the statement of witnesses and took steps for recording the statement of the victim under Section 164 of the Code of Criminal Procedure, 1973 and the appellant was arrested and thereafter, after completion of the investigation charge-sheet was laid against the present appellant which is exhibited as Exhibit-6.

14.2 During cross-examination PW-9 has deposed that he had not submitted the copy of GD Entry No. 147 dated 07.02.2010 along with the charge-sheet and he had submitted on the day when he deposed as a witness from the case diary. He has also stated that he arrested the present appellant on 12.03.2010 at the time when village meeting was going on at Idgah and he has not stated in the case diary regarding the subject matter of the village meeting. He has stated that PW-1 has stated before him that when he was in jail his wife had informed him that his daughter had become pregnant. He has also stated that PW-1 did not state that his daughter has not informed him about the incident. PW-9 has also stated that the victim did not mention in her statement that the present appellant had gagged her and threatened her. PW-9 has stated that during his cross-examination that PW-2 Lutfur Rahman had stated before him during investigation that he learnt from Abul Hussain PW-1 and his wife that when victim went to fetch water from the pond of the present appellant he committed rape on her and thereafter, he established physical relationship with her by making allurements of marrying her.

15.1 PW-10, Dr. Santanu Das, has deposed that on 29.01.2012 when he was posted as Medical & Health Officer, Karimganj Civil Hospital, he examined the victim girl who was aged about 18 years and found that she was carrying pregnancy of 32 weeks. He exhibited medical report as Exhibit-7.

15.2 During his cross-examination he stated that as per the medical report of the victim the age of the victim girl is 18 years.

16. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 during which he had stated that he was 66 years of age, and he has denied that he committed any rape on the daughter of PW-1 and stated that the PW-1 has lodged a false FIR against him. He has denied the incriminating evidence adduced against him by the prosecution witnesses and has pleaded his innocence. He examined three defense witnesses in support of his defense.

17. DW-1, Mustafa Ahmed, has deposed that there is one Idgah in their Kandigram locality, and people from 15-16 villages used to offer Namaz there at the time of Eid. He has stated that on 12.03.2010, he convened the village meeting (*Bichar*) in connection with matter relating to the victim girl and went Sahadat Hussain, and he issued notice to both the parties. He has exhibited the said notice as Exhibit-A. He has also stated that the present appellant who is the father of the Sahadat Ali appeared in the meeting and PW-1 appeared on behalf of the victim girl in the meeting. However, no decision could be taken up in the meeting. He has also stated that when the meeting was going on Friday, police arrested the present appellant from the meeting and no further *Bichar* could be held in this regard. During his cross-examination, he has denied that he prepared a false notice and exhibited it as Exhibit-A. He has also stated that he knows the fact that the victim was an unmarried girl when she became pregnant and he does not know that who impregnated the victim girl and that she delivered a stillborn baby.

18. DW-2, Samsuddin, has stated that he is an Executive Member of Kandigram Eidgah Committee and on 12.03.2010, a meeting of the Eidgah

Committee was held to settle the dispute between Sahadat Hussain and the victim and when the meeting going on, the police arrived all of a sudden and arrested the present appellant. During cross-examination, he has also stated that the present appellant is also an accused in a murder case in connection with the murder of his daughter's husband Raisul Haque and some other cases are also pending against the present appellant.

19.1 DW-3, Akmal Ali, has stated in his deposition that the first informant is husband of his daughter and the victim is his grand-daughter. He has also stated that the appellant is his own brother and his house is situated at a distance about one Bigha from the house of the informant. He has stated that there are three ponds in their house one belongs to him, another belongs to her brother and the other one is joint property and they used to use which is a joint property. He has also stated that the members of the family of his son-in-law and his grand-daughter used to collect water from the pond, which is a joint property of their family and there is a ghat in the pond and there are betel-nut trees besides the ghat. He has also stated that the victim i.e., her grand-daughter told him that the son of the present appellant, namely, Sahadat Hussain made her pregnant. He has stated that he is unaware of any village meeting (*Bichar*) which was held in this regard.

19.2 During cross-examination, he has answered in negative to suggestion given to him that there are plantains on the bank of the pond. He has also stated that the appellant is his own elder brother. He was asked certain suggestive questions by the defence side to which he answered in negative. He has denied that his son-in-law stopped visiting his house after the incident. He has also denied that he has given false evidence to save his own brother.

20. Mr. M. H. Rajborbhuiya, learned counsel for the appellant has submitted

that in the instant case the victim has falsely implicated the present appellant as there is evidence to show that in fact it was the son of the present appellant Sahadat Hussain who was responsible for pregnancy of the victim girl and as the father of the victim girl had to undergo imprisonment in a case relating to murder of the son-in-law of the present appellant, he falsely implicated the present appellant making a concocted story against him. It is also submitted by the learned counsel for the appellant that FIR in the instant case has been lodged after a period of eight months from the date of alleged incident, which itself raises doubts regarding the prosecution story against the present appellant. Learned counsel for the appellant has submitted that the appellant is related grand-father of the victim girl and was a person of 66 years of age at the time when the offence was allegedly committed and it is highly improbable that he would have subjected his own grand-daughter to such sexual offence.

21. Learned counsel for the appellant has submitted that the prosecution side has failed to prove that the stillborn child which was born to the victim girl was fathered by the present appellant, which they could have been easily proved, had there been a DNA cross matching between the present appellant and the stillborn child which was not done in this case and hence, the present appeal is entitled to get benefit of doubt.

22. It is also submitted by learned counsel for the appellant that the victim girl had stated that the appellant committed a rape on her on the bank of the own under plantain (banana tree) during day time, which is according to learned counsel for the appellant is highly probable that a man would commit rape of a girl in day light at the place which is frequented by other persons to collect water and said place was also surrounded by house of Akmal Ali and Nurul Islam and a public bath was there by the side of the said tank.

23. Learned counsel for the appellant has also stated that the evidence of DW-3, which learned Trial Court failed to consider clearly shows that the victim girl who is her own grand-daughter told him that father of the her stillborn child is Sahadat Hussain (son of the present appellant). It is also submitted that the evidence of DW-3 also shows that there were some betel nut trees near pond and not the plantains as stated by the victim girl. It is also submitted by learned counsel for the appellant that had the incident have been true, the PW-7 (mother of the victim girl) could have lodged the FIR, as soon as she came to know about the incident and her not doing so raises the doubt regarding the veracity of the allegations levelled against the present appellant. It is also submitted by the learned counsel for the appellant that the evidence of DW-1 and DW-2 shows that a village meeting (*Bichar*) was called for to discuss the matter regarding the victim girl and Sahadat Hussain, the son of the appellant and which itself shows that the present appellant was not involved in the evidence alleged against him in the FIR.

24. Learned counsel for the appellant has also submitted that even if the testimony of victim girl (PW-3) is considered to be true for argument sake, it only shows that she indulged into sexual intercourse with the present appellant for 10-12 times without reporting the same to anyone on the pretext that the present appellant would marry her and thus, the physical relationship between the present appellant and the victim girl, even if it had happened was consensual. Learned counsel for the appellant has also submitted that the evidence of Doctor (PW-8) shows that the victim girl was of 18 years of age and hence, she was major at the time of alleged offence and as she was major and she herself consented the physical relationship with the present appellant, no offence under Section 376 of the Indian Penal Code has been committed.

25. Learned counsel for the appellant has submitted that the prosecution side has miserably failed to bring home the charge under Section 376 of the Indian Penal Code against the present appellant beyond reasonable doubt and hence, the conviction and sentence imposed on the present appellant by the judgment which is impugned in this appeal is liable to be set aside.

26. In support of the contention made by learned counsel for the appellant, he has cited ruling of this High Court in "**Sahidul Islam Vs. State of Assam**" reported in "**2013 3 GLT 534**", wherein it was observed that when the a full grown girl consents to the act of sexual intercourse on the promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact and Section 90 of the Indian Penal Code cannot be called into aid in such a case to pardon the act of the girl and fasten the criminal liability on the other unless the Court can be assured that from the very inception the accused never really intended to marry her. In the said case, the benefit was also given to the accused on the ground of sufficient delay in lodging a complaint by the victim girl.

27. Learned counsel for the appellant has also cited a ruling of Hon'ble Supreme Court of India in "**Kuldeep K. Mahato Vs. State of Bihar**" reported in "**(1998) 6 SCC 420**", wherein the conviction of the appellant under Section 376 was not sustained only on the ground that the prosecutrix had sufficient opportunity to take the help of the neighbours which was not taken by her and there was no injury found on her person including her private parts which shows that was a consensual party of sexual intercourse.

28. In other case, which has been cited by the learned counsel for the appellant is of Hon'ble Supreme Court of India in "**Munna Vs State of Madhya**

Pradesh“ reported in “(2014) 10 SCC 254”, wherein the benefit of doubt was given to the appellant on the ground of inherent infirmities in the prosecution’s case which create doubt about its veracity and which was found not to be said to be acted upon.

29. Learned counsel for the appellant has also cited another ruling of Hon’ble Supreme Court of India in “**State of Madhya Pradesh Vs Munna**” reported in “(2016) 1 SCC 696”, in the prosecutrix was found to be a consenting party and benefit of doubt was given on that count to the appellant and his conviction was accordingly set aside.

30. Similarly, the learned counsel for the appellant has also cited ruling of this Court in “**Ripak Das Vs. State of Assam**“ reported in “2002 (2) GLT 137”, and “**Mainul Hoque Vs. State of Assam**” reported in “2008 (1) GLT 916”, wherein the accused were acquitted on the count that the prosecutrix was found to be a consenting party.

31. On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor has submitted that in the instant case the victim (PW-3) has categorically stated that at the first instant she was forcibly subjected to sexual intercourse by her own related maternal grand-father and after the said act she was threatened not to divulge the incident to anyone and it is only thereafter, she was subjected to repeated sexually intercourse on the assurance of marrying her.

32. Learned Additional Public Prosecutor has submitted that as the father of the victim girl was in the jail when the offence was first committed and as the perpetrator of the offence was her own related maternal grand-father, it was not unnatural on her part not to disclose the said incident to anyone including her own mother due to shame, indignation and fear of getting outcaste from

society.

33. It is also submitted by learned Additional Public Prosecutor that it is when her pregnancy became visible and she had no other options that she disclosed the matter to her own mother first and as her father was in jail at that point of time, it was not unnatural that they did not pursue any criminal case and waited till release of her father. Learned Additional Public Prosecutor has also submitted that the consent even if it was given later on for subsequent acts of the appellant, it was under misconception of fact and may not be regarded as voluntary consent on the part of the victim girl and that she was subjected to sexual intercourse by the present appellant against her own will and later on continued the same on false pretext of marrying her and such consent, if it is given under such circumstances may not be treated as voluntary consent. In support of her submission, learned Additional Public Prosecutor has cited a ruling of Hon'ble Supreme Court of India in "***Uday Vs. State of Karnataka***" reported in "**(2003) 4 SCC 46**".

34. Learned Additional Public Prosecutor submits that the testimony of PW-3 victim girl has been consistent in regard to the material particulars of the alleged offence and the defence side has failed to demolish her testimony to the effect that she was forcibly subjected to sexual intercourse by the appellant at the first instant when she went to fetch water to his own. She has also submitted that though the defence has taken plea that the son of the present appellant, namely Sahadat Hussain was responsible for the said incident, however, no such allegation has been made against the said Sahadat Hussain by either victim girl or her parents including the first informant.

35. Learned Additional Public Prosecutor has also submitted that the testimony of prosecutrix that she did not consented to the sexual intercourse by

the present appellant is sufficient to convict the present appellant, if her testimony is otherwise found to be reliable and was deform any material infirmities and thus, learned Additional Public Prosecutor submits that the conviction and sentence of the present appellant under Section 376 of the Indian Penal Code by the judgement which is impugned in this appeal should not be interfered with and should be upheld.

36. I have considered the rival submissions made by learned counsel for both sides and I have gone through the evidence on record meticulously.

37. From the evidence of PW-10 (Doctor who examined the victim girl) and PW-8 (Doctor who conducted the examination of the stillborn baby) there is no doubt that the victim girl was pregnant by 32 weeks when she was examined by the doctor and later on she delivered a stillborn baby. The evidence on record also suggests that the victim was unmarried when she delivered a stillborn baby. It also appears from the evidence discussed in the foregoing paragraphs that when she was carrying four months of pregnancy (*when there was every likelihood of noticing the changes in her physical appearance by others*) she told her mother that the present appellant committed rape on her when she went to fetch water to the pond of the present appellant.

38. Though, learned counsel for the appellant had vehemently argued that the prosecution case becomes doubtful due to the delay in lodging of the FIR. However, in the instant case, the delay in reporting the incident by the victim girl to her mother does not itself lead to inference that the incident is false as the fact of the victim girl delivering a stillborn baby, while she was still unmarried remains undeniable. The fact that she was subjected to sexual intercourse which resulted into her in pregnancy is not in dispute. The only question is as to who was the person who is responsible for her pregnancy and

as to whether such sexual intercourse was consensual or not.

39. It is there in the evidence that when the incident occurred the father of the victim girl was in jail. At that time, she was living with her mother and under such circumstances when she was subjected to sexual intercourse by her own related maternal grand-father who was the uncle of her mother, and when she was threatened by the appellant not to divulge the incident to anyone, it is not unnatural for an unmarried girl who was barely of 18 years of age at that time to get worried about her future and to be frightened to report such a traumatic incident to anyone including her mother. If we go through the testimony of the victim girl (PW-3), it appears that though she was cross-examined at length by the defence side, her testimony that she was subjected to forcible sexual intercourse by the appellant could not be demolished. Though, it is also in the evidence that after committing forcible sexual intercourse at the first instance and later on the victim was subjected to forcible sexual intercourse for 10-12 times on the pretext of marrying her by the appellant, however, there is no evidence to suggest that the victim consented to such physical relationship by her own related maternal grand-father, who was about 48 years elder to her at the time when the alleged incident occurred. Merely because appellant continued to rape the victim on subsequent occasions also by promising the victim to marry her does not in itself leads to an inference that on subsequent occasions the victim consented to appellant subjecting her to sexual intercourse. It only shows that the appellant during subsequent acts of sexual intercourse promise to marry her, but it does not shows that the victim consented to same when she has categorically stated in her testimony that she was raped by the present appellant and he is the father of the stillborn baby delivered by her. The judgments relied upon by learned counsel for the

appellant, discussed in foregoing paragraphs, mainly relates to cases where the prosecutrix was found to be a consented party, however, in the instant case the victim girl may not be regarded as a consenting party, at least when she was subjected to such sexual intercourse by the present appellant for the first time. Hence, this Court finds it difficult to believe that the PW-3 (victim girl) was a consenting party to the sexual intercourse to which she was subjected to by the present appellant.

40. As regards the testimony of DW-3, who is the own maternal grandfather of the victim girl, that the victim told her that Sahadat Hussain (son of the appellant) made her pregnant, it is important to note that he has not stated as to when and under what circumstances the victim had disclosed the said facts to him. When the evidence on record shows that the victim was reluctant to disclose the incident even to her own mother, it is unlikely that she would discuss the incident with DW-3, who is her own maternal grandfather and who also happens to be the brother of the alleged perpetrator of crime, i.e., present appellant. Moreover, as DW-3, is the own brother of the appellant, he would naturally try to save his brother, hence his testimony is to be examined with caution, however, in the instant case, his testimony does not inspire confidence as he has failed to disclose as to when and under what circumstances the victim had disclosed to him that Sahadat Hussain was responsible for her pregnancy.

41. As regards holding of village meeting (*Bichar*), even if it is assumed that the said meeting was convened to discuss the matter relating to the victim and one Sahadat Hussain, it does not have any significance in the instant case when neither the victim nor any of her parents have leveled any allegation against said Sahadat Hussain. The PW-3 has categorically stated that it is the appellant who subjected her to sexual intercourse and then threatened

her not to divulge it to anyone, and her testimony has been corroborated by her statement under Section 164 of the Code of Criminal Procedure, 1973, which is exhibited as Exhibit-2 as well as the testimony PW-8 and PW-10.

42. As the incident occurred, when the father of the victim girl was in jail and the perpetrator was her own related maternal grand-father and the fact that PW-3 in fact delivered a stillborn baby and there appears to be no cogent reason for the victim girl to falsely implicate the present appellant, mere delay of filing of FIR under such circumstances would not falsify the prosecution story. The testimony of PW-3 (victim girl), under the facts and circumstances in the instant case as discussed herein above is not liable to be discarded as it lacks any inherent infirmity or anything which creates doubt about its veracity.

43. In view of reasons stated herein above, this Court does not find it justified to interfere with the conviction and sentence of the present appellant under Section 376 of the Indian Penal Code as it stood at the time of commission of the offence. The impugned judgment and sentence of the learned Trial Court is therefore, upheld and the appellant is hereby directed to surrender before learned Trial Court, within two months, to serve out remaining part of his sentence.

44. With above observation, this criminal appeal is hereby disposed of.

45. Send back the case record of Sessions Case No. 03/2011 along with all connected files to the Court of learned Additional Sessions Judge (FTC), Karimganj immediately along with the copy of this judgment.

JUDGE

Comparing Assistant