

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

**C.R.A. 171 of 2018
With
IA NO. CRAN 1 of 2018 (Old No. 1099 of 2018)
Sarada Singha
Vs.
The State of West Bengal**

**For the Appellant : Mr.Samiran Mandal, Adv.
Mr.Abhinaba Dan, Adv.**

**For the State : Mr. Saswata Gopal Mukherjee, Ld. P.P.
Mr. Sandip Chakraborty,
Mr.Ashok Das**

Heard on : 14.07.2021

Judgment On : 14.07.2021

Bibek Chaudhuri, J.

In the instant appeal under Section 373(2) of the Code of Criminal Procedure (hereinafter described as the Code), the convict/appellant has assailed the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Khatra

in Sessions trial No. 3 (10) of 2014 corresponding to Sessions Case No. 10(7) of 2013 thereby convicting and sentencing him to suffer rigorous imprisonment for three years and also to pay fine of Rs. 1,000/- with default clause for committing offence under Section 354 of the Indian Penal Code.

At the outset it is pertinent to note that though the trial Court framed charge against the appellant under Section 376/511 of the Indian Penal Code, the learned trial Judge on appreciation of evidence, both oral and documentary found that the prosecution failed to bring home the charge under Section 376/511 of IPC against the accused. However, there is sufficient material to hold that the accused committed offence under Section 354 of the Indian Penal Code and accordingly the learned Court below convicted and sentenced the accused to suffer imprisonment for three years under the provisions of Section 222 of the Code.

Prosecution case germinated with lodging of an FIR by the daughter of one Anil Lohar (hereinafter described as the victim). In the written complaint she alleged that on 10th July, 2012 at about 5.30 a.m. she went to an open place near a pond to attend nature's call. While she was returning, the accused caught hold of her, touched her breast and other parts of body, then forcibly laid her down on the ground with the intention to commit rape upon her.

However, the victim somehow managed to get out of the clutches of the accused and returned home. She could not tell the incident to any of her family members out of shame on the date of occurrence and also on the following days . Only on 13th July, 2012, she informed the incident to her parents and other relatives considering her future safety and subsequently lodged complaint in the local P.S. In the FIR it was stated by the de facto complainant that she was a student of class X at the relevant point of time , aged about 16 years .

On the basis of the said complaint Indpur Police Station case No. 60 of 2012 under Section 376/511 of the Indian Penal Code was registered, police took up this case for investigation. During investigation statement of the victim girl was recorded under Section 164 of the Code of Criminal Procedure. She was also examined by a Medical Officer. The Investigating Officer also examined and recorded statement of available witnesses, prepared sketch map of the place of occurrence and on conclusion of investigation submitted charge sheet against the accused under Section 376/511 of the Code of Criminal Procedure.

It appears from the lower Court record that in order to bring home the charge against the appellant, prosecution examined in all nine witnesses. Amongst them the P.W. 3 is the victim and prosecutrix. P.W. 1 and P.W.2 are the father and mother of the victim

respectively. P.W. 4 is the uncle of the victim. P.W. 5, P.W. 6, P.W. 7 and P.W. 8 are all members of Lohar family. P.W.9 is the Investigating Officer of this case.

On careful perusal of the evidence on record it is ascertained that except the victim all the witnesses are in the nature of hearsay. They did not see the occurrence. It is pointed out at the very beginning argument by the learned counsel for the appellant that according to the FIR date of occurrence was 10th July, 2012. But the FIR was lodged after three days, that is on 13th July, 2012. There is no explanation of delay in lodging the FIR. On the contrary, it is found from the evidence on record that the father of the prosecutrix is a member of village committee. A criminal case was initiated against the members of the village committee for committing murder of the brother of the accused. In the said case some members of the village committee was convicted and sentenced. Therefore, there is every reason to implicate the accused who is the elder brother of the deceased falsely and for such purpose a concocted FIR was lodged after three days of the alleged occurrence.

It is also submitted by the learned advocate for the appellant that the prosecution failed to prove the place of occurrence. According to the de facto complainant the place of occurrence is an open field near the pond where female inhabitants of the village

regularly go to attend nature's call. On the contrary, the father of the de facto complainant stated that the incident took place inside a forest by the side of the pond. Learned advocate for the appellant also draws my attention to the sketch map prepared by the investigating officer of this case and submits that Investigating Officer did not mention existence of any forest or bushes near the pond. There are agricultural fields on both side of the pond and the version of the de facto complainant and her father with regard to the place of occurrence being contradictory, prosecution case cannot be believed.

It is further submitted by the learned advocate for the appellant that the victim girl while examined as P.W.3 stated that the female inhabitants of their village regularly go to the place, where she was allegedly apprehended by the accused, to attend nature's call. Therefore, it is very natural that apart from the victim girl there must be other persons around the place of occurrence on the date and time of alleged incident. But the prosecution failed to examine any independent witnesses in this case.

Considering all such aspects of the matter it is urged by the learned advocate for the appellant that the learned trial Judge committed gross error in appreciating the evidence of P.W.3 and other witnesses and holding the accused guilty for committing offence under Section 354 of the Indian Penal Code. Lastly he submits that the

incident allegedly took place on 10th July, 2012. The appellant was held guilty for committing offence under Section 354 of the Indian Penal Code. At the time of commission of alleged offence, an offender may be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. The learned trial Judge failed to consider the pre-amended provision of Section 354 of the Indian Penal Code and passed an order of sentence of imprisonment for a term of three years which according to law cannot sustain. The accused must be prosecuted on the basis of the penal provision applicable on the date of commission of offence. On such ground also the impugned judgment and order of conviction and sentence is liable to be set aside.

Mr. Chakraborty, learned P.P.-in-charge, on the other hand submits that in respect of an offence against a woman with regard to outraging of modesty, attempt to rape or commission of rape etc. delay in lodging F.I.R. is not fatal. Practically in number of cases the victim and her family members do not want to lodge any complaint against the accused alleging such incident out of shame and humiliation. It is not uncommon in our village society that a girl being victim of such offence is castigated by the co-villagers raising question on her character. Therefore, delay in lodging F.I.R. in the instant case should be considered under the above backdrop. He also submits that

it is not true that the de facto complainant did not explain the delay in the F.I.R. Practically, she stated that she could not state the incident for two days to her family members out of shame.

Secondly, he submits that in a case of outraging modesty the evidence of the prosecutrix can be the sole basis of conviction. If the evidence of the prosecutrix appears to the Court trustworthy, cogent, believable and unblemished, the Court can record conviction of the accused on the basis of sole testimony of the prosecutrix and no corroboration is necessary in such case.

It is submitted by the learned P.P.-in-Charge that the learned trial Judge elaborately discussed the evidence on record and came to the conclusion that the accused outraged modesty of the victim girl. There is no reason to interfere with the impugned judgment, order of conviction and sentence.

Having heard the learned advocates for the appellant and the respondent/State of West Bengal and on perusal of the entire evidence on record independently as well as the impugned judgment, I like to discuss the issue as to whether the place of occurrence was identified by the witnesses during evidence or it was shifted. The victim girl stated in her evidence when she was returning after attending nature's call she was caught hold by the accused from behind in an open place. The father of the victim girl, on the other hand, stated that the

accused outraged modesty of the victim inside a forest by the side of a pond.

I have closely perused the sketch map. On the eastern side of the pond there is an agricultural land. On the western side of the pond there are agricultural lands. On the northern side of the pond there are bushes and trees and thereafter the house of one Puranjoy Lohar is situated. On the southern side of the place of occurrence the house of the accused is situated at a distance of about 200 metres. Place of occurrence is on the eastern side of the pond being agricultural land. Just on the adjacent north of the place of occurrence there are bushes and trees. According to the de facto complainant her modesty was outraged on the agricultural land and according to the father of the de facto complainant the incident took place inside the bushes situated just adjacent to the place of occurrence. The father of the de facto complainant is not an eye witness. He narrated the place of occurrence on the basis of the statement made by the Investigating Officer.

In view of the fact that except P.W.3, all other witnesses narrated the place of occurrence on the basis of what they have heard from P.W.3, such contradiction cannot be treated as material contradiction. It is found from the evidence of P.W.3 that she was

sexually abused near the place where she used to go daily to attend nature's call.

With regard to delay of two days in lodging complaint, this Court is of the view that the learned Counsel for the appellant overlooked the fact that Indian women are slow and hesitate to complain of sexual assault and if the prosecutrix is a minor girl, in many cases their parents do not come forward for the sake of the future of the girl. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards the woman; it casts a doubt and shame upon her rather than comfort and sympathise her. Therefore, delaying in lodging complaint in such cases does not necessarily indicate the version of the prosecutrix false.

In ***State of Maharashtra Vs. Chandraprakash Kewalchand Jain : [1991] SCC 550***, the Supreme Court had the occasion to point out that a woman who is victim of a sexual assault, is not an accomplice to the crime, but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The similar view is reiterated by the Supreme Court in a subsequent judgment in ***Karnel Singh Vs. State of Madhyapradesh : AIR 1995 SC 2472***.

Coming to the instant case it is ascertained that the victim/prosecutrix narrated the incident almost in the same manner as disclosed in the F.I.R. She did not try to exaggerate any story. She withstood the cross-examination by the defence. In course of cross-examination she was specifically asked as to whether the accused saw her private part. She replied in affirmative. Thereafter, she was asked as to whether she saw the private part of the accused. The victim replied in the negative. Had it been the case of exaggeration or that the prosecution wanted to make out a story of attempt to rape. She could have tutored to answer the above question in different manner.

In ***Vijay @ Chinee Vs. State of Madhya Pradesh reported in (2010) 8 SCC 191***, it is observed by the Hon'ble Supreme Court that a prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness within the meaning of Section 118 of the Evidence Act and her evidence must receive highest weight as she is attached to an injured in a case of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of

injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.

In the instant case there is no reason to disbelieve the evidence of the prosecutrix. Therefore, I do not find any scope to spill ink over the judgment of conviction passed by the learned Trial Judge against which the instant appeal is filed.

On the question of sentence this Court is in concurrence with the submission made by the learned Advocate for the appellant that on the date of commission of offence, the appellant might be sentenced with either discretion for a term of two years or with fine or with both.

Learned Trial Judge practically erred in law by passing a sentence of three years with fine against the appellant.

Therefore, the order of sentence is **set aside**.

On the question of sentence, this Court finds that the incident took place in the year 2012. Since 2012, the accused is pursuing his case before the Trial Court as well as this Court for long nine years. For the act committed by the appellant he already suffered much agony and sleepless night.

In view of such circumstances, this Court is of the view that for committing an offence under Section 354 of the Indian Penal Code, taking into consideration the fact situation, some amount of fine, in default, imprisonment shall be just and sufficient sentence for the offence committed by the accused. Accordingly, the instant appeal is dismissed so far as it relates to the order of conviction. However, the order of sentence passed by the learned Trial Judge is modified and the appellant is sentenced to pay fine of Rs.10,000/-, in default, simple imprisonment for six months for committing offence under Section 354 of the Indian Penal Code.

The half of the fine amount if released, shall be paid to the victim as compensation.

The appellant is directed to make payment of the fine amount within three weeks from the date of the judgment, failing which the learned Additional Chief Judicial Magistrate, Khatra is at liberty to issue warrant of arrest against the appellant to suffer sentence.

Let a copy of this order be sent to the learned Additional Chief Judicial Magistrate, Khatra immediately for information and compliance.

Let a plain copy of this order be also supplied to the learned Counsel for the appellant free of cost for compliance.

Lower Court Records be transmitted to the learned Court below by the department.

(BIBEK CHAUDHURI, J)