

Form J(2)

In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side

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

CRA 252 of 2015

Manindra Paul

-Vs.-

State of West Bengal

For the appellant : Mr. Sabir Ahmed,
Mr. Mujibar Ali Naskar, Adv.,
Mr. Hillal Saha Poddar, Adv.,
Mr. Shraman Sarkar, Adv.,
Mr. Apan Saha, Adv.
Mr. T. Ahmed, Adv.

For the respondent : Mr. Abhra Mukherjee, Adv.,
Mr. Dipankar Mahata, Adv.

Heard on : 22.11.2021, 23.11.2021

Judgment on : 23.11.2021.

Bibek Chaudhuri, J.:

On 13th December, 2011 in the evening at about 5.30 p.m. a minor girl aged about eight years was allegedly ravished by her private tutor. On the next date of the alleged incident, the mother of the

victim girl lodged a written complaint against the accused in the local police station on the basis of which a case under Section 376(2)(f) of the Indian Penal Code was registered. The investigation culminated in filing charge-sheet by the police under the said penal provision against the accused.

Since the offence charge-sheeted was exclusively triable by the Court of Sessions, after commitment, the case was committed to the learned Additional Sessions Judge, Cooch Behar for trial and disposal.

During trial, prosecution adduced evidence in support of the charge by way of examination of the charge-sheeted witnesses. Some documents were marked exhibits on proof. The accused was examined under Section 313 of the Code of Criminal Procedure where he pleaded his innocence. It is also ascertained from the cross-examination of the witnesses on behalf of the prosecution that the defence took a specific plea to the effect that some amount of money was due to the mother of the victim and she lodged a false case against the accused so that she might not pay the said amount.

The learned Trial Judge considered the evidence on record. Some established principles of law were enunciated and the accused was held guilty by the learned Trial Judge for committing offence under Sections 376/511 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and to pay fine of

Rs.20,000/-, in default, to suffer rigorous imprisonment for six months for the offence punishable under Sections 376/511 of the Indian Penal Code. The instant appeal is directed against the said judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Cooch Behar in Sessions Case No. 507/2012/Sessions Trial No. 1(9)/2013.

As a Court of Appeal it is the bounden duty of this Court to appreciate the evidence on record afresh. This Court is also duty bound to see as to whether the learned Judge properly appreciated and accepted the legal principles or ratio decided by the Hon'ble Supreme Court in the instant case or not.

At the outset, I think it prudent to state that the alleged incident took place on 13th December, 2011 at 5.30 p.m. The Protection of Children from Sexual Offences Act, 2012 came into operation with effect from 19th June, 2012. Therefore, the POCSO Act, 2012 is not applicable in the instant case. Similarly, the definition of rape has undergone a considerable change by amending Act XIII of 2013 with effect from 3rd February, 2013. So, the accused was rightly booked under Section 376(2)(f) of the Indian Penal Code.

In order to bring home to charge against the accused/appellant prosecution in all examined 12(twelve) witnesses. Amongst them, P.W. 5 is the victim girl, P.W. 4 is the mother of the victim girl and the

de facto complainant. P.W. 1, Smt. Dipa Bhat and P.W. 2, Smt. Sandhya Rani Paul and P.W. 3, Phanindra Paul were declared hostile by the prosecution.

P.W. 6, Babai Bhat claimed to be present at the place of occurrence immediately after the incident and saw the victim girl in naked condition as well as the accused in compromising position. Evidence of P.W. 7, Mrinal Kanti Basunia is not of much relevance on the ground that his evidence is in the nature of hearsay. P.W. 9, Dr. Dipankar Datta examined the victim girl on 17th December, 2011 and found that there was no evidence of external injury on the person of the victim girl. Her hymen was intact. The report prepared by P.W. 9 was marked as exhibit -2/1 during trial of the case. The remaining witnesses are scribe and Investigating Officer of this case.

The FIR discloses a story that on the date and time of alleged incident the *de facto* complainant heard cry of her minor daughter from an adjoining house. He rushed to the house and saw her daughter standing on the ground in naked condition and her private tutor was sitting on a chair. On being asked her daughter disclosed her mother that the accused committed rape upon her. Hearing such incident the *de facto* complainant raised hue and cry which attracted local people. The witnesses also saw the said incident. I have already

recorded that except Babai Bhat no other witness supported the prosecutrix.

It is the consistent view of the Apex Court of India that in a case of sexual assault or rape the evidence of the victim is of greatest importance. Her evidence cannot be equated with the evidence of that of an accomplice's evidence. She stands on the higher pedestal even that of an injured witness. Therefore, if the evidence of prosecutrix is found to be truthful, cogent, trustworthy and unblemished, the perpetrator of the offence can be convicted on the basis of such sole evidence of the victim girl. No corroboration is necessary in such a case because in order to search for corroboration in a case of sexual assault is to aggravate the wound of the victim girl.

In ***Dilip & Anr. -Vs.- State of M.P.*** reported in **2002 SCC (Cri) 592**, the Hon'ble Supreme Court laid down the law of appreciation of evidence of a prosecutrix in paragraph 12 of the report. Paragraph 12 of the said report quoted below: -

12. *The law is well settled that the prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made the basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be present to the mind of the Judge. In **State of H.P. -Vs.- Gian Chand** on a review of decisions*

*of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on. This Court relied upon the following statement of law from **State of Punjab –Vs.- Gurmit Singh SCC (para 21)**:*

"If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with case involving sexual molestation...."

In **Santosh Pasad @ Santosh Kumar –Vs.- State of Bihar** reported in **(2020) 3 SCC 443**, the Hon'ble Supreme Court relying on its earlier decision in the case of **Raju –Vs.- State of M.P.** reported in **(2008) 15 SCC 133** observed as hereunder: -

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration". Under such backdrop the Hon'ble Supreme Court again had the occasion to hold that if the evidence of the victim girl is praiseworthy, truthful and unblemished and inspires confidence of the Court, conviction can be based on the basis of her sole evidence corroborated by the medical evidence. The Hon'ble Supreme Court held that where the Court accepts the evidence of the victim girl as trustworthy, her evidence must be of sterling quality. Reliance was placed on the judgment of **Rai Sandeep -Vs.- State (NCT of Delhi)** reported in **(2012) 8 SCC 21** and it was held by the Hon'ble Supreme Court: -

"In our considered opinion, the "sterling witness" should be of a very high quality and calibre 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 every one 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 such similar tests to be applied, can it 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."

Bearing the above principles in mind, let me now scan the evidence on record. From the FIR it is found that the victim girl went to take private tuition on the date and time of occurrence in an adjacent house. It is also found from the evidence of the mother of the victim that she used to take tuition with three other children. The said three children were not examined by the Investigating Officer or cited as a witness of this case to prove that they were not present at the time of alleged occurrence. Secondly, though in the FIR it is stated by the *de facto* complainant that the place of occurrence is a house adjacent to the house of the *de facto* complainant, in the evidence on record it is found that the house of the *de facto*

complainant is situated about 2 K.Ms. away from the place of occurrence. Is it possible for a person to hear the cry of her daughter calling 'Maa' (Mother) from a distance of 2 K.Ms. away from the place of occurrence? Again, is it possible for a lady to run all the way a distance of about 2 K.Ms. to see the victim girl in naked condition and the accused was tying the zipper of his pant? If such circumstances are asked to be believed then a natural question will come - how long the alleged incident took place? The victim made her statement about the incident for the first time before the learned Judicial Magistrate under Section 164 of the Code of Criminal Procedure on 27th December, 2021. In her statement under Section 164 of the Code of Criminal Procedure, it is found that the *de facto* complainant never went to the place of occurrence. On the contrary, the victim came back to her house and narrated the incident to her mother. This part of statement recorded under Section 164 of the Code of Criminal Procedure was not contradicted with the victim. On the other hand, it was made exhibit, if such statement recorded under Section 164 of the Code of Criminal Procedure of the victim is believed then presence of the *de facto* complainant at the place of occurrence, presence of the witnesses there and hauling of the accused do not arise at all. The statement of the victim girl belies all such evidence adduced by the prosecution in order to prove the charge.

The learned Trial Judge relied on the principles laid down in ***Aman Kumar & Anr. –Vs.- State of Haryana*** reported in **2004 SCC (Cri) 1497**. In the said decision, it was stated that to constitute the offence of rape, it is not necessary that there should be a complete penetration of penis with emission of semen. The learned Trial Judge also quoted a decision of Guwahati High Court in the case of ***Krishna Bordoli –Vs.- State of Assam*** reported in **2012 Cr. L. J. 4099**. It is held by the Guwahati High Court in the above-mentioned report that in a decisive and a very specific manner, it can be said that mere putting the male genitalia on the female genitalia, if it does not amount to rape, then it will be an offence but of different nature. It can be an attempt of commission of such offence of rape. There is no doubt about the ratio laid down in the above-mentioned decisions. But a judgment must contain how the principles laid down in a particular report is applicable under the facts and circumstances of another case. There is no such discussion in the judgment of the learned Trial Court.

The plea relating to applicability of Section 376 read with Section 511 of the Indian Penal Code needs careful consideration. In every crime, there is first intention to commit, secondly, preparation to commit it, thirdly, attempt to commit it. If the third stage, i.e., attempt is successful then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the

act. The Section 511 is a general provision dealing with attempts to commit offence not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable because every attempt, although it falls short of success, must create alarm which by itself is an injury, the moral guilt of the offender is the same as he had succeeded. Moral guilt must be united to cause injury in order to justify punishment. As the injury is not as grave as if the act had been committed, only half the punishment is awaited.

In the instant case, leaving aside the contradictions as narrated above if we accept the evidence of the mother of the victim girl and the statement made in the FIR, it is found that she saw her daughter standing in naked condition and the teacher sitting on a chair. This specific picturization of the incident does not suggest an attempt to commit rape.

Therefore, I am of the considered view that the learned Trial Judge failed to appreciate the evidence on record properly and the prosecution failed to bring home the charge under Sections 376/511 of the Indian Penal Code against the accused/appellant.

Before I part with I am constrained to record that now-a-days this Court comes across series of judgments delivered by the Trial

Court where decisions of the Hon'ble Supreme Court and other High Courts are cited without considering the fact as to whether some *ratio decidendi* is laid down in the said reports or not even the general observations (*obiter dicta*) having no binding force are relied upon and abruptly quoted in the judgments passed by the trial Courts. These 'cut copy paste' judgments make serious adverse trend in subordinate judiciary. The learned Judicial Officers in subordinate judiciary must understand that in a judgment of the Hon'ble Supreme Court where the Court lays down in general proposition of law, such proposition is applicable under Article 141 of the Constitution of India as the binding force of the Supreme Court decisions. In respect of other cases where the Court does not lay down any general proposition of law but merely enunciates a circumstance as to the appreciation of evidence or on any other matter, such decision is applicable on fact to fact basis and not as the *ratio decidendi*. I am constrained to note that a trend is noticed that whenever a particular Section or the penal provision is noticed on the head note of the reported judgments there is a tendency to refer such judgments by way of copying and pasting some paragraphs from the website in the body of the judgments passed by the Trial Courts. This trend should be stopped and the learned Judicial Officers of subordinate judiciary is advised to read the entire report before applying the same in a case in his or her hand.

The instant appeal, therefore, is **allowed** on contest, however, without cost. The judgment and order of conviction and sentence is set aside. The accused is acquitted from the charge and discharged from the bail bond, if not wanted in any other case.

Learned Registrar (Judicial Service), High Court, Calcutta is requested to circulate this judgment to the learned Judicial Officers of the State through the District Judges of the respective Districts as a guideline to appreciate the reports of the Supreme Court and High Courts while referring them in a judgment of a particular case.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties on usual undertakings.

(Bibek Chaudhuri, J.)

Srimanta
A.R. (Court)