

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 502 of 2019
With
CRAN 1 of 2019 (Old CRAN 3852 of 2019)

Kiran Mir @ Mir Hero Ali @ Mir Kiron Ali
-Vs-
The State of West Bengal & Anr.

For the appellant: Mr. Imtiaz Ahmed,
 Mr. Diptendu Banerjee.

For the State: Ms. Faria Hossain,
 Ms. Sujata Das.

Heard on: July 23, 2021

Judgment on: August 03, 2021.

BIBEK CHAUDHURI, J. : –

1. Bharatpur P.S Case No.132 of 2018 was registered on 22nd June, 2018 on the basis of a written complaint submitted by one Mustari Begum the accused/appellant under Section 376 of the Indian Penal Code.
2. It is pertinent to mention at the outset that the defacto complainant claimed her daughter/victim to be a major girl on the date of commission

of offence, while the appellant was minor above 17 years of age at the relevant point of time.

3. The accused/appellant being minor was produced before the Juvenile Justice Board, Berhampur. The Board medically examined the accused in presence of a psychologist to ascertain his mental and physical capacity and understanding as to consequence of the act committed by him and was of the view that he on the date of commission of the alleged offence had mental and physical capacity to commit the offence and also had the knowledge about the consequences thereof. The report was sent to the children's Court at Berhampur. The learned principal Magistrate on due consideration of the report submitted by the Board committed the case record to the court of the learned Sessions Judge, Berhampur. The learned Sessions Judge, in turn transferred the case record to Special Court, POCSO, Act Kandi, Murshidabad for trial and disposal.

4. On conclusion of trial, the learned trial judge convicted the appellant for committing offence under Section 376 of the Indian Penal Code and he was sentenced to suffer imprisonment for seven years and to pay fine of Rs.2000/- in default to suffer further imprisonment for three months.

5. The said judgment and order of conviction and sentence is assailed by the appellant in the instant appeal.

6. Now, the facts of the case.

7. On 22nd June, 2018, one Mustari Begum lodged a written complaint, stating, inter alia, that on 19th June, 2018 at about 7.30 pm her daughter was alone in the house. Taking advantage of the absence of the defacto complainant, the accused entered into the house, caught hold of the victim girl, shut her mouth with the help of his hand and forcibly took away inside a bamboo bush near their house. Then he committed rape upon the daughter of the defacto complainant. After sometime, the defacto complainant returned home, but did not find her daughter. She conducted search for her daughter with the help of a torch light and found her lying on the ground inside the said bamboo bush with bleeding injury in her private part. Her wearing apparel was soaked with blood. The defacto complainant brought her to her home, washed her face and other parts of body and asked her about the incident. The victim disclosed the entire incident to her. At that time blood was oozing out from the private part of her body. She took her daughter in injured condition to Bharatpur Block Primary Health Centre wherefrom she was referred to Kandi Sub-Divisional Hospital. The victim was medically treated at Kandi Sub-Divisional Hospital for three days. It is also stated by the defacto complainant that as she was busy with the treatment of her daughter, there was delay of three days in lodging the complaint.

8. Police took up the investigation of Bharatpur P.S Case No.132 of 2018. During investigation the Investigating Officer examined the witnesses, collected medical treatment sheet of the victim, arrested the accused and also got him examined medically in order to ascertain as to

whether the accused was capable of committing sexual intercourse. He also seized wearing apparel of the victim and finally submitted charge-sheet against the accused under Section 376 of the Indian Penal Code.

9. The learned trial judge framed charge against the accused under Section 376 of the IPC as the accused pleaded not guilty trial of the case commenced.

10. In order to bring home the charge against the accused, prosecution examined five witnesses out of 15 charge-sheeted witnesses. The witnesses on behalf of the prosecution are Mustari Begum, defacto complainant and mother of the victim (PW1). PW2 is the victim himself. PW3, Dr. Unmesh Mukherjee is a Medical Officer posted at Kandi Sub-Divisional Hospital. PW4, Kabirul Islam is the scribe of the written complaint and PW5 is the Investigating Officer of this case. The accused was examined under Section 313 of the Code of Criminal Procedure in course of his examination under Section 313 of the Code of Criminal Procedure, he specifically pleaded that a long standing dispute between the family of the defacto complainant and their family is going on over drainage of water and out of such rivalry he was falsely implicated in this case. However, the accused did not adduce any evidence in support of his defence. The learned trial judge on appreciation of evidence and arguments advanced by the prosecution and defence in his judgment held the accused guilty for committing offence under Section 376 of the Indian Penal Code and convicted and sentenced him accordingly.

11. It is needless to say that the present appellate Court is the Court of both fact and law. Therefore, it is the bounden duty of this court to examine the evidence, adduced by the prosecution during trial independently and finally come to a decision as to whether the instant appeal should be allowed or is liable to be set aside.

12. It is stated by the victim girl who at the relevant point of time was aged about 18 years that on the date of occurrence at about 7.30 pm she was watching T.V programme sitting in her home. The accused made her necked pressed her breast and raped her. He threatened her to assault and also told her that he would through her in the pond. It is further stated by her that she narrated the incident to a Judicial Magistrate who recorded her statement and she put her LTI thereon. The said statement recorded by the learned Magistrate was marked as Exhibit-4 in course of evidence of the victim as PW2.

13. PW1 is the defacto complainant and mother of the victim girl. It is ascertained from her evidence that on 19th June, 2018 before 7.30 pm she went to the house of her sister-in-law Manuara Begum. Her daughter and her mother-in-law who at the relevant point of time was aged about 80 years and hard of hearing were present in her house. The witness further stated that her mother-in-law could not see properly. After sometime PW1 returned to her house, but did not find her daughter. She searched out her with a torch light and suddenly saw that her daughter was lying on the ground in a bamboo bush situated by the side of their house in naked condition and the accused was fleeing away while wearing his pant. The

witness also stated that she could identify the accused with the torch light. PW1 rushed to her daughter and pulled her up. She noticed that blood was oozing out from her private part. She took her daughter to her home. The victim girl told her that the accused committed rape upon her. The birth certificate of the victim girl was proved by the defacto complainant and it was marked as Exhibit-1 without any objection. The defacto complainant further stated that she could not lodge complaint against the accused on 19th June, 2018 because of shame and family prestige. She also could not arrange for medical treatment of her daughter as her husband remained away from home on the date of occurrence. He used to work in Kolkata. On 21st June, 2018 he took his daughter to Bharatpur Block Primary Health Centre for treatment and from Bharatpur Health Centre she was referred to Kandi Sub-Divisional Hospital. He informed the matter to her husband on 22nd June, 2018 and on that date he lodged complaint with the O.C Bharatpur P.S. The written complaint was marked as Exhibit-2.

14. The said witness further stated that after the incident, she threw away the wearing apparel of her daughter in the pond as she did not know that said wearing apparel would be required for the purpose of investigation. Subsequently she handed over the wearing apparel of the victim which was lying in the pond. The police seized the said wearing apparel. The signature of PW1 on the seizure list was marked Exhibit-3/1. It is ascertained from his cross examination that the house of the accused is situated on the adjacent north of her house. During cross

examination she also stated that she informed her husband about the incident over phone on 21st June, 2018 and he came to the house on 22nd June, 2018. Her husband took her to lodge complaint to the Police Station.

15. PW3, Dr. Unmesh Mukherjee a Medical Officer attached to Kandi Sub-Divisional Hospital. On 23rd June, 2018, he conducted Medico Legal Examination of the victim the medical examination report was marked Exhibit-5 during trial of the case. It is recorded in the medical examination report by PW3 that the victim could not talk properly at the time of her medical examination but by gesture she informed that the appellant Kiron Mir took her to a lane (Goli), stripped her and inserted his penis into her vagina on 19th June, 2018 at about 6.30 pm. On examination the Medical Officer found multiple scratch and abrasion mark on the back and upper part of buttock. Hymen of the victim was ruptured. He also found small tear with blood stain at fourchette of the victim. The Medical Officer opined that the victim was subjected to forceful vaginal penetration and there was all probability that she was sexually assaulted.

16. PW4 is the scribe of the written complaint who stated on oath that he wrote the complaint under the instruction and dictation of PW1. He also identified the written complaint during his evidence.

17. PW5 is the Investigating Officer of this case. In course of his investigation he proved the Medico Legal Report of the accused which was marked as Exhibit-10 during trial of the case. The Investigating Officer

also collected the report from Forensic Science Laboratory in respect of wearing apparel of the victim. The said report was marked as Exhibit-12.

18. On the basis of such evidence on record, both oral and documentary, the learned trial judge held the accused guilty for committing offence under Section 376 of the Indian Penal Code and convicted and sentenced the accused/appellant girl.

19. Learned Advocate for the appellant at the outset submits before this Court that the alleged incident took place on 19th June, 2018 while the mother of the defacto complainant lodged complaint at Bharatpur P.S on 22nd June, 2018, i.e., after a lapse of about three days. There is no explanation of delay in lodging complaint. In the instant case the appellant specifically pleaded during his examination under Section 313 of the Code of Criminal Procedure that a long standing dispute is going on between the families of the defacto complainant and the accused person over drainage of water. The relation between the defacto complainant and the accused was thus inimical. Under such circumstances, unexplained delay in lodging FIR without any reason assigned thereof is fatal for the prosecution and the learned trial judge failed to consider this aspect in the impugned judgment. It is submitted by the learned Advocate for the appellant that only on this ground the appellant is entitled to benefit of doubt.

20. It is further submitted by the learned Advocate for the appellant that in the charge-sheet prosecution cited as many as 15 witnesses. Out of the said 15 witnesses, prosecution examined only five witnesses. There

is no explanation in lower court record as to why the remaining witnesses were not examined. The learned Advocate for the respondent also failed to show that the said witnesses were actually called to depose before the trial court but the prosecution discharged the said witnesses because they were gained over by the accused or that they declined to support the prosecution case. Non examination of most of the charge sheeted witnesses ought to have been treated against the prosecution.

21. The learned Advocate for the appellant next submits that according to the prosecution case, on the date and time of the alleged occurrence the defacto complainant went to the house of her sister-in-law. The victim girl and mother-in-law of the defacto complainant were present in the house when the accused allegedly came to the house and forcibly took away the victim. Learned Advocate for the appellant has raised a question as to whether the mother-in-law of the defacto complainant was not examined during trial of this case.

22. It is also submitted by him that the conduct of the defacto complainant after the incident was not free from doubt. If the prosecution case is believed, the victim received bleeding injury of her private part as well as on the back and upper portion of her buttock. The defacto complainant saw that blood was oozing out from her private part. Seeing such physical condition of the victim the defacto complainant being his mother did not take her to the hospital immediately. She waited till 21st June, 2018 when he admitted her to Kandi Sub-Divisional Hospital. The learned Advocate for the appellant has also raised a question to why the

father of the victim girl was informed by the defacto complainant on 21st June, 2018 when their daughter was allegedly ravished by one of their neighbours. It is also pointed out by the learned Advocate for the appellant that according to the defacto complainant as well as the victim the incident took place on 19th June, 2018 at about 7.30 pm but the victim stated to the Medical Officer on 23rd June, 2018 that the alleged incident took place at about 6.30 pm on 19th June, 2018. Therefore, there is discrepancy with regard to actual time of incident.

23. Learned Advocate for the appellant has also pointed out that the Medical Officer found scratch mark on the back and upper part of buttock of the victim girl. In view of such specific injury he has raised a question as to why DNA examination was not done by the Investigating Officer to ascertain that the said injuries were caused by the nails of the appellant.

24. Accordingly it is submitted by the learned Advocate for the appellant that the appellant is entitled to get benefit of doubt in the instant case and the impugned judgment ought to be set aside.

25. Mrs. Faria Hossain, learned Advocate for the State respondent, on the other hand submits that delay in lodging complaint in a case of sexual assault is not fatal for the prosecution unless there are material discrepancies between the statement made in the FIR and the evidence of the victim. In support of her contention, she refers to a decision of the Hon'ble Supreme Court in the case of **State of Himachal Pradesh vs. Sanjay Kumar** reported in (2017) Cri LJ 1443 (SC). In the said decision the FIR was lodged after three years of incident when the incident came to

light at the time of medical examination of the prosecutrix. The Hon'ble Supreme Court found that except minor or trivial discrepancy versions of the prosecutrix and her mother regarding material particulars of incident were found to be in sync. Thus, it was observed and held by the Hon'ble Supreme Court that the reluctance on the part of the prosecutrix in not narrating the incident to anybody for three years is not fatal to the prosecution case.

26. Coming to the instant case it is submitted by the learned P.P-in-Charge that the alleged incident took place on 19th June, 2018 and the FIR was lodged on 22nd June, 2018. In her evidence she clearly stated that she could not come to the Police Station to lodge complaint on 19th June, 2018 out of shame and family prestige. She also stated that she was busy for medical treatment of her daughter. When she failed to manage the victim, she informed the matter to her husband on 21st June, 2018. The husband of the defacto complainant used to work at relevant point of time in Kolkata. He came to the house on 22nd June, 2018 and then only the FIR was lodged. Thus, the defacto complainant explained delay of three days in lodging complaint against the appellant in the local P.S. It is important to note that during cross examination no suggestion was put to PW1 challenging or refuting her above statement by way of suggestion. Practically, the prosecution evidence remained unrebutted during cross examination of the witnesses on behalf of the prosecution.

27. It is further submitted by the learned Advocate for the prosecution that in a criminal trial, court seeks quality evidence who are trustworthy

and corroborate the prosecution case in material particulars. It is the quality of the witnesses that matters and not the quantity. If the prosecution feels that the prosecution would be able to establish the charge against the accused by examining some of the charge sheeted witnesses, prosecution has the right not to examine others. In a case under Section 376 of the Indian Penal Code where statement of the victim girl that the accused committed rape on her is corroborated by medical evidence, then conviction of accused under Section 376 is held to be just and proper. In support of her contention, the learned P.P-in-Charge refers to a decision of the Punjab and Haryana High Court in the case **of Dalbir vs. State of Haryana** reported in **2002 Cri LJ 3960**.

28. Learned P.P-in-Charge further submits that the learned Counsel for the appellant has vehemently criticized the process of investigation in the instant case and the impugned judgment on the ground that Investigating Officer did not seize the torch light with the help of which the defacto complainant recovered her girl. The learned Counsel for the appellant was also critical on the point as to whether the alleged incident took place at 7.30 pm or 6.30, pm because it was stated in the FIR as well as in the evidence of defacto complainant and the victim girl that the alleged incident took place at 7.30 pm. But the Medical Officer recorded in the Medico Legal Examination Report of the victim that the incident took place at about 6.30 pm. According to the learned Advocate for the State respondent, such discrepancies are minor and trivial in nature. There is difference between minor discrepancy in evidence and contradiction.

Discrepancy has to be distinguished from the contradiction. To buttress her argument learned P.P-in-Charge relies on a decision of the Hon'ble Supreme Court in the case of **State of H.P Vs. Lakh Raj** reported in **2000 Cri.L.J 44 (SC)**.

29. It is now a settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

30. In the instant case it is found from the evidence of the victim as well as her mother that the victim was raped by the accused on 19th January, 2018 at about 7.30 pm. The FIR was lodged on 22nd June, 2018. It is stated by the defacto complainant that she was busy with medical treatment of her daughter and her husband did not reside at his native

place. She could not inform the incident to the police due to shame and family prestige. After being informed, her husband came to his native place on 22nd June. On that date the victim was taken to the hospital. She was medically examined by the Medical Officer on 23rd June, 2018. The Medical Officer found multiple scratch mark and abrasion on the back and upper part of both buttocks of the victim. He also found hymen of the victim was ruptured and small tear with blood stain at fourchette of the victim. He opined that the victim was subjected to forceful vaginal penetration. At the time of medical examination the victim stated that she was ravished by the accused on 19th June, 2019 at about 6.30 pm. The learned Advocate for the appellant made forceful submission on the time of the alleged incident because in the FIR, the mother of the victim as well as in her statement recorded under Section 164 of the Code of Criminal Procedure the, victim herself stated that incident took place at about 7.30 pm. But on 23rd June, 2018 the victim stated before the Medical Officer that the incident took place at about 6.30 pm. According to the learned Counsel for the appellant misstatement of the time of occurrence is a serious contradiction that goes up to the root of the prosecution case.

31. This court is not in a position to accept such submission made by the learned Advocate for the appellant. The victim and her mother are village rustic ladies. The victim cannot speak properly. Under such circumstances, discrepancy of about one hour as to the commission of the offence is not fatal for the prosecution. Relying on the evidence of the victim and her mother coupled with the Medical Officer this court finds no

scope to interfere with the judgment and order of conviction and sentence passed by the learned trial judge against the appellant.

32. Before I part with, I must record that the Medical Officer who examined the accused/appellant as to his potency was not examined during trial of the case. The said medical report was marked Exhibit-10 being proved by the Investigating Officer of this case. It is submitted by the learned Advocate for the appellant that the Investigating Officer cannot prove medical report prepared by a Medical Officer. According to the learned Advocate for the appellant when prosecution has failed to prove as to whether the accused was potent or not, he cannot be held guilty for committing offence under Section 376 of the Indian Penal Code. In reply thereto I like to record the provision of Section 294 of the Code of Criminal Procedure which reads as hereunder.

294. No formal proof of certain documents.- (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

33. Sub-section (3) of Section 294 of the Code says that if genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under the Code without proof of the signature of the person by whom it purports to be signed. On careful perusal of the evidence of the Investigating Officer (PW5) I find that the medical examination report of the accused was marked Exhibit-10 without any objection from the side of the defence. During cross examination authenticity and genuineness of the document was not questioned by the learned Advocate for the defence. Therefore, the said Exhibit-10 was accepted as genuine by the defence during trial. In course of appeal genuineness and authenticity of the said document cannot be questioned.

34. For the reasons stated above, the instant appeal is dismissed on contest, however without cost.

35. The judgment and order of conviction and sentence passed in by the learned Additional Sessions Judge, Special Court, Kandi, Murshidabad in Bharatpur Police Station Case No.132 of 2018 on 22nd June, 2018 is affirmed.

36. Let a copy of this judgment be sent to the learned court below along with the lower court record.

(Bibek Chaudhuri, J.)