

Form J(2)

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

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

C.R.A. 637 of 2018

**Hanif Miya alias Hanif Mian
Vs.
The State of West Bengal**

**For the Appellant : Mr.Angshuman Chakraborty, Adv.
Mr.Shashanka Sekhar Saha, Adv.**

**For the State : Mr. Saswata Gopal Mukherjee, Ld. P.P.
Ms. Faria Hossain,
Mr.Aniket Mitra**

Heard on : 08.07.2021

Judgment On : 15.07.2021

Bibek Chaudhuri, J.

The appellant has assailed the judgment and order of conviction and sentence dated 14th November, 2018 and 15th November, 2018 passed by the learned Additional Sessions Judge, Fast Track 1st Court at Alipore in Sessions trial No. 08 (08) 2017

corresponding to Sessions Case No. 57(05) 2017 convicting the appellant to suffer rigorous imprisonment for seven years and fine of Rs. 20,000/- ,in default, to suffer imprisonment for further period of six months for the offence punishable under Section 376(1) of the Indian Penal Code.

Maheshtala Police Station case No. 78 of 2017 was registered on 15th February, 2017 under Section 376 of the Indian Penal Code (hereafter "IPC" for short) on the basis of a written complaint submitted by one Tanjila Bibi. It is alleged in the complaint that on 12th February, 2017 her daughter aged about 20 years was found missing. She is mentally retarded. The de facto complainant lodged a missing diary with the Maheshtala Police Station. She and her family members also conducted search for her said daughter. On the next morning at about 7.30 a.m. the victim was found at a place call Garwan Para. At that time she was physically exhausted and struggling while walking. She was bare footed. Her wearing apparels were full of dust. On being asked, she told her mother and sister-in-law Manoara Bibi that during afternoon of 12th February, 2017 she went to see the football match at Sanjibini club. The accused took her from the playground to a small field near Panchanan Tala and committed rape upon her. After commission of such offence the accused left

her on the field. She was then somehow coming towards her husband, while she met her mother and sister-in-law. During trial of the case the prosecution examined eleven witnesses. Amongst them the victim deposed during trial as P.W.1. P.W.2 Tanjila Bibi is her mother and P.W. 3 Manoara Bibi is the sister-in-law of the victim. P.W. 4, Jarina Bibi, P.W.5, Sk. Kachi, P.W.6, Motila Bibi are the neighbours of the victim. P.W.7, Alamin Molla, the elder brother of the victim, wrote the first Information Report under the instruction of her mother. P.W.8, Dr. Bipul Kanti Sikdar is the Medical Officer who examined the victim on 15th February, 2017 medically. P.Ws. 10 and 11 are the Judicial Magistrates attached to the Criminal Court at Alipore. They recorded the statement of the mother of the victim and the victim respectively under Section 164 of the Criminal Procedure Code. P.W. 9 is the Investigating Officer of the case.

The accused was examined under Section 317 of the Code of Criminal Procedure. However, he did not examine any witnesses in support of his defence. Defence case as revealed from the cross-examination made on behalf of the accused to the witnesses on behalf of the prosecution appears to be denial of the prosecution story.

It is ascertained from the FIR that victim at the time of alleged incident was aged about 20 years. She is mentally retarded and she was found missing from the evening of 12th February, 2017. On the next day, that is on 13th February, 2017 the mother and the sister-in-law of the victim found her at a place called Garwan Para in troubling condition. Thus, it is ascertained from the FIR that the victim was found on 13th February, 2017. The FIR was lodged on 15th February, 2017.

Learned advocate for the appellant at the outset submits that there is unexplained delay of about two days in lodging the FIR in the instant case by the de facto complainant. The de facto complainant did not assign reason about such delay in lodging the FIR.

It is further pointed out by Mr. Chakraborty, learned advocate appearing for the appellant that the FIR discloses a gory event. Inasmuch as the victim was allegedly taken away by the accused to a field and committed rape upon her. The offence was committed in such a manner that the victim could not return her house on the date of occurrence and she was left alone on the open field throughout the night. On the next morning when the de facto complainant found her, she was struggling to walk and her wearing apparels were full of dust. It is also found from the

medical report that the victim suffered multiple aberrations on her legs, thigh and several scratch marks on the left breast. Her hymen was also ruptured.

However, it is pointed out by Mr. Chakraborty that the victim did not support the prosecution case in her evidence. It is stated by the victim that on the date of occurrence she went to see the football match. There was huge gathering of spectators to see the match. After the match she came back to her home. Thus, the victim did not support the prosecution case to the effect that after the football match the accused took her to a field and committed rape upon her forcibly. Then he left the victim on the said field and went away. The victim spent entire night on the field. It is also submitted by Mr. Chakraborty that the victim girl was not declared hostile by the prosecution. Further more, he refers to an order dated 1st November, 2017. As the victim was mentally retarded, an interpreter was called to assist the victim and the Court in recording her evidence. The interpreter informed the Court that the victim is not deaf and dumb but mentally retarded. Therefore, the said interpreter was released by the Court and the victim was called on to give evidence on the dock. On examination of the Lower Court record it is ascertained that the victim was not examined either by the prosecution or by the Court to ascertain as to whether she can understand the questions

put to her during examination-in-chief and give cogent answer to the same. In other words the trial Court did not examine the victim prior to recording her statement as to whether the victim had an ability to understand normal questions under normal circumstances. In the absence of such examination and in view of the fact that the victim did not support the prosecution case, her evidence is not only fatal for the prosecution but destroys the entire story. The mother of the victim Tanjila Bibi also did not support the prosecution case her evidence as P.W. She did not narrate even a single word against the accused and about the incident. She was also not declared hostile by the prosecution. P.W.3, Manoara Bibi also did not support the prosecution case. She was, however, declared hostile by the prosecution and was cross-examined by the prosecution. P.W.5, Sk. Kachi and P.W.6 Motila Bibi also did not support the prosecution case and were declared hostile. It is ascertained from the evidence of P.W.7 Alamin Molla that he is the elder brother of the victim. According to him, her sister herself came back to their home on the next morning after she was found missing. She also stated that the victim did not disclose any incident to him. He lodged a complaint as per instruction of the police and her mother put her signature thereon.

Mr. Chakraborty, thus, submits that none of the above named witnesses supported the prosecution case. He also refers to the evidence of the medical officer (P.W.8) who medically examined the victim on 15th February, 2017. He found swelling on the victim's lip, multiple abrasion on her back and thigh, multiple scratch mark on left breast. Her hymen was found ruptured and swelled. The medical report is marked Exhibit-3. The learned trial Judge held the accused guilty for committing offence under Section 376 of the Indian Penal Code on the basis of medical examination report and the statement of the victim and her mother recorded under Section 164 of the Code of Criminal Procedure. It is surprising to note that the learned trial Judge regarded statement of the victim and her mother recorded under Section 164 of the Code of Criminal Procedure as substantive piece of evidence. Thus, the learned trial Judge has committed grave error because a statement recorded by Magistrate under Section 164 of the Code of Criminal Procedure is not a substantive evidence but corroborative in nature and such statement can only be used either to corroborate or to contradict the evidence adduced by the witness during trial of a case. It is the evidence given by a witness in Court on oath, which can only be treated as substantive evidence. So far as substantive evidence is

concerned, the victim girl did not state anything about commission of offence by the appellant. In the absence of such evidence and in view of the fact that the victim was not even declared hostile by the prosecution and no contradiction was taken in respect of her previous statement recorded under Section 164 of the Code of Criminal Procedure, the said statement has no evidentiary value. The same is the rule of appreciation of evidence in respect of a statement under Section 164 of the Code of Criminal Procedure in respect of the mother of the victim (P.W.2). All other witnesses are in the nature of hearsay having no relevance in the matter of adjudication as to whether prosecution was able to prove the charge against the accused or not. The learned trial Judge held the accused guilty for committing offence under Section 376 of the Indian Penal Code on the basis of inadmissible evidence on record.

This Court cannot deny that the victim girl was ravished not only that she was physically tortured at the time of commission of sexual abuse. However, it is the bounden duty for the prosecution to prove by cogent, reliable and legally admissible evidence that the accused had committed such offence. There being no such evidence on record, the judgment and order of

conviction and sentence passed by the learned Additional Sessions Judge, Fast Track, First Court at Alipore is liable to be set aside.

Accordingly, the instant appeal is allowed.

The judgment and order of conviction and sentence passed by the learned trial Judge in Sessions Case No.57(05) of 2017 (Sessions Trial No.08(08) of 2017 is set aside. The appellant/accused is set at liberty and released from his bail bond.

Let a copy of this judgment be sent to the learned trial Court below along with the Lower Court record forthwith.

(Bibek Chaudhuri, J.)