

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

CRA 26 of 2021

With

CRAN 1 of 2021

Rabiul Sk

VS.

The State of West Bengal & Anr.

For the Appellant : Mr. Kusal Kumar Mukherjee, Adv.

For the State : Mr. Prasun Kr. Dutta, Id. APP
Mr. Subrato Roy, Advocate

Heard and Judgment on: **August 26, 2022**

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction dated January 14, 2021 and the order of sentence dated January 15, 2021 passed by the learned Additional Sessions Judge cum Judge, Special Court under POCSO Act,

Krishnagar, Nadia in Sessions Trial No. VIII (VII) 2019 corresponding to Sessions Case No. 35 (06) of 2019.

2. Briefly stated the case of the prosecution is that, the appellant on June 5, 2019 at about 8:30 PM committed rape on the victim under Section 376(3) of the Indian Penal Code, 1860 and committed grievous penetrative assault on the victim and, therefore, committed an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

3. The victim lodged a complaint with the police on June 6, 2019 with regard to the incident. A First Information Report was lodged on the complaint of the victim. The police inquired into the same and submitted a charge sheet against the appellant. Charges were framed against the appellant. The appellant pleaded not guilty and claimed to be tried. At the trial prosecution examined 10 witnesses. The prosecution tendered 16 documents and one material exhibit which were marked as exhibits at the trial. On the conclusion of the evidence of the prosecution the appellant was examined under Section 313 of the Criminal Procedure Code. He declined to

adduce any evidence. The trial resulted in the impugned judgment of the conviction and the impugned order of sentence.

4. The learned Trial Court found the appellant guilty under Section 376(3) of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences Act, 2012 for committing rape and penetrative sexual assault on the victim. The appellant was sentenced to 10 years of imprisonment and was directed to pay a fine of Rs.1,00,000/- and, in default, to suffer simple imprisonment for one year.

5. Learned advocate appearing for the appellant submits that the prosecution was unable to establish the case beyond reasonable doubt. He submits that, there are various contradictions in the evidence led at the trial on behalf of the prosecution. According to him, such contradictions are fatal to the case of the prosecution.

6. Learned advocate appearing for the appellant submits that at the trial, the victim was examined as prosecution witness no. 1, the father of the victim was examined as prosecution witness no. 2, the uncle of the victim was examined as

prosecution witness no. 3, the cousin elder brother of the victim was examined as prosecution witness no. 5, the Doctor who examined the victim was examined as prosecution witness no. 8 and the Investigating Officer was examined as prosecution witness no. 10.

7. Learned advocate appearing for the appellant draws the attention of the Court to the evidence of the victim examined as P.W. 1. He submits that P.W. 1 states in her examination-in-chief that, the appellant called her over telephone and asked her to come to the mango garden behind her house, on June 5, 2019 at about 8:00 P.M. when no member of her house was present at the house. He contrasts such evidence with the contents of the written complaint of P.W.1. He submits that in the written complaint of the P.W.1, being Exhibit-1, she stated that the appellant came to her house. The appellant gave false enticement and threatened her. The appellant forcibly took her to the mango orchard behind her house, and thereafter forcibly ravished her. He submits that this is a major contradiction.

8. Learned Advocate appearing for the appellant refers to the other portion of the evidence of P.W.1. He submits that P.W.1 stated that she came back to her house after the incident and informed the matter to her uncle and aunty. He submits that the uncle named in the evidence of P.W.1 was examined as P.W.3. He refers to the evidence of P.W.3 and submits that P.W.3 does not claim that P.W.1 told him anything about the incident. He submits that this is the second contradiction in the evidence led at the trial. The aunty of P.W. 1 was not examined by the prosecution at the trial.

9. Learned Advocate appearing for the appellant draws the attention of the Court to the evidence of P.W.1 in cross-examination. He submits that, in cross-examination of P.W.1 stated that, she did not notice that her wearing apparels was torn or not on that date. The surface of the garden was rough. She tried her level best to resist the appellant from committing the offence against her. She sustained injuries in her legs, hands and back. He refers to the medical examination report of P.W.1, which is Exhibit-3. He submits that the doctor did not find any external injury on the body of the P.W.1 at the

time of the chemical examination. He refers to the evidence of the doctor being P.W.8. He submits that even in the deposition of P.W.8 at the trial, the doctor did not speak of any injury being suffered by the victim.

10. Learned Advocate appearing for the appellant draws the attention of the Court to the deposition of the elder cousin brother of the victim being P.W.5. He submits that the evidence given by P.W.5 is hearsay. He submits that P.W.5 claims that P.W.5 heard about the incident from others. Therefore, the evidence of P.W.5 should be discarded.

11. Learned Advocate appearing for the appellant submits that prosecution failed to establish the date of the incident. In the written complaint, being Exhibit-1, the victim claimed that there were two dates on which the incidents occurred. In her deposition at the trial the victim as P.W.1 stated that the date of the incident was June 5, 2019. In such circumstances, he submits in view of the discrepancy in the evidence placed before the trial court, the learned Judge erred in convicting the appellant and sentencing the appellant.

12. Learned Advocate appearing for the State submits that the age of the victim stands established by the birth certificate of the victim which is Exhibit-4. He submits that the victim was a minor at the time of the incident.

13. Learned Advocate appearing for the State draws the attention of the Court to the evidence of P.W.5. He submits that it is established by evidence that the appellant used to disturb the victim. He refers to the medical report of the victim. He submits that penetrative sexual assault was established by the medical examination report of the victim being Exhibit-3. He refers to the evidence of the doctor being P.W.8. From such evidence it is also established that there was penetrative sexual assault on the victim. Therefore, according to him, the appellant was rightly found guilty of the offence charged and was rightly sentenced. He submits that there is no infirmity in the impugned judgment of conviction and the order of sentence calling for interference of the High Court.

14. The date of birth of the victim is established by Exhibit-4 which is the birth certificate of the victim. The date of birth of

the victim is January 9, 2005. The date of the incident alleged in the police complaint being Exhibit-1 is June 5, 2019. Therefore, as on the date of the incident, the victim was a minor.

15. The police complaint being Exhibit-1 speaks of forcible sexual assault on the victim. Exhibit-1 was lodged by the victim herself. She implicates the appellant in her written complaint.

16. The victim was examined by the medical doctor on June 6, 2019. The medical examination report is Exhibit-3. Exhibit-3 records that the victim confided in the doctor that there was an affair between her and the appellant. The medical examination report of the victim being Exhibit 3 states that there was no external injury on the body of the victim.

17. In her statement recorded under Section 164 of the Code of Criminal Procedure which is Exhibit-2 and which was recorded on June 10, 2019, the victim states that the appellant took her forcibly to the place of occurrence and ravished her. The victim as P.W. 1 makes the same claim in

her disposition at the trial as made in the statement recorded under Section 164 of the Criminal Procedure Code.

18. There are discrepancies in the version of the incident occurring as given by the victim herself. She claims that there were two incidents of May 27, 2019 and June 5, 2019. Such claim appears from Exhibit-3 which is the medical examination report. However, the case of the prosecution is limited to one of the incidents only, that is, June 5, 2019.

19. With regard to the incident of June 5, 2019, the versions of the victim are also varied. P.W. 1 also makes different claims as to her relationship with the appellant at different points of time.

20. One of the versions of the incident of June 5, 2019 appears from the written complaint lodged with the police which is Exhibit-1. In Exhibit-1, she claims that the appellant came to her house at about 8 P.M. when nobody was present in her house. The appellant gave her false enticement and threatened her, forcibly took her to the mango orchard situated behind the house and forcibly ravished her.

21. The second version of the incident of the same day is given by her before the doctor examining her on June 6, 2019 which is recorded in the medical examination report being Exhibit-3. There she says that there was an affair between her and the appellant. She speaks of two incidents, one happened on May 27, 2019 and the other on June 5, 2019. She does not speak of the appellant forcibly taking her out and ravishing her before the Doctor examining her.

22. In her statement recorded under Section 164 of the Code of Criminal Procedure on June 10, 2019 which is Exhibit-2, she claims that there was a brother-sister relationship between her and the appellant. She was called by the appellant to meet him behind her house where she was ravished forcibly by the appellant.

23. In her evidence before the trial court as P.W.1, she claims that the appellant called her over telephone and asked her to come to the mango orchard situated behind her house. She claimed that the appellant threatened her while he called her. Thereafter, the victim went to the mango orchard when the appellant forcibly ravished her.

24. Victim speaks of an affair between her and the appellant in the medical examination report being Exhibit-3. She speaks of a brother-sister relationship with the accused in her statement recorded under Section 164 of the Criminal Procedure Code and the accused forcibly ravishing her in Exhibit-1 and in her deposition as P.W.1.

25. In cross-examination P.W. 1 stated that she suffered external injuries on her legs, hands and back on the date of the incident being June 5, 2019 at the instance of the appellant. Such claim in the cross-examination is belied by the medical examination report being Exhibit 3 of the P.W.1. Exhibit 3 does not speak of any external injury on the body of P.W. 1. It is also belied by the evidence of the Investigating Officer being P.W. 10 who stated in cross-examination that P.W. 8 answered his query about injuries by saying that no external injury was found on the body of P.W. 1.

26. P.W. 1 stated in her complaint to the police being Exhibit 1 that she confided about the incident to the father which in her deposition she stated that she told her uncle and aunt about the incident on her return.

27. P.W. 2 did not record any statement before the Police during investigation. In Court, at the trial, P.W. 2 stated that, he returned home at 10 O'clock at night on the date of the incident. He called the name of his daughter, P.W. 1 and knocked on the door. Then he broke the door and did not find P.W. 1 inside. He found the fencing of the room made of the jute stick broken. P.W. 10 who was the Investigating Officer stated in course of investigation that, he did not find any broken door in the house of the victim girl or broken fencing.

28. There are discrepancies between the evidence of P.W. 2 who is the father of the victim and P.W. 10 who was the Investigating Officer. In his deposition P.W. 2 claimed that he went to the police station and informed the police that her daughter was missing after he returned to his house at 10 O'clock at night and did not find his daughter. He claimed that the police arrived to his house prior to his daughter returned. In his evidence, P.W. 10 stated that he was the Inspector-in-Charge at the relevant point of time. The police did not receive any information prior to lodgment of the FIR on

June 6, 2019. He did not visit the place of occurrence prior to June 6, 2019.

29. The Investigating Officer, P.W. 10, prepared rough sketch map of the place of occurrence along with index, containing two pages which was annexed as Exhibit 7. The rough sketch map of the place of occurrence being Exhibit 7 shows that, the house of the victim was approximately 80 meters away from the place of occurrence while the house of the neighbour Sunil Mondal was approximately 100 meters away. Prosecution did not lead any evidence at the trial that, the house of Sunil Mondal was also empty at the time of the incident. Prosecution alleged the use of force by the appellant during the incident with the victim suffering injuries on her legs, hands and back. There is a house of Sunil Mondal within 100 meters of the place of occurrence. Yet prosecution did not produce any witness at the trial who claimed to hear protest or any of help from the victim.

30. Apart from the claim of P.W. 1 there is no other witness or evidence placing the appellant at the place of occurrence at the time and day alleged on his statement recorded under

Section 313 of the Criminal Procedure Code, the appellant stated that the evidence of P.W. 1 regarding his involvement was false.

31. Learned Judge while dealing with the aspect of rupture of the hymen held in the judgment of conviction that, absence of injuries on the victim does not lead to the inference that the victim was making a false statement, when the evidence of the doctor was that there was a rupture of the hymen.

32. With the deepest of respect, we are unable to agree with such conclusion arrived at by the learned trial Judge. We are not unmindful of the proposition of law that, the evidence of the prosecutrix is more reliable than that of an injured witness. A conviction can be founded on the testimony of a prosecutrix alone where her testimony inspires confidence and is found to be reliable. Taking the evidence of the prosecution at the highest, the rupture on the hymen was on June 5, 2019, if not earlier, on May 27, 2019. Assuming that the incident actually took place on June 5, 2019 it was coupled with the victim suffering external injuries in accordance with her claim. The incident occurred at 8:30 PM on June 5, 2019

at a distance of 80 meters from her house. Her father returned to the house at 10 P.M. She returned at 12:30 PM. She was examined by the Doctor on June 6, 2019. The Doctor did not find any injuries on her.

33. The rupture on the hymen is claimed to occur on June 5, 2019 as per the statement of P.W. 1. It happened due to the appellant forcefully ravishing her. There is no injury mark on the body of the victim corroborating such statement, particularly, when she was examined the following day on June 6, 2019. There is no medical evidence in Exhibit 3 corroborating the claim of the victim as P.W. 1 that she suffered injuries on her legs, hands and back. In fact, the medical examination report which was prepared within a day of the incident does not speak of any injuries. In absence of such medical evidence corroborating the statement of the victim and particularly the evidence that the prosecution adduced at the trial, we are unable to concur with the conclusion of the learned Trial Judge that the appellant needs to be convicted for the rupture of hymen of the victim as noted in the medical report of the victim being Exhibit 3.

34. The prosecution needs to prove its case beyond reasonable doubts. A reasonable doubt is understood to be one which is not imaginary, trivial or merely a possible doubt but growing out of the evidence of the case. A fair doubt based on reason and common sense is considered as a reasonable doubt. In the facts and circumstances of the present case, the timeline of the occurrence of the incident, timeline of the post occurrence events, absence of corroborative medical evidence and the location of the place of occurrence raises justifiable and fair doubts emanating out of the evidence on record. According to P.W. 1 the incident occurred at 8:30 PM when no one was at her house. She was forcibly taken away to the mango garden behind her house which Exhibit 7 shows is approximately 80 meters from her house. She claims to suffer injuries on her legs, hands and back of which such claim is not corroborated by the medical examination report prepared the following day of the incident. P.W. 2 claims that he returned home at 10:00 PM. P.W. 3 claimed that the victim returned at 12:30 AM at the night. P.W. 5 claims that there were 15/20 neighbours at 10:30 PM at the house when he

returned. The place of occurrence is 80 meters from the house of the victim and 100 meters from the house of another neighbour. None of the prosecution witnesses nor the neighbour heard any cry for help or shouts of distress from the victim for the period from 8:30 PM till her return at 12:30 AM at night. Her return and the time taken for her return from the place of occurrence remains unexplained. P.W. 1 did not claim in her evidence that she was held back at the place of occurrence from 8:30 PM to 12:30 AM. by the appellant.

35. In our view, the discrepancies and lacunae in the evidence raises reasonable doubts. The prosecution not being able to prove the case beyond reasonable doubt, we set aside the judgement of conviction dated January 14, 2021 and order of sentence dated January 15, 2021 passed by the learned Trial Judge.

36. The appellant is acquitted from all the charges levelled against him.

37. The appellant is in jail. The appellant be released forthwith subject to the appellant furnishing a bond for six months in terms of Section 437A of the Code of Criminal

Procedure to the satisfaction of the learned Chief Judicial Magistrate, Nadia.

38. A copy of the judgment and order along with the trial Court records be remitted to the trial Court forthwith.

39. CRA 26 of 2021 is allowed.

40. In view of the disposal of the appeal, CRAN 1 of 2021 stands disposed of accordingly.

41. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Debangsu Basak, J.)

42. I agree.

(Bibhas Ranjan De, J.)