

Form J(2)

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

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

**CRA 22 of 2016
[Bachhu Ali & Anr. –Vs.- State of West Bengal]
with
CRA 145 of 2016
[Natu Ali –Vs.- State of West Bengal]**

**For the appellants : Mr. Sekhar Kumar Basu, Sr. Adv.,
Mr. Somnath Banerjee, Adv.,
Mr. Ranadeb Sengupta, Adv.**

**For the State : Mr. Saibal Bapuli, Adv.,
Mr. Bibaswan Bhattacharyya, Adv.**

Heard on : 21.12.2021.

Judgement on : 04.03.2022.

Bibek Chaudhuri, J.

These two appeals were filed against the common judgment and order of conviction and sentence passed by the Learned Additional Sessions Judge, 7th Court at Barasat in Sessions Case No. 04(05)/2006 corresponding to Sessions Trial No. 03(04)/2007 thereby convicting appellant, Bachhu Ali and Atiar Rahaman (appellant in CRA/22/2016) for committing offence under Sections 313/34 of the

Indian Penal Code and sentencing them to suffer rigorous imprisonment for five years and to pay fine of Rs.5, 000/-, in default, to suffer further rigorous imprisonment for three months and also convicting Natu Ali (appellant in CRA/145/2016) and sentencing him to suffer rigorous imprisonment for a period of seven years and to pay fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for further six months for the offence punishable under Section 376 of the Indian Penal Code and also to undergo imprisonment for a period of five years and to pay fine of Rs.5,000/-, in default, to undergo rigorous imprisonment for a further period of three months for the offence punishable under Section 313 of the Indian Penal Code.

The *de facto* complainant, a village lady, aged about 21 years on the date of lodging complaint, submitted a written complaint to the Inspector-in-Charge, Barasat Police Station stating, *inter alia*, that accused Natu Ali proposed her to marry about three months before the date of lodging complaint. The *de facto* complainant agreed to his proposal because her family was very poor. Accused Natu Ali then took her to a nearby Mosque and told her that he had married to her on that date. He also promised that their marriage would be held socially on a subsequent date. Subsequently, accused Natu committed rape upon her inside a nearby mango grove for 4/5 times. As a result of such cohabitation, she became pregnant. The *de facto*

complainant informed the matter to the accused and her parents and other relatives. After the said information being revealed to the family members of accused Natu, he consulted with his relatives. Thereafter, the relatives of Natu made her understand that the society would not accept delivery of child by an unmarried lady. Then they proposed to her that they would take her to a Doctor and the Doctor would do whatever be the best for her. On 30th May, 2005, the brother of Natu, namely, Bachhu Ali took her to accused Atiar Rahaman. Atiar brought her to a Nursing Home at Nilganj for providing her necessary treatment. In the Nursing Home Atiar consulted with one Doctor, named, Mala. Then on the pretext of medical treatment, the said Doctor aborted the fetus of the *de facto* complainant. Then accused Atiar told her to go to her house. She alone returned to her house. Subsequently, the accused persons threatened her with dire consequence if she would lodge a complaint against them in the local Police Station. The *de facto* complainant informed the matter to her parents. A village 'Saalish' was held to settle the dispute but no fruitful result could be achieved. Therefore, the petitioner lodged the complaint on 12th June, 2005.

Mr. Sekhar Kumar Basu, Learned Senior Counsel on behalf of the appellants in both the appeals submits that as per written complaint accused Natu proposed the prosecutrix to marry about

three months before the date of lodging complaint. Thereafter, the *de facto* complainant and accused Natu had sexual relationship on several occasions. The *de facto* complainant/prosecutrix was major, aged about 21 years on the date when Natu promised her to marry and thereafter they had sexual relationship. Thus, the *de facto* complainant was a consenting party when the accused had allegedly sexual relationship with her.

It is also urged by Mr. Basu that no case of false promise of marriage was instituted against accused Natu. He was also not charged under Section 417 of the Indian Penal Code.

The Learned Senior Counsel for the appellants next argues that the prosecutrix made out a story that accused Natu took her to a Mosque and declared that the *de facto* complainant is the married wife of Natu and social marriage would be held subsequently. In the FIR the prosecutrix failed to say the date when Natu took her to the Mosque of their village and accepted her as his wife. The prosecutrix failed to state any date of any incident in her written complaint or evidence. She, however, stated that on 30th May, 2005 the brother of Natu, namely Bachhu Ali took her to Atiar Rahaman who is the sister's husband of Natu. Atiar took her to a Nursing Home at Nilganj for medical treatment. There she met with a Doctor, named, Mala. The said Doctor allegedly terminated her pregnancy.

It is vehemently argued by the Learned Senior Counsel on behalf of the appellants that apart from the above allegation made in the written complaint and also at the time of adducing evidence by the *de facto* complainant there is nothing on record to substantiate the allegation. The Investigating Officer did not take any step to identify the Nursing Home situated at Nilganj, Barasat with the help of the *de facto* complainant. The Investigating Officer also did not ascertain as to whether there was any Doctor named Mala in the Nursing Home where the victim was taken for medical treatment. The said Doctor was not cited as a witness in the instant case. Therefore, the prosecution has withheld the best evidence in support of the charge under Section 313 of the Indian Penal Code against accused Bachhu Ali and Atiar Rahaman. Mr. Basu submits that prosecution examined one Golam Sorwar, P.W. 2. He is a village quack. According to his evidence, on 5th June, 2005 he medically examined the prosecutrix and found that she was pregnant for about 2 ½ /3 months. He then advised her to consult some Gynecologist. The evidence of P.W. 2, Golam Sorwar is of no importance because he did not state as to how the prosecutrix became pregnant. He did not issue any prescription to the prosecutrix. Furthermore, in cross-examination, the mother of the *de facto* complainant admitted that

previously the *de facto* complainant was aborted on number of occasions.

The Learned Public Prosecutor-in-Charge has supported the findings of the impugned judgment and order of conviction and sentence.

During trial, prosecution examined in all 13 witnesses. Amongst them, the evidence of the prosecutrix, P.W. 1 and her mother, P.W. 6, Sufia Bibi is of some importance. During trial, two Medical Officers were also examined as P.W. 11 and P.W. 12. P.W. 3, Suleman Ali and P.W. 5, Jhulfikar Ali did not support the prosecution case. P.W. 4, Sk. Manoj is the scribe of the written complaint who had no direct knowledge about the incident. From the evidence of P.W. 7, Jakir Hossain and P.W. 8, Abdul Selim it is ascertained that over an illicit relationship between Natu and the prosecutrix a village 'saalish' was held.

From the evidence of P.W.11, Dr. Monotosh Chakraborty it is ascertained that on 15th June, 2005 he conducted medical examination of the prosecutrix at Barasat District Hospital. During investigation the patient reported history of miscarriage about 10/12 days back.

Having heard the learned advocates for the parties and on careful perusal of the evidence on record let me now consider as to

whether the prosecution was able to establish the charge under Section 313 /341 of the Indian Penal Code against accused Bachhu Ali and Atiar Rahaman. From the F.I.R. it is found that on 30th May, 2005 Bachhu brought the prosecutrix to the house of Atiar Rahaman. Then he left the place. Atiar took the prosecutrix to a nursing home at Nilganj. In the said nursing home Atiar Ali consulted with one doctor, named, Mala. Dr. Mala terminated her pregnancy. Thus, as per F.I.R. which was submitted on 12th June, 2005 the foetus in the womb of the victim was aborted on 30th May, 2005. However, from the evidence of Dr. Monotosh Chakraborty (PW11) it is ascertained that the patient reported history of miscarriage 10/12 days before her medico legal examination. Medicological examination of the prosecutrix was conducted by P.W.11 on 15th June, 2005. Thus, the victim was aborted any time between 5th and 7th June, 2005. If the evidence of medical officer is believed, then statement of the de facto complainant in the FIR is found to be unreliable. In order to prove charge against Bachhu Ali and Atiar Rahaman under Section 313 /34 of the Indian Penal Code the prosecution required to prove that Bachhu brought the prosecutrix to the house of Atiar and Atiar took her to a nursing home situated at Nilganj. The Investigating Officer did not take any step to find out the nursing home at Nilganj where the pregnancy of the victim was allegedly terminated. The best

witness to prove the case of termination was the doctor who aborted the foetus in the womb of the victim. The said doctor was not even cited as a witness. The Investigating Officer did not take any attempt to identify the said doctor. In absence of such offence this Court cannot be in agreement with the findings of the learned Court below with regard to the order of conviction and sentence under Section 313 of the Code of Criminal Procedure.

The case against Natu Ali is that he established sexual relationship with the de facto complainant on false promise of marriage. The de facto complainant is a major lady aged about 21 years at the relevant point of time. She knew the consequences of having physical relationship with a man before marriage. In spite of such consequences being known by her, the victim established physical relationship allegedly with Natu Ali. Thus, the victim was a consenting party and no charge of rape stands against the person who is having consensual sexual relationship with the accused.

It is needless to say that in a case of rape the sole testimony of the prosecutrix can be the basis of conviction. But in such a case the evidence of the prosecutrix must be of sterling quality. The Hon'ble Supreme Court in ***Rai Sandeep alias Deepu versus State (NCT of Delhi)*** reported in ***(2012) 8 SCC 21*** described the characteristics of a sterling witness in the following words:

" A '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."

In the instant case, it is found from the evidence on record that the victim was a consenting party in the relationship with the accused Nattu Ali. The mother of the victim stated in her cross-examination that the victim was previously aborted on several times. No charge was framed against the accused Nattu Ali for false promise of marriage. The FIR was lodged after about four months of the alleged

incident. Conviction cannot be recorded in a case of rape where there is inordinate delay in lodging the FIR. The delay in lodging FIR makes the accused defenceless. Therefore, it is not at all advisable to rely on a delayed FIR in a case of rape, especially when circumstantial evidence established a consensual love relationship between the *de facto* complainant and Natu Ali.

Since from the evidence on record it transpires that the victim was a consenting party in her relationship with the accused Natu Ali, I have no other alternative but to hold that the appellant Natu Ali could not be convicted under Section 376 of the Indian Penal Code.

Accordingly, the judgment and order of conviction and sentence passed against the accused persons namely Bachhu Ali, Atiar Rahaman and Natu Ali is set aside.

The appellants are acquitted from their respective charges and discharged from their bail bonds.

Accordingly, CRA 22 of 2016 and CRA 145 of 2016 are allowed on contests.

Let a copy of this judgment along with the lower Court record be sent down to the learned Court below at the earliest.

[Bibek Chaudhuri, J.]

Srimanta/Suman
A. R. (Court)