

Form J(2)

IN THE HIGH COURT AT CALCUTTA

Criminal Appellate Jurisdiction

Appellate Side

Present :

The Hon'ble Justice Bibek Chaudhuri

C.R.A. 263 of 1985

Pralay Dasgupta @ Chhotku & Anr.

Vs.

The State of West Bengal

For the Appellants : Mr. Aritra Bhattacharyya, Adv.

**For the State : Mr. Ranabir Roy Chowdhury, APP.,
Mr. Mirza Firoj Ahmed Begg, Adv.**

Heard on : 20.12.2021 & 21.12.2021.

Judgment On : 21.04.2022

Bibek Chaudhuri, J.

In the instant appeal the accused persons have challenged the order of conviction and sentence under Sections 376/511 and Section 342 of the Indian Penal Code in Sessions Trial No.17 of 1985 arising out of Sessions Case No.101 of 1984 handed down by the learned Sessions Judge, Purulia.

The appellant No.1 was directed to suffer imprisonment for 7 years for committing offence under Sections 376/511 of the Indian Penal Code and the appellant No.2 was directed to suffer sentence of rigorous

imprisonment of one year for committing offence under Section 342 of the Indian Penal Code, IPC in short.

Purulia Town Police Station Case NO.6 dated 12th May, 1984 was registered under Sections 376/448/342/506 of the IPC against the accused persons on the basis of a written complaint submitted by one Chitaranjan Dutta. It is alleged by the *de facto* complainant that his daughter, aged about 8 years at the relevant point of time went to fetch water from Manbhom Sports Association (M.S.A.) on 12th May, 1984 at about 9:30 /10:00 a.m. At that time accused Pralay Dasgupta @ Chhotku called her and took her inside the office room of MSA. Then he closed the door and windows of the said room, made the minor daughter of the *de facto* complainant to lie down on the table forcibly put off her pant and attempted to commit rape upon her. When the daughter of the *de facto* complainant cried out of fear, the accused fled her off. At the time of her departure, the accused threatened her saying not to disclose the incident to anybody. The daughter of the *de facto* complainant returned to her house weeping. The *de facto* complainant came to know about the incident from her daughter and asked the accused that he would take steps by lodging a complaint against him with the police. At that time accused Proloy and his friend Kanak Pramanick threatened the *de facto* complainant saying that if he tried to lodge a complaint with the police against them, they would drive them away from the locality.

On completion of investigation police submitted charge sheet against the accused persons. The learned Sessions Judge framed charge against accused Pralay Dasgupta under Sections 376/511 of the IPC. Both the accused persons were also charged under Section 342 of the IPC. On their pleading not guilty, trial of the case commenced.

Learned advocate for the appellant at the outset submits that the learned Trial Judge failed to frame charge in compliance with the requirement of Section 212 of the Code of Criminal Procedure. In order to substantiate his contention, he refers to the charge framed against the accused persons. It is submitted by him that in the charge the learned Trial Judge failed to state the time and place of occurrence of the offence allegedly committed by the accused persons. In support of his contention, the learned advocate for the appellants refers to a decision of the Division Bench of this Court in the case of **Jamsed Shaikh & Ors. Vs. State** reported in **(1986) C CLR (Cal) 166**. Relying on the decision of the Hon'ble Supreme Court in **Main Pal Vs. State of Haryana** reported in **(2010) SC 130**. It is submitted by the learned advocate for the appellants that the relating to Sections 212, 215 and 464 of the Code are as follows"-

- (i) the object of framing charge is to enable an accused to have a clear ideas of what he is being tried for and of the essential facts that he has to made. The charge must

contain the particulars of dates, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

- (ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him and unless he has such knowledge, his defense will be prejudiced. Where an accused is charged with having committed an offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it. The accused will be prejudiced, resulting in failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, i.e. if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge;
- (iii) In judging a question of prejudice, as a guilt; the Court must act with a brought vision and look to the substance and not to the technicalities and their main concern should be to see whether the accused had a fair trial,

whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given full and fair chance to defend himself.

Coming to the instant case it is submitted by the learned advocate for the accused that the accused persons/appellants did not know about the place of occurrence and the time when the alleged incident took place. Therefore, the error in the charge is incurable and the appellants were prejudiced. On the basis of such erroneous charge the trial conducted against the accused persons was vitiated.

Learned advocate for the appellants next draws my attention to the evidence of the *de facto* complainant (P.W.1), the victim (P.W.2) and P.W.3, mother of the victim.

P.W.1 in his evidence stated that on 12th May, 1984 at about 9:30/10:00 a.m. when he was in his house, his daughter came to him crying. She reported that when she went to Maidan for bringing water, accused Chhotku called her showing two ballons. He told her to come to the ground keeping bucket full of water in her house. After keeping water in the house she went to the office room of MSA, closed the door and windows and laid her on a table. The accused then forcibly disrobed her and tried to thrust his penis

inside her private part. At this she began to cry out loudly. Then the accused left her and told her not to say anything to anybody. After hearing the incident, the father of the victim asked about the incident to Chhotku and his friend Kanak came in front of the house of the *de facto* complainant. The accused persons threatened him saying that they would compel him to leave the locality if the matter is informed to the police. They also abused him. They left the house. The *de facto* complainant went to Purulia Town Police Station with his daughter and submitted the FIR.

It is submitted by the learned advocate for the appellants that the written complaint was filed on 12th May, 1984 at about 12:30 p.m. The incident took place according to the *de facto* complainant at about 9:30/10:00 a.m. as per the evidence of P.W.1 the accused persons wrongly confined him in his house for about half an hour. Thus, it is presumed that entire incident was over at about 10:30 a.m. Then why there was delay at about two hours in lodging the complaint in the local police station.

According to the learned advocate for the appellants in a case of sexual abuse, the victim is the best witness. If the victim's evidence is found to be reliable, trustworthy and unblemished, conviction can be based on the basis of the sole testimony of the

victim of an offence of sexual abuse. It is found from the evidence of the victim that on 12th May, 1984 at about 9:30 a.m. she went to MSA Maidan to bring water from the tubewell. At that time the appellant No.1 gave her balloons and asked her to come. She went to her house to keep the bucket full of water and then went to the appellant No.1. He took her inside the office room of MSA Maidan. Then he closed the door and windows of the said office, laid her on a table, forcibly took off her pant and then tried to thrust his penis inside her private part. When she cried out, the appellant left her. She wore the pant and came out. The accused told her that she would not state the incident to her house and narrated the incident to her parents. When his father was going to the local police station, the accused persons told him not to go to the police station. They threatened him that they would compel him to leave the locality where they used to live. They stayed there for some time and thereafter the accused persons left. Then the de facto complainant and the victim went to the police station. She was sent to hospital on the next Monday. She was medically examined by the Medical Officer. She also made a statement under Section 164 of the Code and her signature was exhibited as exhibit-3.

It is pointed out by the learned advocate for the appellant that the *de facto* complainant did not state in his written complaint that when his daughter went to MSA ground to fetch water, the appellant No.1 called her and gave her balloon. The written complaint is also conspicuously silent on the fact that the victim again went to MSA ground and went to the appellant No.1. The absence of the sequence of incident in such a case is fatal for the prosecution. Learned Trial Judge failed to appreciate such important omission amounting to material contradictions of the prosecution.

Along with the evidence of P.W.1, P.W.2 and P.W.3, the learned advocate for the appellants draws my attention to the evidence of D.W.1, Golak Orang who used to work as Gardener in the Maidan of M.S. Association. From the evidence of D.W.1, it is ascertained that there are five rooms in Maidan of M.S. Association. The said rooms are kept under lock and key and the key is kept under the possession of the Secretary. Ground is covered by boundary wall having three gates. The gates are also kept under lock and key. The Gardener enters into the Maidan through the Western side gate. He used to possess the key of the said gate. It is admitted by D.W.1 that there is a tap water connection at M.S.A. Maidan. Water is distributed from the over

tank of the office of M.S. Association. There is also a tap water connection outside the office. From his office it is ascertained that on 12th May, 1984 at about 8 a.m., two girls came to take tap water from the tap situated at the outside of the office of M.S. Association. D.W.1 did not allow them to take water. They went away. After half an hour they again came to take water. At that time D.W.1 was working in the field. Seeing that, he reported the matter accused Pralay Dasgupta who was in the field. Pralay came to them and threw away water which they collected and slapped one of them. They began to cry and went away. Pralay left the field at about 12/12:30 p.m.

According to the learned advocate for the appellants, D.W.1 is a disinterested witness. There is no reason to disbelieve him. D.W.1 gave a completely different account of the incident that took place on 12th May, 1984. When two contrary narration as to the incident came before the court, the Court ought to have accepted the incident that supported the accused persons.

Referring to a decision of the Supreme Court in the case of ***Rai Sandeep alias Deepu Vs. State (NCT of Delhi)*** reported in ***(2012)8 SCC 21***. The learned advocate for the appellant submits that lone evidence of the victim and of an evidence of sexual abuse can be the basis of conviction if her evidence is of a sterling

witness. In the said report, the Hon'ble Supreme Court summarize the character 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 ever 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, the evidence of the victim girl cannot be treated of having sterling quality. There are inherent contradictions, omission and exaggeration in the evidence of the victim girl (P.W.2). Therefore, her evidence cannot be accepted as the sole basis of conviction of the appellants.

Learned advocate for the appellants also submits that the learned Trial Judge failed to examine the accused persons under Section 313 of the Cr.P.c. in its proper perspective. In support of his contention, he refers to the following decision of the Hon'ble Supreme Court :-

- (1) ***Reena Hazarika Vs. State of Assam*** reported in ***(2019) 13 SCC 289***;
- (2) ***Nagaraj Vs. State, represented by Inspector of Police, Salem Town, Tamil Nadu*** reported in ***(2015) 2 SCC 739***;

In ***Reena Hazarika*** (supra), it is held by the Hon'ble Supreme Court that Section 313 of the Cr.P.C confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) of the Cr.P.C. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is entirely a different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C, in the given facts of a case, the conviction may well stand vitiated.

In ***Nagaraj*** (supra) the Hon'ble Supreme Court observed that Section 313 Cr.P.C is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem.

Under the backdrop of the above mentioned proposition with regard to examination of an accused under Section 313 of the Cr.P.C, the learned Advocate for the appellant takes me to the examination of accused persons under Section 313 of the Cr.P.C made by the learned Sessions Judge, Purulia. The learned Sessions Judge did not refer the incriminating material appearing against the accused persons from the evidence of the witnesses. On the other hand, he went on examining the accused persons by putting general questions in the following manner:-

"It transpires from the evidence....."

"It is in evidence..." etc.

According to the learned Advocate for the appellant the learned Sessions Judge failed to examine the appellant properly

under Section 313 of the Cr.P.C and therefore the trial was vitiated.

Mr. Ranabir Ray Chowdhury, learned Advocate for the petitioner, on the other hand submits that error in framing of charge is not fatal, if no failure of justice is occasioned because of such error. Section 464 of the Cr.P.C provides what is to be done in cases where a charge is not framed or there is any error, omission or irregularity in framing of the charge. A finding, sentence or order could be set aside only in these cases, where the facts are such that no valid charge could be preferred against the accused in respect of the facts proved. Secondly, if the facts are such that a charge could be framed and yet it is not framed, but no failure of justice has, in fact been occasioned thereby, the finding, sentence or order of the court of competent jurisdiction is not to be set aside on that ground. In the instant case the appellants never agitated against framing of charge during trial of the case. On the other hand, the accused persons cross examined the witnesses on behalf of the prosecution on the basis of the defence taken by them in course of trial. Not only that, the accused persons examined one of the gardeners of MSA Maidan as a defence witness to prove that Pralay Dasgupta @ Chhotku was not

present on the date and time of occurrence in the office of the said ground and the victim had no opportunity to enter inside of the said ground on the date and time of alleged occurrence because the entrance gate of the ground was locked.

On factual score it is submitted by Mr. Ray Chowdhury that the victim girl narrated the incident which took place with her on 12th May, 1984 at about 9.30 am. Her evidence corroborates with her statement recorded under Section 164 of the Cr.P.C. Therefore, there is no reason to disbelieve the evidence of the victim girl. Learned trial judge convicted the appellant No.1 under Section 376/511 of the IPC and both the appellants under Sections 342 of the IPC. There is no reason to interfere with the judgment and order of conviction and sentence passed by the learned trial judge. Accordingly learned P.P-in-Charge has prayed for dismissal of the instant appeal.

Having heard the learned Counsels for the parties and on careful consideration of the evidence on record it is necessary to recapitulate the incident that took place on the date and time of occurrence inside the office room of the ground. According to the victim girl she went to fetch water from a tap situated inside the MS Ground at Purulia. When she was taking water, the appellant No.1 called her showing balloons. The victim girl told

him that she would come to take balloons from appellant No.1 keeping the bucket full of water in her house. Then she went away with the bucket. After a while she again came to the ground and found appellant No.1 standing in front of the office room of the ground. When she went to him, he took her inside the office room, closed the door and windows, laid her down on a table, opened her pant and tried to thrust his penis inside her vagina. The learned trial judge accepted the evidence of the victim girl without considering the evidence of the Medical Officer who opined that if anybody tries to thrust his penis inside the vagina of the said victim girl who is a child aged about 11 years at the relevant point of time, in all probability she would sustain injury on her private part. However, the Medical Officer did not find any injury on her private part.

In ***Aman Kumar & Anr. vs. State Of Haryana : (2004) 4 SCC 379***, it is held by the Hon'ble Supreme Court that the plea relating to applicability of Section 376 read with Section 511, IPC 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, that is, 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. Section 511 is a general provision dealing with attempts to commit offences 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, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

Thus, in a case of attempt of rape, prosecution is under obligation to prove all ingredients of commission of offence of rape, short of penetration. Even if a minor girl is disrobed and made to lie down on a table and the accused lies over her, the said act does not constitute an offence under Section 376/511 of the IPC. In the instant case the victim girl specifically deposed that when the accused tried to thrust his penis inside her vagina she cried out in pain. However the Medical Officer did not find any injury in or around the private part of the victim girl. This negates the charge under Section 376/511 of the IPC. Moreover, the trial of the case was vitiated due to improper

examination of the accused persons under Section 313 of the Cr.P.C.

It is the rule of criminal jurisprudence that an accused is presumed to be innocent till he is proved guilty. In the instant case there are discrepancy and contradictions in the evidence of the victim girl and her evidence cannot be treated as of starling quality.

For the reasons stated above, this court is of the view that the appellant are entitled to get benefit of doubt. Accordingly the instant appeal deserves favourable consideration.

The appeal is thus allowed on contest.

The judgment and order of conviction and sentence passed by the learned Sessions Judge, Purulia in Sessions Trial No.17 of 1985 arising out of Sessions Case No.101 of 1984 is set aside.

Appellants are acquitted from the charge and discharged from their bail bond.

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

(Bibek Chaudhuri, J.)