

Form J(2)

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

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

CRA 74 of 2016

**Shiburam Bhuiya @ Shibnath Bhuiya
Vs.
The State of West Bengal**

**Amicus Curiae : Mr. Anirban Dutta
Mr. Sayantan Sinha**

Heard on : 30.03.2022

Judgment on : 30.03.2022

Bibek Chaudhuri, J.

In the instant appeal under Section 374(2) of the Code of Criminal Procedure the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court at Arambagh, Hooghly in Sessions Trial No.16 of 2014 corresponding to Sessions Case No.39 of 2014 convicting the appellant under Sections 376/511 of the Indian Penal Code and sentencing him rigorous imprisonment for five years and to pay fine of Rs.5,000/-, in default, simple imprisonment for three months more.

On the basis of a written complaint submitted by one Debasis Bera alleging, inter alia, that on 7th June, 2013 at about 9.30 P.M. his minor daughter went to Kali Temple of their village to bring "prosad" (offering to the goddess). At about 9.30 P.M. while she was returning to her house, the appellant caught hold of her, dragged her to a field at some distance from the temple, outraged her modesty and tried to commit rape upon her. The said minor girl started shouting out of fear which attracted the local people and seeing them the accused fled away.

On the basis of the said written complaint, police took up investigation of the case and submitted charge sheet against the appellant under Section 341 and Sections 376/511 of the Indian Penal Code. The trial of the case was conducted by the learned Additional Sessions Judge, 2nd Court at Arambagh, Hooghly. During trial, the prosecution examined seven witnesses. The accused pleaded his innocence while examining under Section 313 of the Code of Criminal Procedure and finally the trial Court convicted the appellant and sentenced him accordingly.

Hence, the instant appeal against the order of conviction and sentence.

Amongst the witnesses examined during trial the de facto complainant deposed in this case as P.W.1. P.W.2 is the mother of

the victim girl. P.W.3 is the victim girl herself. P.W.4 and P.W.5 namely, Rabi Ram and Uttam Panja are the residents of the same village but they did not support the prosecution case. P.W.6 Dr. Sudipa Ganguly was a Medical Officer of Kamarpukur Block Primary Health Centre. On 9th June, 2013 she conducted medicological examination of the victim girl. P.W.7 Anup Kumar Roy is the Investigating Officer of this case.

It is pertinent to mention at the outset that the appellant has already served sentence passed by the Court below. Therefore, he lost interest to proceed with the case. However, since the instant appeal is pending and the appellant has the right to challenge the order of conviction even after the sentence was served by him, this Court appointed Mr. Anirban Dutta, advocate as *amicus curiae* to assist the Court on behalf of the appellant. Mr. Dutta has confined his argument on the question as to whether the appellant was rightly convicted by the Court below on the basis of the evidence on record or not.

At the outset it is submitted by Mr. Dutta, learned advocate as *amicus curiae* that the alleged incident took place on 7th June, 2013. F.I.R. was lodged on 9th June, 2013 on the basis of a written complaint submitted by P.W.1 Debasis Bera. In the written complaint it was specifically stated by the de facto complainant that when his

minor daughter was dragged to a field by the appellant, she raised hue and cry which attracted the local people and seeing them the appellant fled away. But in the deposition he stated that on hearing hue and cry of the victim girl they rushed to the place of occurrence and saved his daughter. It is submitted by Mr. Dutta that the evidence of P.W.1 is totally contradictory from what he has expressed in his written complaint. Next Mr. Dutta submits that in course of evidence both the de facto complainant and the mother of the victim girl and the victim girl herself stated that she went to Kali Temple with her aunt (Jathaima/Boroma). The said aunt was not examined during trial. The victim girl in her evidence stated that she was playing with her friends in front of the temple. However, none of her friends was examined in this case. Thus, the prosecution failed to produce the best witness of the occurrence. It is further submitted by Mr. Dutta that sub-clause 5(A) of Section 164 was added to the statute with effect from 3rd February, 2013. The said provision runs thus:-

" [(5-A) (a) In cases punishable under Section 354, Section 354-A, Section 354-B, Section 354-C, Section 354-D, sub-section (1) or sub-section (2) of Section 376, [Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB],

Section 376-E or Section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed."

In the instant case, however, the Investigating Officer did not take any attempt to record the victim's statement under Section 164 of the Code of Criminal Procedure. The investigation of the case was carried out in a very perfunctory manner. Therefore, on the basis of evidence on record, the appellant could not be convicted.

Mr. Dutta further submits that it is alleged by the victim girl (P.W.3) that the appellant caught hold of her neck and there was a

scratch mark on her neck. He also tried to take off her clothes. The accused also pressed her body and then he got on top of her. Then she became senseless. In the written complaint as well as in the evidence the de facto complainant and P.W.2 being the mother of the victim girl did not narrate the said fact. In the written complaint also the de facto complainant did not state the specific act by which the appellant allegedly tried to commit rape upon the victim girl. Therefore, the evidence of the victim girl on this point is a subsequent development in course of evidence and it cannot be taken into consideration. It is already recorded that the appellant was convicted for an attempt to commit rape. The word 'attempt' has not been defined in the Indian Penal Code. It should be borne in mind that an offence consists of five stages.

- (1) Motive to commit an offence.
- (2) Intention to commit an offence.
- (3) Preparation for committing an offence.
- (4) Attempt to commit it and
- (5) The commission of offence.

A person commits an offence or attempts to commit a particular offence when (a) he intends to commit that particular offence; and (b) when he having made preparation (c) and with the intention to commit the offence punishable. The Section does not say that the

intention to commit offence is punishable. In order to hold an accused guilty for attempting to commit an offence it is obvious that the prosecution must come forward with specific evidence of overt act by the appellant.

The plea relating to applicability of Section 376 read with Section 511 of the Indian Penal Code is required to be adjudicated upon on the above principle. In between complete rape and attempt to commit rape there is a rear area covered by Section 354 of the Indian Penal Code i.e., assault or criminal forces to a woman with intent to outrage her modesty or indecent assault. The dividing line between attempt to commit rape and indecent assault is not only thin but also in practicability invisible. For an offence of attempt to commit rape, the prosecution is required to establish that the act of the accused went beyond the stage of preparation. Rape is committed when there is slightest penetration of male organ inside the geneteria. An attempt of rape must have all the ingredients of motive, intention, preparation to commit rape, sort of penetration.

Catching hold of the neck of a girl or pressing different parts of body or even sitting on the top of a girl are not the instances of attempt to commit rape.

For the reasons stated above, this Court finds that the learned trial Judge committed an error in convicting the appellant for an offence under Sections 376/511 of the Indian Penal Code.

Accordingly, the instant appeal is **allowed**.

The order of conviction passed by the learned Additional Sessions Judge, 2nd Court, Arambagh, Hooghly in Sessions Trial No.16 of 2014 corresponding to Sessions Case No.39 of 2014 is set aside.

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

(Bibek Chaudhuri, J.)