

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 66 of 2012

Abdul Gaffar Molla

-vs.-

The State of West Bengal

For the Appellant	:	Mr. Satadru Lahiri, Mr. Abdul Hamid, Mr. Safdar Azam.
For the State	:	Mrs. Anasuya Sinha, Mr. Pinak Kumar Mitra.
Heard on	:	12.04.2022, 29.04.2022, 04.05.2022, 05.05.2022, 13.05.2022, 19.05.2022, 07.06.2022, 26.07.2022, 05.08.2022, 16.08.2022, 22.08.2022 & 29.08.2022.
Judgment on	:	23.11.2022

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 20.01.2012 and 21.01.2012 passed by the Learned Additional Sessions Judge, Fast Track 4th Court, Diamond Harbour, South 24 Parganas in Sessions Trial Case No. 4(7)08 arising out of Sessions Serial Case No. 1(2)08 thereby convicting the appellant for commission of offence under Section 376/417 of the Indian Penal Code and sentencing him as follows:

- 1) To suffer Rigorous Imprisonment for seven years and to pay a fine of Rs.1,00,000/- in default to suffer Rigorous Imprisonment for one year for the offence under Section 376 of the Indian Penal Code.
- 2) To suffer Rigorous Imprisonment for six months for the offence under Section 417 of the Indian Penal Code.

Diamond Harbour Police Station Case no. 100 dated 13.04.2007 was registered for investigation under Section 376/493/120B of the Indian Penal Code against Abdul Gaffar Molla (accused/appellant), Hannan Molla, Taharia Bibi, Khalek Molla, Mannan Molla. One Zahira Khatoon lodged a complaint with the Officer-in-charge, Diamond Harbour Police Station to the effect that she developed a relationship with her neighbour Abdul Gaffar Molla (accused/appellant). The accused often used to propose her for marrying him and forced her for physical relationship, as a result of such physical relationship complainant became pregnant and informed the same to the parents and uncle(s) of the accused who asked her to undergo medical test. After medical test the complainant was confirmed regarding her pregnancy and when she informed the same to the accused and his relations they denied of any relationship and the accused/appellant threatened her that if the incident is divulged she would be killed. The accused along with his relations started harassing the complainant and attempted to take her away forcefully from her

house for aborting the foetus. The complainant apprehended that she was running risk of her life and as such the accused and his relations should face consequences of their acts and be punished.

The Investigating Agency on completion of investigation submitted charge-sheet under Section 376/493/120B/506 of the Indian Penal Code. The case was thereafter committed to the Court of Sessions and the trial Court framed charges under Section 376/506 of the Indian Penal Code against the appellant and under Section 417/506 of the Indian Penal Code against rest of the accused persons. The charge was read over to all the accused persons who pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 13 witnesses which included PW1, victim; PW2, Syed Ali Molla, father of the victim; PW3, Esmotara Bibi, mother of the victim; PW4, Morsalim Sk, villager who organized salishi; PW5, Nurul Hassan Molla @ Salman, younger brother of victim; PW6, Kasem Sk, witness who was tendered for cross-examination, PW7, Samsul Beg, Co-villager; PW8, Karim Khan, Co-villager; PW9, Dr. Apurba Kr. Roy, doctor who conducted test of pregnancy of the victim; PW10, Dr. Prasanta Kr. Chowdhury, doctor who subsequently prepared medical report of victim; PW11, Nirmal Kr. Kar, ASI of police who filled up FIR and started case; PW12, Sandip Chatterjee, Superintendent of Diamond Harbour Sub-divisional Hospital who produced the original Certificate Issue Register and PW13, Swapan Kr. Dey, Investigating Officer of the case.

Prosecution relied upon some documents which included Ext.1, FIR and signature on the FIR; Ext.2, Statement under Section 164 of the Code of Criminal Procedure and the signatures, Ext.2 (series); Ext.3/1 and Ext.3/2, medical report and its signatures dated 30.04.2007; Ext.4/2, Medical Report dated 19.04.2007; Ext.5, Formal FIR; Ext.6, Attested Copy of Hospital Report of Birth Certificate; Ext.7, sketch map.

PW1, is the victim lady who deposed that the house of the accused is situated across the pond of her residence and there are no adjacent house in between. At the time of the incident the accused Abdul Gaffar forcibly raped her at her room at a time when none were present at her house. She deposed that the accused/appellant on several occasions raped her although by village courtesy he happens to be her brother. When the complainant went to nature's call he used to enter her room and threatened to kill her in case she did not meet her to have intercourse. As a result of such threatening she could not raise alarm and he also proposed her for marriage, however the misdeed of the accused made her pregnant and subsequently she informed her parents. A salish was held in her village about the incident wherein she narrated the facts but the accused was absent although his family members attended the Salish. The family members of the appellant represented in the salish that if at the time of blood test the baby which was in her womb was proved to be that of the appellant they would arrange marriage of their son with her. The other relations who have been accused were also present in the salish. The accused persons did not arrange for paternity test of the baby, however, on urine test it

was found that she was pregnant. The matter was informed to them when the appellant fled away from his house as such no other discussion could take place. Having no other option she lodged complaint with the police who interrogated her and took her to the Learned Magistrate where her statement was recorded. She was also sent to the Hospital for medical examination and she also gave her statement to the police authorities. She gave birth to a male child whose name is Abdul Zahir Molla. She identified her signature in the FIR which was marked as Ext.1/1 and she stated that the complaint was written as per her instruction, she understood the contents of the same as it was read over and explained to her. She identified her signatures in the statement under Section 164 of the Code of Criminal Procedure which were shown to her, the same were marked as Ext.2 (series). Her consent for being examined by the doctor in the hospital was shown to her which was marked as Ext.3/1. Her ultra-sonography report where her signature appeared was marked as Ext.4/1. She also stated that she obtained Birth Certificate of her son from the Municipality and in the said Certificate the name of the father was that of the appellant. Victim stated that although the accused proposed to marry her and had sexual relationship with her for which the child was born but the accused/appellant refused to marry her.

PW2, Sayed Ali Molla, father of the victim deposed that at the time of incident his daughter was aged about 16/17 years and the house of the accused persons were situated near their house and they had visiting terms. His daughter had a love affair with the appellant which he heard about 3 years

ago from his wife. As a result of the relationship his daughter became pregnant at the instance of the appellant Abdul Gaffar Molla and his daughter confirmed the same. After knowing that his daughter was pregnant he along with his wife had been to the house of Abdul Hannan father of Abdul Gaffar who committed that in case his son was involved in the incident he would arrange marriage of their son with his daughter. His daughter was examined by the doctor at Sarisha Primary Health Centre where doctor told that his daughter was pregnant and as Abdul Gaffar/appellant refused to marry his daughter they had no other option except to report to the police authority. A village salish was held wherein all the accused persons were present except the appellant. He identified all the accused persons in Court.

PW3 is Esmotara Bibi who deposed that she and her husband happened to be agricultural day labours and the victim happens to be their daughter. The house of the appellant was situated by the side of their house and they had visiting terms with the family. On seeing physical change in her daughter she made a query to which her daughter replied that she was carrying as she was subjected to forcible rape by the appellant. She also stated that her daughter told her that the appellant had promised to marry her and thereafter forced her for physical relationship. The witness stated that she informed the incident to her husband who clarified from her daughter and subsequently she and her husband had been to the house of Hannan Molla and narrated the incident, who promised that if his son is responsible for the incident then he would arrange marriage of his son with their daughter but subsequently, the

appellant's family refused to arrange any marriage with their daughter. Thereafter she went to Diamond Harbour Sub-divisional Hospital with her daughter for her treatment and the doctor informed her that her daughter was carrying. The appellant's family however insisted for aborting the child and they would arrange for marriage of her daughter with their son. The incident was thereafter informed to the panchayat and a salish took place but the accused persons refused to accept the resolution of the salish, as such the Panchayat member requested them to lodge complaint with police station. She also stated that her daughter gave birth to a male child three years ago and he is still alive. The witness identified all the accused persons including the appellant in Court.

PW4, Morsalim Sk is co-villager who deposed that he knew both the family of the victim as well as that of the appellant and is a resident of the same village. According to him in the year 2007 father of the victim came to his house and told him that his daughter was carrying because of the appellant's mis-deed and he requested to arrange for a salish. A salish was held in presence of respected persons of the village, both the parties appeared in the Salish and on being asked the victim narrated the incident. The victim narrated that she was carrying for three months and it was because of the appellant Abdul Gaffar. After hearing both the sides the panchayat and the other members tried to arrange for marriage but Hannan Molla father of Abdul Gffar refused to accept such proposal of marriage as such he had no other option except to ask the victim and her father to take shelter of law.

PW5, Nurul Hassan Molla is the younger brother of the victim. He identified all the accused persons including the appellant in Court. He deposed that Abdul Gaffar used to visit their house when his parents were not there. He stated that Abdul Gaffar told him that he would marry his sister and thereafter he came to know from his mother about three years ago that his sister was pregnant and Abdul Gaffar was responsible for the same. The matter was informed to the panchayat of the village, however, the accused persons refused to accept the resolution which was passed in the Salish and they fled away from the village.

PW6, Kasem Sk was tendered by the prosecution however, his cross-examined was also declined.

PW7, Samsul Beg is a co-villager who deposed that he knew the victim's family who are residing subsequently at Thakurpukur after leaving the village with the family members. He stated that Abdul Gaffar had visiting terms with the family of the victim and at that time the victim was a student and the victim's parents told him that their daughter became pregnant at the instance of Abdul Gaffar. On query from the victim he came to know the information was correct, matter was referred to the gram panchayat who arranged for a salish but the accused persons refused to accept the resolution of the salish.

PW8, Karim Khan, deposed that he knew the victim and her family as also the accused persons and their family. He stated that he came to know from Syed Ali Molla that his daughter was pregnant at the instance of Abdul

Gaffar. The witness clarified the same from the victim who supported such version and told him that the accused/appellant promised to marry her and had sexual intercourse as a result of which she became pregnant and subsequently refused such commitment. A Salish took place at the village, however, the accused persons refused to accept the resolution of the Salish.

PW9, is Dr. Apurba Kumar Roy who deposed that on 30.04.2007 he conducted the ultra-sonography examination of the victim in reference to Diamond Harbour Police Station Case No. 100 dated 13.04.2007. He referred to his examination which was available in the report and is as follows:

“After Examination I found a single live intra-uterine foetus and 17 weeks maturity in, change position with post-eriorly located placenta (Grade-0) and adequate liquor. This is the said report. This is my hand writing and signature with official seal. The medical report dt. 30/4/07 is marked as Exhbt.- 3/2.”

PW10, is Prasanta Kumar Chowdhury, he deposed that on 19.04.2007 he examined the victim who was 18 years, in reference to Diamond Harbour police station case no. 100 dated 13.04.2007. the brief history of the case as is present in the report was that the victim had love affair with Abdul Gaffar of her locality for about a year, who raped her. He told that he would marry her and had sexual intercourse several time at the residence of the victim girl and once at the home of the accused. Subsequently, the accused refused to marry her and she is presently having amenorrhoea. The examination report as stated by the doctor is set out as follows:

“On examination an average built girl weight – 50 kg. Height – 5 ft. Mentally alert L.M.P. on 15th Pous.

Breasts globular in shape, nipple developed, secondary areola developed. Axillary hair sparse. Pubic hair developed. Vulva and Vagina well developed.

Hymen torned, vagina admits 2 fingers easily. Uterus 16 to 18 weeks size, A/V soft, mobile.

For confirmation of pregnancy and determination of duration of pregnancy she was referred to radiology department.

No marks of injury, recent or past detected on the private parts.

No sign of V.D. detected.”

PW11 is Nirmal Kumar Kar, Assistant Sub-Inspector of Police attached to Diamond Harbour Police Station who received the written complaint from the victim and started the case being Diamond Harbour PS Case no. 100 dated 13.04.2007. The Formal FIR was also prepared by the witness who identified his signature. The Formal FIR was admitted in evidence and marked as Ext.5.

PW12 is Sandip Chatterjee who is the Superintendent at Diamond Harbour Sub-Divisional Hospital who produced the original Certificate Issue Register from February 2007 to 21.10.2007 along with attested copy which was attested by Superintendent Dr. Anowar Hossain. The witness deposed that as per the Birth Certificate Register, serial no. 1673/2015 dated 30.09.2007 the victim gave birth to a child and in the said register Abdul Gaffer Molla is appearing as also Abdul Jaheer Molla. Name of the grand-mother of the child

has been referred as Esmotara Bibi. The Original Register along with attested copy was admitted in evidence and marked as Ext.6.

PW13, S.I. Swapan Kumar Dey is Investigating Officer of the Case. He deposed that on 13.04.2007 he was posted at Diamond Harbour Police Station and he was endorsed the investigation relating to Diamond Harbour Police Station case no. 100/07 dated 13.04.2007. He narrated the manner in which he conducted the investigation after starting the case, which included preparation of sketch map with index, examination of the victim along with medical examination, recording of statements under Section 164 of the Code of Criminal Procedure, issuance of warrant proclamation and attachment of the absconding accused persons as also submission of charge-sheet before the Jurisdictional Court being CS no. 150 dated 01.08.07 under Section 376/493/120B/506 of the Indian Penal Code.

Mr. Satadru Lahiri, learned Advocate appearing for the appellant submitted that the victim's version from the inception is inconsistent as she has embellished, exaggerated and contradicted her own version which touches the root of the case. To demonstrate such contention learned Advocate pointed that in the FIR the victim stated she had an affair with the appellant and as a consequence she conceived out of such relationship. In her statement under Section 164 of Cr.P.C. before the learned Judicial Magistrate, victim narrated the events relating to sexual encounter in a manner which rules out any prior relationship as narrated in the FIR. Again before PW10 the doctor, victim

admitted to have an affair and as such she entered in a physical relationship on several occasions resulting in her pregnancy. Before the Court in her deposition, victim made cryptic versions borrowing from all the three earlier representations. The contradictions in the version of the victim would be evident from the cross-examination of PW13 the Investigating Officer of the case. On the aforesaid aspect, learned Advocate for the appellant relied upon Dilip & Anr. –Vs. – State of M.P. reported in (2001) 9 SCC 452; Prakash Chand – Vs. State of Himachal Pradesh reported in (2019) 5 SCC 628; Santosh Prasad alias Santosh Kumar –Vs. – State of Bihar reported in (2020) 3 SCC 443 and Narender Kumar –Vs. – State (NCT of Delhi) reported in (2012) 7 SCC 171.

Learned Advocate for the appellant also raised the issue relating to delay in lodging the FIR as according to him there was an inordinate delay in complaining to the police authorities which raises serious doubt regarding the authenticity of the version of the victim. To substantiate such contention, learned Advocate relied upon Prakash Chand – Vs. State of Himachal Pradesh reported in (2019) 5 SCC 628; Vijayan –Vs. – State of Kerala reported in (2008) 14 SCC 763; K.P. Thimmappa Gowda –Vs. – State of Karnataka reported in (2011) 14 SCC 475; Deelip Singh alias Dilip Kumar –Vs. – State of Bihar reported in (2005) 1 SCC 88 and Abdul Barik –Vs. – State of West Bengal reported in 2022 SCC OnLine Cal 417.

It was further contended by the Appellant that the prosecution intentionally withheld the exact age of prosecutrix but from the different

materials available in evidence it would reveal that she is not less than sixteen years and as such was unable to understand the consequences of her act. Learned Advocate to establish the same referred to the statement of the victim under Section 164 of Cr.P.C. as well as medical report where it reflects the age of the victim to be 18 years, while the parents have claimed her age to be of 16 years. On the other hand in spite of issuing process the prosecution did not tender the headmaster of the School as a witness to produce the School register. Relying upon K.P. Thimmappa Gowda (supra), Deelip Singh alias Dilip Kumar (supra), Saddam Hussain -Vs. - State of West Bengal reported in 2021 SCC OnLine Cal 3012 and Swapan Roy -Vs. - State of West Bengal reported in 2016 SCC OnLine Cal 611, learned Advocate for the appellant submitted that the victim was able to understand the consequences of her act and being more than 16 years there is no scope for bringing her case within the ambit of Section 417 or Section 90 of IPC. Additionally it was submitted on behalf of the appellant that the marriage was not solemnised not for the appellant but for the resistance of the parents of the appellants. Learned Advocate lastly concluded that having regard to the totality of the evidence as relied upon by the prosecution, no case has been made out for convicting the appellant and as such the judgment and order of conviction and sentence passed by the Trial Court is liable to be set aside.

Mrs. Anasuya Sinha, learned Advocate appearing for the State on the other hand resisted the submissions advanced on behalf of the Appellant and submitted that in the present case the evidence reflected that the parents of

the victim girl are agricultural labours who are engaged in the field for their day to day living, as such the factum of the girl staying alone at home is a regular event. The background of the girl itself would go to show that she is unable to narrate her part of the events in a composed and calculated manner which would include each and every intricacies. The conduct of the appellant in this case cannot also be thrown away or ignored as immediately the news regarding the girl being pregnant spread, the appellant started evading her and from the inception the family members also started imposing conditions. It was pointed out before this Court that the statement of a rape victim is to be considered as if she is an injured witness and not an accomplice to the crime. Learned Advocate submitted that the victim girl being of tender age fell into the trap of the appellant who by promising to marry and threatening and thereafter running away when the victim became pregnant points to his culpability. The appellant or his family members did not arrange for any DNA testing which they represented before the panchayat while the girl in her medical examination was found to be pregnant. Learned Advocate for the State relied upon *State of H.P. -Vs. - Lekh Roy & Anr.* reported in (2000) 1 SCC 247, *Yedla Srinivasa Rao -Vs. - State of A.P.* reported in (2006) 11 SCC 615 and *Vijay alias Chineer -Vs. - State of Madhya Pradesh* reported in (2010) 8 SCC 191 for supporting the judgment and order of conviction and sentence passed by the trial Court and submitted that there is no scope for interference in this appeal.

On a scrutiny of the evidence available on record it reflects that the victim in the FIR narrated that she developed relationship with the

accused/neighbour namely, Abdul Gaffar Molla and the accused often proposed that he would marry her and forced her for physical relationship, as a result of which she became pregnant. In her statement before the doctor PW10 the victim, PW1 narrated that she had an affair with Abdul Gaffar of her locality for a period of one year, who told her that he would marry her and had sexual intercourse several times at her residence and once at the home of the accused but subsequently he has refused to marry her and she is having Amenorrhoea for five months. The victim while in her statement before the learned Magistrate under Section 164 of the Code of Criminal Procedure narrated that while her parents had been to her elder sister's home she was alone in her house the accused entered into her room at night and forcefully disrobed her and she was embraced in such a manner that she was unable to overpower him which was a forceful sexual intercourse at the instance of the accused, the accused thereafter repeated such misdeed on several occasions, as a result of which she became pregnant and when this was informed to Abdul Gaffar/accused/appellant and his relations they threatened of murdering her and as such she was compelled to institute the case. PW1 in her deposition before the Court narrated that the accused Abdul Gaffar raped her at her room when she was alone and none was present at her house and repeated such misdeed number of occasions. Whenever, she went to nature's call accused would enter her room and threatened to murder her in case she refused to have sexual intercourse. Because of such threat she could not raise any alarm and he also proposed to marry her. She became pregnant and the

same was reported for which a Salish was held where the family members of the accused appeared and submitted that in case after blood test of baby it was found to be that of that appellant/Abdul Gaffar then they would arrange her marriage with him. The accused persons did not arrange for any paternity test, however she was taken to doctor and doctors after examination reported that she was pregnant.

One of the salient feature in this case is the change of stand of the victim before different authorities which at the inception was only restricted to a relationship for which there was sexual intercourse with the promise to marry and which with a passage of time change to forceful/aggressive sexual encounter which is diametrically opposite to her narration of evidence as stated earlier. Considering the manner in which the victim has changed her stand from time to time it would be difficult to rely upon her sole testimony to arrive at a conclusion for convicting the appellant.

Having regard to the above, I am of the opinion that it would not be safe to rely upon such evidence to arrive at a conclusion for holding the appellant guilty of commission of the offence.

Accordingly the judgment and order of conviction and sentence dated 20.01.2012 and 21.01.2012 passed by the Learned Additional Sessions Judge, Fast Track 4th Court, Diamond Harbour, South 24 Parganas in Sessions Trial Case No. 4(7)08 arising out of Sessions Serial Case No. 1(2)08 is hereby set aside and the appellant is acquitted of the charges.

Thus, CRA 66 of 2012 is allowed.

The Appellant is on bail he is discharged from the bail bonds.

Department is directed to send back the Lower Court Records to the respective Courts and communicate this judgment, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)