

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

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

**C.R.A. 131 of 2018**  
**Abdul Barik**  
**-Vs-**  
**State of West Bengal**

For the Appellant: Mr. Aniruddha Bhattacharya, Adv.,  
Ms. Sitisha Biswas, Adv.

For the State: Mr. Swsata Gopal Mukherjee, Ld.P.P.,  
Ms. Faria Hossain, Adv.,  
Mr. Sandip Chakraborty, Adv.

Heard on: 22.12.2021.

Judgment on: 04.03.2022.

**Bibek Chaudhuri, J.**

The accused suffered conviction and sentence for committing offence under Section 376 of the Indian Penal Code in Sessions Case No. 84 of 2016 corresponding Trial No. 21(9) of 2016 by the learned Additional District & Sessions Judge, 2<sup>nd</sup> Court, Islampur, Uttar Dinajpur.

The learned Trial Judge handed down sentence of imprisonment for seven years with fine and default clause against the accused. In the present appeal, judgment and order of conviction and sentence is under challenge at the instance of the accused.

One Nurban Bibi lodged a written complaint before the Inspector-In-Charge, Karandighi, Police Station on 16<sup>th</sup> August, 2008 alleging,

inter alia, that the accused had love relation with the minor daughter of the defacto complainant. Subsequently he committed rape upon the victim on the promise of marriage. As a result of such physical relationship the minor daughter of the defacto complainant became pregnant. When pregnancy of the daughter came to the knowledge of the defacto complainant she asked her about the incident. The daughter of the defacto complainant narrated the incident to her mother. She and her husband enquired the accused about the incident but he denied any such happening altogether. The defacto complainant informed the matter to parents of the accused but they did not take any step, on the contrary they sent the accused to some other place. The defacto complainant also made complaint against the accused to local political leaders. They advised the father of the accused to give marriage of the daughter of the defacto complainant with the accused but he refused to accept such proposal. On 14<sup>th</sup> August, 2008 the victim girl found the accused near her house. She demanded to marry her. The accused agreed to marry the victim provided. On 15<sup>th</sup> August, 2008 a village Salish was held over the matter. In the said Salish it was decided that the defacto complainant would have to pay Rs. 25,000/- in cash to accused Abdul Barik but the accused refused to marry the daughter of the defacto complainant.

The trial of the case was conducted by the learned Additional

Sessions Judge, 2<sup>nd</sup> Court at Islampur. The appellant was convicted and sentenced to imprisonment for seven years and fine with default clause.

It is pertinent to mention at the outset that during the pendency of the case in the trial court, the victim girl was given marriage with another person and she is now peacefully enjoying her marital life with her husband. During trial, prosecution examined nine witnesses amongst them, the victim girl was examined as PW-2. PW-1 is her mother and the defacto complainant of this case. PW-3 is the brother of the prosecutrix and PW-4, the present father –in-law of the prosecutrix. PW-6 and 7 are the Investigating Officers and PW-9 is the Medical Officer who examined the prosecutrix.

During investigation the statement of the prosecutrix was recorded under Section 164 of the Code of Criminal Procedure. The written complaint, statement of the victim recorded under Section 164 of the Code of Criminal Procedure, the formal FIR, the Medical report, the school leaving certificate of the victim girl were marked exhibits during trial of the case.

It is submitted by the learned advocate for the appellant that even if the case of the defacto complainant is believed and it is held that the accused had physical relationship with the victim, he cannot be convicted for the offence under Section 376 of the Indian Penal Code. In order to substantiate his argument it is stated by the learned advocate for the appellant that according to the prosecution case the victim girl

had love-affairs with the prosecutrix. While she was in relation with the accused, it is alleged that the accused once had physical relationship with the victim on promise of marriage. Subsequently he refused to marry her.

Placing reliance on the decision of the Hon'ble Supreme Court in the case *Bijayon Vs State of Kerala* reported in 2008, 14 SCC, 763, it is submitted by the learned advocate for the appellant that the FIR was lodged after nine months of the alleged incident of rape. In *Bijayon (supra)*, it is held by the Hon'ble Supreme Court that in cases where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, especially when the prosecutrix could venture to wait for eight months for filing the FIR for rape. This leaves the accused totally defence less. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like medical report or any other injury on the body of the prosecutrix so as to show the sign of rape.

It is the case of the prosecution that the prosecutrix voluntarily submitted herself to physical relationship with the accused and waited for eight months for filing the FIR.

The learned Trial Judge convicted the accused on the ground that the victim was aged about fourteen years and even if the act of sexual relation-ship was established with the consent of the victim, such consent is immaterial. The learned Trial Judge accepted the prosecution

version also on the ground that medical examination report dated 27<sup>th</sup> August, 2008 states that the breast of the prosecutrix were well developed and milk was coming out from both nipples on screwing. According to the learned advocate for the appellant, the medical report as narrated above shows that the prosecutrix was pregnant at the time of her medical examination. The learned Trial Judge found absence of any injury on the private part of the prosecutrix immaterial because she was examined after eight months of the incident.

It is true that the prosecutrix was aged about fifteen years at the relevant point of time when she had love relation with the accused. On the date of her medical examination on 27<sup>th</sup> August, 2008, she was aged about sixteen years. It is true that she was minor at the time of the alleged incident. But it is an un-denying fact that the prosecutrix attained the age of discretion when the alleged incident took place. She was aware of the consequences of having physical relationship with her lover.

The learned Trial Judge did not consider that the FIR was lodged after a lapse of about nine months of the alleged incident. Neither the defacto complainant nor the prosecutrix could state who told the date of occurrence during trial of the case.

It was by the prosecution that a village Salish was held to settle the dispute between the prosecutrix and the accused. No Salishnama was produced during trial of the case.

PW-5, Md. Alam who deposed in the case as an independent witness was not present in the alleged Salish convened by the father of the prosecutrix. From the record, it appears that there was previous animosity between the families of the appellant and the prosecutrix. It is further found that during pendency of the case the victim again went away with one Nazrul, son of PW-4 to Delhi and married her. Though the previous or subsequent conduct of the prosecutrix and her nature and character are not relevant in a case of rape, there are circumstances which were required to be borne in mind by the learned Trial Judge.

For the reasons stated above, I am not in a position to agree with the order of conviction and sentence passed against the appellant in the instant matter.

Accordingly, the judgment and order of conviction and sentence passed the learned Additional Sessions Judge, 2<sup>nd</sup> Court at Islampur in Sessions Case No. 84 of 2016 correspondent to Sessions Trial No. 21(9) of 2016 is set aside.

The appellant is acquitted and discharged from his bail bond.

The appeal is accordingly allowed on contest.

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

**(Bibek Chaudhuri,J)**