

IN THE HIGH COURT AT CALCUTTA

Criminal Application

Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 136 of 2020

With

CRAN 1 OF 2020 (Old No. CRAN 1185 of 2020)

Parimal Guha

Versus

The State of West Bengal

For the appellant : Ms. Sreeparna Das, Adv.

For the State : Mr. Partha Pratim Das, Adv.
: Ms. Manasi Roy, Adv.

Heard on : September 12, 2022

Judgement on : September 23, 2022

Md. Shabbar Rashidi, J.:

1. This appeal is directed against the judgment and order of conviction dated 08.08.2019 passed by the learned 1st Additional District and Sessions Judge, Sealdah, 24-Parganas (South) in Sessions Trial No. 2 (3) 2018.

2. Factual background of the case is that on 01.02.2014, one Badal Patra lodged a complaint with Tangra Police Station to the effect that he had two daughters aged 27 years and 16 years. His elder daughter was not so clever as she ought to be in the age group, and was not able to work properly. Some 10/12 days prior to the lodging of complaint, his elder daughter, complained cough and cold and abdomen pain. She was taken to Chittaranjan Hospital where she was advised ultrasonography test. Later, ultrasonography test was conducted and the test report suggested her pregnancy of two months. The report was also shown to the doctor at

Chittaranjan Hospital who also confirmed the pregnancy. Upon enquiry, the daughter of the complainant disclosed that one uncle of the complainant, namely Parimal, who earlier used to live in the house of complainant had repeated physical relations with complainant's daughter and threatened her not to disclose such relation.

3. It is further case of the complainant that on December 02, 2013, the said Parimal Guha, visited the house of complainant on the occasion of Kali Puja. The daughter of the complainant disclosed before him that Parimal Guha committed rape upon her against her will on the night intervening December 3, 2013 and December 4, 2013. On the basis of such written complaint, Tangra P.S. Case No. 22 dated 01.02.2014 under Section 376 (1) of Indian Penal Code was started against Parimal Guha.

4. Police took up investigation and on completion of investigation, submitted charge-sheet under Section 376 (2) (1) of the Indian Penal Code, 1860. Since the case was exclusively triable by the Courts of Sessions, upon

appearance of the accused and after observing formalities under the provisions of Section 207 of the Criminal Procedure Code, the case was committed to the Court of Sessions for trial.

5. In consideration of the materials available in the CD and upon hearing the accused, charge under section 376(2) (m) of the Indian Penal Code was framed against the accused appellant which was duly read over and explained to him in Bengali to which the accused pleaded not guilty and claimed to be tried. Accordingly, the appellant stood trial for the offence punishable under Section 376(2) (m) of the Indian Penal Code. In order to substantiate the charges, as many as nine witnesses were examined on behalf of the prosecution.

6. Upon conclusion of the trial and examining the accused under Section 313 of the Code of Criminal Procedure, the appellant was found guilty of the offence punishable under section 376(2)(m) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 200,000/- (Rupees Two

Lac) in default to undergo further rigorous imprisonment for one year by the impugned order. With a view to prove, the charge leveled against the accused/appellant, the prosecution has examined nine witnesses in all.

7. The de facto complainant has deposed as PW1. He has stated that in the year 2014 when menstruation period was over, he took his elder daughter to Purbanchal Nursing Home, Beliaghata for check-up where she was declared pregnant. PW1 has also stated that on query, his daughter disclosed the name of present appellant responsible for her pregnancy. He went to Tangra Police Station where his statement was recorded by police and he put his signature thereon. He has identified his signature on the written complaint (Ext. 1). PW1 identified the appellant in the Court. He has also proved his signature on the two documents i.e. Seizure lists dated 03.02.2014 and 06.02.2014 (Ext. 2 and 3 respectively) and the Zimma Bond (Ext. 4).

8. The victim was cross-examined as PW2. She identified the accused in Court. She further stated that

the accused Parimal Guha used to visit her house and wanted dirty act with her. She used to be threatened for restraining him. She has further stated that she shouted upon which her father came and took steps against Parimal Guha with the Police. PW2 also stated that she informed her mother. She has also stated that the accused used to call him when she went to toilet in the night and he used to threaten her on refusal. Subsequently, the accused committed the misdeed removing her wearing apparel and touching her body. She became pregnant. She also stated that to have narrated the incident before the magistrate which was on it (Ext. 5), she was also examined by the doctor at the N.R.S. Hospital. She stated the incident to the doctor. She also signed on the medical papers (Ext. 6). There appears no cross-examination of the witness to the defence. In her cross-examination, the witness was confronted with suggestions denying her statement in the examination-in-chief which were denied by PW2.

9. The mother of the victim deposed as PW3. She stated that the appellant Parimal Guha has visiting terms at her house and used to tease her daughter. One day, Parimal wanted to cohabit with her daughter whereupon her daughter raised alarm and husband of PW3 came there. Thereafter, the matter was reported to police. She also identified the accused in dock. This witness was also not substantially cross-examined by the defence except confronting her suggesting the statements made in her examination-in-chief as false which was denied by PW3.

10. PW4 is the brother of the victim. He also identified the accused in dock. He has stated that about 5/6 years ago(from 2,3,19) sister complained of belly pain. She was taken to Kankurgachi Seva Nursing Home which declared her pregnancy. On enquiry, PW2 stated before the PW4 that Parimal Guha was the person who committed the misdeed. In cross-examination, PW4 stated that his submission was based on what he heard from Banti patra.

11. PW5 did not support the case of the prosecution.

12. PW6 is the medical officer at N.R.S. Hospital. He has stated that on 05.02.2014 he examined Parimal Guha and found him capable of doing sexual intercourse and his proved his report in this regard (Ext. 7).

13. PW7 is the medical officer of R.G. Kar Medical College and hospital. She has stated that on 05.02.2014, she examined the victim and found No. 1. Flabby breast, dark areola, flushed nipple, No.2 internal genital area—(i) labia majora thinned, darken, protrusion of thickened darkened labia minor to the labia major on full abduction of thighs. No injuries detected. No. (ii) hymen fimbriated, evidence of old healed tear at 5,6 and 8 O' Clock position. No. (iii) vagina rugosities diminished, capacious, dilated, admits the middle and index finger of the undersigned examiner easily with movement in all direction. No injuries detected. No. (iv) uterus palpable per abdomen up to umbilicus ---- referred to the department of gynecology for gestation and its age.

14. She further stated that in her opinion, there was nothing to suggest that the victim girl was suffering from any venereal disease. However, further opinion in this regard could be given after receipt of the report of preserved vaginal swap and smear. PW7 also opined that pregnancy and gestational age thereto could be confirmed from the departments of gynecology. This witness further opined that the mental state of the victim girl appearing to be retarded and confused and she referred to departments of psychiatrist. PW7 proved the report prepared by her (Ext. 6).

15. PW8 has stated that on 01.02.2014, while posting at Tangra Police Station as sub-inspector of police, he recorded the statement of one Badal Patra. After recording, it was read over and explained to Badal Patra whereupon he put his signature thereon.

16. PW8 proved the said submission Ext. 1/1. Thereafter, Tangra Police Station case No. 22 dated 01.02.2014 under Section 376 (I) IPC was registered on the basis of the statements and as per the directions of

O.C., Tangra Police Station. PW8 also filled up the formal FIR (Ext. 8). He has further stated that in course of investigation, he visited the place of occurrence, recorded the statement of available witnesses under Section 161 Code of Criminal Procedure. He also seized the medical documents in proper seizure list from the father of the victim (Ext. 2/1). PW 8 also proved the medical documents (Ext. 9 series). He also arranged for recording the statement of the victim under Section 164 Code of Criminal Procedure and arrested the accused. Owing to his transfer, PW8 handed over the investigation of the case to the officer-in-charge.

17. PW9 is the second IO. He has stated that on 25.03.2014, he received the charge of investigation of Tangra Police Station case No. 22 dated 01.02.2014. In course of investigation, he collected the bead head ticket. After completion of investigation, PW9 submitted the charge-sheet under Section 376 (2) (1) of the Indian Penal Code against the accused Parimal Guha.

18. The appellant by filing the instant appeal has sought to assail the impugned judgment and order of conviction and sentenced on the ground that the Learned Trial Court failed to consider the delay in lodging the FIR. The appellant has also come up with a contention that there are material contradictions in testimony of prosecution witnesses, rendering its case highly doubtful.

19. As observed in catena of judgments, we are of considered opinion that, there it is well settled that a conviction can be based on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach.

20. Legal principles do permit that the testimony of a prosecutrix may be accepted without any corroboration. She has to be placed on a higher stand than an injured witness, but, when a court, on scrutiny of the evidence, finds it difficult to accept the version of the prosecutrix, because it is not irreprehensible, there is necessity for

search of such direct or circumstantial evidence which would lend reliability to her testimony.

21. In the case at hand, the evidence of the prosecutrix (PW2) goes to show that the appellant used to visit her house and wanted to do dirty act with her. On her disagreement she was threatened by the appellant (accused Parimal Guha). Then she stated that on her shouting, her father came and took steps against appellant with the police. She also allegedly narrated the incident to her mother. It was also stated by her (PW2) that the accused used to call her while she used to go to toilet in the night. On refusal, she used to be threatened by the appellant. Subsequently, he committed the misdeed by removing her wearing apparel and touching her body. She also stated to have narrated the same story in her statement recorded under section 164 of the Criminal Procedure Code.

22. If we consider the evidence of the prosecutrix as sacred, the statement appears to be not qualified by any specific incident. Such statement gives an inference of

the commission of continuous acts committed over a period of time by the accused. These facts, gets corroboration from the statement of the father of the victim i.e. the de-facto complainant, as recorded before Tangra police station. He has stated in the said statement that he was reported by her daughter that 7/8 years ago appellant used to reside in the house of victim and during that period, he had repeated sexual intercourse with the victim against her will and also threatened the victim for not disclosing it to her family members. However, the victim never complained of the alleged misdeeds, during the said 7/8 years or thereafter, when the threatening factors subsided. She never felt it right to disclose the facts to the persons interested in her well being or the appropriate authorities during the mischief period or subsequent thereto.

23. Be that as it may, although, there is no mention of the particular incident, in the statement of PW2 as to actually on which date, the appellant succeeded in committing the misdeed but, the present appeal has

originated from a particular set of incidents which is said to have occurred in the night intervening December 3 and 4, 2013.

24. PW1, the de-facto complainant, in his deposition, appears to have stood by his statement which was recorded at Tangra Police Station and was treated as written complaint. He stated that he first came to know of the occurrence, when he took his daughter, to a nursing home (Purbanchal Nursing Home, Beliaghata) after her menstruation period was over, and she was declared to be carrying. Upon such medical report, his daughter was enquired whereupon she disclosed the name of appellant as the person responsible for her pregnancy. To its contrary, the victim (PW2) stated that her father (PW1) came hearing her shouting and thereafter, he took steps against the appellant at the police station. She also stated to have disclosed the facts to her mother and also before the Magistrate and the doctor at NRS Hospital, who examined her. PW3 stated in her deposition that one day Parimal wanted to cohabit

with the victim whereupon she raised alarm. On her alarm husband of PW3 came and the matter was reported to police. Such statements on the part of the aforesaid prosecution witnesses, leaves an impression that the matter instantly brought to the notice of police just after the incident.

25. PW1 has stated in his written information that the appellant, Parimal Guha, left residing at his house some 7/8 years ago whereas in PW2 in her statement recorded under section 164 of the Criminal Procedure Code (Ext. 5) stated that he left her house on December 02, 2013. Furthermore, prosecution witnesses have stated that the appellant had visiting terms at the house of PW1. PW3 also stated that Parimal Guha, the appellant used to visit her house and tease the victim. No evidence has been adduced by the prosecution either to prove that the appellant had visiting terms at the house of the victim or he used to tease her.

26. According to the case made out by the prosecution, the victim complained of cough, cold and belly pain for

which she was taken to a nursing home where she was declared pregnant. PW1 in his deposition appears to have deviated from his previous statement in writing (Ext.1/1) this respect. In the written information it was stated that he took his daughter to the nursing home when she was suffering under cough, cold and belly pain. Similar statement is forthcoming from the mouth of PW4, the brother of victim. He was allegedly reported by PW2 that she was reeling under cough, cold and belly pain, though it was a hearsay statement. However, in his deposition, PW1 stated that he took his daughter for medical checkup after her menstruation period was over. The story of cough, cold and belly pain appears to have been given a go by while deposing before the court. PW2, neither in her deposition before the trial court nor in her statement recorded under section 164 of the Code of Criminal Procedure, has testified the story of complain of cough, cold and belly pain. Going to nursing home, on the complain of cough, cold and belly pain or for medical checkup and the witnesses arriving upon hearing the

shouting of the victim are altogether different stories. Such contradictions, certainly, has a bearing on the reliability of the prosecution witnesses resulting in a negative impact on the veracity of the prosecution case.

27. Furthermore, if we believe in the story of visiting the nursing home on the pretext of cough, cold and belly pain or medical checkup, no explanation, whatsoever, appears to have been offered by the prosecution as to what prevented the victim from disclosing the alleged misdeed by the appellant, to her parents and family members. The threat looming over was already removed then.

28. On the other hand, if we accept the story of the arrival of father upon the alarm raised by the victim and the victim reporting the incident to her mother, the victim's alarm, in the circumstances, can be expected to draw some intervention of local people in the neighborhood over the hue and cry. No independent witness has come forward to support the case of prosecution. PW5, an independent witness from the

neighborhood, has been examined by the prosecution but she has not supported its case. Even if we stretch our imagination to consider that since the matter concerned a lady and the family would normally opt to keep the matter concealed, there appears no explanation as to what prevented the victim's family from informing the police instantly and made them wait for some days until receipt of the medical report.

29. According to the story set out by the prosecution, the appellant is said to have visited the house of the victim on the occasion of Kali Puja, organized there and the alleged incident of rape upon the victim was committed in the night intervening December 03 and December 04, 2013. Exhibit 9 series goes to show that the victim was first examined at Calcutta National Medical College and Hospital on January 20, 2014 i.e. after about one and a half months of the incident. There is no explanation, whatsoever, in the case made out by the prosecution as to why the matter was not reported to the police between December 4, 2013 and January 20,

2014 when the prosecution witnesses have stated that the victim raised an alarm during the incident. There is also nothing in the evidence that the alleged alarm was raised by the victim when the accused/appellant was attempting to commit rape upon her or if it was after the rape was committed. This proposition becomes relevant in the case of the commission of an offence under Section 376 of the Indian Penal Code where consent or will of the victim of the offence is very much material.

30. No evidence has been adduced on behalf of the prosecution to establish that there was a Kali Puja organised in the house of the victim and that the appellant was an invitee therein. These facts were required to be proved by the prosecution to substantiate the occasion and opportunity for the appellant to commit the offence.

31. The victim has been portrayed as a lady of unsound mind for which the appellant was charged with an offence punishable under section 376 (2)(m) of the Indian Penal Code. However, the factum of unsoundness of her

mind or mental retardness has not been proved by the prosecution. To the contrary, the purport of her deposition before the court or statement recorded under section 164 of the Code of Criminal Procedure does not support the contention. She appears to be quite capable of giving lucid answers to the questions put to her. There is, at least, no observation by the learned trial judge or the learned Magistrate indicating that the witness was suffering under any infirmity of unsoundness of mental faculties or of physical disability.

32. As regards the charge and conviction of the accused under Section 376(2) (m) of the Indian Penal Code, nothing appears to have been brought forth by the prosecution to establish that any bodily harm, maiming or disfigurement was caused to the victim or her life was thrown endangered by the appellant. In fact, no such case has been made out on the part of the prosecution. For the sake of argument, if we assume that pregnancy of the victim is the disfigurement endangering her life, as contemplated under section 376 (2) (m) of the Indian

Penal Code, 1860, considering the evidence, it seems quite difficult to hold conclude that the appellant is the man responsible for such pregnancy. It is well settled that where there are two contradictory views probable, the one in favour of the accused is to be accepted extending him the benefit of doubt.

33. From a careful scrutiny of the materials on record, it transpires that there is an unexplained delay in lodging the First Information Report by PW1. There appears to be material contradictions in the testimony of the prosecution witnesses and the prosecution has failed to adduce independent witnesses who ought to have been brought, in the circumstances in ordinary course.

34. Therefore, taking into account the inordinate and unexplained delay in lodging the First Information Report, the contradictory testimony of the prosecutrix before the learned trial court vis-à-vis that before the learned Magistrate, coupled with the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as natural

and truthful to inspire confidence, enough to secure conviction of the accused/appellant.

35. Therefore, in the light of the aforegone discussion we are of the opinion that prosecution has failed to establish the circumstances beyond all reasonable doubts conclusively incriminating the appellant. Hence, the appellant is entitled to the benefit of doubt. For the aforesaid reasons the impugned judgment of conviction and subsequent order of sentence dated 08.08.2019 and 09.08.2019 passed by Learned 1st Additional Sessions Judge, Sealdeh, South 24 Parganas, in connection with Sessions Trial No. 02 (3) of 2018, are liable to be set aside and are hereby set aside accordingly.

36. Accordingly, the instant appeal being CRA Nos. 136 of 2020 is allowed. The appellant shall be released from custody, if not wanted in any other case, upon execution of a bond to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

37. Connected application, if any, shall stand disposed.

38. Trial court records along with a copy of this judgment; be sent down, at once, to the learned trial court for necessary action.

39. Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

[MD. SHABBAR RASHIDI, J]

40. I agree.

[DEBANGSU BASAK, J.]