

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

PRESENT:

**THE HON'BLE JUSTICE TIRTHANKAR GHOSH**

**CRA 357 of 2004**

***Sri Hiren Roy @ Hati***

***-vs.-***

***The State of West Bengal***

For the Appellant : Mr. Sourav Chatterjee.

For the State : Mr. Pravas Bhattacharya,  
Mr. Pratick Bose.

Heard on : 11.04.2022, 26.04.2022, 05.05.2022,  
13.05.2022, 19.05.2022, 07.06.2022,  
26.07.2022 & 05.08.2022.

**Judgment on : 18.11.2022**

**Tirthankar Ghosh, J:-**

The present appeal has been preferred challenging the judgment and order of conviction and sentence dated 30.03.2004 passed by the Learned Sessions Judge, Uttar Dinajpur at Raiganj in Sessions Trial No. 17 of 2002 arising out of Sessions Case No. 61 of 2002 thereby convicting the appellant for commission of offence under Section 376 of the Indian Penal Code and sentencing him to suffer Rigorous Imprisonment for five years and to pay a fine of Rs.5,000/- in default to suffer Rigorous Imprisonment for six months.

Kaliaganj Police Station case no. 61/02 dated 16.05.2002 was initiated and registered against the appellant Hiren Roy @ Hati under Section 376/506 of the Indian Penal Code on the basis of a complaint lodged by Bulbuli Roy with the Officer-in-charge Kaliaganj Police Station on 16.05.2002. The allegations made in the letter of complaint were to the effect that the mother of the accused approached the complainant with a request to take her minor daughter for household work, after which her daughter worked for about six days in her house. During this period one day at night the accused/appellant after entering her daughter's room allured her for marriage and committed rape upon her, as a result of which she became pregnant. The accused/appellant threatened her daughter that in case she divulged such incident he would kill her and her father, so being afraid her daughter did not disclose the incident. It was only a day before the victim divulged the incident when the complainant found that her daughter was about two months pregnant. It has been alleged that the accused gave her medicine for miscarriage which she refused to consume. The complainant requested the Police authorities to take legal action against the accused and stated that the delay has been caused as the accused expressed to settle the matter by way of village salish which he did not participate.

The investigating Officer on completion of investigation submitted charge-sheet under Section 376 of the Indian Penal Code against the accused and the learned Magistrate after taking cognizance, supply of copies under Section 207 of the Code of Criminal Procedure to the accused, committed the

case to the Court of Sessions. The trial Court thereafter framed charges under Section 376 of the Indian Penal Code against the accused/appellant on 12.08.2002. The charges were read over to the accused person to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 15 witnesses which included PW1, Bulbuli Roy, mother of the victim and complainant; PW2, Biplab Das, brother-in-law of victim; PW3, Arabinda Roy, local resident and co-villager; PW4, Sudhir Roy, local resident and co-villager; PW5, 'X', victim; PW6, Charan Soren, local resident and co-villager; PW7, Rupo Roy, co-villager; PW8, Dulal Das, tendered by the prosecution; PW9, Tushar Kanti Bhattacharjee, Medical Officer who examined the victim; PW10, Jiban Krishna Bhaduri, Medical Officer who examined the accused; PW11, Dr. Arabinda Chakraborty, Medical Officer who after test found the victim to be pregnant; PW12, Dr. Pradip Kumar Bhattacharjee, doctor who conducted ossification test of the victim; PW13, Rohini Kumar Dutta, Advocate who prepared FIR/letter of complaint; PW14, Kaushik Bhattacharyya, Learned Magistrate who recorded the statement of the victim under Section 164 of the Code of Criminal Procedure and PW15, Bidhan Banerjee, Investigating Officer of the case.

Prosecution also relied upon 8 documents which included Ext.1, Medical Report prepared by Dr. Tushar Kanti Bhattacharjee; Ext.2, Medical Report of Hiren Roy prepared by Dr. Jiban Krishna Bhaduri; Ext.3, Pathological Test conducted by Dr. Arabinda Chakraborty of the victim; Ext.4, Ossification Test

of the victim conducted by Dr. Pradip Kumar Bhattacharjee; Ext.5, written complaint; Ext.6, statement of the victim under Section under Section 164 of the Code of Criminal Procedure; Ext.7, Formal FIR and Ext.8, Sketch Map.

PW1, Bulbuli Roy, deposed that the victim 'X' happened to be her minor daughter and on or about 23<sup>rd</sup> Falgun, the incident occurred. Mother of the accused Hiren Roy took her minor daughter to her residence for the purpose of household work and she was kept therein for about 7 days. At night on the date of the incident Hiren Roy forcibly entered the room where the victim was staying and committed rape upon her against her will. The accused threatened the victim that in case she divulged the incident or disclosed the same he would kill her along with her parents. After 7 days her minor daughter returned home and out of fear she did not disclose such incident. On or about 1½ months thereafter her minor daughter became pregnant and she disclosed regarding the incident of accused committing rape. She also stated that the accused brought her medicine for miscarriage which she did not consume. The witness thereafter divulged the incident to her son-in-law and the co-villagers, a meeting was called but in the said meeting the accused or his relations did not turn up as such she with the help of her Advocate Rohini Kumar Dutta lodged FIR with Kaliaganj Police Station. Police came to their village and arrested the accused. Her daughter was also taken to the hospital as also before the Court. She stated that at the time of the incident her daughter was 16 years old and she gave birth to a child who died after 22 days.

PW2, is Biplab Das, who is brother-in-law of the victim and resides in the adjacent village. He deposed that on 23<sup>rd</sup> Falgun, mother of Hiren Roy took away the victim to their house for household work and one day at night Hiren Roy entered the room of the victim and committed rape upon her and threatened her with dire consequences, if she disclosed the incident. After about 1½ month victim disclosed to her mother about the incident and her mother (who is the mother-in-law of the witness) informed the same to his wife who in turn stated to him. A meeting was called but Hiren or his relations did not turn up in the said meeting and in the said meeting the victim disclosed the incident, thereafter police was informed. Police also served a notice upon the accused who did not appear and thereafter he was arrested. The witness identified the accused in Court.

PW3, Arabinda Roy, is a co-villager who deposed that he knew both the accused as well as the victim and was examined by the witness who happened to be the victim. He stated that eight months ago a Salish was held at the village over the incident of the victim and he was present there, at the Salish the victim disclosed that she was engaged by mother of the accused for household work and the accused committed rape upon her and subsequently she became pregnant for misdeed of the accused. In spite of informing the accused or his family members they did not attend the Salish. The witness identified the accused in Court.

PW4, Sudhir Roy is a co-villager who deposed that he knew the accused as also the victim. He stated that a Salish was held at the village over the incident of the victim, he was present in the Salish and in that Salish the victim disclosed that on 23<sup>rd</sup> Falgun, mother of the accused took her to their home for household work and in the night the accused entered her room and raped her. The accused or his relations did not turn up in the Salish, although they were informed and the victim disclosed that she became pregnant because of the offence committed by Hiren Roy. The witness stated that after the Salish the mother of the victim girl informed the police.

PW5, 'X' is the victim. She stated that mother of Hiren Roy engaged her for household work and one night the accused entered her room touched her body for which she become conscious and thereafter committed rape upon her. The accused threatened her with dire consequences that in case the incident was disclosed, she and her family members would be killed. On the following day she returned back to her home and two months thereafter she felt that she was pregnant and as such disclosed the incident to her mother. Her mother informed the incident to her father and her elder sister's husband, local people were also informed and a meeting was held at the locality. She disclosed the incident in the meeting. The accused or his relations did not turn up in the said meeting. She deposed that at the time of the incident she was 16/17 years old and her mother informed regarding the incident to the police, consequently police came down and she was produced before the learned Magistrate who recorded her statement, she was also taken to Raiganj Hospital for medical

examination on four occasions. The doctors found her to be pregnant and afterwards she gave birth to a child who died after 22 days. She also deposed that she informed regarding the incident of birth of the child to the police station as also to the Court. Additionally she deposed that after the incident the accused offered her medicine for miscarriage but she did not consume the same and as the accused threatened her, she immediately did not disclose the incident to her parents.

PW6, Charan Soren is a local resident and a co-villager who deposed that he knew both the accused and the victim. The witness narrated that in the month of Falgun the victim was engaged by mother of the accused for their household work and after few days she returned to her house and told her mother that the accused raped her. The incident was informed to him by the mother of the victim. A gram Salish was held where the victim attended the meeting and narrated the incident of commission of rape at the instance of the accused. The accused or his family members did not attend the said Salish. Additionally it has been stated that because of the offence committed by the accused the victim became pregnant and the matter was reported to the police station.

PW7, Ruppoo Roy is a local resident and a co-villager who deposed that he knew both the victim and the accused and on 23<sup>rd</sup> Falgun the incident occurred when mother of Hiren Roy took the victim to their home for household work. Victim worked for about 7 days staying at the home of the accused and

in the house one night the accused forcibly raped the victim. After about 2½ months victim informed the incident to one Biplab Roy who reported the matter and as such a village salish was called where the accused or his relations did not appear but the victim appeared and narrated regarding the incident. The incident was thereafter reported to the police station when FIR was lodged and police investigated the case.

PW8 Dulal Das was tendered by the prosecution and the defence declined to cross-examine the witness.

PW9 is Dr. Tushar Kanti Bhattacharjee who deposed that on 17.05.2002 he examined the victim on being identified by the police personnel. The doctor also deposed that the victim was examined in presence of a nursing staff namely, Sefali Das and on examination he found the following.

*“(1) It cannot be stated whether she was raped or not. (2) No marks of violence is present in the private parts of the victim. (3) No foreign particles is seen in the private parts of the victim. (4) Hymen was ruptured. (5) Pervaginal examination is suggestive of pregnancy which is to be confirmed by urine for pregnancy test. Vaginal swab is handed over to the police concerned. Symptom of pregnancy was found. This is the report which was written and signed by me (Ext-1).”*

PW10 is Dr. Jiban Krishna Bhaduri who examined the accused on 13.06.2002 and expressed his opinion that the accused was capable of performing sexual intercourse. He identified the report which was written and signed by him and the same was marked as Ext.2.

PW11 is Dr. Arabinda Chakraborty who deposed that on 18.05.2002 he examined the vaginal swab and urine of the victim who was aged about 16 years and was identified by a police constable of Kaliaganj Police Station. The witness narrated regarding the test and his opinion which is as follows:

*“Material: (1) Smear shows no spermatozoa microscopically.*

*(2) Urine for preg-colour test: Negative. Please report it after 10 days positively.*

*On 8-6-2002 at 10-15 A.M.; Patient’s name and P.S. Case No. as above. Brought by Jharna Misra, Home Guard of Kaliaganj P.S.*

*Urine for Colour Test : Positive.*

*From my said examination it was ascertained that the said victim girl was a pregnant girl. This is the report, prepared and signed by me and it bears my signature. (Exbt-3).”*

PW12 is Dr. Pradip Kumar Bhattacharjee who examined the victim being identified by a police personnel of Kaliaganj Police Station. He narrated regarding the ossification test which was conducted and opined that on examination of the bonny age of the victim/patient he found her to be more than 16 years but less than 19 years. The report which was prepared and signed by him was marked as Ext.4.

PW13 Rohini Kumar Dutta is an Advocate who deposed that he prepared and wrote the FIR as was instructed by the complainant PW1. He stated that he read over the contents of the FIR to the complainant and thereafter the

complainant put her LTI and then he signed on the FIR. The FIR was marked as Ext.5.

PW14 Kaushik Bhattacharyya is a Judicial Magistrate who was posted on 20.05.2002 at Raiganj. The witness identified the recorded statement of the victim under Section 164 of the Code of Criminal Procedure as well as the signature which was marked as Ext.6.

PW15 Bidhan Banerjee is the Investigating Officer of the case who narrated regarding the case being endorsed to him by the then Officer-in-charge of Kaliaganj Police Station. He identified the signature of the Officer-in-charge in the Formal FIR which was marked as Ext.7. The witness also stated regarding the manner in which the entire process of investigation was conducted by visiting the place of occurrence, preparing sketch map along with index which was marked as Ext.8, examination of the victim as also the available witnesses. The witness also stated that he sent the victim for medical examination and arranged for her statement to be recorded under Section 164 of the Code of Criminal Procedure. He also made arrangement for medical examination of the accused regarding his potency test. He collected all the reports and after consultation with his superior submitted charge-sheet under Section 376 of the Indian Penal Code.

Mr. Sourav Chatterjee, learned Advocate appearing for the appellant (being engaged by High Court Legal Services Authority) submitted in this case that there are infirmity in the testimony of the prosecutrix and the incident

having been reported belatedly, raised a suspicion regarding false implication of the accused/appellant. The manner in which the incident was divulged by the victim before her mother (who lodged the complaint before the police authorities), her statement under Section 164 of the Code of Criminal Procedure as well as her deposition before the Court raises serious doubt regarding the prosecution case.. Learned Advocate relied upon the factual circumstances referred to in Dilip & Anr. –Vs. – State of M.P. reported in (2001) 9 SCC 452 and submitted that the present case would be covered by the finding of the Hon'ble Apex Court. Learned Advocate emphasised that even if it is assumed that the prosecutrix at the relevant point of time was 16 years of age the same would go to show that she was not a child who was unaware regarding the consequences of a sexual act. The fact that there was no resistance being offered by the prosecutrix would go to show that the accused did not force himself upon her and as such facts referred to by the Hon'ble Supreme Court in the cited judgment are against the victim and could enure benefit to the accused/appellant. Learned Advocate for the appellant also referred to Kaini Rajan –Vs. – State of Kerala reported in (2013) 9 SCC 113 and by drawing attention to paragraph 12 of the said judgment wherein the Hon'ble Apex Court analysed the expression 'rape' under Section 376 of the Indian Penal Code and held that the expression 'against her will' means that the act must have been done in spite of the opposition of the woman. In the cited judgment the expression 'Consent' was also taken into consideration and it was observed that an inference regarding 'consent' can be drawn only based on

evidence or probabilities of the case. According to Section 90 of the Indian Penal Code the term 'Consent' has a reference but without defining the term 'Consent' in the said Section, what has been defined is 'no Consent'. According to the Hon'ble Apex Court 'Consent' for the purpose of Section 375 of the Indian Penal Code requires voluntary participation not only after the exercise of the intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. As to whether there was consent or not is to be ascertained only on a careful study from all the relevant circumstances. The learned Advocate thereafter drew the attention of the court to paragraph 19 of the referred judgment and submitted that the behaviour of the parents and relations in this case are strange as all of them deposed that they came to know about the incident after 1½ - 2½ months, only after the victim complained of pregnancy. It has been emphasized on the last sentence of the paragraph under reference that the uncorroborated version of the victim of rape should not be relied upon in a case where there has been a change of the stand of the victim particularly in convicting the accused/appellant. Learned Advocate for the appellant also relied upon *Prakash Chand -Vs. - State of Himachal Pradesh* reported in (2019) 5 SCC 628 and stated that the circumstances of delayed FIR, the statement of the victim before the learned Magistrate under Section 164 of the Code of Criminal Procedure, her deposition before the Court and the pleas of she being threatened for lodging the case is not acceptable as no charge under Section 506 was made out either at the end of the investigation or has been

proved by the prosecution at the end of the trial. To that effect attention of the Court was drawn to paragraph 27, which is as follows:

*“27. The trial court, in fact, has proceeded to rely upon the testimony of the prosecutrix about the appellant threatening her that in case she discloses the incident to anyone she will be killed by the accused. This apparently is related to the incident in December 1999. In fact, the appellant was specifically charged with criminal intimidation allegedly done on 10-7-2000. The appellant was so charged in alleged furtherance of common intention along with the co-accused. The trial court has also proceeded to convict the co-accused relying on the evidence of the prosecutrix. The High Court has acquitted the co-accused of the charge of criminal intimidation. We have noted that there is no specific charge even framed against the appellant under Section 506 in regard to the alleged incident which took place in December 1999 and the charge in fact relates only to the acts alleged to have been committed on 10-7-2000. Apart from the fact that there is no specific charge against the appellant in regard to what happened in December 1999, we are inclined to think that the appellant could not be convicted under Section 506 having regard to the circumstances which we have already discussed hereinbefore.”*

The learned Advocate for the Appellant also relied upon Santosh Prasad @ Santosh Kumar -Vs. – State of Bihar reported in (2020) 3 SCC 443 and referred to paragraph 6 of the said judgment wherein the Hon’ble Supreme Court was pleased to observe as follows:

*“6. Having gone through and considered the deposition of the prosecutrix, we find that there are material contradictions. Not only there are material contradictions, but even the manner in which the*

*alleged incident has taken place as per the version of the prosecutrix is not believable. In the examination-in-chief, the prosecutrix has stated that after jumping the fallen compound wall the accused came inside and thereafter the accused committed rape. She has stated that she identified the accused from the light of the mobile. However, no mobile is recovered. Even nothing is on record that there was a broken compound wall. She has further stated that in the morning at 10 o'clock she went to the police station and gave oral complaint. However, according to the investigating officer a written complaint was given. It is also required to be noted that even the FIR is registered at 4.00 p.m. In her deposition, the prosecutrix has referred to the name of Shanti Devi, PW 1 and others. However, Shanti Devi has not supported the case of the prosecution. Therefore, when we tested the version of PW 5, prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests of "sterling witness". There is a variation in her version about giving the complaint. There is a delay in the FIR. The medical report does not support the case of the prosecution. FSL report also does not support the case of the prosecution. As admitted, there was an enmity/dispute between both the parties with respect to land. The manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and circumstances of the case, we find that the solitary version of the prosecutrix, PW 5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellant and the accused is to be given the benefit of doubt."*

On the other hand learned Advocate also submitted that in Vijayan –Vs.

– State of Kerala reported in (2008) 14 SCC 763 it has been held that in case

where the sole testimony of the prosecutrix is available, it is very dangerous to convict the accused, specially when the prosecutrix could venture to wait for seven months for filing the FIR for rape. This leaves the accused totally defenceless and the findings of the Hon'ble Supreme court that no DNA Test was conducted to find out whether the child was born out of the said incident and the appellant/accused being held responsible for the child are also to be taken into account. Learned Advocate submits that in the factual circumstances of the present case although the child died after 22 days and no document has been produced in Court regarding the birth of the child yet the prosecution could have conducted a DNA Test as the child was alive for 22 days for proving the allegations. The same having not been done the accused/appellant was entitled to benefit of doubt and should be released. Lastly it has been submitted on behalf of the appellant that having regard to the factual circumstances of the present case and the law laid down by the Hon'ble Apex Court there is no scope for convicting the appellant and as such the judgment and order of conviction passed by the learned Trial Court should be set aside.

Mr. Pravas Bhattacharya, learned Advocate appearing for the State has resisted the submission advanced by the appellant and submitted that the evidence of the victim in a rape case is to be considered as an injured witness and not an accomplice to the crime. The evidentiary value of the victim in such case assumes importance as in majority of the cases offence of such nature takes place where there are no eye-witnesses and the consequences of which

follow from the commission of the acts of the accused are only to be considered as evidence. It has been submitted by the State that in the present case the victim being a minor girl would have faced severe consequences if she divulged the incident immediately, as firstly there is a social embarrassment, secondly, there was a commitment made by the accused, thirdly the accused threatened the victim. It has been emphasized that having regard to the provisions of Section 417 of the Indian Penal Code and Section 90 of the Indian Penal Code, the age of the victim, the commission of offences under Section 376 of the Indian Penal Code is established on the medical documents as well as by way of cumulative assessment of the deposition of the victim in Court, her statement before the learned Judicial Magistrate under Section 164 of the Code of Criminal Procedure. It has been submitted that in the light of the evidence both oral and documentary which has surfaced in course of the trial there is no scope for interference with the finding of guilt and sentence inflicted upon the accused/appellant by the trial Court.

I have considered the judgments/authorities as well as the submissions advanced by the learned Advocate for the Appellant and the State and I am compelled to hold that the victim girl could not be shaken in her cross-examination, so far as her consistency is concerned while answering the questions raised by the defence. An assessment of her cross-examination reflects that the defence confronted the victim with the topography of the house where offence took place, in and around the location of house of the accused, the number of rooms in the house of the accused, whether she had any

relationship with the accused prior to the incident and who were present in the house and after how many days the incident occurred, who were present at the house at the relevant date, her opinion regarding the accused, how did the accused react when she met him on next occasion, whether she made any prayer before the Court for aborting the child. To each of the questions the victim answered with confidence and she could not be shaken in cross-examination. In fact she answered regarding the location of the house, the number of rooms being seven and there is a courtyard in the middle of the house with room surrounding the courtyard. It was after six days of going to the house of accused, the incident took place and at the relevant date mother of the accused was not present, further the father of accused used to sleep in a western side room. In response to the question regarding her opinion about the accused she deposed that earlier she did not like the accused and presently also she disliked him. Responding to the question of the defence regarding her meeting the accused on the second occasion, she stated that after two months of the incident she visited the accused and rebuked him and asked him to marry to which the accused answered that his father was annoyed and as such he would take her to his house after one year.

The answers in the cross-examination along with the specific accusation in the examination-in-chief that 'Hiren Roy forcibly raped me. He threatened me (of) dire consequences and my parents if I disclosed the incident to anybody', are sufficient to believe the sole testimony of the victim girl, fortunately in this case there are overwhelming corroborating evidence not only

from oral deposition of other witnesses but also the medical evidence where the doctors being PW9 and PW11 opined that the victim was pregnant. The point of delay in this case is sufficiently explained in the background of the facts of the case, as the accused in this case hails from an affluent family and threatened the victim who was taken to their home for household work and also allured the victim by promising her to marry after commission of the offence.

Thus, if the totality of the prosecution evidence is considered particularly the evidence of the victim, her statement under Section 164 of the Cr.P.C., the medical evidence and the deposition of the other witnesses, I am of the opinion that there is no scope for interference with the judgment and order of conviction and sentence passed by the Learned Sessions Judge, Uttar Dinajpur in Sessions Trial No. 17 of 2002 (arising out of Sessions Case No. 61 of 2002). As such the judgment of the learned Trial Court is confirmed.

Accordingly, CRA No. 357 of 2004 is dismissed.

Pending Applications, if any, are consequently disposed of.

If the Appellant is on bail, his bail bonds stand cancelled and he is directed to surrender before the jurisdictional Court.

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.)**