

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 277 of 2021

Achinta Sarkar

-Vs-

The State of West Bengal

For the appellant: Mr. Swapan Kr. Mallick, Adv.,
 Mr. Mamdulal Manna, Adv.,
 Ms. Sudeshna Das, Adv.,
 Mr. Sayan Mukherjee, Adv.,
 Mr. Urfan Ali Mondal, Adv.

For the State: Mr. Saswata Gopal Mukherjee, Ld. P.P.,
 Ms. Faria Hossain, Adv.,
 Mr. Anand Keshari, Adv.

Heard on: 11 April, 2022

Judgment on: 20 May, 2022.

BIBEK CHAUDHURI, J. : –

1. The defacto complainant filed a petition before the learned Chief Judicial Magistrate at Malda on 11th April, 2007 stating, inter alia, that on 10th March, 2007 at about 11.30 pm, accused Achinta Sarkar, appellant herein trespassed into her bed room and committed rape upon her under threatening of dire consequences. The defacto complainant raised alarm which attracted her father Sudhir Singha. He apprehended the accused and raised hue and cry. Hearing such hue and cry local villagers rushed

to the place of occurrence and came to know about the incident. At that time one Phoni Mondal came to the spot and declared in presence of the villagers that he would arrange marriage of the defacto complainant with the appellant. He also promised to hold a village 'salishi' over the said incident and requested the defacto complainant not to lodge any complaint in the police station. The defacto complainant subsequently contacted the accused persons but they flatly refused to fulfill their promise. She was abused with filthy language and driven out from the house of the accused No.1.

2. The defacto complainant further stated that she informed the matter to the police attached to Baishnabnagar Police Station in writing but police did not take any action against the accused person.

3. Learned Chief Judicial Magistrate transmitted the said petition filed by the defacto complainant to the jurisdictional P.S directing the Officer-in-Charge of the police station to consider the said petition as FIR and start investigation following registration of a specific case against the accused person.

4. The materials on record further suggest that the Inspector-in-Charge, Baishnabnagar Nagar P.S received the said petition on 26th April, 2007 and registered Baishnabnagar P.S Case No.44 dated 26th April, 2007 under Section 376 of the IPC against the appellant. The investigation of the case ended with submission of charge-sheet against the appellant under Section 376 of the IPC. The case was committed to the Court of Sessions since the offence under Section 376 of the IPC is exclusively a

session trial case. Subsequently, the learned Sessions Judge transferred the case to the 1st Court of the learned Additional Sessions Judge at Malda for trial and disposal.

5. The learned trial judge framed charge against the accused under Section 376 of the IPC as the accused pleaded not guilty, trial of the case commenced. During trial the prosecution examined nine witnesses. Amongst them the defacto complainant deposed as PW1. PW2 is the father of the defacto complainant. PW3 is her mother. PW4 Sukumar Mondal, PW5 Bijay Singh and PW6 Rabi Singha are the local villagers and neighbours of the defacto complainant. PW7 Dr. Debnath Sarkar is a Medical Officer posted at Malda District Hospital at the relevant point of time. On 21st July, 2007 he medically examined the appellant to ascertain as to whether the appellant is capable of sexual intercourse in normal circumstances. PW9 Dr. Sayantan Gupta is another Medical Officer who conducted Medico Legal Examination of the defacto complainant. PW8 Nepal Chandra Sen is the Investigating Officer of the case.

6. After examination of the witnesses on behalf of the prosecution, the accused was examined under Section 313 of the Cr.P.C. Defence case as disclosed from the trend of cross examination of the witnesses on behalf of the prosecution and examination of the accused under Section 313 of the Cr.P.C appears to be complete denial of the prosecution case.

7. The learned trial judge on conclusion of trial of Sessions Trial No.25 of 2011 arising out of Sessions Case No.153 of 2011 convicted the accused under Section 376 of the IPC by her judgment and order of

conviction dated 3rd August, 2021 and 4th August, 2021 respectively and sentenced him to suffer rigorous imprisonment for a term of seven years and a fine of Rs.10,000/-, in default further rigorous imprisonment for six months. The appellant has assaulted the judgment and order of conviction and sentence passed by the court below in the instant appeal.

8. Learned Advocate for the appellant at the outset attacks the prosecution case on the ground of delay. It is submitted by the learned Advocate for the appellant that the alleged incident took place on 10th March, 2007 at about 11.30 pm. The defacto complainant filed a petition under Section 156(3) of the Cr.P.C on 11th April, 2007. The FIR was registered after about 1 and ½ months from the date of occurrence on 26th April, 2007. Delay in lodging the FIR especially in a case under Section 376 of the IPC is fatal for the prosecution. It is not the case of the prosecution that the defacto complainant out of shame and humiliation could not lodge FIR in the jurisdictional police station. Specific case of the defacto complainant is that she was allegedly raped on 10th March, 2007 at about 11.30 pm. At the time of incident she raised alarm which attracted her father. The father of the defacto complainant, namely, Sudhir Singh, PW2 rushed to the room of victim and apprehended the accused. He raised hue and cry which attracted local people at the spot. One Phoni Mondal also came to the spot and promised the defacto complainant that he would give marriage of the accused with the defacto complainant. Then the defacto complainant went to the house of the accused to request them to keep their promise. When they refused to give

marriage of the defacto complainant with the appellant, she lodged a complaint. In view of such circumstances, the learned Advocate for the appellant has developed his alternative limb of argument raising a question as to whether the alleged act between the defacto complainant and the appellant on 10th March, 2007 was a consensual affair or not.

9. In order to substantiate his contention the learned Advocate for the appellant has referred to the relevant portion of examination-in-chief of the defacto complainant. Where she stated on oath that after registration of the case, the accused married her and the said marriage was registered. Thereafter, he resides with her for 3/4 months. As a result of cohabitation between them she became pregnant then the appellant fled away and did not come back. The defacto complainant gave birth to a daughter in the said wedlock between her and the accused.

10. It is further submitted by the learned Advocate for the appellant that the defacto complainant is the legally married wife of one Rintu Singh. PW1 was specifically asked that her marriage with Rintu Singh is still subsisting however the defacto complainant denied such suggestion.

11. It is further submitted by the learned Advocate for the appellant that from the evidence of PW2 Sudhir Singh it is found that on the date of occurrence at about 11.30 pm he was sleeping on the veranda in front of their Thakurghar. His wife was sleeping on the veranda in front of the room where the defacto complainant was sleeping. At about 11.30 pm the wife of PW2 called him and stated that a person had trespassed into the room of her daughter. Then both of them rushed to the said room and

caught hold of the appellant. At that time the defacto complainant told that the appellant had raped her. It is also found from his evidence that the appellant is a resident of another village, named, Niroi. He had his maternal uncle's house at village Sukdebpur. PW2 and other villagers took the appellant to the house of Phoni Mondal, maternal uncle of the appellant. His maternal uncle requested them to release the accused on condition that they would make arrangement of marriage of the defacto complainant with the appellant. On the next morning they went to the house of the accused at village Niroi but the relatives of the appellant abused them and did not agree to give appellant's marriage with the daughter of PW2. It is submitted by the learned Advocate for the appellant referring to the evidence of PW2 that the defacto complainant did not raise any alarm when the appellant allegedly committed rape upon her. On the other hand, it is ascertained from the evidence of PW2 that the mother of the defacto complainant woke up and came to understand that some person had entered into the room of the defacto complainant. She then informed the matter to the husband who was also sleeping on the veranda of their Thakurghar both of them entered into the room and apprehended the appellant. At that time of apprehension the defacto complainant alleged that the appellant committed rape upon her. PW2 and PW3 did not see the incident. They reached the room of the defacto complainant after the incident. It is submitted by the learned Advocate for the appellant that had there been commission of sexual intercourse against the will of the defacto complainant she must have resisted the

offender. It is very natural for her to raise hue and cry, but the defacto complainant did not raise any alarm as it appears from the evidence of PW2 and PW3. This goes to suggest that the prosecution case is not beyond the shadow of doubt and the accused is entitled to get benefit of doubt.

12. PW3 admitted in her examination-in-chief that after filing of the case, the accused agreed to marry the defacto complainant. They stayed together for about 5/6 months. Then both of them came to the house of PW2 and stayed there for about 8/9 days. Thereafter, the accused left the place saying that he was going elsewhere to earn his livelihood. Thereafter he never returned to his house. In the mean time, her daughter became pregnant and gave birth to a female child.

13. PW4 Sukumar Mondal, PW5 Bijay Singh and PW6 Rabi Singh are local villagers. It is found from the evidence that on the date of occurrence at about 11.30 pm PW2 Sudhir Singh called them. They came to the house of Sudhir and found the appellant inside the room of the defacto complainant. The defacto complainant narrated to them that the accused threatened her and committed rape upon her. The witnesses then called the maternal uncle of the appellant namely, Phoni Mondal. He promised that he would make arrangement for marriage of the defacto complainant with the appellant. However, the family members of the appellant were not willing to give marriage of the appellant with the defacto complainant and then the defacto complainant filed the case against the appellant. The said witnesses also stated that subsequent to the filing of the case, the

appellant stayed with the defacto complainant as husband and wife for about 6 months and in their wedlock a female child was born.

14. Medico Legal Examination of the defacto complainant does not suggest any important evidence in support of the case because the Medical Officer found that the victim was habituated to sexual intercourse. Such Medico Legal Examination report was obvious because the victim herself admitted that she stayed with the appellant for 5/6 months after her alleged marriage and she gave birth to a female child in the said wedlock.

15. The learned P.P-in-Charge, on the other hand, submits that the evidence of the defacto complainant and her parents were duly corroborated by other witnesses. They found the accused in the room of the defacto complainant at dead hours of night. They informed the matter to the maternal uncle of the appellant, named, Phoni Mondal. He assured the defacto complainant and her parents and other witnesses that he would arrange for the marriage of the appellant with the defacto complainant. Then he took the appellant away with him. With such assurance the maternal uncle of the appellant willfully diverted the defacto complainant and his family members from taking proper legal action immediately after the occurrence. In order to avoid any legal action the accused married the defacto complainant in court under Special Marriage Act. Then he cohabitated with her as a result of which the defacto complainant became pregnant.

16. It is submitted by the learned P.P-in-Charge that the evidence of the defacto complainant ought to be considered under the backdrop of the entire facts and circumstances. Delay in lodging complaint should be held to be properly explained because the defacto complainant was made to plea that the accused would marry her. Subsequently, the accused and the defacto complainant stayed together for few months as husband and wife. The said fact has not been denied by the accused. A suggestion was put on behalf of the defence is that the defacto complainant is the married wife of one Rintu Singh which she denied. Thus, it is submitted by the learned P.P-in-Charge that in spite of delay in lodging FIR the prosecution case cannot be held to be suspect. From the evidence of the defacto complainant it is ascertained that on 10th March, 2007 at about 11.30 pm when she was sleeping in her room, the appellant entered into her room and committed rape upon her. She raised hue and cry. The father of the defacto complainant (PW2) rushed to the room of his daughter and apprehended the accused. Subsequently, local people assembled at the P.O. The appellant was apprehended in the room of the defacto complainant by her father. Subsequently, Phoni Mondal maternal uncle of the appellant was intimidated. He requested PW2 and other villagers to release the accused on the promise that he would arrange defacto complainant's marriage with the accused. On such assurance the accused was handed over to Phoni Mondal. On the subsequent day when PW2 and other villagers went to the house of the accused his parents and other relatives abused them and denied to give marriage of their son with the

defacto complainant. Subsequently, the defacto complainant lodged the petition under Section 156(3) of the Cr.P.C on the basis of which Baishnabnagar P.S Case No.44 dated 26th April, 2007 was registered. It also appears from the evidence on record that during the pendency of the said case, the marriage of the defacto complainant with the accused was solemnized under the said Marriage Act. Both of them stayed together for few months. Then the accused renounced the defacto complainant. If the evidence on record is considered as a whole, only one conclusion will come that the appellant committed rape upon the defacto complainant on 10th March, 2007.

17. Having heard the learned counsels for the parties and on careful perusal of the entire materials for the State and held that on 10th March, 2007 at about 11.30 pm the accused committed rape upon the defacto complainant. Let me assigne the reasons in support of my decision:-

Firstly, it is not specifically denied by the accused that he was apprehended on 10th March, 2007 at about 11.30 pm in the room of the defacto complainant. The parents of the defacto complainant apprehended him and at that time the defacto complainant told them that she was ravished by the accused.

Secondly, it is not denied by the defence that the accused was subsequently released on assurance made by the maternal uncle of the appellant that he would arrange for the marriage of the defacto complainant with the appellant. Believing on

such assurance the defacto complainant did not lodge complaint against the appellant immediately after the occurrence. Therefore, delay in lodging FIR in this case is of little importance.

Thirdly, the appellant did not deny that his marriage was solemnized with the defacto complainant during the pendency of the case in the trial court. After marriage they resided together as husband and wife. Then the appellant went away leaving the defacto complainant unnoticed when she was pregnant. Subsequently, she gave birth to a female child.

18. The learned trial judge considered the evidence on record in detail and elaborately discussed all the reasons as to why the accused was convicted. I am not in a position to take an alternative view considering the evidence on record.

19. Therefore, I do not find any merit in the instant appeal.

20. The appeal is dismissed on contest.

21. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge 1st Court at Malda in Sessions Trial No.25 of 2011 arising out of Sessions Case No.153 of 2011 is affirmed.

22. Let a copy of this judgment be sent to the court below along with the lower court record.

(Bibek Chaudhuri, J.)