

Sl. No.2

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 475 of 2018

Premanath @ Premanath Dutta

Vs.

State Of West Bengal

For the Appellant : Mr. Anirdam Jana

For the State : Ms. Zareen N Khan
Ms. Amita Gaur

Heard on : 05.08.2022

Judgment on : 09.09.2022

Ananya Bandyopadhyay, J.:-

The instant appeal is preferred against the judgment and order of conviction dated 18.07.2018 and 19.07.2018 passed by Ld. Additional Sessions Judge, 2nd Court, Serampore, Hooghly in sessions Trial No. 15 of 2015 arising out of sessions case no. 38 of 2015 convicting the appellant under Section 376 (2)(1) of the Indian Penal Code (for short IPC) and sentencing him to suffer imprisonment for life and to pay a fine of Rs. 10,000/- in default to suffer rigorous imprisonment for one year more.

The prosecution case emanated from a complaint dated 13.10.2014 wherein the complainant Ranjana Sadhukhan being the mother of the victim stated that she had been a widow residing permanently in the village of Rajbalhat of Rajbalhat-2 Gram Panchayat under Jangipara P.S., Hooghly. On 11th of October, 2014 she accompanied her younger daughter for private tuition at about 3 pm leaving her 19 years old physically challenged elder daughter at home. On her exit from the house the victim was taken to Kali Charan Samsan by Premanath Dutta, a neighbour in the locality enticing her with an ice-cream who thereafter raped her. At about 4 p.m., on her return the complainant noticed signs on her elder daughter been subjected to rape. Being perplexed, the helpless complainant went to the local doctor namely Partha Pratim Jana on 12.10.2014 who requested her to seek legal recourse. The complainant prayed for taking legal steps against the miscreant.

Based on the written complaint Jangipara P.S case No. 233 of 2014 dated 13.10.2014 under Section 376 (2)(1) IPC was instituted. A formal FIR was registered against the convict Premanath @ Premnath. The investigation originated and terminated with the submission of chargesheet under Section 376 (2)(1)(j) IPC. Chargesheet was submitted on 30.11.2014. Subsequently, charge was framed against the appellant under Section 376 (2)(1)(j) IPC to which he pleaded not guilty and claimed to be tried.

The prosecution cited 8 witnesses and exhibited 10 documents, in order to establish its case.

Learned Advocate Mr. Arindam Jana for the appellant at the outset stated that the evidence of PW1 reflected inconsistency regarding the time of her absence from her house contrary to the evidence of PW 3. PW 1 in her evidence stated that she went out at 3 pm and returned at 4 pm. She witnessed the clothes and pants of the victim stained with blood which however, were not seized. PW 3 Sikha Addya in her evidence stated that PW 1 was present at her house from 3:30 to 5 pm like any other day when the younger daughter of PW1 attended her tuition. He further argued that the scribe namely Subhash Dutta who had written the complaint was not examined. He further stressed upon the fact not a single member was cited as a witness who had accompanied PW 1 to the Police Station to lodge the complaint. Moreover, it was surprising that PW 1 was oblivious of the names of the members who accompanied her to the Police Station. It was further strenuously argued that considering the gravity of the offence, PW 1 belatedly lodged the complaint and went to the doctor after two days of the incident for examination. It was further stressed PW 2 the victim stated that she was in Mansatala along with her friend and the said friend was not examined. Moreover, the appellant had taken PW2 to a jungle where there was snake and the said jungle was not denoted in the map. He further stated that the evidence of PW 2 is not trustworthy owing to her physical and mental retardedness.

She would not have been able to comprehend the term “*Sabhadhipati*” and the version of her evidence was tutored. The wearing apparels of the victim were not seized for FSL report. The incident of physical molestation of PW 2 was reported for the first time to PW 4 by PW 1 on whose advice the written complaint was lodged and the victim was subjected to medical examination. There were inconsistencies in the opinion of the Doctors who had examined the victim. PW 5 stated that the hymen of the victim was intact and there was no bruise, nail mark, cut injuries found over the breast, neck, lower abdomen, vulva and perineum and thigh of the victim however, PW 7 stated a small tear in posterior wall of hymen extending to left lateral wall to be present in the body of the victim, though active bleeding or foreign body were absent in her private part. PW 7 in his evidence stated that the victim sustained an injury on 12.10.2014 at about 4 pm however, according to the complaint the incident took place on 11.10.2014, therefore, the evidence of PW 1 was unreliable. He concluded in absence of corroborative evidence and inconsistencies in the medical reports the conviction of the appellant should be set aside.

Learned Advocate Ms. Zareen N. Khan appearing for the State submitted minor discrepancies in the evidence of the prosecution witnesses concerning the date of the incident does not shake the crux of the prosecution case. The evidence of PW 1, 3 and 7 corroborated the prosecution case with regard to the time of the incident and the medical report mentioned a tear of the hymen and accordingly, the

prosecution had been successful in proving its case and, therefore, the appeal should be dismissed.

PW 1, Ranajana Sadhukhan, the mother of the victim stated to be a widow with two daughters of whom the elder daughter, the victim had been physically and mentally challenged. She further stated that on 11th October, 2014 she had taken her younger daughter to Suparibagan for her studies at about 3 pm leaving her elder daughter i.e. the victim at home. On her return at about 4 pm, she saw the clothes and pant of the victim stained with blood and on enquiry the victim revealed that she had been in the open and Prema Kaka i.e. the appellant took her on a bicycle to Kali Mandir at Samsan Ghat with a promise of providing her “*fuchka*” and “*ice-cream*”. The appellant had also tortured the victim. The complainant became mentally depressed and thereafter lodged the complaint which was written by one Subhash Dutta at her instruction with her signature thereon marked as Exhibit 1. She had also submitted certain documents under a seizure list to the Police with her signature marked as Exhibit 2. The victim was medically treated at Jangipara and Serampore Hospital and was further examined by the Police. The handicapped certificate and birth certificate of the victim handed over to the Investigating Officer were marked as Exhibit 3 and Exhibit 4 respectively.

During her cross-examination PW1 stated to have known the scribe Subhash Dutta who was a “*Sabhadhipati*” belonging to a particular political party who helped them in their difficult times and

she had been supporting him. She acceded to the fact of her absence at the time of the incident at the place of occurrence and confirmed the date and time of lodging the complaint at the Police Station. She agreed to have been accompanied by Subhash Babu to the Police Station though she could not recollect the names of the other members who went to the Police Station along with her. She confronted to have filed a false case against the appellant of a different political party being a supporter of Subhash babu. She stressed upon the fact of witnessing the clothes and pant of the victim stained with blood.

PW 2 i.e. the victim stated that she visited the Court in order to say something. She revealed that *“one bad incident took place with”* her. She further stated that her father expired and her mother was alive. The appellant gave her an *“ice-cream”* and *“fuchka”* to eat. She was sitting at Mansatala. She also stated to have one younger sister and named her in Court who went along with her mother to study on the date of the incident. She further stated that the appellant took her to a jungle on a bicycle and *“did a dirty work with”* her, which scared her. She also identified the place where the appellant had taken her through a photograph shown to her. She further stated that in absence of her father the appellant Premanath *“did this work”* to her. She had been to the Court and made a statement before the Magistrate. The appellant threatened to throttle her neck, spread one *“Gamchha”* and made her lie down on it and committed the offence

which she could not understand. She stated that accused had taken her at the pretext of giving her "*fuchka*" and raped her. He had also physically assaulted her. She stated the incident to her mother and also to the Police.

During her cross-examination, she stated to have obeyed the directions of her mother who lodged the present case and she was deposing in the case. During her cross-examination she further stated the incident took place for about one year back and at the relevant time no one was present at the place of the incident. She controverted the fact that the appellant did not commit rape on her.

PW3 Sikha Addhya in her statement corroborated the fact that she taught the younger daughter of the complainant PW1 at her house and on 11th October, 2015 both the complainant PW 1 and her younger daughter were present at her home for the purpose of tuition from 3.30 to 5 pm. She came to know the incident of the victim being raped from someone and she was interrogated by the Police.

PW 4 Dr. Partha Pratim Jana stated that the victim being mentally challenged was under his treatment. He had advised the complainant PW1 to visit any Government Hospital or Police Station concerning the physical molestation of her daughter by someone and denied to have issued any document of reference to the hospital or Police Station.

PW5 Dr. Dibyendu Dutta stated to have been attached with Serampore Walsh Hospital as Gynaecologist. He had examined the

victim girl brought by the complainant and one lady constable. Complainant PW1 narrated the incident of sexual assault on the victim to him. He further stated to have found the hymen of the victim intact without any bruise, nail mark, cut injuries over the breast, neck, lower abdomen, vulva, perineum and thigh. The vaginal sperm was taken and sent for semen examination and report was prepared in his handwriting and signature marked as exhibit-5. He further stated that *“in case of non-application of any force and resistance at the time of sexual intercourse injuries like nail mark, bruise, cut mark cannot be seen”*. He further stated that he did not examine the interior of vagina of the victim and the rupture of hymen of an unmarried girl correlated to the type of hymen. He further stated at the time of examination he did not find any sign of rape on the victim.

PW-6, Dr. Anindita Chakraborty, stated to be a Medical Officer, posted in Walsh Hospital, Serampore, had examined the appellant in connection with the case. She had prepared a medical examination report in her own handwriting bearing her signature and an official seal marked as Exhibit-6.

PW-7, Dr. Anupam Ghosh, stated that on 14.10.2014 he was posted at Jangipara Rural Hospital as General Duty Medical Officer and on the date of examination he was posted at Medical College and Hospital, Calcutta, as Post-graduate trainee and he examined the victim at 1.00 am during the intervening night of 13.10.2014 and 14.10.2014 in connection with the case. He learnt about the incident

of rape as described by the complainant i.e. PW-1 comprehending the language of the victim about the manner of its occurrence. He further stated that the victim though conscious and alert was physically and mentally retarded in external appearances. Initially, PW 6 found a small tear in the postural wall of the hymen extending to the left lateral wall. PW 7 did not find any active bleeding or foreign body on the private part of the victim which according to him required confirmation of the Gynaecologist. The injury report of the victim prepared and signed by him was marked as Exhibit 7. He had referred the victim to Walsh Hospital for further opinion and testing.

PW 8 S.I. Maheswar Majhi stated that on the date of the examination he was posted at Uttarpara P.S. and on 13.10.2014 he was posted at Jangipara P.S. as S.I. of Police and received one complaint from PW 1 which was marked as Exhibit 1/1, resulting in the initiation of a specific case being Jangipara P.S. case no. 233/2014 dated 13.10.2014 under Section 376 (2)(1) IPC. Based on which the formal FIR was drawn up signed by him marked as Exhibit 8 whereby he was endorsed to investigate the case. He had examined Subhash Dutta the scribe of the complaint under Section 161 Cr.P.C. who conformed to have written the complaint under the instruction of the complainant PW 1 and signed the same which was marked as Exhibit ½.

PW8 further stated that he visited the place of occurrence, examined the witnesses and recorded the statement under Section

161 Cr.P.C., prepared the rough sketch map with the index of the place of occurrence and the rough sketch map along with signature was marked as Exhibit 9 and 9/1 respectively. He had taken the photograph of the place of occurrence and had taken the victim for medical examination to Jangipara Rural Hospital. He collected the outdoor ticket and the injury report of the victim who was referred to Serampore Walsh Hospital and examined. The medical examination report was collected. Subsequently, he arrested the appellant who was thereafter medically examined and his medico-legal examination report was collected. The birth certificate and disability certificate of the victim were collected from the complainant through a seizure list marked as Exhibit 2/1. Thereafter, the statement of the victim was recorded under Section 164 Cr.P.C. and the same was collected. He had also recorded the statement of Dr. Partha Pratim Jana under Section 161 Cr.P.C. and submitted the chargesheet against the appellant as aforesaid. He further stated he did not seize any wearing apparel of the victim as well as the appellant. He further stated that the injury report mentioned the date and time of injury to be 12.10.2014 at about 4 pm. In the course of investigation it was established that at the time of occurrence there were none other than the victim and the appellant at the place of occurrence and he did not examine the neighbours at the place of occurrence.

On the basis of rival submission and the materials on record it transpired that :-

The document marked as Exhibit 4 i.e. the original birth certificate of the victim revealed her date of birth to be 4th July, 1995 which established the fact of her being an adult on the date of commission of the offence. The original disability certificate marked as Exhibit no. 3 denoted the victim to be suffering from congenital mental retardation with an IQ of 30+-5. Moreover, it stated that the victim could not travel without assistance of escort as well as live her livelihood independently. It appears that the victim does not possess the cognitive faculty to fabricate an incident which she has not experienced by herself. It is evident from the deposition of the complainant PW1 that on her return she noticed blood stain on the garments of the victim to her supposition of rape. The victim on her own accord did not narrate the incident to her mother i.e. PW1. However, on inquiry she disclosed being raped by the appellant.

Learned Advocate for the appellant argued that the rough sketch map did not mention the presence of any jungle. The victim during her examination under Section 164 Cr.P.C. stated to have been taken to the house of the convict and raped. The index of the rough sketch map marked as Ext. 9/1 revealed the existence of a small room *“said to be old Kali Temple at Kali Chatterjee Samsan south faced having two windows, one door and one veranda on the east and south side of the said temple”*. It is a pucca building situated at village Rajbalhat JL 06, P.S. Jangipara, Hooghly. The rough sketch map describing the place of occurrence and its adjacent areas depicted a

span of cultivating land without any house suggesting the same to be uninhabited, probably being an isolated place which can be an envisionary of a jungle to the victim. Moreover, during her deposition the victim PW 2 recognised the place of occurrence through the photograph shown to her. The physical and mental disability of PW2 has been proved by the document marked as Ext. 3. The document marked as Ext. 10 on admission stated the opinion of the ACJM, Serampore endorsing that *“the victim girl was mentally and physically handicapped but she has given the correct answer to some relevant question. But she is not absolutely in fit state of mind to understand everything asked to her.”* The said observation was in consonance with the deposition of the victim before the Court where she stated that, she could not understand what the appellant was doing at her private part. Thereafter, she confirmed being raped and physically assaulted by the appellant.

It is natural and obvious that a widowed mother of two daughters, one of them being physically and mentally challenged girl was confounded at the revelation of her vulnerable daughter being subjected and exposed to such an offence creating deep and severe impact on the body and mind of the victim. Her perplexity was perhaps intensified with the social element of stigmatization of her daughter in the village. In the predominant rustic environment the de facto complainant i.e. the mother will not risk of maligning and abashing her daughter's reputation, character and image to the

detriment of her daughter and such quandary must have prevented her to take an immediate decision. She, therefore, at the first instance sought for the help of the local doctor on whose advice she reported the incident to the Police and thereafter resorted to medical assistance. Non-examination of the scribe in the instant case cannot be fatal to the prosecution case, non compliance of which by the prosecution in presence of creditworthy evidence can be done away with.

In my opinion, any nexus, premeditation or connivance on the part of the complainant to implicate the appellant in a false case is absent. The plea taken by the appellant of political rivalry was not established through defence witnesses. Seeking help from a literate localite is a normal practice in village ambience. It negates any probability of vengeance to have been exercised against the appellant in the disguise of proximity of the PW 1 and her daughters with the scribe. In case of such prevailing situation there would not have been any delay to lodge a complaint and instant action would have been taken against the appellant. The helpless and distressed mother was obfuscated and initially went to the local doctor for relief rather than reporting the incident to the police or disclosing the same in the neighbourhood.

The evidence of PW 5 i.e. Dr. Dibyendu Dutta revealed the absence of bruise, nail mark, cut injuries over the breast, neck, lower abdomen, vulva, perineum and thigh which he had earlier mentioned

in the report marked as Exhibit 5 wherein it was further stated that the victim had been a mentally retarded lady. According to her mother's statement she was sexually assaulted by the appellant on 11.10.2014. The date and time of the examination was 14.10.2014 at 4 pm PW 7 i.e. Dr. Anupam Ghosh in his deposition stated that at about 1 a.m. of the intervening night of 13.10.2014 and 14.10.2014 he had examined the victim and the report of the examination had been marked as exhibit 7 which stated two days back on an afternoon a man named Prema called the victim at the Samshan near her house to give her "ice-cream" and "fuchka" while the victim went to the samsan, the appellant Prema raped her "*day before yesterday*". The mother of the victim assisted in communicating the language of the victim patient to PW 7 who according to him was '*growth and mentally retarded*'. The Ld. Advocate for the appellant stated the date of injury as per the injury report marked as Exhibit 7 was 12.10.2014 and the incident took place on 11.10.2014. He stressed on the discrepancy with regard to the date of occurrence of the incident with its subsequent reporting asserting it to be a false accusation of the appellant into inculcation. The serial no. 8 which mentioned the date and time of examination in the injury report marked as Exhibit 7 delineated the same to be 14.10.2014 at 1 am.(night) which meant that the examination was held one hour after of the midnight of 13.10.2014. It further revealed that the PW 7 mentioned the alleged sexual assault to have occurred "*two days back afternoon*" which corroborated the incident to have taken place in the afternoon of

11.10.2014 incongruity with the deposition of other prosecution witnesses namely PW 1, PW 2 and PW 3. PW 7 had deposed of a small tear in posterior wall of hymen that extended to left lateral wall. Active bleeding or foreign body were not found on the private part of the victim. After a lapse of considerable time of the incident it is evident that any extraneous substance or bleeding will definitely be absent at the time of examination. The victim during her examination stated that *"I could not understand what Prema was doing"*. She further stated that *"Prema did a dirty work with me. I got scared due to fear"*. It evinced the fact that victim by virtue of her ignorance as to what she was exactly subjected to, did not offer any resistance, out of fear of assault. In absence of any forceful resistance any bruise or marks on the body of the victim might not appear. The rupture of hymen exclusively does not determine the commission of rape.

In Modi's medical jurisprudence, twenty-third edition, at pages 897 it is stated:

"At page 897: To constitute the offence of rape, it is not necessary that there would be complete penetration of the penis with emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

In **Amal Kumar and another vs. State of Haryana** ¹ the Hon'ble Supreme Court had opined that in order to satisfy the ingredient of rape, complete penetration is not necessary to be present.

The Ld. Advocate for the appellant stated that the prosecution did not examine the friend accompanying the victim prior to the commission of the offence. Moreover, wearing apparels of the victim was also not seized. The complaint was lodged belatedly and there had been every possibility that the garments worn by the victim must have been washed. The non-examination of the friend will not discredit the evidence of the victim if her statement is sufficient to evoke confidence to be believed and relied upon. The Hon'ble Supreme Court on several occasions observed that corroboration is not elementary or a cardinal principle for conviction in a rape case. If the evidence of the victim is unambiguous, does not suffer from basic infirmity and inspires confidence it cannot be rendered unworthy of credence.

The Supreme Court in **Rai Sandeep alias Deepu v. State (NCT of Delhi)** ² observed that,

15. In our considered opinion, the sterling witness should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the

¹ 2004) 4 SCC 379

² (2012) 8 SCC 21

consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a sterling witness whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

In the instant case the victim in her statement recorded under Section 164 Cr.P.C. stated that the appellant at first gave her “fuchka” to eat followed by an “ice-cream” and subsequently raped her. During her deposition before the Court on 07.09.2015 she did not deviate from her earlier statement and confirmed the act of rape committed upon her by the appellant. The defence could not shake her evidence during cross examination. In an indoctrinated rural society manifesting obstinate social dogmas the de facto complainant will not

prevaricate and falsely implicate the appellant in the commission of rape on her daughter causing her humiliation, aggravating the sufferings of her daughter beyond her physical and mental disability. The mother will generally not intend to stigmatise her daughter dishonouring her reputation and dignity in the society. The victim PW 2 during her deposition stated that her father was not there so the appellant “*did this work*” to her. This statement exemplifies the forlorn and wretched condition of the family afflicted with anxiety and deprivation of father’s physical presence and emotional support resulting in insecurity. Under such despondency to rely upon an influential person in the vicinity viz. the Scribe is quite normal. The victim identified the appellant as ‘*Prema Kaka*’ as a co-villager. Therefore, to address the scribe as the “*Sabhadipati*” having been acquainted with him over considerable period of time cannot be considered to be tutored. The veracity of the prosecution case becomes reliable since no mother would generally try to take advantage of or destroy her daughter’s honour, respect and moral through false accusation of sexual molestation. Failure on her part to recollect and name the members who accompanied her to the Police Station is natural, considering her hapless state of mind and excruciation.

In my opinion the testimony of the victim and other prosecution witnesses corroborated each other and is therefore worthy of credence and reliability.

In my opinion, the prosecution has been successful in proving its case. The conviction of the appellant Premanath Dutta @ Premnath under Section 376(2)(1)(j) IPC is upheld.

The Ld. Trial Court has imposed maximum sentence of life imprisonment and to pay a fine of Rs. 10,000/- in default to suffer rigorous imprisonment for one year more, considering the fact that the offence was perpetrated against a vulnerable lady.

However, external injuries were not found on the body of the victim. No criminal antecedent was found against the appellant. Balancing the aggravating and mitigating factors, I am of the opinion to reduce the sentence imposed on the appellant. The appellant is directed to suffer rigorous punishment for a period of 10 years and to pay a fine of Rs. 10,000/- in default to suffer further simple imprisonment for one year more with the aforesaid modification.

The appeal is disposed of.

The period of detention if any undergone by the appellant during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

Photostat certified copy of this judgment, if applied for, shall be made available to the appellant upon completion of all formalities.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)