

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 609 of 2018

Sudip Sen & Ors

Vs.

The State of West Bengal

For the Appellants: Mr. Milan Mukherjee, Sr. Adv.,
Mr. Biswajit Manna, Adv.

For the State: Mr. Saibal Bapuli, A.P.P.,
Mr. Arani Bhattacharyya, Adv.

Heard on: 24 February, 2022.

Judgment on: 10 March, 2022.

BIBEK CHAUDHURI, J. : –

1. Five accused persons stood trial and convicted for the offence under Section 376(2)(g)/511 of the Indian Penal Code, IPC in short and also under Section 323/34 of the IPC on conclusion of trial of Sessions Case No.26(2) of 2011 corresponding to Sessions Trial No.1 (August) 2011. The learned trial judge handed down sentence of rigorous imprisonment of five years each with fine and default clause for committing offence under Section 367(2)(g)/511 of the IPC. The appellants were also sentenced to suffer rigorous imprisonment for one year each with fine and default clause for the offence punishable under Section 323/34 of the IPC.

2. On 11th January, 2010 the defacto complainant lodged a written complaint alleging, inter alia, that she had love relationship with accused Sudip Singh. They used to visit different places in an around of the township of Nabadwip where they used to stay, riding on a red coloured motorcycle of accused Sudip. On 10th January, 2010 at about 4 pm Sudip called the defacto complainant on her mobile phone and informed her that the paternal aunt of Sudip was seriously ill and she wanted to see the defacto complainant. He also said that he would be waiting for her at a place called Gabtala. The defacto complainant went to Gabtala at about 5.30 pm where Sudip came to the spot by his motorcycle. She rode on the said motorcycle and took her to a house situated at Tegharipara at about 6 pm. The defacto complaint saw one Sauvik Das a friend of Sudip standing in front of the house. Sauvik told Sudip that everybody was waiting for them inside the house. When they entered into the house Sauvik closed the entrance door. She also found other friends of Sudip, namely Papan Barik, Abhijit Chandra Nath @ Bijon Nath and Ashim Sadhu inside the said house. They told Sudip to go to the room of the aunt with the defacto complainant. Sudip took her to a room. The friends of Sudip also followed them. There was no other person in the said room. They immediately closed the door of the room from inside. When the defacto complainant sensed about some foul play and asked Sudip about his aunt, he assaulted her by slaps on her cheek. He also threatened her with dire consequences. The defacto complainant raised hue and cry. At this Sudip and all his friends started assaulting her by slaps. Then they

forcibly laid her on a cot. Sudip disrobed her and all of them inappropriately touched different parts of her body with sexual intent. When they tried to commit rape upon her the neighbouring people started to knock at the entrance door of the said house. Sudip fled away scaling the wall of the house. His friends were however caught red handed by the local people. They were manhandled by them. They sent the defacto complainant to her home. As she was mentally upset on the date of occurrence, she could not lodge a complaint in the local P.S. On the following day the defacto complainant lodged the complaint with the Inspector-in-Charge, Nabadwip P.S.

3. The case under Sections 376/511/120B/34 of the IPC was registered against the accused persons. On completion of investigation charge-sheet was submitted before the learned Sessions Judge at Nadia, the case was committed to the 3rd Fast track Court at Krishnanagar for trial.

4. The learned trial judge framed charge against the accused/appellants under Section 376(2)(g)/511 of IPC and 323/34 of the IPC. On conclusion of trial the accused persons were convicted under the charge framed against them and sentenced to suffer imprisonment as narrated above.

5. Mr. Milan Mukherjee, learned Senior Advocate for the accused persons/appellants submits that the written complaint contains two different incidents in respect of same cause of action. The first incident speaks about making a phone call by appellant Sudip to the defacto

complainant requesting her to come to a place, called, Gabtala on 10th January, 2010 at about 5.30 pm. Accordingly the defacto complainant went to Gabtala on her own accord. Sudip came to that place riding on a motorcycle. The defacto complaint sat on the motorcycle and went away with Sudip. The second incident was held in a house at Tegharipara. It is alleged that the appellant Sudip and his friends forcibly caught hold of her on a cot, stripped her off and touched different parts of her body in order to commit rape upon her. Then the victim raised hue and cry which attracted local people. They started to knock at the door of the said house Sudip fled away scaling a wall and other accused persons were caught red handed and manhandled by the local people.

6. It is submitted by Mr. Mukherjee that Section 164A of the Code of Criminal Procedure enjoins a duty upon the Investigating Officer of a case where, during the stage when an offence of committing rape or attempt to committing rape is under investigation, the woman with whom rape is alleged or attempted to have been committed shall be examined by a Registered Medical Practitioner employed in a Government Hospital. During investigation of the case the Investigating Officer proposed the victim girl to be examined by the Medical Officer but she refused her medical examination. The accused persons were also not examined as per the provision of Section 53A of the Code of Criminal Procedure. Refusal to be examined medically by the victim is an important circumstance which the learned trial judge failed to consider. On 12th January, 2010 the victim girl gave a statement under Section 164 of the Code of Criminal

Procedure. It is reported by the victim girl that the accused persons disrobed her and touched different parts of her body. They also touched various parts of her body by their mouth also.

7. Mr. Mukherjee next submits that PW2 Nitai Debnath and PW3 Amit Mazumder being the local witnesses did not support the prosecution case and they were declared hostile. PW4 is the uncle of the defacto complainant. PW5 Biva Rani Nath is the mother of accused Avijit Nath she was also declared hostile. PW6 is the mother of the defacto complainant. PW7 is her father. PW8 Subhankar Biswas who recorded the statement of the victim girl under Section 164 of the Code of Criminal Procedure did not face cross examination. PW10 is the mother of accused Souvik Das and PW11 is the I.O of the case. It is submitted by Mr. Mukherjee that except the uncle and the parents of the defacto complainant nobody supported the prosecution case. The local witnesses who saved the victim were not examined. Even the rickshaw puller who brought the defacto complainant from Tegharipara to her house after the alleged incident was not examined. The Investigating Officer failed to collect proper evidence to bring home charge against the accused persons. Therefore, the order of conviction passed by the learned trial judge ought to be set aside.

8. It is further submitted by Mr. Mukherjee that even if the sole testimony of the defacto complainant is taken on its face value, charge under Section 376/511 of the Code of Criminal Procedure cannot stand.

9. Learned P.P-in-Charge on the other hand, submits that indisputably the victim girl had love relationship with the appellant No.1 Sudip Sen. Taking advantage of the said relationship, the appellant No.1 took her to an empty house and he along with his friends, disrobed the victim girl. They also touched different parts of her body by their hands and mouth. It is also submitted by the learned Advocate for the respondent that a girl of self respect would not lead her evidence to the effect that she was disrobed by the appellants. An unmarried girl would not come forward to depose falsely against the appellants at the cost of her chastity and womanhood. Therefore, there is no reason to disbelieve the evidence of the victim girl. The learned Advocate for the respondent has also drawn my attention to the mobile call details (Exhibit-6 collectively). It is found from the said call details that the appellant No.1 made four calls to the victim girl on 10th January, 2010 between 16.11 hours and 17.23 hours. The said phone calls record reveals that appellant No.1 insisted upon the victim girl to leave her house and go to some place with him. In other words, the call register dated 10th January, 2010 supports the claim of the defacto complainant. Other appellants were already waiting in the house where she was taken and they committed the offence wrongfully confining her in a room. Therefore, there is no reason to alter the order of conviction and sentence passed by the learned court below.

10. Having heard the leaned Counsels for the parties and on careful perusal of the entire materials on record, I like to state at the outset that

though the learned Advocate for the appellant vigorously argued that the defacto complainant did not want to get herself medically examined and refused Medico Legal Examination on the very date of occurrence, the said circumstance does not alone render the prosecution case doubtful. It is the case of the prosecution that the accused appellant tried to commit rape upon her. In case of attempt of rape, there cannot be any injury in the private part of the victim girl. The Medical Officer wanted to examine the private part of the victim girl on the date of occurrence which she refused. In a case under Section 376/511 of the IPC, absence of such Medico Legal Examination Report does not render the prosecution case wholly doubtful.

11. It is true that the prosecution has failed to produce any independent witness who saved the victim girl. But for the lapse of the prosecution to produce any independent witness of the occurrence, prosecution case cannot be disbelieved. I am in agreement with the learned Advocate for the respondent that the prosecutrix would not adduce false evidence against the appellants, especially appellant No.1 when she had subsisting love relationship with him. The learned trial judge did not commit any error in holding the appellant's guilty for committing offence upon the prosecutrix.

12. Now comes the question as to whether the specific act done by the appellants amounts to an offence under Section 376/511 of the IPC or not. Undoubtedly, there has been a major change in the definition of rape by the Criminal Law Amendment Act, 2018, with effect from 21st April,

2018. But at the time of commission of offence, penetration is the sine-qua-non for an offence of rape.

13. In order to find an accused guilty of an attempt with intent to commit rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts of rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Therefore, in a case of attempt to commit rape the prosecution is under obligation to prove that accused had committed and taken all step, short of penetration. In the instant case the evidence of the prosecutrix establishes that the accused disrobed her and touched different parts of her body by their hands and mouth. From such evidence the ingredients of offence of attempt to commit rape cannot be said to be proved. However, it has been established beyond any shadow of doubt that the appellant committed offence under Section 354 of the IPC.

14. Thus conviction of the appellants under Section 376/511 of the IPC is altered to a conviction under Section 354 of the IPC. Conviction under Section 323/34 of the IPC remains unaltered.

15. Now comes the question of sentence. The appellants are facing trial for last 12 years. At the time of commission of offence they were students. They passed considerable period of time in incarceration. This court is of

the view that if the appellants are sentenced to suffer rigorous imprisonment for six months with fine for committing offence under Section 354 of the IPC and also rigorous imprisonment for six months with fine for committing offence under Section 323/34 IPC, the punishment shall be just, proper and sufficient.

16. Accordingly the appellants, namely, Sudip Sen, Souvik Das @ Soubhik Das, Papan Barik, Abhijit Chandra Nath @ Bijan Nath and Ashim Sadhu are sentenced to suffer rigorous imprisonment for six months with fine of Rs.1000/- each in default to suffer imprisonment for further one month each for committing offence under Section 354 of the IPC.

17. The appellants are also sentenced to rigorous imprisonment for six months and also to pay fine of Rs.1000/- in default rigorous imprisonment for one month each for committing offence under Section 323/34 IPC. Substantive sentence for imprisonment shall run concurrently. However sentence of imprisonment for nonpayment of fine shall run separately.

18. The period of incarceration shall be set off against the actual period of imprisonment under Section 428 of the Code of Criminal Procedure.

19. The instant appeal is thus disposed of.

20. Let a copy of the judgment be sent to the court below with the lower court record.

21. Let a copy of the judgment duly countersigned by the ACO of this court be handed over to the learned Advocate on record for the accused free of cost.

(Bibek Chaudhuri, J.)