

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bibhas Ranjan De

C.R.A. 679 of 2013

Narottam Biswas

-Vs-

State of West Bengal

For the Appellant : Mr. Angshuman Chakraborty, Adv.

For the State : Mr. Partha Patim Das, Adv.

Heard on : 05.01.2022

Judgment on : 05.01.2022

Joymalya Bagchi, J. :-

Appeal is directed against the judgment and order dated 30.07.2013 passed by Learned Additional Sessions Judge, 5th Court Krishnagar, Nadia in Sessions Trial No. XIII(Jan) 2013 arising out of Sessions Case No. 27(1) 2013 convicting the appellant for commission of offence punishable under Section 376(2)(f) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for ten years and also pay a fine of Rs. 25,000/-, in default to suffer further rigorous imprisonment for one year more and with

a further direction that the fine, if realized, be handed over to the victim girl.

Prosecution case as alleged against the appellant is to the effect that the victim girl (P.W. 7), aged around 7 years, along with her mother (P.W. 1) had been invited to attend the Boubhat ceremony of their neighbour, one Mohonlal Biswas. Around 9 P.M. dancing and other celebrations were going on in connection with the marriage. Victim girl went out to call her friend Papiya to participate in the dance. Taking that advantage of the situation, appellant called her and told her to keep a bag in his house. Victim girl politely agreed. When she entered the room the appellant immediately entered from behind and closed the door. Thereafter, the appellant removed her wearing apparels as well as his trouser. He put his male organ on her vagina but could not penetrate. Thereafter, he inserted his male organ in her mouth. He gave a ten-rupee note to the child. When her mother (P.W. 1) enquired, she narrated the incident to her. On the next day, her mother lodged written complaint at the police station being Tehatta P.S. Case No. 799/2010 dated 12.12.2010 under Section 376(2)(f) of the IPC against the appellant. Victim girl was medically treated and made statement before the learned Magistrate. Appellant absconded and subsequently was arrested and medically examined by P.W. 13 on 13.10.2012. In conclusion of investigation, charge sheet was filed against the appellant and charge was framed under Section 376(2)(f) of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. It was his specific defence that he was

impotent and incapable of sexual intercourse. In the course of trial, prosecution examined 15 witnesses and exhibited a number of documents. In conclusion of trial, learned trial judge by judgment and order dated 30.07.2013 convicted and sentenced the appellant, as aforesaid.

Mr. Chakraborty, appearing for the appellant submits that his client was impotent as would appear from the opinion of Dr. Bani Mondal (P.W. 13). Hence, allegation that he committed rape on the minor girl is patently absurd. He further argued that the evidence of the victim girl (P.W. 7) is at variance with the deposition of her mother (P.W. 1) and First Information Report. Other prosecution witnesses also did not support the prosecution. He, accordingly, prayed for acquittal.

Mr. Das, learned Counsel appearing for the State argues that the evidence of the minor victim (P.W. 7) is clear, cogent and convincing. She had made statement in similar lines before the learned Magistrate. Her version is corroborated by her mother (P.W. 1) and other prosecution witnesses. P.W. 5, medical officer noted bruise near introitus which supports the prosecution case. Evidence has come on record that the appellant is the father of three children and was subjected to potency test two years after the incident. Therefore, it cannot be said that he was impotent at the time of occurrence. Accordingly, he prayed for dismissal of the appeal.

P.W. 7 is a minor child and the victim in the instant case. She was seven years of age at the time of occurrence. Trial judge post questions to

assess her competence and thereafter recorded her deposition. She stated on the fateful night around 9 P.M. she had gone to attend the boubhat ceremony of a neighbour, Mohonlal Das. People were dancing and she went out to call her friend Papiya to join the dancing. Appellant called her and told her to keep a bag in his house. She proceeded to the house of the appellant with the bag. After she entered the house appellant also entered there and closed door from inside. Thereafter, the appellant removed her trouser and tried to insert his male organ in her vagina. But he failed to do so. Thereafter, he inserted his male organ inside her mouth. He gave a ten-rupee note to her and asked her not to tell anyone. When her mother noticed the money and inquired about it, she narrated the incident to her mother in the presence of others. On the next morning, her mother lodged a case. Police seized her wearing apparels. She made statement before Magistrate. She proved her signature on the statement. She was also examined by doctor. In the course of cross-examination, defence failed to elicit any contradiction or inconsistency in her deposition.

On the other hand, her deposition is substantially corroborated by her mother (P.W. 1). She stated that the incident occurred when her daughter had gone to attend the boubhat ceremony of their neighbour, Mohon. She further deposed that she found her daughter was in pain and had a ten rupee note in hand. When she enquired, her daughter narrated the entire incident. They started looking for the appellant but he had run away. On the next day, they lodged First Information Report which was

scribed by P.W. 11. She proved her signature on the First Information Report (Ext.1). Her daughter was seven years of age and was studying in Class III. In the course of cross-examination, she emphatically denied that the appellant was impotent at the time of occurrence. She stated that the appellant had married thrice and was the father of three children.

P.Ws. 2, 3, 6 and 10 are local witnesses and they stated that they heard the incident from P.W. 1, mother of the victim.

It is argued that there is a contradiction in the deposition of the minor child and that of her mother. While the child stated that she narrated the incident to her mother in the presence of others in the house of Mohan, neither her mother (P.W. 1) nor other local witnesses have supported her version. Allegation of insertion of penis in the mouth is also absent in the First Information Report. On an appreciation of the evidence of the minor victim (P.W. 7) in the backdrop of that of her mother (P.W. 1) and others, I find that there is substantial corroboration of the prosecution case. Both the minor victim and her mother stated victim had gone to attend the boubhat ceremony in the house of Mohan. Victim went out to call her friend Papiya to participate in the dance. At the time, the appellant on a mere ruse lured her into his room and tried to penetrate his male organ into her vagina. He also inserted his male organ in her mouth. After satisfying his lust he handed over a ten-rupee note to the child. Subsequently, her mother noticed the child in discomfort and the currency note in her hand. When she enquired, the victim girl narrated the incident.

In view of the aforesaid clear, cogent and consistent version coming out from the minor victim (P.W. 7) and her mother, minor variation with regard to the place where the victim narrated the incident to her mother does not affect the credibility of the prosecution case. Non-examination of Mohan or Papiya also is of little consequence. They are not significant witnesses whose non-examination would prejudicially effect the unfolding of the prosecution case. On the other hand, all the neighbouring witnesses, namely, P.Ws. 2, 4, 6 and 10 have stated in unison, soon after the incident mother of the victim girl (P.W. 1) had narrated to them the heinous sexual assault on her daughter. First Information Report was also promptly lodged on the next day. Absence of the allegation regarding insertion of penis in the mouth of the victim in the FIR appears to be an inadvertent slip on the part of an agitated mother as the said allegation finds place in the statement of the minor recorded under Section 164 before the learned Magistrate (P.W. 12) soon after the incident.

Minor was also examined by Dr. Saikat Mukhopadhyay (P.W.5). On examination he found he noted as follows:

“Hymen was intact and even little finger could not be inserted inside the vagina. Probably there was no sexual intercourse. Only mild bruise (blackish) was seen near introitus (around vagina). No other injury was seen in her private parts other than the mild bruise. No injury was seen on the other parts of the body.”

In addition to the aforesaid medical evidence, defence has strongly relied on the evidence of P.W. 13 who examined the appellant on 13.10.2012 and opined that he was not capable of sexual intercourse in his

medical report (Ext. 13). P.W. 13 further opined on manual examination no excitement was found in the male organ of the appellant. Strong reliance is placed on the aforesaid evidence of P.W. 13 to argue that the appellant was impotent at the time of occurrence and, therefore, the allegation of rape is patently absurd. On the first blush such argument appears to be attractive. However, a deeper scrutiny of the materials on record would show that the appellant is a married man and the father of three children. Therefore, it cannot be said that at all points of time the appellant was impotent. It is also relevant to note that the incident occurred on 11th December, 2010 and the appellant had been medically examined by P.W. 13 on 13.10.2012, that is almost two years after the incident, when the medical officer noted that he was incapable of sexual intercourse.

In the aforesaid backdrop, it is not possible to come to hold that the appellant was impotent on the date of the incident rendering him incapable of commission of the act. However, the evidence of minor girl (P.W. 7) and the opinion of P.W. 5, who examined her shortly after the incident would show that the appellant had made an attempt to rape the victim but was not successful. Due to such attempt bruise was seen near introitus i.e. around vagina.

In this factual backdrop, I am of the opinion that the prosecution case of attempt to commit rape upon the minor girl is wholly established.

In the light of the aforesaid discussion, I consider it prudent to modify the conviction of the appellant to one under Section 376(2)(f) read

with Section 511 of the Indian Penal Code. Substantive sentence imposed on the appellant is, accordingly, modified and he is directed to suffer rigorous imprisonment for five years instead of rigorous imprisonment for ten years. Sentence of fine imposed on him remains unattended and it is directed the fine amount, if realized, be handed over to the victim girl, as compensation.

Bail bond of the appellant is cancelled. The appellant is directed to surrender forthwith and serve out the remainder of his sentence within one month from date.

In the event he fails to do so, trial court shall take appropriate steps to apprehend him and execute the sentence in accordance with law.

The period of detention, if any, undergone by the appellant during investigation, enquiry and trial shall be set off against the substantive sentences imposed upon him in terms of section 428 Cr.P.C.

The appeal is, allowed to the aforesaid extent.

Let a copy of this judgment along with the lower court records be sent down to the trial court immediately.

Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Bibhas Ranjan De, J.)

(Joymalya Bagchi, J.)