

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

Before: Hon'ble Justice Sugato Majumdar

CRA 832 of 2013

Sk. Hasibul

Vs.

The State of West Bengal

For the Appellant : Mr. Abhijit Kumar Adhya.

**For the State : Mr. Saswata Gopal Mukherjee, Ld. P.P.
Ms. Sreyashee Biswas.**

Hearing concluded on : 18.07.2022

Judgment on : 22.07.2022

Sugato Majumdar, J.:-

The instant appeal is preferred against the impugned judgment and order of sentence dated 17/09/2013 and 18/09/2019 respectively passed by the Sessions Judge, Howrah in Sessions Trial No. 93/2013 convicting the appellant under Section 376 of the Indian Penal Code.

Genesis of the present case is the written complaint dated 28/10/2012 submitted by the prosecutrix/victim in Jagacha Police Station. It was alleged in the written complaint that the prosecutrix had a love affair with the appellant for about one year prior to the incident. Both of them used to roam around together and the affair was known to the local people. The appellant assured the prosecutrix to marry her. On 28/10/2012 at about 06:30 P.M., the appellant called the prosecutrix over telephone. They met each other in a

building of the locality, then under construction, near the residence of the appellant. It was stated by the appellant to the prosecutrix that he would discuss on their prospective marriage. The prosecutrix went there. The appellant promised to marry her and forcefully committed rape upon her. She returned home and informed the matter to her family members. She also submitted the written complaint which was received by the Jagacha Police Station on 29/10/2012 at 00:35 hours.

On receiving the written complaint formal F.I.R was drawn up against the appellant being Jagacha Police Station Case No. 612/2012 dated 29/10/2012 under Sections 376/420 of the Indian Penal Code and investigation began. On completion of the investigation, charge sheet was filed. Since the offence was triable by the Court of Sessions, it was committed to the Court of Sessions. Sessions Judge framed charge under Section 376 of the Indian Penal Code which was read over and explained to the appellant. He pleaded not guilty and claimed to be tried. Thereafter trial began.

The defense of the appellant was his innocence and false implication in the case. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 in which his plea was innocence and false implication although he admitted that he had an affair with the prosecutrix.

The trial court on conclusion of the trial held the appellant guilty of the offence charged and sentenced him to suffer rigorous imprisonment for five years along with a fine of Rs. 3000/- in default of which to suffer rigorous imprisonment for a further term of three months.

On being aggrieved, the instant appeal is preferred.

Mr. Addhya, the Learned Counsel for the appellant submitted that the allegation made by the prosecutrix in the written complaint is that on assurance of marriage the appellant raped the victim. That assurance was not false as is evident from subsequent marriage between them. Because of such

marriage, the very basis of the allegations has been set at naught. The trial court failed to take into consideration that aspect of the matter.

Next Mr. Adhya submitted that medical report does not corroborate the allegation of rape. It is the case of the prosecutrix that she had long term relationship with the appellant. The medical report (Ext. 5) does not indicate any forceful rape. In fact, according to him, it doesn't corroborate the allegation of rape. Medical report opines that the victim was habituated to sexual intercourse. Such opinion reinforces the hypothesis of consensual sex, as appears from the written complaint. The trial court committed error in relying on the medical report, according to Mr. Adhya.

Next Mr. Adhya submitted that the statements of the prosecutrix are rife with contradictions. No other evidence came forward to corroborate the allegations leveled against the appellant. The trial court rather superficially relied upon the statements of the prosecutrix that she was raped without taking into consideration the contradictions and intrinsic incoherences of her statements. In absence of corroboration, ambiguous and contradictory statements should not be relied upon by the trial court mechanically to reach a conclusion that the appellant is guilty of rape, he argued. In nutshell, Mr. Adhya submitted that the impugned judgment and the order of sentence is liable to be set aside.

Per contra, Ms. Biswas appearing for the State submitted that statements of the prosecutrix, in all occasions, are consistent and uniform. The prosecutrix stated and reiterated the selfsame allegation of rape in all occasions whether in the written complaint or before the judicial magistrate or before the court. According to her, subsequent marriage cannot exonerate the appellant from the culpability of his heinous offence. It is no longer *res integra*, that consistent and reliable statements and evidence of the victim girl can solely be relied upon to come to a conclusion of rape. Since the victim girl consistently stated that she was raped by the appellant there was no error on

the part of the trial court to rely upon her statements. According to Ms. Biswas, the trial court rightly held that the accused is guilty of the offence charged and the impugned judgment and the order of sentence demands no interference.

I have heard rival submissions.

It is settled principle of law, adumbrated in plethora of decisions of the High Courts and the Supreme Court of India that in deciding the issue whether there was rape or not testimony of the victim girl can be solely relied upon provided that the same inspire confidence and is credit worthy. In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217** the Supreme Court of India observed that if the evidence of the victim does not suffer from any basic infirmity, and the “probabilities factor” does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the qualification that corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation or when the “probabilities factor” is found to be out of tune. This principle was subsequently reiterated in catena of decisions subsequent thereto. In **Sham Singh v. State of Haryana, (2018) 18 SCC 34**, the Supreme Court of India observed, referring to previous decisions on this point:

“6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable

prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults.”

Examination of evaluation of evidence by the trial court should be judged with touchstone of these salutary principles of law.

Prosecution examined eleven witnesses. P.W. 1 is the prosecutrix herself, P.W. 2 is her elder brother, P.W. 3 is a local witness, P.W. 4 is the mother of the prosecutrix. These apart there are other witnesses including the doctor who examined the prosecutrix, Judicial Magistrate who recorded her statements under section 164 of the Code of Criminal Procedure, 1973 and the Investigating Officer.

The nutshell of allegation as stated in the written complaint (Ext.1) is forceful rape on assurance of marriage. Medical evidence does not corroborate the allegation of forceful rape. Both the prosecutrix and the appellant had love affairs for a year prior to the incident. It is in the written complaint that the appellant expressed his willingness to marry the prosecutrix. In cross examination she stated that both of them condescended to marry each other. They had travelled freely. Medical report, Ext. 4, indicates that she was habituated to sexual intercourse. It is also in the medical report that no foreign body or injury was found on examination of the prosecutrix. In the written complaint the prosecutrix did not spell out whether she had any

consent or not; the written complaint is silent as to whether the prosecutrix resisted the act of the appellant or not. It rather indicates that the act of rape was committed on assurance of marriage. Since they married each other later, it cannot be said that the appellant while committing the act, nurtured within himself an intention to avoid marriage and that the assurance of marriage was false. Circumstance, as emanates from the written complaint is one. In her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, she stated differently that she was called by the appellant in his locality; that when the prosecutrix reached there, the appellant, in inebriated state, dragged her to a nearby room under construction and committed rape upon her forcefully. She resisted, shouted and raised hue and cry but because of a loud speaker which was being played at that point of time, none could hear her and she was not rescued by anyone. Circumstances narrated in the statement recorded under Section 164 of the code of Criminal Procedure, 1973 (Ext. 2) is different. According to Ext. 2 she was forcefully ravished against her will inspite of resistances, hue and cry raised by her. The earlier circumstance, as stated in the written complaint, that rape was made on representation of marriage is absent. Medical Report negated presence of foreign body or use of force. This statement of the prosecutrix is rather contradictory to the statement contained in the written complaint. In her deposition before the trial court she only stated that appellant committed raped upon her on 28/10/2012 inside a pacca room at Halder Para. She did not state whether she had consent or not, whether it was forceful or violent or not; whether she had consented to or whether her consent was procured on assurance of marriage. She stated nothing about the circumstances of the alleged rape.

Section 114A of the Indian Evidence Act raises a presumption as follow:

“114A. Presumption as to absence of consent in certain prosecutions for rape.—In a prosecution for rape under clause [\(a\)](#) or clause (b) or clause (c) or clause (d) or clause (e) or clause

(g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.”

In this case the prosecutrix did not say a single word expressing that she had no consent in the sexual intercourse. In cross-examination she conceded that they had eagerness to marry each other and that they travelled at different places. In view of that evidence it cannot be presumed also that she did not consent to the alleged sexual intercourse. If it is a case of rape on assurance of marriage then such allegation loses much of its force on marriage. Marriage is admitted by the prosecutrix herself (P.W. 1), her brother (P.W. 2), P.W. 3 as well as P.W. 4 being the mother. It is in the statement of mother and elder brother of the prosecutrix that they are living happily right now. Since there was no eye witness to the incident, evidence of the prosecutrix is solely to be relied upon. Statements of the prosecutrix contain dichotomy, ambivalence and vagueness as to what happened at the material point of time of rape.

The prosecutrix stated in the written complaint that on returning home, she stated the incident of rape to her family members. P.W. 2 and P.W. 4 being her elder brother and mother stated nothing in their evidence in this regard. P.W. 2 stated that he and his mother accompanied the prosecutrix to Jagacha Police Station but he had no knowledge of what was stated in the complaint. P.W. 4 stated that she had no knowledge about the incident. These statements contradict what the prosecutrix stated in the written complaint.

The prosecutrix stated in the written complaint that the incident of rape took place at No. 1 Sultanpur, Vodopara. That is the place of occurrence according to the F.I.R and the sketch map. In evidence she stated that the

incident took place at Halder Para, which name was introduced for the first time in the evidence.

The statements of the prosecutrix made on different occasions are dichotomous, contradictory, ambivalent and vague. Such vagueness and contradictions go to the root of the matter belying their creditworthiness. The trial court failed to notice of these contradictions and ambiguities in her evidence. Although the trial court observed that she narrated the same story of rape before the Magistrate as stated in the written complaint such observation is rather superficial. The evidence and sole testimony of the prosecutrix, therefore, for the reasons stated above, do not inspire confidence to rely upon and are not creditworthy. The trial court committed error in relying upon such evidences.

For reasons stated above, this Court cannot agree with the findings of the trial court that the appellant is guilty of the offence under section 376 of the Indian Penal Code.

The impugned judgment dated 17/09/2013 and the order of sentence dated 18/09/2013 demands interference of this Court.

Therefore, the impugned judgment and order of sentence dated 17/09/2013 and 18/09/2013 respectively passed by the Sessions Judge, Howrah in Sessions Trial No. 93/2013 convicting the appellant under Section 376 of the Indian Penal Code is hereby set aside.

The appellant is acquitted of the charges leveled against him.

He set at liberty and also is released from the bail bond.

A copy of this judgment along with the lower court record may be returned forthwith.

(Sugato Majumdar, J.)