

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 46 of 2008

Jiban Mondal

-Vs-

State of West Bengal

Amicus Curiae	:	Ms. Samira Grewal
For the State.	:	Mr. Binay Kumar Panda Mr. Narayan Prasad Agarwala Ms. Sreyasee Biswas Mr. Pratick Bose
Heard on	:	26.09.2022, 27.09.2022 & 24.11.2022
Judgment on	:	23.02.2023

Ananya Bandyopadhyay, J. :-

1. The instant appeal is directed against the Judgment and order of conviction dated 26.07.2006 and 27.07.2006 passed by Additional Sessions Judge, 1st F.T.C. Cooch Behar in Sessions Trial No. 02(03)06 arising out of Sessions Case No. 153/05 convicting the appellant u/s 376 of the Indian Penal Code sentencing him to suffer rigorous imprisonment for 5 years and to pay fine of Rs. 2000/- in default to suffer further rigorous imprisonment for six months. If the amount of fine is realized half of the said amount i.e. to say Rs. 1000/- to be given to the victim as compensation.

2. Prosecution case emanated from a complaint dated 18.01.2005 filed by the complainant inter alia stating that the accused persons were his neighbours. The appellant taking opportunity of the absence of any person in his house had taken away the sister of the petitioner a mentally challenged, deaf and dumb person and forcibly raped her. The sister of the complainant returned home weeping and informed others about the incident through gestures. The complainant was asked to hold arbitration by the respected persons of the village. The said arbitration in the village could not be held due to the absence of the appellant i.e. Jiban Mondal who left the village. The wife and son of the appellant were asked to ensure his presence immediately who apologized on behalf of the appellant for his act and promised to present him within a short period of time. However, there was a delay progressively for more than two and half months as the aforesaid family members of the appellant failed to produce him. In the meantime, two other persons threatened the complainant and the family members including the disabled sister of dire consequences to the extent of ravishing the victim again, if they informed the matter to the Police Station. Paresh Barman and Dwijen Barman the co-accuseds in this case brought the appellant to the village on 31.12.2004 and all of them

assaulted the brother of the complainant and threatened them not to inform the incident to the police station. The complainant had the conviction that the neighbours would take appropriate steps against the accused persons through arbitration and had a feeling that his sister would not be in a position to narrate the torture meted out to her and accepted the advice of the neighbours. However, the accused persons delayed the process and further threatened the complainant which compelled his elder brother Niranjana Biswas to lodge a written complaint on 02.01.2005 at Haldibari P.S. However, the police authority advised him to lodge a case directly before the learned Court owing to the delay. Under such circumstances, the petitioner lodged the case before the learned Court under Section 156(3) of the Cr. P.C. seeking justice.

3. Based on the aforesaid complaint Haldibari P.S. Case No. 8 of 2005 dated 07.02.2005 under Section 447/323/506/306/109 I.P.C. was instituted. Investigation was initiated which culminated in the submission of a charge-sheet. Charges under Section 376/448/323 I.P.C. were framed against the present appellant and under Section 448/323 I.P.C. against the rest of the accused persons. Accused persons pleaded not guilty and claimed to be tried. The other accused persons

except the present appellant were acquitted of the charges leveled under Section 448/323 I.P.C.

4. Ms. Samira Garewal, learned *amicus curiae* submitted that the delay to lodge the complaint was not properly explained. Due to acrimonious relationship between the parties, the appellant was falsely implicated in the instant case. The prosecution witnesses narrated separate stories. P.W. 1. P.W. 2 and P.W. 3 were the relatives of the victim and evidence of P.Ws. 4, P.W. 5 and P.W. 6 were hear say not to be relied upon. The medical report stated the hymen can be ruptured for other reasons too apart from rape. Therefore, there cannot be any conclusive determination of the victim to have been ravished by the appellant. The appellant did not undergo medical examination to determine his potency and therefore benefit of doubt must be given to the appellant as to whether he was capable to commit such an offence without cogent proof. Accordingly, the appeal shall be allowed.
5. Mr. Binay Kumar Panda, learned advocate for the State that the complaint as well as the deposition of P.W.1 aptly explained the cause of delay to lodge the complaint. The victim had identified the appellant in T.I. Parade. The mental and physical incapability of the victim could not subject her to be tutored. The absence of appellant immediately after the alleged

incident reasonably proved his guilt. The prosecution was able to prove its case and accordingly appeal shall be dismissed.

6. P.W. 1 Manoranjan Biswas, narrated the incident expressed by his deaf and dumb sister who took him to the house of the appellant and identified him to be the culprit through gestures. The victim expressed to have been raped and P.W. 1 found semen stains on her wearing apparels. The appellant Jiban escaped and his wife promised to produce the appellant before the local people. However, proceeding of the salish prolonged on several pre-texts which caused delay in filing the complaint before the police station and finally they lodged the complaint under Section 156(3) Cr. P.C. The other co-accused had threatened P.W. 1 and assaulted his elder brother in presence of the appellant. During his cross-examination P.W. 1 named the persons to whom he narrated the incident of rape on his sister. He further stated that the accused persons had filed a case against them at Mekliganj Court and they obtained bail.

7. P.W. 2 Shefali Biswas, stated that the victim through gestures had narrated how she was raped and led them to the house of the appellant Jiban and identified him. The neighbours heard the victim to weep. The appellant fled. She further referred to the incident of Salish to take place, threat and assault of the

accused persons on her family members. She further stated the victim was medically treated.

8. P.W. 3 Gangadashi Mandal deposed the same narrative of P.W. 1 and 2 about the incident of rape on the victim and her identification of the appellant.
9. P.W. 4, Biswanath Sanyashi, concurred the evidence of P.W.1 2 and 3.
10. P.W. 5, Nathuran Sarkar stated to have reached the house of the appellant having heard hue and cry and found the victim and the appellant in a compromising position. During his cross-examination he further stated to have been to the house of the appellant alone.
11. The evidence of P.W. 6 Laxman Mondal was hear say.
12. P.W. 7, Dr. A.K. Chakraborty examined the victim on 14.02.2005 and stated *“on examination I found that the girl was deaf and dumb, her general condition was good. No injury was seen in face, abdomen, breast, back, medical aspect of Thigh, vulva, vagina over private parts. Vagina admits one finger. Hymen was torn & healed. It was old torn. No sign of recent injury was seen. This is the report prepared by me (Ext.1). if any girl is raped, in that case hymen may be torn”*.
13. During his cross-examination he stated that *“ not a fact that Shephali did not tell me how the rape was committed”*.

14. P.W.8 Dali Das Bayin, had interpreted the statement of the victim before the Court of learned A.C.J.M. Mekliganj for recording her statement under Section 164 Cr.P.C.
15. During her cross-examination P.W.8 stated "*the victim is an illiterate. I understood the sign and symbol of the victim but the victim could not understand the sign and symbol which I have understood*".
16. P.W.9, Malati Biswas, assisted the court in recording the statement of the victim during her examination. As per interpreter victim told that she was assaulted by the accused and after gagging her mouth the accused raped her.
17. P.W. 10, Dipak @ Dipankar Sengupta, was present at the time of the T.I. Parade conducted by the learned Magistrate and identified his signature on the document marked as Ext. 3.
18. During his cross-examination P.W. 10 stated "*it is not possible to teach the victim by any person to show sign and symbol and narrate the story falsely*".
19. P.W.11, Tapash Ch. Das learned A.C.J.M. Mekliganj recorded the statements of the victim with the help of the interpreter. P.W. 11 also conducted the T.I. Parade when appellant was identified by the victim.

20. P.W.12, Kamalish Adhikary, S.I. at police had visited P.O. and prepared the rough sketch map with the index. Examined available witnesses under Section 161 Cr.P.C. and seized handicapped certificate of the victim under seizure list Marked as Ext. 6. He arrested the accused persons. The statements of the victim was recorded under Section 164 Cr.P.C. and the medical document as well as the report of the T.I. parade were collected. The potency report of the appellant was also collected. The F.S.L. report was marked as Ext. 8. Charge-sheet was submitted on the completion of investigation.

21. The document marked as Ext.6 stated the victim to be a mentally challenged person with severe II motor impairment. Her percentage of permanent disability was calculated to the extent of 80 percent and I.Q. of 33.33 which denotes severe motor impairment. A person suffering from such an extent of mental disability unless and until gets subjected to a grave atrocity will not concoct or fabricate any such incident which has not been experienced by her. The manner in which she has narrated through gestures, of being coerced to sexual menace during the proceedings under Section 164 Cr.P.C. is corroborated by her evidence before the Court, both through the interpreters without any deviation fortified by the fact of her identifying the appellant during T.I. parade. The act of the

appellant has created indelible impression in the mind of the victim not be erased by her mental incapacitation. The sole testimony of the victim worthy of credence devoid of malice is beyond any doubt to indict the appellant. The victim does not possess any such mental faculty to embellish or exaggerate any incident not experienced by her to implicate a person. In rural ambience there is general tendency to settle disputes through salish. The apprehension of the family members with regard to the disability of the victim prevented them to lodge complaint at the appropriate time coupled with the fact of the absence of the appellant and such delay as explained by the prosecution to lodge the complaint does not improbabilises its case. The medical report stated hymen to have been ruptured and the presence of an old tear is suggestive of the incident to have taken place months before the victim underwent medical examination. The document marked as Ext. 7 dispels the fact of impotency on the part of the appellant.

22. The evidence of related witness if found to be trustworthy can be relied upon. The evidence of the related witnesses cannot be discarded in the instant case, since prime credibility of the victim's evidence is corroborative and reliable.

23. Under the facts and circumstances of the case, the prosecution has been able to establish its case and accordingly the appeal is dismissed.
24. I record my appreciation for the able assistance rendered by Ms. Samira Grewal, learned advocate, as *amicus curiae* in disposing of the appeal.
25. Lower court records along with a copy of this judgment be sent down at once to the learned trial court for necessary action.
26. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)