

**IN THE HIGH COURT AT CALCUTTA**

**(Criminal Revisional Jurisdiction)**

**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Shampa Dutt (Paul)**

**CRR 430 of 2020**

**Sucharita Santra**

**Vs**

**The State of West Bengal & Anr.**

**For the Petitioner** : Mr. Debashis Banerjee,  
Mr. Rakesh Jana.

**For the State** : Mr. Madhusudan Sur,  
Mr. Manranjan Mahato.

**For the Opposite Party No. 2** : Mr. Phiroze Edulji,  
Mr. Ajit Kumar Mishra,  
Mr. Abhishek Dey.

Heard on : 19.01.2023

Judgment on : 21.02.2023

**Shampa Dutt (Paul), J.:**

The revisional application has been preferred against an order dated 01.07.2019 passed by the Learned Additional Sessions Judge, Fast Track Court – II, Howrah, in S.T. No. 177/2017 arising out of Howrah Police Station Case No. 482/15 dated 18.07.2015 under Section 376 of the Indian Penal Code, whereby the said Learned Court was pleased to observe that charge should be framed under Section 376/511 of the Indian Penal code as against the accused instead of Section 376 of the Indian Penal Code as per the Charge Sheet submitted.

The petitioners case is that the petitioner had been working as Teacher-in-Charge in National Institute of Open Schooling (NIOS) which operates and functions at the Maria's Day School Complex at 11/6, Grand Trunk Road (S) and 2, Gopal Gobinda Bose Lane, Howrah-711101, since the year 2001.

On 25.06.2015, the Opposite Party No. 2, a staff of the School raped her. On that day while the petitioner was alone in a room on the School premises, the Opposite Party No. 2 suddenly grabbed her and forcibly molested her and thereafter lifted her wearing apparel, grabbed her and inserted his finger inside the private part of the Petitioner and tried to proceed further to forcibly commit intercourse.

The Petitioner was stunned and severely traumatized by such sudden outrageous and heinous act and she somehow managed to escape from the clutches of the Opposite Party No. 2 and reported the entire incident to the Principal of the School.

That owing to his influence in the School, no step was taken against the Opposite Party No. 2 by the School authorities despite being aware of such ghastly acts committed by him, which ultimately compelled the Petitioner to report the entire incident to the officers of the Howrah Police Station by way of submitting a written complaint on 18.07.2015.

On the basis of the aforesaid written complaint submitted by the Petitioner a criminal proceeding was initiated as against the Opposite Party No. 2 herein being Howrah Police Station Case No. 482/15 dated 18.07.2015 under Section 376 of the Indian Penal Code.

Upon conclusion of investigation, the Investigating agency submitted Charge Sheet in connection with the aforesaid criminal proceeding under Section 376 of the Indian Penal Code.

The case was thereafter committed before the Learned Sessions Judge, Howrah. On 01.07.2019, the aforesaid proceeding being S.T. 177 of 2017 was fixed for consideration of charge before the Court of the Learned Additional Sessions Judge, Fast Track –II, Howrah and the Learned Court upon hearing the Learned Advocate representing the

accused person and the Learned Public Prosecutor, vide order dated 01.07.2019, was pleased to inter alia observe and direct that charge should be framed under Sections 376/511 of the Indian Penal Code as against the Opposite Party herein for commission of offence of attempt to commit rape upon the Petitioner, apparently without perusing the written complaint of the Petitioner and the specific narration of commission of rape upon her as well as the report submitted by the Investigating agency.

Only upon enquiry she was informed about the same at a later stage and could obtain the certified copy of the order impugned on 9<sup>th</sup> January, 2019.

Being highly aggrieved by the impugned order dated 01.07.2019 as passed by the Learned Additional Sessions Judge, Fast Track-II, Howrah in S.T. 177 of 2017, the Petitioner has preferred this revision praying for necessary orders.

**Mr. Debasish Banerjee, learned counsel for the petitioner** **has** submitted that while passing the order impugned, the Learned Trial Court has committed a grave and severe error by failing to observe and perceive that the de facto complainant that is the Petitioner herein has specifically complained that the accused had inserted and penetrated his finger into her vagina by lifting her wearing apparels apart from committing other forms of grave sexual offences upon her and such act

of inserting his finger, that is a part of his body, into the vagina of the Petitioner against her will and consent, constitutes an offence as specified under Section 375 of the Indian Penal Code and punishable under Section 376 of the Indian Penal Code.

The Learned Trial Court has committed a grave and severe error by observing and coming to conclusion that penetration of finger into the vagina would constitute only an offence of **attempt** to rape.

The Learned Trial Court has failed to appreciate and acknowledge the amendments and the significance of such amendments as brought into the laws governing sexual assaults on women by way of the **Criminal Amendment Act of 2013**.

The Trial Court has committed grave and serious error while concluding that charge in connection with the present case should be framed under Sections 376/511 Indian Penal Code for attempt to commit rape without assigning any reason for discarding why charge should not be framed under Section 376 of the Indian Penal Code for commission of rape upon the Petitioner.

As such the impugned order dated 01.07.2019 as passed by the Learned Additional Sessions Judge, Fast Track – II, Howrah in S.T. 177 of 2017 arising out of Howrah Police Station Case No. 482/15 dated 18.07.2015 under Section 376 of the Indian Penal Code, is liable to be set aside.

**Mr. Phiroze Edulji, learned counsel for the Opposite Party No.2/accused** has submitted that the trial court has rightly come to the decision that the materials in the case diary only make out a prima facie case of an offence allegedly under Section 376/511 IPC and not 376 IPC.

As such the revisional application is liable to be dismissed.

**Mr. Madhusudan Sur the learned counsel for the State** has produced the Case Diary.

Heard the counsel for the parties including the state. Perused the material on the record including the Case Diary. Considered.

**Mr. Edulji** has relied upon the following judgments:-

**(1) State of Bihar vs Ramesh Singh, (1977) 4 SCC 39,**

**Criminal Appeal No. 51 of 1977, on August 2, 1977.**

*“4 .....that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code.*

.....at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused.....

**5.** In *Nirmaljit Singh Hoon v. State of West Bengal* [(1973) 3 SCC 753 : 1973 SCC (Cri) 521 : (1973) 2 SCR 66] — Shelat, J. delivering the judgment on behalf of the majority of the Court referred at p. 79 of the report to the earlier decisions of this Court in *Chandra Deo Singh v. Prokash Chandra Bose* [AIR 1963 SC 1430 : (1964) 1 SCR 639 : (1963) 2 Cri LJ 397] — where this Court was held to have laid down with reference to the similar provisions contained in Sections 202 and 203 of the Code of Criminal Procedure, 1898 “that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed that where there was *prima facie* evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused”. Illustratively, Shelat, J., further added “Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a *prima facie* case”.

**(2) Kanti Bhadra Shah and Anr. Vs State of West Bengal, (2000) 1 SCC 722, Criminal Appeal No. 5 of 2000, on January 5, 2000.**

**“8.** ..... that if the trial court decides to frame a charge there is no legal requirement that he should pass an order specifying the reasons as to why he opts to do so.....

**9.** *The said section shows that the Magistrate is obliged to record his reasons if he decides to discharge the accused. The next section (Section 240) reads thus:*

*“240. Framing of charge.—(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.*

*(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.”*

**10.** *..... this section required a Magistrate to record his reasons for discharging the accused but there is no such requirement if he forms the opinion that there is ground for presuming that the accused had committed the offence which he is competent to try.....*

**11.** *Even in cases instituted otherwise than on a police report the Magistrate is required to write an order showing the reasons only if he is to discharge the accused. This is clear from Section 245. As per the first sub-section of Section 245, if a Magistrate, after taking all the evidence considers that no case against the accused has been made out which if unrebutted would warrant his conviction, he shall discharge the accused. As per sub-section (2) the Magistrate is empowered to discharge the accused at any previous stage of the case if he considers the charge to be groundless.*

*Under both sub-sections he is obliged to record his reasons for doing so. In this context it is pertinent to point out that even in a trial before a Court of Session, the Judge is required to record reasons only if he decides to discharge the accused (vide Section 227 of the Code). But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge.*

**12.** *If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work.....”*

**(3) State by Central Bureau of Investigation vs S. Bangarappa, (2001) 1 SCC 369, Criminal Appeal 997 of 2000, on November 20, 2000.**

**“21.** *Time and again this Court has pointed out that at the stage of framing charge the court should not enter upon a process of evaluating the evidence by deciding its worth or credibility. The limited exercise during that stage is to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed further (vide State of M.P. v. Dr Krishna Chandra Saksena [(1996) 11 SCC 439 : 1997 SCC (Cri) 35] ).”*

In the present case the Petitioner/Complainant/victim is a married woman aged 40 years.

The relevant portion of her complaint is:-

*“.....On 25.06.2015, the Opposite Party No. 2, a staff of the School raped her. On that day while the petitioner was alone in a room on the School premises, the Opposite Party No. 2 suddenly grabbed her and forcibly molested her and thereafter lifted her wearing apparel, grabbed her and **inserted his finger inside the private part of the Petitioner and tried to proceed further to forcibly commit intercourse.....**”*

**The Criminal law (Amendment) Act, 2013 which came into effect on 3<sup>rd</sup> February 2013 also Amended Section 375 of the Indian Penal Code among other Sections.**

**Section 375 of the Indian Penal Code, lays down:-**

*“[375. Rape.—A man is said to commit “rape” if he—*

- (a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
- (b) **Inserts, to any extent, any object or a part of the body**, not being the penis, **into the vagina, the urethra or anus of a woman** or makes her to do so with him or any other person; or*
- (c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
- (d) Applies his mouth to the vagina, anus, urethra of a woman or makes*

*her to do so with him or any other person,*

*Under the circumstances falling under any of the following seven descriptions:-*

***First.— Against her will.***

***Secondly.—Without her consent.***

*Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.*

*Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.*

*Fifthly.— With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.*

*Sixthly.— With or without her consent, when she is under eighteen years of age.*

*Seventhly. — When she is unable to communicate consent.*

*Explanation 1. — For the purposes of this Section, “vagina” shall also include labia majora.*

*Explanation 2. — Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication,*

*communicates willingness to participate in the specific sexual act:*

*Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.*

*Exception 1. — A medical procedure or intervention shall not constitute rape.*

*Exception 2. — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]”*

**Section 376 of the Indian Penal Code, lays down:-**

**“376. Punishment for rape.—***(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.].....”*

**In the present case allegations in the written complaint is that the accused inserted his finger (a part of the body) into the vagina of the complainant.**

**Firstly-Against her will.**

**Secondly- Without her consent.**

The relevant portion of the order under revision dated 01.07.2019 is :-

*“In the instant case, there is specific allegation of the victim that the relevant point time and place accused person attempted to commit rape upon her by apprehending her and by pulling her ‘sari’ and saya (petticoat).*

*What was the intention of the accused to commit alleged offence or whether he took attempt to commit rape upon her that can only be adjudicated upon after taking evidence at the time of trial but prima facie, there are sufficient materials against the accused person u/s. 376/511 of the IPC and charge should be framed under the Section as mentioned above fixing **08.07.19** for framing of charge u/S 376/511 of I.P.C.”*

**Surprisingly the trial Judge left out an important part of the statement as made in the written complaint being “inserted his finger inside the private part of the Petitioner and tried to proceed further to forcibly commit intercourse.....” Why and how is a question.**

So lets presume that the trial judge overlooked the amendment of 2013. **The incident in this case is dated 25.06.2015.** The public prosecutor in charge also did not make any submission to that effect before the court.

**The said order and findings has thus clearly caused miscarriage of Justice and is an abuse of process of the court/law.**

The materials in the case diary including the statements recorded under Section 161 Cr.P.C. and the fact that the victim/complainant subjected herself to medical examination and also the written complaint all make out a prima facie case under Section 375 (b) of the IPC, punishable under Section 376 of the Indian Penal Code against the accused person with **sufficient material to proceed towards trial** and this is a fit case where the inherent powers of the court should not be exercised in the interest of Justice.

Thus the order under revision dated 01.07.2019 passed by the Additional Sessions Judge, Fast Track Court-II, Howrah in S.T. No. 177 of 2017 is hereby set aside, being not in accordance with law.

**CRR 430 of 2020 is allowed.**

**The Additional Sessions Judge, Fast Track Court-II, Howrah will frame charge as per findings herein within a month from the date of this order, and dispose of the case expeditiously as the case relates to an alleged incident of the year 2015.**

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

**(Shampa Dutt (Paul), J.)**