

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 131 of 2007

Dipak Mondal & Anr.

-Vs-

The State of West Bengal

For the Appellants	: Mr. Partha Sarathi Bhattacharyya Mr. Bhaskar Seth Mr. Prabir Bej Ms. Swarnali Saha
For the State	: Ms. Faria Hossain Mr. Anand Keshari
Heard on	: 13.01.2023, 19.01.2023 & 31.01.2023.
Judgment on	: 18.04.2023

Ananya Bandyopadhyay, J. :-

1. The instant appeal is directed against the Judgment and Order of conviction dated 14.02.2007 & 15.02.2007 passed by Learned Additional Sessions Judge, 4th Court, Burdwan in Sessions Trial No. 21/2005 arising out of Sessions Case No. 92 of 2005 convicting the appellants under Section 376(2)(g) of the Indian Penal Code and sentencing the appellants to suffer rigorous imprisonment for 7 (seven) years each and also to pay a fine of Rs.5,000/- each in default to suffer rigorous imprisonment for 6 (six) month each for the offence committed under Section 376(2)(g) of the Indian Penal Code.

2. The prosecution case originated on the basis of a written complaint dated 02.11.2003 filed by the mother of the victim inter alia stating on 30.10.2003 at 10 P.M. her daughter had gone to see the competition of candle on the occasion of the Kalipuja. As she went to call her friend 3 young men of the neighbourhood namely Dipak Mondal, Ajay Mondal and Devdas Mondal Gayen respectively raped her daughter forcibly. The issue was tried to be settled socially but the aforesaid guilty persons desperately threatened them compelling them to lodge the complaint. The complainant prayed for appropriate legal action to be taken against the guilty persons.
3. Based on the aforesaid complaints Burdwan P.S. Case No. 385/03 dated 02.11.2003 under Section 376 (g) of the Indian Penal Code was instituted. Investigation commenced and culminated in submission of charge sheet being number 180/2004 dated 30.06.2004 against the accused persons to which they pleaded not guilty and claimed to be tried.
4. The prosecution cited 12 witnesses and exhibited certain documents.
5. The Learned Advocate for the appellants submitted the presence of serious infirmities, irregularities, and omissions in the evidence of the prosecution witnesses. He further submitted that the complaint didn't mention the reason for the delay to lodge the same. The family members of the victim were primarily the witnesses instead of independent and disinterested witnesses. Vital witnesses namely Shibu Sen, Joydeb and Rekha Sarkar were not examined. In a case

of gang rape the accused namely Dev Das was acquitted by the Juvenile Court. The Statement of the witnesses recorded under the Section 161 of Code of Criminal Procedure and the deposition before the Learned Trial Judge were contradictory. The date of the 'Shalish' was not amply proved. The opinion of the doctor that PW-11 who examined the victim girl was not taken into consideration, PW-11 had opined the victim girl to be a virgin without any evidence of recent sexual intercourse, injury or inflammation on the body of the victim including external genitalia. The appellants have been falsely implicated for extortion of money due to political rivalry and on refusal to pay the same the appellant had been falsely indicted. The victim didn't disclose of the rape being committed upon her before PW-9 instead claimed of pain in the abdomen. The Learned Advocate for the appellants relied on the decisions cited in (2011) 6 SCC 394, 2008 (6) Supreme 501 AIA 2012 Supreme Court 3157, (2020) 3 SCC 443 and submitted the appeal to be allowed.

6. The Learned Advocate for the State submitted that the statement of victim recorded under Section 164 Cr.P.C. was exhibited vide Court's order dated 8.5.2006. The sole evidence of the prosecutrix is credible enough for convicting the appellants as a victim of gang rape. Minor contradictions in the prosecution evidence didn't affect the crux of its case. The prosecution succeeded in establishing the case and therefore the appeal shall be dismissed.

7. The rough sketch map marked Ext. 11 mentioned the house of Joydeb alias Debu Banerjee, i.e. PW-2 to be situated at a considerable distance from the place of occurrence. There were houses of Dulu Karmakar, Haralal Karmakar, Basanti Biswas, Chittaranjan Halder, Dilip Sil and Gouri Pal were near to the place of occurrence, however, no one from the aforesaid houses saw the incident or appeared at the place of occurrence hearing the screaming of the victim girl. PW-2 stated to have rushed towards the place of occurrence following the source of yelling. PW-2 claimed to have seen the offenders at the place of occurrence who instantaneously fled at his presence. PW-2 further deposed, on the way to the house of the victim, he found the accused persons, who told him not to disclose "these things to anyone else". PW-2 admitted of the settlement of the incident through a meeting at a cost of Rs.3,000/- as punishment for medical treatment of the victim and to leave the locality within 2 months. The said terms and conditions were recorded in writing. He further stated the police to have seized the wearing apparels of the victim under a seizure list bearing his signature marked as Ext. 3/2. He further deposed the guardians of the accused persons to have declined to abide by the terms and conditions of the settlement which compelled the complainant to initiate the complaint.
8. PW-3 was the scribe of the complaint written by her under the instruction of the complainant.

9. A circumspection of the evidence of the prosecution witnesses revealed PW-5, to be the victim girl who vividly described the manner in which she was raped by the appellants, one by one, respectively. Initially PW-5 did not spurn or disapprove to accompany the appellant Dipak Mondal (Laltu) towards the bank of the river. Subsequently on reaching the bank of the river, the appellant Dipak Mondal instantaneously raped her till he fulfilled his sexual gratification followed by the other two accused one after the other in similar fashion. The victim further stated to have narrated the incident to her parents, Debu Banerjee and Mahadeb Ghosh. Mahadeb Ghosh was not examined neither was her friend, Rekha Sarkar examined. There had been vital contradictions in her testimony before the Court and the statements recorded under Section 164 of Cr.P.C. in terms of the mode and manner she was subjected to the offence committed upon her by the individual offender. During her cross-examination she stated to have been undergoing menstruation which was not revealed by her to either of the doctors who examined her.

10. PW-6, the mother of the victim, reiterated the statement of the victim, PW-5. During her cross-examination, PW-6 stated that:-

“I did not suppress anything before the I.O. I stated to the I.O. that my daughter returned back to my house at 10-25 p.m. on 30-10-2003 with Debu Banerjee. I cannot recollect whether I stated to the I.O. that I saw mud on the pant and head of my daughter. My brother’s wife is the Panchayet member. Many persons assembled in the para. Accd. persons were called and

they came on the very night. Accd. persons were neither assaulted or detained in the club room. On that night I did not go to the P.S. to inform the matter.”

Volunteers, “I was asked by the para people and the Panchayet members that they have called Panchayet and not to report the matter till the decision of that night.””

11. PW-7 admitted a meeting to have taken place in his village concerning the incident of rape committed by the accused persons on the victim. He deposed that:-

“I was present in the meeting. Many persons were also present in the said meeting. I was not present in the said meeting all along. I remained present there for only 10/15 minutes. Mrinmoy Bhattacharjee wrote something on a paper on which I signed. Besides myself other persons also signed there. (One document is shown to this witness). This is my signature. This marked as Ext.- 5/1 (objected to).”

12. During his cross-examination, PW-7 stated that:-

“Soma’s aunt was a Panchayet member who was present in the said meeting. Soma’s parents were also present in the said meeting. Persons, present in the meeting, signed on that document. I did not put any date below my signature. I did not lodge any complaint at the P.S. or before daroga babu. I was not examined by the I.O. in connection with this case. I stated all these before this Court for the first time and has not stated these earlier to anyone-else.....There is no such date on the document. I cannot say what is written on this paper.”

13. PW-8 stated to have examined the victim on 31/10/2003 who complained of pain in her lower abdomen due to physical assault. During her cross-examination, PW-8 stated the victim did not complain of anything else besides the history of pain in her abdomen.
14. The evidence of PW-9 is based on hearsay.
15. PW-10 submitted the charge-sheet on completion of the investigation without collecting the FSL report from Belgachia Forensic Laboratory.
16. PW-11 had examined the victim on 4/11/2003 and deposed as follows:-

“She stated her last normal menstruation period starting date as 23-10-03. On examination I found her hymen intact. On examination I did not find any sign of tear either recent or old or inflammation in respect of hymen. In case of forcible sexual intercourse by three persons consecutively then, there must be signs of inflammation and injury, in ter vagina. In case of sexual intercourse even by a single person till he is exhausted there must be inflammation and injury on the vagina of a virgin girl. During examination of Soma Mali I did not find any marks of injury on her vagina, genital parts or body. I also did not find any bleeding or marks of bleeding from the vagina at the time of examination of Soma Mali. On examination, I gave my opinion that there was no evidence of recent sexual intercourse over the body including external genitalia of the girl examined. If the injury or inflammation occurred within 5/7 days prior to examination there must be some signs of injury or inflammation. At the time of examination of Soma Mali I found her virgin. Her

age on the date of examination i.e. on 18-11-2003 was 17 to 18 years, more towards the lessor side i.e. 17 years.”

17. In **Rai Sandeep alias Deepu v. State (NCT of Delhi)**¹, the

Hon’ble Supreme Court inter alia, observed as follows:-

“22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the Accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the Accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well

as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.....

As compared to the case on hand, we find that apart from the prosecutrix not supporting her own version, the other oral as well as forensic evidence also do not support the case of the prosecution. There were material contradictions leave alone lack of corroboration in the evidence of the prosecutrix. It cannot be said that since the prosecutrix was examined after two years there could be variation. Even while giving allowance for the time gap in the recording of her deposition, she would not have come forward with a version totally conflicting with what she stated in her complaint, especially when she was the victim of the alleged brutal onslaught on her by two men that too against her wish. In such circumstances, it will be highly dangerous to rely on such version of the prosecutrix in order to support the case of the prosecution."

18. In **Ashok Kumar v. State of Haryana**², this Court while dealing with the offence under Section 376 (2) (g) Indian Penal Code read with explanation held as under in Para 8:

¹ (2022) 2 SCC 74

² (2003) 2 SCC 143

“8. Charge against the Appellant is Under Section 376(2)(g) Indian Penal Code. In order to establish an offence Under Section 376(2)(g) Indian Penal Code, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence.....

26. Applying the above principle to the case on hand, we find that except the ipse-dixit of the prosecutrix that too in her chief examination, with various additions and total somersault in the cross examination with no support at all at the instance of her niece and nephew who according to her were present in the house at the time of occurrence, as well as, the FSL report which disclosed the absence of semen in the socks which was stated to have been used by the accused as well as the prosecutrix to wipe of semen, apart from various other discrepancies in the matter of recoveries, namely, that while according to the prosecutrix the watch snatched away by the accused was 'Titan' while what was recovered was 'Omex' watch, and the chain which was alleged to have been recovered at the instance of the accused admittedly was not the one stolen, all the above factors

do not convincingly rope in the accused to the alleged offence of 'gang rape' on the date and time alleged in the chargesheet."

19. In **Lalliram v. State of M.P**³, in regard to an offence of gang rape falling under Section 376 (2) (g) this Court laid down the principles as under in paras 11 and 12:-

"11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra v. State of Orissa where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar v. State of Haryana⁴)

12. As rightly contended by Learned Counsel for the Appellants, a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar case it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial.....

31. When we apply the above principles to the case on hand, we find the prevaricating statements of the prosecutrix herself in the

³ (2008) 10 SCC 69

⁴ (2004) 4 SCC 379

implication of the accused to the alleged offence of gang rape. There is evidence on record that there was no injury on the breast or the thighs of the prosecutrix and only a minor abrasion on the right side neck below jaw was noted while according to the prosecutrix's original version, the Appellants had forcible sexual intercourse one after the other against her. If that was so, it is hard to believe that there was no other injury on the private parts of the prosecutrix as highlighted in the said decision. When on the face value the evidence is found to be defective, the attendant circumstances and other evidence have to be necessarily examined to see whether the allegation of gang rape was true. Unfortunately, the version of the so called eye witnesses to at least the initial part of the crime has not supported the story of the prosecution. The attendant circumstances also do not co-relate to the offence alleged against the Appellants. Therefore, in the absence of proper corroboration of the prosecution version to the alleged offence, it will be unsafe to sustain the case of the prosecution.

32. In the decision reported as **Krishan Kumar Malik v. State of Haryana**⁵ in respect of the offence of gang rape under Section 376 (2) (g), Indian Penal Code, it has been held as under in paras 31 and 32:

31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (Code

⁵ (2011) 7 SCC 130

of Criminal Procedure), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.

33. Applying the said principles to the facts of the case on hand, we find that the solitary version of the chief examination of PW-4, the prosecutrix cannot be taken as gospel truth for its face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellants.”

20. In **Santosh Prasad alias Santosh Kumar v. State of Bihar**⁶, the

Hon’ble Supreme Court inter alia, observed as follows:-

“5.4.1. In the case of *Raju v. State of M.P*⁷, it is observed and held by this Court in paragraphs 11 and 12 as under:

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the Accused as well. The Accused must also be protected against the possibility of false implication, particularly where a large number of Accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

⁶ (2020) 3 SCC 443

⁷ (2008) 15 SCC 133

12. Reference has been made in *State of Punjab v. Gurmit Singh*⁸ to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the Accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption Under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.....

5.5. With the aforesaid decisions in mind, it is required to be considered, whether is it safe to convict the Accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?

6. Having gone through and considered the deposition of the prosecutrix, we find that there are material contradictions. Not only there are material contradictions, but even the manner in which the alleged incident has taken place as per the version of the

⁸ (1996) 2 SCC 384

prosecutrix is not believable. In the examination-in-chief, the prosecutrix has stated that after jumping the fallen compound wall Accused came inside and thereafter the Accused committed rape. She has stated that she identified the Accused from the light of the mobile. However, no mobile is recovered. Even nothing is on record that there was a broken compound wall. She has further stated that in the morning at 10 O'clock she went to the police station and gave oral complaint. However, according to the investigating officer a written complaint was given. It is also required to be noted that even the FIR is registered at 4:00 p.m. In her deposition, the prosecutrix has referred to the name of Shanti Devi, PW1 and others. However, Shanti Devi has not supported the case of the prosecution. Therefore, when we tested the version of PW5-prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests of "sterling witness". There is a variation in her version about giving the complaint. There is a delay in the FIR. The medical report does not support the case of the prosecution. FSL report also does not support the case of the prosecution. As admitted, there was an enmity/dispute between both the parties with respect to land. The manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and circumstances of the case, we find that the solitary version of the prosecutrix-PW5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the Appellant and Accused is to be given the benefit of doubt."

21. The complaint dated 2/11/2003 lodged by the mother of the victim stated the victim to have been ravished by the perpetrators on 30/10/2003 and such heinous incident was at the first instance tried to be resolved. Such a despicable and abhorrent act does not deserve impunity. The immediate reaction of any person let aside a

parent should be to punish the offenders and not to squander time in order to achieve settlement. The initial conduct of the complainant raises incertitude and incredulity that an abominable, contemptible, horrific and reprehensible gang rape committed on the victim daughter of the parents would not create a repulsive impact to punish the offenders to the detriment of honour and dignity of the victim, who on the contrary, will resort to negotiation and social settlement of the issue in question, an act which is illegal, detestable and unpardonable against the societal norms.

22. The statements of the victim girl recorded under Section 164 of the Cr.P.C. and her deposition before the Court are contradictory in nature. The victim girl did not disclose the incident to PW-8, the Lady Doctor who examined her on 31.10.2003 except complain of stomach ache. There was no reason for not expressing such grave experience on her part to the Doctor i.e. PW-8. The extra-judicial confession written through a purported settlement is legally unsustainable. PW-7 who stated to have signed the aforesaid settlement was unaware of the contents of the same. It is unbelievable that the incident as narrated by the victim prolonged for a considerable period within which no one from the adjoining houses and lanes witnessed the same or heard her scream. PW-2 deposed to have seen the offenders through the light of an electric post and the window of a house. It is surprising that the inmates of such house did not appear at the spot from the vicinity, while

PW-2 staying at a far away distance reached the place of occurrence.

23. The incident to have been occurred in the street light must have been noticed by passersby and the neighbours in proximity. It is unfathomable apart from PW-2 no one arrived at the spot.
24. The opinion of PW-11, the Doctor who examined the victim girl controverts her narrative, nullifying the same predominantly.
25. Such a condemnable incident would culminate into mass resentment and furore demanding punishment of the perpetrators and definitely not resolution of the crime through settlement. The purported settlement document itself was over written with the word “attempt of rape”. Its truthfulness and credibility is contemptuous.
26. The honour and dignity of a victim of rape is to be protected and secured. The physical and psychological trauma endured is inexplicable affecting her existence, future growth, development and survival. The constant threat of stigma, insinuation and ignominy is devastating. The immediate reaction of anybody to such an abhorrent incident would be to get the offenders arrested and punished. Shockingly in the instant case, the parents delayed to take legal actions and tried to settle the score, is unbelievable and deprecating. The right of victim to seek and attain justice is supreme and paramount. It is equally important that innocent persons shall not be punished without sufficient guilt being established against them.

27. The evidence of the victim, which was not supported by the medical examination report, the contemporaneous circumstances, conduct of the parents and faulty investigation could not be relied upon. The prevaricating evidence of the victim cannot term her to be a “sterling witness”. The F.S.L. report was not collected. No independent witness was examined except the family members of the victim and the interested witnesses being PW-2 and PW-7.
28. Under the facts and circumstances of the case in absence of prove of commission of the offence by the appellants beyond reasonable doubt. The prosecution has failed to prove its case and accordingly the appeal is allowed.
29. The appellants are acquitted of the charges. The appellant if in custody, be released forthwith if not required in connection with any other case. The appellant shall, however, furnish a bail bond to the satisfaction of the trial Court which shall continue for six months from date in terms of Section 437A of the Criminal Procedure Code.
30. CRA 131 of 2007 is disposed of accordingly.
31. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
32. 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.)