

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

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

C.R.A.129 of 2021

Farmuj Ali @ Farmiz Ali

VS.

The State of West Bengal

For the Appellant : Mr. Soumyajit Das Mahapatra,
Mr. Somnath Adhikary,
Ms. Madhurai Sinha, Advocates

For the State : Mr. Saswata Gopal Mukherji, Ld. P.P.
Mr. Partha Pratim Das,
Mrs. Manasi Roy, Advocates

Hearing concluded on : 03.05.2023

Judgement on : 03.05.2023

DEBANGSU BASAK, J.:-

1. The appeal is directed against the judgment of conviction and order of sentence dated January 18, 2021, passed by learned

Additional District & Sessions Judge, 4th Court, Berhampore, Murshidabad in Sessions Trial No.5(9)2005 arising out of Sessions Trial Case No.395/2002 convicting the appellant under Section 376 of the Indian Penal Code, 1860.

2. A written complaint was lodged by the prosecution witness (P.W.) 1, against the appellant claiming that she was raped several times by the appellant. She became pregnant. She disclosed the matter of rape to her parents. Thereafter, her father along with others called a village mediation on March 24, 1996. The appellant agreed to marry her. However, the appellant refused to marry her subsequently. Two further mediation meetings took place on May 5, 1996 and May 14, 1996. However, such mediation failed. Therefore, the police complaint.

3. On the basis of such written complaint of P.W.1 the First Information Report (F.I.R.) was lodged by the police under Sections 417/376 of the Indian Penal Code, 1860. Appellant was chargesheeted. Charge under Section 376 of the Indian Penal Code, 1860 was framed as against the appellant. Appellant pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined 11 witnesses to prove the charge. On completion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code where he claimed to be innocent and falsely implicated.

5. The case of the prosecution at the trial was that, the appellant on different dates at a particular village committed rape on the victim who was a minor aged about 13 years and as a result of which, the victim became pregnant.

6. Victim deposed as P.W.1. In her deposition, she spoke of a relationship between her and the appellant for 10 years. She claimed that she was 12/13 years old at the time of the incident. She spoke of an incident of rape. She claimed that she confided in her elder brother and sister-in-law about the rape and about the attempts. Attempts of matrimony between her and the appellant ultimately failed. She spoke of a male child being born to her. She also speaks of DNA test being held to ascertain the paternity of the appellant. She stated that she lodged the written complaint as per advice of her advocate.

7. In cross-examination, her age was questioned. She denied that she was 37 years old at the time of deposition. She denied the suggestion that, she was not 13 to 14 years old at the time of incident. She, however, acknowledged that she wished to marry the appellant and as such, she filed the case with “this story”.

8. The grand-father of the victim deposed as P.W.2. He was not an eyewitness to the incident. He spoke of the village mediation. He also spoke about the pregnancy of the victim. In cross-examination, he stated that he did not know about truthfulness of the incident.

9. Father of the victim deposed as P.W.3. He stated that the victim was 13/14 years old at the time of incident. He was not an eyewitness to the incident. He spoke about the village mediation being called.

10. In cross-examination, he described his age and time when he was married. He stated the age of her spouse and the time when the victim was born.

11. P.W.4 is the village head who corroborated the fact that a village mediation was held between the families of the victim and the appellant.

12. The cousin sister of victim deposed as P.W.5. She also spoke about the village mediation. She was not an eyewitness to the incident. She, however, could not speak about the date of birth of the victim in her cross-examination.

13. The maternal uncle of the victim deposed as P.W.6. He spoke about the relationship between the victim and the appellant. He also corroborated that a village mediation was held.

14. The first Investigating Officer deposed as P.W.7. He prayed for extension of the period of investigation. He submitted the charge-sheet against the appellant.

15. P.W.8 is the second Investigating Officer. He drew the rough sketch map along with index which was tendered in evidence and marked as Exhibit-1. He tendered the First Information Report which was marked as Exhibit-2. He also tendered written complaint written by a police personnel which was marked as Exhibit-3.

16. A pathologist, then in service, with the Sub Divisional Hospital deposed as P.W.9. He tendered the certificate dated August 26, 1999 which was marked as Exhibit-4. He also

tendered the report which was marked as Exhibit-5, 5/1 and 5/2 respectively.

17. The scribe of the written complaint, an advocate, deposed as P.W.10. He identified his signature and the signature of the P.W.1 in such written complaint, which was marked as Exhibit-3/1 and 3/2.

18. Another Investigating Officer deposed as P.W.11. He spoke about the arrest of the appellant and collection of the DNA test samples. The DNA Report was tendered in evidence and marked as Exhibit-6 under Section 294 of the Criminal Procedure Code.

19. The issues that fall for consideration in this appeal are:-

- (i) Is the appellant guilty as charged?
- (ii) Was the victim a minor at the time of the occurrence of this incident?

20. The evidence of the prosecution established that there was a relationship between the appellant and the victim. The DNA test report being Exhibit-6 established that the appellant was the father of the child born to P.W.1. P.W.1 claimed that at the behest of the appellant, she became pregnant. She claimed rape in her deposition and in the written complaint being Exhibit-1.

21. The claim of rape is not corroborated by any other witnesses examined by the prosecution. There is no eyewitness to the incident spoken of by the P.W.1. In fact she spoke of a relationship between her and the appellant over a period of time.

22. Prosecution witnesses including relatives of the victim in unison stated that there was a relationship between the victim and the appellant. They also spoke of mediation. P.W.1 herself stated that in the mediation, initially, the appellant agreed to marry her but the marriage did not take place as the brother of the appellant did not agree to it.

23. There are embellishments between the versions of the incident of rape and the subsequent events as made out by P.W.1 in her written complaint being Exhibit-1 with that of her oral testimony in Court. In Exhibit-1 she stated that she confided about incident with her mother and then her relatives intervened for the village mediation. Such version stood altered to her confiding in her elder brother and sister-in-law in her oral deposition. Apart from that there are other embellishments about the incident of rape itself. In her cross-examination, she

acknowledged that she wanted to marry the appellant and as such, she filed the police case “with the story”.

24. Accused can be convicted on the strength of the testimony of a rape victim provided that such testimony inspires confidence and is trustworthy. In the facts of the present case, the testimony of P.W.1 and her subsequent conduct does not inspire confidence of the Court as to her claims.

25. P.W.1 claimed that the relationship between her and the appellant was of 10 years. In the same breath she claimed that she was 13/14 years old at the time of the incident.

26. Taking the fact that there was a relationship between her and the appellant of 10 years and she being 13/14 years when the incident took place, then, she was 3/4 years when she developed her relationship.

27. Age of the P.W.1 was not conclusively established at the trial.

Although, P.W.1 denied that she was 37 years old at the time of her deposition which makes her about 24 years when the incident occurred, as noted above, her age was not conclusively established at the trial. Prosecution did not produce any birth certificate of the victim at the trial.

28. Evidence of P.W.1, the victim, establishes a relationship between her and the appellant. It is plausible to take a view that the physical relationship which developed between the appellant and the victim, was consensual in nature. Age of the victim was not conclusively established. We are not in a position to conclusively say that the appellant entered into a physical relationship with a minor.

29. It is trite law that when two views are possible then the one that favours the accused should be accepted.

30. In view of the discussions above, the first issue is answered in the negative and in favour of the appellant. The second issue is answered by holding that the prosecution failed to establish the age of the victim at the time of the incident.

31. Consequently, we are of the view that the charge as against the appellant was not proved beyond reasonable doubt.

32. We, therefore, set aside the impugned judgment of conviction and the order of sentence and acquit the appellant of the charge framed.

33. CRA 129 of 2021 is **allowed**.

34. Appellant is directed to be set at liberty forthwith, if not required in any other case. He 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.

35. A copy of this judgment and order along with the trial court records be transmitted to the appropriate Court forthwith.

36. Urgent photostat certified copy of this judgment and order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Debangsu Basak, J.)

37. I Agree.

(Md. Shabbar Rashidi, J.)